

STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF ENVIRONMENT



IN THE MATTER OF PROPOSED  
REVISIONS TO THE RULEMAKING  
PROCEDURES FOR THE DEPARTMENT,  
20.1.9 NMAC

NO. NMED 18-15(R)

New Mexico Environment Department,

*Petitioner.*

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ORDER AND STATEMENT OF REASONS FOR REPEAL AND REPLACEMENT OF  
REGULATIONS

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This matter comes before the Secretary of the New Mexico Environment Department (“Secretary”) upon a petition filed by the New Mexico Environment Department (“Department”) proposing amendments to the Department’s Rulemaking Procedures codified at Title 20, Chapter 1, Part 9 of the New Mexico Administrative Code (20.1.9 NMAC or “Rulemaking Procedures”).

The Secretary appointed an administrative law judge (“ALJ”) for this proceeding, and the ALJ held a public hearing in this matter on Friday, October 12, 2018, at Room 311 in the State Capital Building, 490 Old Santa Fe Trail, Santa Fe, New Mexico. The public notice for the hearing was published in the New Mexico Register on September 11, 2018. NMED Exhibit 7. The public notice was also published in the Albuquerque Journal on September 11, 2018. NMED Exhibit 8. The remaining public notice requirements were met pursuant to 20.1.9.12.B NMAC and NMSA 1978, Sections 14-4-2(E) and -5.2. NMED Exhibits 9 through 13. The Department provided notice to the Small Business Regulatory Advisory Commission pursuant to the Small Business Regulatory Relief Act, NMSA 1978, Sections 14-4A-1 to -6. (Laws 2005, ch. 244, § 5). NMED Exhibit 5.

At the public hearing, the ALJ heard technical testimony from the Department. No other party entered an entry of appearance in this matter, and there was no public comment. On November 19 2018,

the Secretary, having familiarized himself with the record, the Department's technical testimony, and the ALJ's oral recommendation (in lieu of a written report), adopts the Department's proposed amendments to 20.1.9 NMAC for the following reasons:

1. Pursuant to NMSA 1978, Sections 9-7A-6 (1991) and 14-4-5.8 (2017), the Secretary has the authority to adopt procedural rules to govern rulemakings necessary to carry out the duties of the Department and its divisions.

2. The purpose of 20.1.9 NMAC is to standardize the procedures used in regulatory change hearings before the Department; to encourage participation in the regulatory change hearings conducted by the Department; and to assure that the regulatory change hearings are conducted by the Department in a fair and equitable manner. 20.1.9.6 NMAC.

3. In 2017, the New Mexico Legislature passed House Bill 58 ("HB58") addressing public participation in the rulemaking process. 2017 N.M. Laws, ch. 137 § 3. NMED Exhibit 4.

4. HB58's amendments to the State Rules Act, NMSA 1978, Sections 14-4-1 to -11 ("SRA"), establish requirements for executive agency rulemaking notices, post-hearing steps, and maintenance of and access to the rulemaking record. NMED Exhibit 4. The SRA requires agencies to publish a Notice of Proposed Rulemaking in the New Mexico Register and provide that notice to the public through specific, additional notice requirements. NMSA 1978, § 14-4-5.2 (2017). Additionally, the SRA establishes timelines for agency action after publication of the Notice of Proposed Rulemaking and adoption of a final rule. NMSA 1978, § 14-4-5 (2017).

5. The SRA requires the New Mexico Attorney General ("Attorney General") to adopt default rulemaking procedures. NMSA 1978, § 14-4-5.8. Accordingly, the Attorney General adopted default procedural rules at 1.24.25 NMAC.

6. However, the SRA allows agencies to adopt their own or continue existing procedures that provide at least as much opportunity for public participation as the Attorney General's rules. NMSA 1978, § 14-4-5.8.

7. The Department of Environment Act establishes specific rulemaking requirements for the Secretary that are not contemplated by the SRA. *Compare e.g.* NMSA 1978, § 9-7A-6(D) with NMSA 1978, § 14-4-2(E) (2017). It is further unlikely that any default rules promulgated by the Attorney General will be able to fully comply with the Department of Environment Act while remaining generally applicable for a diverse group of executive agencies. Petition, NMED Exhibit 1.

8. The ALJ heard technical testimony from Jennifer Hower, Esq. regarding the Department's proposed changes at the October 12, 2018, public hearing. The Secretary finds Ms. Hower to be qualified to provide expert technical testimony on this matter.

9. Ms. Hower provided a step-by-step review of the Department's proposed changes to the Rulemaking Procedures in NMED Exhibit 3, and the Secretary finds:

- a. Adding citation to the SRA is appropriate. NMED Exhibit 3, pg. 4; NMSA 1978, § 14-4-5.8.
- b. The Department proposed several changes to 20.1.9 NMAC, and repeal and replacement of 20.1.9 NMAC is therefore appropriate, requiring a new effective date for the Rulemaking Procedures. NMED Exhibit 1, Section 20.1.9.5; NMED Exhibit 3, p. 4.
- c. Ms. Hower compared the definitions in the Rulemaking Procedures with the SRA and the Default Rules. *See e.g.* NMED Exhibit 3, pp. 4-7 (comparing the definitions of "person", "providing to the public", and "regulation" with the SRA and the Default Rules). The revisions to 20.1.9.7 NMAC are comparable to the SRA and the Default Rules, and adoption of the proposed definitions will provide at least as much opportunity for public participation as the SRA or Default Rules.
- d. Adoption of the proposed 20.1.9.7.B and .C is appropriate to help clearly define parts of the record proper as well as service requirements for the parties involved in the rulemaking. NMED Exhibit 1, Section 20.1.9.7.B and .C; NMED Exhibit 3, pp. 4-5.
- e. Adoption of the definition of "general public", "participant", and "party" are necessary and appropriate to determine the methods of participation and corresponding requirements throughout the rulemaking. NMED Exhibit 1, Sections 20.1.9.7.D and 20.1.9.12.C; NMED Exhibit 3, p. 5.

- f. Adoption of the proposed 20.1.9.7.M NMAC is appropriate and necessary to facilitate providing notice to the public for the proposed 20.1.9.12.B(1), 20.1.9.23.G, and 20.1.9.24 NMAC. NMED Exhibit 3, pp. 5-6. Further, this method of notice will provide for at least as much public participation as the SRA or the Default Rules. *Id*; NMSA 1978, § 14-4-2(E); 1.24.25.11 NMAC.
- g. The Department's proposed 20.1.9.7.N NMAC includes the necessary items in the record proper for compliance with the SRA. NMED Exhibit 3, pp. 6-7; NMSA 1978, § 14-4-5.4; 1.24.25.14.A NMAC.
- h. The Department's proposed revisions to the definition of "regulation" provide clarity to which actions this part will apply while being at least as inclusive as the SRA and the Default Rules. NMED Exhibit 1, Section 20.1.9.7.O; NMED Exhibit 3, p. 7.
- i. The service requirement revisions in the proposed 20.1.9.7.R NMAC are appropriate and will facilitate an orderly procedure for rulemakings. NMED Exhibit 3, pg. 7.
- j. It is necessary and appropriate to differentiate between public comment and technical testimony, as described by the Department. NMED Exhibit 1, Section 20.1.9.7.S. Addition of this definition helps to clearly explain the responsibilities associated with public comment and technical testimony further described in Ms. Hower's testimony on proposed 20.1.9.13 NMAC. NMED Exhibit 3, p. 11.
- k. Addition of "transcript of proceedings" will help define the hearing record and comply with the SRA. NMED Exhibit 1, Section 20.1.9.7.T; NMED Exhibit 3, p. 8.
- l. Changing "impartial" to "equitable" in 20.1.9.8.B NMAC ensures compliance with the SRA by using the same language as the SRA and the objectives of the Rulemaking Procedures. NMED Exhibit 3, pg. 8; NMSA 1978, § 14-4-5.3(B); 20.1.9.6.C NMAC.
- m. Addition of guidelines for calculation of time is appropriate to reduce confusion regarding the varying responsibilities of the parties and participants to rulemakings. NMED Exhibit 1, Section 20.1.9.9; NMED Exhibit 3, p. 8.

- n. The filing and service requirements as proposed by the Department are appropriate to ensure an efficient rulemaking and distribution of information amongst the participants and parties. NMED Exhibit 1, Section 20.1.9.10; NMED Exhibit 3, pp. 8-9. Further, the Department's proposed language will comply with the SRA requirements for examination of documents and provisions for duplication of documents. *Id.* Posting rulemaking information on the New Mexico Sunshine Portal is required by the SRA and the Default Rules. NMED, §§ 14-4-2(E)(2) and 14-4-5.4(A); 1.24.25.14.A NMAC. The proposed amendments will properly incorporate this requirement into the Rulemaking Procedures. NMED Exhibit 3, pp. 8-9. The proposed amendments to 20.1.9.10.F NMAC will properly incorporate the limitations and requirements for providing records to the public on the Secretary's Administrator. NMED Exhibit 3, pg. 9; NMSA 1978, § 14-4-5.2(B).
- o. The Secretary's current requirements for public notice of a rulemaking hearing in 20.1.9.12 NMAC provide for public participation in the rulemaking process, but addition of the Department's proposed changes will include the necessary items to ensure that the Secretary's notice of proposed rulemaking requirements provides for at least as much public participation as the SRA and Default Rules. NMED Exhibit 3, pp. 9-10; NMSA 1978, § 14-4-5.2; 1.24.25.11 NMAC. Further, the proposed addition of 20.1.9.12.E NMAC provides for more public participation by requiring notice when there is a change in the hearing date or submission deadlines. NMED Exhibit 3, pp. 10-11; NMSA 1978, § 14-4-5.2(D).
- p. The Department proposed, and the Secretary agrees, that it should be a stated objective of the Rulemaking Procedures to make possible the effective presentation of evidence and points of view of the parties and members of the public. NMED Exhibit 1, Section 20.1.9.6.C. In order to comply with that objective, the Rulemaking Procedures require more structure than they currently have, and adding requirements and procedures for the pre-filing of technical testimony will help achieve that objective by ensuring adequate presentation of information, better prepared response from all parties, and a more robust hearing record. NMED Exhibit 1, Section 20.1.9.13; NMED Exhibit 3, p. 11.

- q. It is necessary to amend 20.1.9.14 NMAC to state that any person may file an entry of appearance rather than just those affected by the proposed rule to more closely align with statutory law. NMED Exhibit 3, pg. 11; NMSA 1978, § 9-7A-6(D).
- r. Allowing witness participation in a rulemaking at the hearing officer's discretion will allow for more public participation in the rulemaking. NMED Exhibit 1, Section 20.1.9.15; NMED Exhibit 3, pp.11-12.
- s. The Department's proposed addition of 20.1.9.16 NMAC to control the process and resolution of motions in a rulemaking hearing is necessary and appropriate to ensure an orderly and effective hearing process. NMED Exhibit 1 Section, 20.1.9.16; NMED Exhibit 3, p. 12. This will help reduce confusion through clear structure and timelines. *Id.*
- t. The current Rulemaking Procedures in 20.1.9.13 NMAC are not clear enough to provide for at least as much public participation as the SRA or Default Rules. As Ms. Hower testified, the Department's proposed amendments to the Rulemaking Procedures provide similar accommodations for public participation through appointment of a hearing officer, submitting public comment, and requiring a fair and equitable hearing. NMED Exhibit 3, pp. 12-13. These amendments will bring the conduct of the hearing procedures in line with the more expansive procedures outlined for the Environmental Improvement Board and Water Quality Control Commission. *Id.*
- u. Since the transcripts are prepared by the court reporter and copies are purchased from the court reporter, it is appropriate that additional copies be obtained from the court reporter and is reflected as such in 20.1.9.20 NMAC. NMED Exhibit 1, Section 20.1.9.20; NMED Exhibit 3, pg. 13.
- v. The Department's proposed 20.1.9.23 NMAC more clearly outlines the process for the Secretary's post-hearing decision. NMED Exhibit 1, Section 20.1.9.23. The proposed amendments incorporate the SRA requirements and add clarity to the post-hearing process. NMED Exhibit 1, Section 20.1.9.23; NMED Exhibit 3, p. 13. The proposed language for 20.1.9.23.F NMAC appropriately incorporates the SRA requirement to decide on a proposed rule within two years of publication in

the New Mexico Register of the notice of proposed rulemaking as well as termination of a rulemaking proceeding. NMED Exhibit 3, pg. 13; NMSA 1978, §§ 14-4-5(B) and (C).

w. The proposed language for post-hearing notice requirements in 20.1.9.24 NMAC appropriately incorporates the SRA requirements for providing public notice of the Secretary's decision, filing with the State Records Administrator within 15 days, and submittal of a concise explanatory statement for adoption of the proposed rule. NMED Exhibit 3, pp. 13-14; NMSA 1978, §§ 14-4-3(A), 14-4-5(D), and 14-4-5.5. The Secretary further finds that the proposed language retains the necessary procedural steps for compliance with both the SRA and the Department of Environment Act, and that it is appropriate to set the date of adoption for signature of the order adopting the proposed rule. The proposed language provides at least as much opportunity for public participation as the SRA and the Default Rules. NMED Exhibit 3, pp. 13-14; 1.24.25.14(F) and 1.24.25.15

10. Adoption of the proposed amendments reduces confusion for petitioners before the Secretary by compiling all applicable provisions in one location.

11. The Department's Rulemaking Procedures are designed to encourage participation in rulemakings, 20.1.9.6 NMAC; adoption of the proposed amendments will further facilitate public participation.

12. Due to procedural considerations, 20.1.9 NMAC is to be repealed, and the amendments discussed above are to be incorporated into a replacement 20.1.9 NMAC.

**ORDER**

The Secretary of the New Mexico Environment Department hereby repeals Title 20, Chapter 1, Part 9 of the New Mexico Administrative Code and replaces it with the rule indicated in Attachment A with any appropriate corrections of formatting or other non-substantive changes necessary to file these rules with the New Mexico State Records Center. The regulatory change as described in this Order is hereby adopted, to be effective on the date of publishing in the New Mexico Register.

  
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Butch Tongate, Secretary  
New Mexico Environment Department

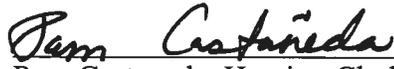
  
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Dated

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the **Order and Statement of Reasons for Repeal and Replacement of Regulations** was sent to the following parties via the stated methods below on November 27, 2018:

*Via hand delivery and email:*

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