

**STATE OF NEW MEXICO
WATER QUALITY CONTROL COMMISSION**



No. WQCC 17-06(R)

**IN THE MATTER OF PROPOSED
REVISIONS TO THE RULEMAKING
RULES FOR THE WATER QUALITY
CONTROL COMMISSION, 20.1.6 NMAC**

New Mexico Environment Department

Petitioner.

ORDER AND STATEMENT OF REASONS FOR AMENDMENT OF REGULATIONS

This matter comes before the New Mexico Water Quality Control Commission (“Commission”) upon a petition filed by the New Mexico Environment Department (“Department”) proposing amendments to the Commission’s Rulemaking Procedures codified at Title 20, Chapter 1, Part 6 of the New Mexico Administrative Code (20.1.6 NMAC or “Rulemaking Procedures”).

The Commission held a public hearing in this matter on Tuesday, January 9, 2018, at Mabry Hall in the Jerry Apodaca Building, 300 Don Gaspar, Santa Fe, New Mexico. The public notice for the hearing was published in the New Mexico Register on October 31, 2017. NMED Exhibit 8. The public notice was also published in the Albuquerque Journal on November 9, 2017. NMED Exhibit 9. The remaining public notice requirements were met pursuant to 20.1.6.201 NMAC. The Department also 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. NMED Exhibit 6.

At the public hearing, the Commission heard technical testimony from the Department. No other party entered an entry of appearance in this matter, and there was no public comment. On January 9, 2018, the Commission, having familiarized itself with the record and the Department’s technical testimony, deliberated and voted unanimously to adopt the Department’s proposed amendments to 20.1.6 NMAC with two revisions for the following reasons:

1. Pursuant to NMSA 1978, Sections 14-4-5.8 (2017), 74-6-4(E) (2009), and 74-6-6 (1993), the Commission has the authority to adopt procedural rules to govern rulemakings.
2. The purpose of 20.1.6 NMAC is to standardize the procedures used in rulemaking proceedings before the Commission, to encourage participation in the hearings conducted by the Commission for the promulgation of regulations; to make possible the effective presentation of the evidence and points of view of the parties and members of the general public; to allow all interested persons a reasonable opportunity to submit data; views, or arguments orally or in writing; and to assure that Commission hearings are conducted in a fair and equitable manner. 20.1.6.6 NMAC.
3. In 2017, the New Mexico Legislature passed House Bill 58 (“HB 58”) addressing public participation in the rulemaking process. 2017 N.M. Laws, ch. 137 § 3. NMED Exhibit 4.
4. HB 58’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 also requires the New Mexico Attorney General to adopt default rulemaking procedures. NMSA 1978, § 14-4-5.8. Accordingly, the New Mexico Attorney General (“Attorney General”) has proposed default procedural rules. NMED Exhibit 5 (“Default Rules”).
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 Water Quality Act establishes specific rulemaking requirements for the Commission that are not contemplated by the State Rules Act. *Compare e.g.* NMSA 1978, § 74-6-6(C) (1993) *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 Water Quality Act while remaining generally applicable for a diverse group of executive agencies.

8. The Commission heard technical testimony from Jason Wallace, Esq. regarding the Department's proposed changes at the January 9, 2018, public hearing. The Commission found Mr. Wallace to be qualified to provide expert technical testimony on this matter.

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

- a. Adding citation to 20.1.6.3 NMAC ("Statutory Authority") to the SRA is appropriate because some of the revisions are based on the SRA. NMED Exhibit 3, pg. 4;.
- b. Mr. Wallace compared the definitions in the current Rulemaking Procedures with the SRA and the Default Rules. *See e.g.* NMED Exhibit 3, pg. 4 (comparing the definitions of "person", "providing to the public", and "rule" with the SRA and the Default Rules). The proposed changes to 20.1.6.7 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.
- c. Adoption of the proposed 20.1.6.7(P) NMAC ("Provide to the public.") is appropriate and necessary to facilitate providing notice to the public the proposed 20.1.6.201(A), 20.1.6.204(C), 20.1.6.306(H), and 20.1.6.307 NMAC. NMED Exhibit 3, pp. 5-6. Further, adoption of 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); NMED Exhibit 5, Section 1.24.25.10. Finally, although the phrase "provide to the public" is defined in statute, the Commission finds that providing a definition in 20.1.6.307 NMAC will add clarity. *See* NMSA 1978, § 14-4-5.7 (B) (discouraging but not prohibiting defining a word or phrase that is defined in an applicable statute).
- d. The Department's proposed 20.1.6.7(Q) NMAC will include the necessary items in the record proper for compliance with the SRA. NMED Exhibit 3, pp. 6-7; NMSA 1978, § 14-4-5.4; NMED Exhibit 5, Section 1.24.25.13.

- e. Changing “impartial” to “equitable” in 20.1.6.100(B) NMAC will ensure compliance with the SRA by using the same language as the SRA. NMED Exhibit 3, pg. 7; NMSA 1978, § 14-4-5.3(B).
- f. Posting of rulemaking information on the New Mexico Sunshine Portal is required by the SRA and the Default Rules. NMSA 1978, §§ 14-4-2(E)(2) and 14-4-5.4(A); NMED Exhibit 5, Section 1.24.25.10(A)(2). The proposed amendments will properly incorporate this requirement into the Rulemaking Procedures. NMED Exhibit 3, pg. 7.
- g. The Commission administrator may not charge a fee for providing records in electronic form that are included in the Notice of Proposed Rulemaking. NMSA 1978, § 14-4-5.2(B). The Commission finds that NMED’s proposed language should be revised to more accurately reflect this requirement. Specifically, proposed 20.1.6.105(B) NMAC should read: “Cost of duplication: The cost of duplicating documents shall be borne by the person seeking copies of such documents, but the commission administrator shall not charge a fee for providing the notice of proposed rulemaking in electronic form.” The proposed amendments to 20.1.6.105(B) NMAC with revisions will properly incorporate the limitations and requirements for providing records to the public on the Commission Administrator. NMED Exhibit 3, pg. 7; NMSA 1978, § 14-4-5.2(B).
- h. The Commission’s current requirements for public notice of a rulemaking hearing in 20.1.6.201 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 Commission’s notice of proposed rulemaking requirements provides for at least as much public participation as the SRA and Default Rules. NMED Exhibit 3, pp. 7-8; NMSA 1978, § 14-4-5.2; NMED Exhibit 5, Section 1.24.25.10(B).
- i. The proposed amendments to 20.1.6.204 NMAC will provide for more public participation by requiring notice when there is a change in the hearing date or submission deadlines. NMED Exhibit 3, p. 8; NMSA 1978, § 14-4-5.2(D); NMED Exhibit 5, Section 1.24.25.10(C). Additionally, the Commission’s current requirements for providing public comment and submittal of a notice to present technical testimony provide for at least as much public participation as the SRA or Default

Rules by allowing for full and orderly participation. NMED Exhibit 3, pp. 8-9; NMSA 1978, § 14-4-5.3; NMED Exhibit 5, Section 1.24.25.11.

- j. The current Rulemaking Procedures in 20.1.6.300 NMAC provide for at least as much public participation as the SRA or the Default Rules. As Mr. Wallace testified, 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, pg. 9. The Commission further finds that it is necessary to maintain the current hearing procedures in order to facilitate the submittal of technical testimony in its rulemaking hearings.
- k. Given the direction in the SRA, NMSA 1978, Section 14-4-5.4(B)(3), and consistent with the Water Quality Act, it is appropriate to amend 20.1.6.303(A) NMAC to give the hearing officer the discretion to allow an audio recording rather than a verbatim transcript in appropriate rulemaking settings. NMED Exhibit 3, pg. 9; NMSA 1978, § 74-6-6.
- l. The proposed language for 20.1.6.306(G) NMAC appropriately incorporates the SRA requirement to decide on a proposed rule within two years of publication of the notice of proposed rulemaking as well as termination of a rulemaking proceeding. NMED Exhibit 3, pg. 9; NMSA 1978, §§ 14-4-5(B) and (C).
- m. The Commission must provide a concise explanatory statement to the public at the time it adopts a rule. NMSA 1978, § 14-4-5.5. The Default Rules interpret this to be within 15 days of adoption. NMED Exhibit 5, Section 1.24.25.13(F). To more clearly state this requirement, proposed 20.1.6.307(A) NMAC is revised to read: "The commission administrator shall provide to the public notice of the commission's action and a concise explanatory statement." The proposed language for post-hearing requirements for 20.1.6.307 NMAC as revised appropriately incorporates the SRA requirements for providing public notice of the Commission's decision, filing the adopted rule with the State Records Administrator within 15 days, and submittal of a concise explanatory statement for adoption of the rule. NMED Exhibit 3, pp. 9-10; NMSA 1978, §§ 14-4-3(A), 14-4-5(D), and 14-4-5.5. The Commission further finds that the proposed language as revised retains the necessary

procedural steps for compliance with both the SRA and the Water Quality Act, and that it is appropriate to set the date of adoption for signature of the order adopting the proposed rule. *See* 20.1.6.306(F) NMAC (“The commission’s written decision is the official version of the commission’s action, and the reasons for that action.”). The proposed language as revised provides at least as much opportunity for public participation as the SRA and the Default Rules. NMED Exhibit 3, pp. 9-10; NMED Exhibit 5, Sections 1.24.25.13(F) and 1.24.25.14

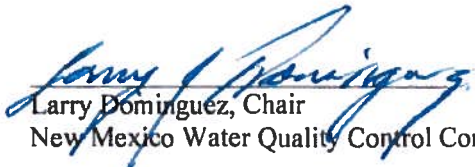
10. While 20.1.6.2 NMAC states that governing law controls over the Commission’s Rulemaking Procedures, adoption of the proposed amendments will reduce confusion for petitioners before the Commission by compiling all applicable provisions in one location.

11. The Commission’s Rulemaking Procedures are designed to encourage participation in rulemakings, 20.1.6.6 NMAC, but adoption of the HB 58-based amendments will further facilitate public participation.

12. Due to procedural considerations, 20.1.6 NMAC is to be repealed, and the amendments discussed above are to be incorporated into a replacement 20.1.6 NMAC.

ORDER

By a unanimous vote, the proposed changes to 20.1.6 NMAC were approved by the Commission. Title 20, Chapter 1, Part 6 of the New Mexico Administrative Code is hereby repealed, and replaced with the rule indicated in NMED Exhibit 1, and as revised as set forth in this order, with any appropriate corrections of formatting or other 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 30 days after its filing in accordance with the State Rules Act. *See* NMSA 1978, §§14-4-5(D), 74-6-6(E).


Larry Dominguez, Chair
New Mexico Water Quality Control Commission

1-22-19
Dated

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Order and Statement of Reasons for Amendment of Regulations** was sent to the following parties on January 23, 2018:

Via hand delivery and email:

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