

From: [Chris Mechels](#)  
To: [Public Facilitation, NMENV](#)  
Subject: [EXT] NMAC - EIB 20-55 Comment #7  
Date: Thursday, December 17, 2020 8:11:36 PM

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For the record.

----- Forwarded Message -----

From: Chris Mechels [REDACTED]  
To: Soloria, Karla <[ksoloria@nmag.gov](mailto:ksoloria@nmag.gov)>  
Cc: Hower, Jennifer, NMENV <[Jennifer.Hower@state.nm.us](mailto:Jennifer.Hower@state.nm.us)>, John Volkerding  
([JVNatrc@aol.com](mailto:JVNatrc@aol.com)) <[JVNatrc@aol.com](mailto:JVNatrc@aol.com)>  
Sent: Thu, 17 Dec 2020 07:18:42 -0500 (EST)  
Subject: Re: Noncompliance with Rules Act in the upcoming hearing on [11.5.1.16](#)  
NMAC

Ms. Soloria,

I am glad to receive your message, but it would have been more appropriate 2 weeks ago.

Your first paragraph answers a point that I didn't make. I simply suggested that the likely source of the "shortcomings" in the EIB procedure was the timing. This is born out in the documents you provide. The EIB and WQCC procedures both went to hearing before the content of the final Default Hearing Procedure was known.

Second concerning the content of [\(1.24.25.12\)](#) and [\(1.24.25.14\)](#) and the comparable EIB provisions, you might actually examine them directly, rather than questioning me. I assure you that Public Comments and a Concise Explanatory Statement are NOT trivial, as you make them out. I was involved in the hearing that created the current Default Hearing Procedure, and these points were NOT trivial, they are crucial. Ask your boss, Sally. She was there.

Your, very late, posting of my comments does not answer my complaint, as the EIB procedure does not allow for email comments, or the posting. It instead directs me to the EIB website for comments, but that website access is for "requesting" information. Especially in the current Covid times, email comments are very important, and public posting allows for some public access and exchange. You would deny these? You did deny these...

As for your confusion about the [\(1.24.25.14\)](#), have you compared it to the EIB procedure? A key difference is in the Concise Explanatory Statement, which we considered very important when developing the Default Hearing Procedure. A chronic problem with Rules Hearings has been some "boiler plate" language to "justify" the decision. The Concise Explanatory Statement is an attempt to get a "real" explanation. The Default Procedure has the "enhanced" CES, the EIB procedure does not. The NMED Procedure, which came later, has the "enhanced" CES.

There are many differences between the Default Procedure and the EIB Procedure which need examination, but I simply chose two of the most important, for the sake of brevity.

I was surprised to see the "posting" of the EIB procedure to the NMAG, as their response to my October 2020 IPRA request did not include it, only the NMED posting. I am curious how Sally Malave, who received the posting, "lost" it. I suggested, in my IPRA request to the NMAG, that they make these posting available on their website, as that would make such errors visible, so they could be corrected. Perhaps you could sit down with your boss, Sally, and the IPRA responder, and find out what went wrong? Please let me know what you find, and consider making the posting public.

Finally, concerning the defective notice on the SunshinePortal. Your statement there is "only one notice" is quite evasive. In fact the Rules Act requires under "provide to the public" that the notice be posted to the SunshinePortal. This is an extremely important change in the 2017 HB58, as the former requirement that hearing notices be posted in newspapers was eliminated. The SunshinePortal is now the MOST IMPORTANT access point for information on Public Hearings, and you dismiss it.

You failed to post the proposed change on the Portal, as required. I contacted Paula Jones, and asked her to send me the change. She agreed, but never did it. Contacting her seems difficult at best. I mentioned the problem with the "comment due" date, which is a very clear error, and she said the Portal posting wasn't done by her, not her responsibility. The result, an error which could have been easily and quickly corrected, persists, and serves to cut off public comments. Looking to previous NMED hearings the failure to post properly on the SunshinePortal is chronic, and needs to be addressed.

As a result of these serious errors with the EIB procedure, and the notice requirements, I believe the 18 December should be canceled. As NMED has seen fit to extend the Emergency Rule for another 120 days, there seems no pressure to proceed, as these violations of the Rules Act would lead to an "invalid" outcome.

The EIB could then, perhaps using an Emergency Rule, update their hearing procedure, and move forward more confidently. They should also ask for a more detailed support for the Rapid Response proposed change, as the situation has most certainly changed since the August rulemaking.

Overall, the NMAG seems to handle their duties as "Board Counsel", to the various Boards and Commissions, rather poorly. The NMAG Civil Division has responsibility for "open government", for part time service as Board Counsel, and for defending against lawsuits brought for violating OMA, IPRA and Rules Act. They are wearing far too many hats, and seem to operate in confusion, both defending open government, and defending those who violate against open government. That seems to describe the current case, and many others.

Someday, this must be addressed.

Regards,

Chris Mechels  
[REDACTED]

----- Original Message -----

From: Soloria, Karla <ksoloria@nmag.gov>

To: Chris Mechels [REDACTED]

Cc: Hower, Jennifer, NMENV <Jennifer.Hower@state.nm.us>, John Volkerding (JVNatrc@aol.com) <JVNatrc@aol.com>

Sent: Wed, 16 Dec 2020 17:16:17 -0500 (EST)

Subject: Re: Noncompliance with Rules Act in the upcoming hearing on [11.5.1.16](#) NMAC

Mr. Mechels:

I have examined the issues you raised in your emails to me in my capacity as counsel to the Environmental Improvement Board ("Board") dated November 24, 2020 (forwarded to my correct email address on December 1) and December 1, 2020. I address each of your concerns in turn, below.

First, you made a general statement that the "EIB Hearing Procedure does not comply with the Rules Act." You stated that "the Hearing Procedure was adopted before the 1.24.25 NMAC Default Procedure..." While this appears to be true, the mere fact that the Board's current rulemaking procedure (20.1.1 NMAC) was adopted prior to the promulgation of the Attorney General's default procedural rules for rulemaking (1.24.25 NMAC) does not in and of itself render the Board's rulemaking procedure out of compliance with the State Rules Act (NMSA 1978 § 14-4-1 to -11). The State Rules Act merely requires that should an agency adopt its own procedural rules, or continue in effect existing rules, such rules "shall provide at least as much opportunity for participation by parties and members of the public as is provided in the procedural rules adopted by the attorney general." NMSA 1978 § 14-4-5.8. Therefore, for purposes of compliance with the State Rules Act, it does not matter when the Board adopted its rulemaking procedure, so long as such rules provide "as much opportunity for participation by parties and members of the public as is provided by [the Attorney General's default procedural rules]". See *id.*

You further stated that the Board's rulemaking procedure does not comply with the State Rules Act insofar as it "fails in Public Comments ([1.24.25.12](#)) and Rulemaking Record ([1.24.25.14](#))." In your emails to me you did not specify how the Board's rulemaking procedure "fails" as to [1.24.25.12](#) NMAC, which is the section of the Attorney General's default rules dealing with the written comment period. However, I understand from separate correspondence you have had with the New Mexico Environment Department as well as the Board's chair, John Volkerding, that your main concern regarding this issue is that the default rule [1.24.25.12](#) NMAC requires an agency to "post all written comments on its website, if one exists, as soon as practicable, and no more than 3 business days following receipt to allow for public

review." See NMAC 1.24.25.12(D). The Board's rulemaking procedure does not contain a similar requirement that the Board post all written comments to its website. While the Board maintains its rulemaking procedure complies with the State Rules Act, to allay your specific concerns with the posting of public comment, the Board's administrator has posted public comments for the upcoming rules hearing in matter EIB 20-55(R) to the Board's website.

You did not specify in your emails to me how the Board's rulemaking procedure "fails" as to [1.24.25.14](#) NMAC, which is the section of the Attorney General's default rules dealing with the rulemaking record and adoption of rule. Accordingly, I cannot respond to that concern other than to state that the Board's rulemaking procedure has its own provisions regarding the content of the record proper and public access to same. See [20.1.1.7](#) and [20.1.1.201](#) NMAC. The Board's rulemaking procedure further addresses the process for deliberation and decision (20.1.1.406 NMAC) as well as notice of board action (20.1.1.407 NMAC).

Secondly, you raised the concern that the Board's rulemaking procedure does not comply with the State Rules Act insofar as it has not been "posted" with the New Mexico Attorney General. See NMSA 1978 § 14-4-5.8 (requiring that "An agency that adopts its own procedural rules shall send a copy of those procedural rules to the attorney general and shall maintain those procedural rules on the agency's website"). I have attached correspondence to this email which indicates the Board's rulemaking procedure was in fact transmitted to the Attorney General's office on October 1, 2018, and I trust that such correspondence addresses this concern.

Finally, you raised the concern that the public notice for the hearing in EIB 20-55(R) lists a comment cut off date of November 27, 2020. There was only one public notice published for this hearing, which I have attached. Pursuant to that public notice, there was no cut off date for public comment. The date of November 27, 2020 was listed as the deadline for persons to submit notices of intent to present technical testimony, and such deadline for notices of intent was in compliance with the Board's rulemaking procedure. See 20.1.1.302 NMAC.

Given the above explanations, the Board maintains its rulemaking procedure is in compliance with the State Rules Act and that the rulemaking hearing in EIB 20-55(R) should proceed as scheduled.

Thank you for bringing your concerns to my attention.

Regards,  
Karla Soloria  
*Assistant Attorney General*  
*Counsel, Environmental Improvement Board*