2018 Administrative Law Institute

Friday, October 19, 2018



2018 Administrative Law Institute



Friday, October 19, 2018 • 9 a.m.-4:30 p.m. State Bar Center, Albuquerque

\$99 Non-member not seeking CLE credit \$229 Early bird fee (Registration must be received by September 19) \$251 Public Law section members, government and legal services attorneys, and Paralegal Division members \$279 Standard Fee/Webcast Fee Co-sponsor: Public Law Section Registration and refreshments 8:45 a.m. 9 a.m. **Rulemaking: Implications and Updates from House Bill 58** Joseph M. Dworak, Esq., Assistant Attorney General, Open Government Division Deputy Director, Office of the Attorney General; and Matt Ortiz (non-attorney presenter), Administrative Law Division Director, State Records Center and Archives 10 a.m. Effective Practice and Practice Pitfalls to Avoid in Administrative Proceedings Carolyn R. Glick, Esq., New Mexico Public Regulation Commission; and Hon. Rachel A. Bayless, Esq., New Mexico Workers' Compensation Administration 11 a.m. Break 11:15 a.m. Administrative Hearings Practice- Administrative Law Judge, Hearing Officer and Hearing **Examiner's Perspective** Hon. Irma Gonzalez, Esq., Administrative Hearings Office; Erin Anderson, Esq., New Mexico Environment Department; Sally Malavé, Esq., Assistant Attorney General, Open Government Division Director, Office of the Attorney General; and Felicia L. Orth, Esq., Contract Administrative Law Judge Noon Lunch (provided at the State Bar Center) Public Law Section Annual Meeting 1 p.m. Administrative Appeals-Judge's Perspective Hon. David K. Thomson, First Judicial District Court, Hon. Michael D. Bustamante, ret. and Hon. Celia Foy Castillo, ret. 2 p.m. Ethical Considerations for Government Lawyers (1.0 EP) Anne L. Taylor, New Mexico Disciplinary Board 3 p.m. Break 3:15 p.m. Inspection of Public Records Act: 2018 Primer and Panel Discussion Tania Maestas, Esq., Chief Deputy Attorney General, Civil Affairs, Office of the Attorney General; Andrea Salazar, Esq., Cuddy & McCarthy, LLP; and Nicholas M. Sydow, Esq., Assistant Attorney General, Civil Appellate Chief, Office of the Attorney General 4:30 p.m. Adjournment

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CLE Information



Overview

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New Mexico

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Speaker Biographies

Joseph M. Dworak, Esq. Assistant General, Open Government Division Deputy Director Office of the Attorney General

Carolyn Glick has been practicing law for 27 years. She has held her current position as a hearing examiner with the New Mexico Public Regulation Commission (NMPRC) for 11 years. Before that, she served as associate general counsel and general counsel at the NMPRC. She also worked as an assistant public defender at both the trial and appellate levels, an associate in a private law firm and a law clerk to Supreme Court Justice Seth Montgomery.

Judge Rachel A. Bayless, a native New Mexican, was appointed as a workers' compensation judge in April 2017. Prior to her appointment, she served as general counsel of the Workers' Compensation Administration since Feb.2014. Bayless worked as an associate attorney at Madison, Harbour & Mroz, P.A., and as a staff attorney for the Law Office of Eva K. Blazejewski. She also worked for the 2nd Judicial District Attorney's Office as an assistant district attorney where she prosecuted misdemeanors and felony physical and sexual abuse of children. Her litigation experience includes insurance defense, personal injury defense, representing employers and insurers in workers' compensation matters, and some plaintiffs' work. Bayless earned a Bachelor of Business Administration degree, *summa cum laude*, from Eastern New Mexico University in 2001, and a Juris Doctorate degree, *magna cum laude*, from the University of New Mexico, School of Law in 2005.

Hon. Irma Gonzalez, Administrative Hearings Office

Erin Anderson, Esq. New Mexico Environment Department

Sally Malavé begin her service as an assistant attorney general in September 1993 and, with the exception of a 14-month stint at Santa Fe County, has served as counsel to a variety of state agencies, boards and commissions. Since Oct. 2016, she has served as director of the Open Government Division. Through this experience, she has gained a considerable amount of institutional knowledge and understanding of the functions of the Office of the Attorney General as it relates to other members of the executive, as well as to the legislative and judicial branches of government.

Malavé also has extensive experience in the conduct of quasi-adjudicatory proceedings, rulemaking hearings, as well as in handling administrative appeals to the district court and court of appeals.

During her tenure at the OAG, she has authored Attorney General Opinions and advisory letters on a wide array of questions of law. Malavé has investigated complaints and issued written determinations regarding alleged violations of the Open Meetings Act and the Inspection of Public Records Act.

Felicia Orth retired in 2014 as the New Mexico Environment Department Hearing Officer, where she conducted hearings in air quality, solid waste, hazardous waste, liquid waste, ground

water, surface water and construction programs. Under contract since then, she has conducted hearings for the Environmental Protection Agency, NMED, EMNRD, the Albuquerque-Bernalillo Air Quality Control Board, the NM Medical Board, and the NM Racing Commission, among others. Orth has an undergraduate degree in Philosophy from Washington University in St. Louis and a law degree from the University of Wisconsin-Madison.

Judge David K. Thomson is a State District Trial Court Judge in N.M. He serves on Division VI in the First Judicial District. This District serves Santa Fe, Rio Arriba and Los Alamos Counties.

Judge Thomson was born and raised in Santa Fe, N.M. He has an undergraduate degree in Economics and Government from Wesleyan University, Middletown Connecticut. Before law school he worked for U.S. Senator Jeff Bingaman. He graduated from the University of Denver College of Law in 1998. Judge Thomson was term law clerk for U.S. District Judge Bruce Black, District of New Mexico. After his clerkship he joined the New Mexico Attorney General's Office as a litigation attorney eventually serving as a Deputy Attorney General. Prior to taking the bench in 2015 Judge Thomson was a sole practitioner.

Judge Thomson's current docket consists of over one thousand cases of general jurisdiction. The New Mexico Supreme Court has appointed Judge Thomson to Chair the Uniform Jury Instruction Committee. Judge Thomson graduated from the National Judicial College, and teaches CLEs on a number of topics including trial practice, evidence, Judicial ethics, and ethics in the courtroom. Judge Thomson is on the Executive Committee of the American Bar Association National Conference of State Trial Judges and State Representative to the ABA Judicial Division. Judge Thomson serves as Secretary of the New Mexico District and Metropolitan Judges Association.

Hon. Michael D. Bustamante

Judge Bustamante is a native New Mexican with deep roots in the state. On his mother's side he can trace his family to the Onate expedition! His father's side of the family are relative newcomers and probably came to New Mexico in the early 1700s. He graduated from Grants High School in 1967, received his B.A. in Economics from UNM in 1971 and graduated from UNM Law School in 1974. He was in the private practice with the law firm of Ortega and Snead and its successors from then until he went into solo practice in 1990. He was appointed to the Court of Appeals in December 1994 and served until October 2016. He has been and is still active in many community, bar and court related organizations and committee work. He emphasizes that his constant aim is to be useful and leave all things in which he gets involved better than he found them.

Hon. Celia Foy Castillo born and raised in southern New Mexico, Castillo received her BA from St. Mary's College, Notre Dame, Indiana. She began her career as a teacher, first teaching English in Madrid, Spain and then Spanish in Gallup, New Mexico. Her second career was law. After receiving her JD from the University of New Mexico, Castillo was a law clerk to NM Court of Appeals Judge Mary Walters, practiced several years in Santa Fe, NM, and then moved to

Silver City, N.M. where she became the managing partner of Foy, Foy, and Castillo, PC. Her third career began in 2000 when she became a judge on the NM Court of Appeals; she served as Chief Judge from 2011 to her retirement in 2013. Now she participates in a variety of activities, many as a volunteer. Castillo and her husband Al live in Santa Fe and travel as often as they can.

Anne L. Taylor is an assistant disciplinary counsel for the Office of Disciplinary Counsel of the New Mexico Supreme Court Disciplinary Board where she has worked since January, 2002. Taylor has a J.D. from Vanderbilt University School of Law in Nashville, Tenn. She has argued numerous disciplinary cases before the New Mexico Supreme Court and serves as the liaison between the Disciplinary Board and the Client Protection Fund. In addition, Taylor is responsible for overseeing the Disciplinary Board's IOLTA. When she's not lawyering, Taylor is also a compulsory rated gymnastics judge.

Tania Maestas, Esq. Chief Deputy Attorney General, Civil Affairs, Office of the Attorney General

Andrea Salazar is an associate attorney at Cuddy & McCarthy. Her practice focuses on litigation, school law, employment law, real estate and land use and zoning.

Prior to joining Cuddy, Salazar worked as an assistant Santa Fe County attorney where she advised the Santa Fe County Planning Commission; litigated code enforcement and administrative appeals for the Land Use Department.; and assisted County Officials and Department in numerous matters. She began her career as a public defender in Albuquerque, litigating both misdemeanor and felony cases.

Nicholas Sydow is the civil appellate chief at the Office of the New Mexico Attorney General. In this role, he supervises the Office's civil appeals, including briefing and arguing significant cases for the State and managing the Office's civil amicus advocacy. Sydow has argued numerous cases in the Tenth Circuit, New Mexico Supreme Court, and New Mexico Court of Appeals. Previously, he managed the Attorney General's antitrust litigation. Sydow also has practiced in large firms in Albuquerque and Los Angeles. He is a cum laude graduate of Harvard Law School.

Matthew Ortiz has been with Administrative Law Division of the Commission of Public Records for over five years. During that time, his division has filed and published over 2,100 rulemaking actions (new rules, rule repeals, repeal and replacement rules, and amendments) and published over 500 notices of rulemaking hearings. He has personally taught over 40 rule trainings for over 300 state employees. He is a member of the New Mexico Compilation Commission, as the designee for the State Records Administrator. Prior to 2014, he was an attorney in private practice for over 15 years. He is a former deputy Santa Fe county attorney and former assistant attorney general. He was elected to three terms on the Santa Fe city council from 2000-2012. He is a graduate of the Georgetown University Law Center, Washington DC and Lake Forest College, Lake Forest, IL.

Rulemaking: Implications and Updates from House Bill 58



Why care about the State Rules Act?

14-4-3. FORMAT OF RULES; FILING; DISTRIBUTION.

A. Each agency promulgating any rule shall place the rule in the format and style required by rule of the state records administrator and shall deliver the rule to the state records administrator or the administrator's designee, accompanied by the concise explanatory statement required by the State Rules Act. The state records administrator or the administrator or the administrator's designee shall note thereon the date and hour of filing.

14-4-5. TIME LIMIT ON ADOPTION OF A PROPOSED RULE -- FILING AND COMPLIANCE REQUIRED FOR VALIDITY.

Except in the case of an emergency rule, no rule shall be valid or enforceable until it is published in the New Mexico register as provided by the State Rules Act.

14-4-7.1. NEW MEXICO REGISTER.

B. The New Mexico register shall be the official publication for all notices of rule makings and filings of adopted rules, including emergency rules, by agencies.

(1) The register shall include the full text of any adopted rules, including emergency rules. Proposed rules may be published in full or in part at the discretion of the issuing agency.

(2) Upon request of an issuing agency, the state records administrator may determine that publication in the register of the full text of an adopted rule would be unduly cumbersome, expensive or otherwise inexpedient, and may publish instead a synopsis of the adopted rule and a statement that a copy of the rule is available from the issuing agency.





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Section 14-4-2 : Definitions

F. "rule" means any rule, regulation, or standard, including those that explicitly or implicitly implement or interpret a federal or state legal mandate or other applicable law and amendments thereto or repeals and renewals thereof, issued or promulgated by any agency and purporting to affect one or more agencies besides the agency issuing the rule or to affect persons not members or employees of the issuing agency, including affecting persons served by the agency. An order or decision or other document issued or promulgated in connection with the disposition of any case or agency decision upon a particular matter as applied to a specific set of facts shall not be deemed such a rule, nor shall it constitute specific adoption thereof by the agency. "Rule" does not include rules relating to the management, confinement, discipline or release of inmates of any penal or charitable institution, the New Mexico boys' school, the girls' welfare home or any hospital; rules made relating to the management of any particular educational institution, whether elementary or otherwise; or rules made relating to admissions, discipline, supervision, expulsion or graduation of students from any educational institution;

Section 14-4-2 : Definitions

D. "proposed rule" means a rule that is provided to the public by an agency for review and public comment prior to its adoption, amendment or repeal, and for which there is specific legal authority authorizing the proposed rule;

E. "provide to the public" means for an agency to distribute rulemaking information by: (1) posting it on the agency website, if any; (2) posting it on the sunshine portal; (3) making it available in the agency's district, field and regional offices, if any; (4) sending it by electronic mail to persons who have made a written request for notice from the agency of announcements addressing the subject of the rulemaking proceeding and who have provided an electronic mail address to the agency; (5) sending it by electronic mail to persons who have participated in the rulemaking and who have provided an electronic mail address to the agency; (6) sending written notice that includes, at a minimum, an internet and street address; and (7) providing it to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees;

Section 14-4-3 : Format

A. Each agency promulgating any rule shall place the rule in the format and style required by rule of the state records administrator and shall deliver the rule to the state records administrator or the administrator's designee, accompanied by the concise explanatory statement required by the State Rules Act. The state records administrator or the administrator's designee shall note thereon the date and hour of filing.

Β. The state records administrator or the administrator's designee shall maintain a copy of the rule

as a permanent record open to public inspection during office hours, on the website of the records center, published in a timely manner in the New Mexico register and compiled into the New Mexico Administrative Code.

C. At the time of filing, an agency may submit to the state records administrator or the administrator's designee a copy, for annotation with the date and hour of filing, to be returned to the agency.

D. The state records administrator, after written notification to the filing agency, may make minor, non-substantive corrections in spelling, grammar and format in filed rules. The state records administrator shall make a record of the correction and shall deliver the record to the filing agency and issuing authority within ten days of the change. Within thirty days of receiving that state records administrator's record of a correction, the agency shall provide to the public notice of the correction in the same manner as the agency used to give notice of the rulemaking proceeding pursuant to Section 4 of this 2017 act.

Section 14-4-5 : Time limits

TIME LIMIT ON ADOPTION OF A PROPOSED RULE-- FILING AND COMPLIANCE REQUIRED FOR VALIDITY.

A. Except in the case of an emergency rule, no rule shall be valid or enforceable until it is published in the New Mexico register as provided by the State Rules Act.

Β. An agency shall not adopt a rule until the public comment period has ended. If the agency fails to take action on a proposed rule within two years after the notice of proposed rulemaking is published in the New Mexico register, the rulemaking is automatically terminated unless the agency takes action to extend the period. The agency may extend the period of time for adopting the proposed rule for an additional period of two years by filing a statement of good cause for the extension in the rulemaking record, but it shall provide for additional public participation, comments and rule hearings prior to adopting the rule.

C An agency may terminate a rulemaking at any time by publishing a notice of termination in the New Mexico register. If a rulemaking is terminated pursuant to this section, the agency shall provide notice to the public.

Within fifteen days after adoption of a rule, an agency shall file the adopted rule with the state records D. administrator or the administrator's designee and shall provide to the public the adopted rule. The state records administrator or the administrator's designee shall publish rules as soon as practicable after filing, but in no case later than ninety days after the date of adoption of the proposed rule. Unless a later date is otherwise provided by law or in the rule, the effective date of a rule shall be the date of publication in the New Mexico register.

E.

A proposed rule shall not take effect unless it is adopted and filed within the time limits set by this section.

Section 14-4-5.2 Notice of Rulemaking

A. Not later than thirty days before a public rule hearing, the agency proposing the rule shall provide to the public and publish in the New Mexico register a notice of proposed rulemaking.

The notice shall include: (1) a summary of the full text of the proposed rule; (2) a short explanation of the purpose of the proposed rule; (3) a citation to the specific legal authority authorizing the proposed rule and the adoption of the rule; (4) information on how a copy of the full text of the proposed rule may be obtained; (5) information on how a person may comment on the proposed rule, where comments will be received and when comments are due; (6) information on where and when a public rule hearing will be held and how a person may participate in the hearing; and (7) a citation to technical information, if any, that served as a basis for the proposed rule, and information on how the full text of the technical information may be obtained.

Section 14-4-5.3, Public Participation, Comments & Rule Hearings

A. The notice of proposed rulemaking shall specify a public comment period of at least thirty days after publication in the New Mexico register during which a person may submit information and comment on the proposed rule. The information or comment may be submitted in an electronic or written format or at a public rule hearing pursuant to Subsection B of this section. The agency shall consider all information and comment on a proposed rule that is submitted within the comment period.

B. At the public rule hearing, members of the public shall be given a reasonable opportunity to submit data, views or arguments orally or in writing. Each agency shall determine, in accordance with governing statutory and case law, the manner in which parties to the proceeding and members of the public will be able to participate in public hearings. All public hearings shall be conducted in a fair and equitable manner. Except as otherwise provided by law, an agency representative or hearing officer shall preside over a public rule hearing.

C.

The public rule hearing shall be open to the public and be recorded.

Section 14-4-5.4, Agency Record

AGENCY RECORD IN RULEMAKING PROCEEDING .---

A. An agency shall maintain a rulemaking record for each rule it proposes to adopt. The record and materials incorporated by reference in the proposed rule shall be readily available for public inspection in the central office of the agency and available for public display on the state sunshine portal. If an agency determines that any part of the rulemaking record cannot be practicably displayed or is inappropriate for public display on the sunshine portal, the agency shall describe that part of the record, shall note on the sunshine portal that the part of the record is not displayed and shall provide instructions for accessing or inspecting that part of the record.

B. A rulemaking record shall contain:

(1) a copy of all publications in the New Mexico register relating to the proposed rule;

(2) a copy of any technical information that was relied upon in formulating the final rule;

(3) any official transcript of a public rule hearing or, if not transcribed, any audio recording or verbatim transcript of the hearing, and any memoranda summarizing the contents of the hearing prepared by the hearing officer or agency official who presided over the hearing;

(4) a copy of all comments and other material received by the agency during the public comment period and at the public hearing;

(5) a copy of the full text of the initial proposed rule and the full text of the final adopted rule and the concise explanatory statement filed with the state records administrator or the administrator's designee; and

(6) any corrections made by the state records administrator pursuant to Section 14-4-3 NMSA 1978.

Section 14-4-5.5 Concise Explanatory Statement

At the time it adopts a rule, an agency shall provide to the public a concise explanatory statement containing:

- A. the date the agency adopted the rule;
- B. a reference to the specific statutory or other authority authorizing the rule; and
- C. any findings required by a provision of law for adoption of the rule."

Section 14-4-5.6, Emergency Rules

A. An agency shall comply with the rulemaking procedures of the State Rules Act unless the agency finds that the time required to complete the procedures would:

(1) cause an imminent peril to the public health, safety or welfare;

(2) cause the unanticipated loss of funding for an agency program; or

(3) place the agency in violation of federal law.

B. The agency shall provide to the public a record of any finding pursuant to Subsection A of this section and a detailed justification for that finding before issuing an emergency rule. The record shall include a statement that the emergency rule is temporary. After such record has been provided to the public, the agency may issue the emergency rule immediately without a public rule hearing or with any abbreviated notice and hearing that it finds practicable.

C. When an agency makes a finding pursuant to Subsection A of this section, the agency shall follow the provisions of this section in addition to any more specific requirements in statute that pertain to the agency regarding promulgating emergency or interim rules.

D. Emergency rules may take effect immediately upon filing with the state records administrator or the administrator's designee or at a later date specified in the emergency rule. Emergency rules shall be published in the New Mexico register.

E. No emergency rule shall permanently amend or repeal an existing rule. An emergency rule shall remain in effect until a permanent rule takes effect under the normal rulemaking process. If no permanent rule is adopted within one hundred eighty days from the effective date of the emergency rule, the emergency rule shall expire and may not be readopted as an emergency rule. If an expired emergency rule temporarily amended or repealed an existing rule, the rule shall revert to what it would have been had the emergency rule not been issued."

Section 14-4-5.7 Conflicts between Rule and Statute

Section 14-4-5.7 NMSA 1978, CONFLICTS BETWEEN RULE AND STATUTE--VARIANCE BETWEEN PROPOSED AND FINAL ACTION.

A. No rule is valid or enforceable if it conflicts with statute. A conflict between a rule and a statute is resolved in favor of the statute.

B. A word or phrase that is defined in an applicable statute should not be defined in rule. A conflict between a definition that appears in a rule and in an applicable statute is resolved in favor of the statute.

Section 14-4-5.8, Procedural Rules

No later than January 1, 2018, the attorney general shall adopt default procedural rules for public rule hearings for use by agencies that have not adopted their own procedural rules consistent with the State Rules Act. Each agency may adopt its own procedural rules, or continue in effect existing rules, which 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. 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 or the agency's website.

Effective on April 10, 2018, there is a new default procedural rule for rulemaking: 1.24.25 NMAC. Some highlights of new requirements for rule hearing rule include (but are not limited to):

- -- rulernaking pracess can be initioted by ogency or by public (by petition to ogency);
- -- if agency has public board or commission, decision to initiate rulemaking must be done by vote af body in open session;

- if public petitions for rulemoking: petition must be writing and explain purpose and legal authority on its face, agency shall make determination to accept or deny petition, if agency denies petition, it must issue concise explanatory statement for denial, if agency has public body, it must make determination in open session, agency must keep record of petition;

- -- for oll public comments received, agency must post comments to website ot least three business days after receipt;
- -- omendments to proposed rule must fall within the scope of rulemaking proceedings;
- -- more detailed requirements for what findings are required in concise explanatory statement.



Administrative Law Division Style and Citation Guidelines ' 1.24.10.12 NMAC, Style 1.24.10.9 NMAC, NMAC Citation 2015 New Mexico Legislative Drafting Manual

BRACKETS, STRIKE-THROUGH AND UNDERSCORE

Deleted language from existing law must be [struck through and set out within brackets], and added language must be <u>underscored</u>. [Deleted language] always comes before new language. Do not place added underscored language in between deleted bracketed language. Do not delete or add parts of words. Do not strike through brackets. You do not need to strike through or underscore when the only change consists of deleting or adding punctuation.

Example:

1.13.10.2 SCOPE: [All agencies that utilize the records center services and state archives.] All state agencies and any public entity that use the state records center services.

NUMBERS

Always spell out number values less than 10. Use figures for numbers 10 or greater, except when at the beginning of a sentence. Do not use both alpha and numeric values together, except for dollar amounts. Spell out percentages and percent, except in tables, then use figures and symbols. Spell out fractions. Insert a hyphen between numerator and denominator, unless either element contains hyphen. Insert a hyphen within compilation numbers. Avoid special symbols, use common abbreviation or full spelling. In tables you may use symbols like %, \$, +, -, X; \div , >

Example: Eight, not "8" Ninety-five percent, not "95%" one and seventy-eight one-hundredths percent, not "0.178%" one-fourth, not "1/4" fifty-five degrees, not "55°" Section 10-11-12 NMSA 1978

"80", not eighty and not eighty (80) five-tenths of one percent, not "0.5%" (14% allowed when used in a table) three and two-fifths, not "3 2/5" 30 pounds or 30 lbs. 12 inches, not 12"

MONEY

Figures and symbols may represent amounts of money. It is not necessary to spell out the number. If a sum of money is spelled out, follow the spelling with figures and the dollar symbol (\$) in parentheses.

Example:				
\$1.00	\$99.99	\$4.78	\$419,057.50	\$514
seventy-five	e dollars (\$75)	\$450	\$3,000	
No need to	include cents ".00"	unless cents are	included in the value.	

OTHER LANGUAGE STYLES

The following punctuation rules are specific to the Legislative Council Service (LCS).

- there are always two spaces after periods, except for a title (e.g., Ms. or Mr.) or an allowed abbreviation. There are always two spaces after colons.
- language shall be gender neutral. Do not use he, she, (s)he or he/she unless referring to something specifically masculine or feminine.
- never use "and/or". If the intent is that any of several items, including all items, is sufficient, use the disjunctive "or". If the intent is that all items are necessary, use the conjunctive "and".
- reference to "the state of New Mexico" is unnecessary. New Mexico cannot legislate for another state. When necessary to refer to the state, use either "New Mexico" or "state".

CAPITALIZATION

Do Capitalize:

- every letter of the heading, title and enacting clause of a bill or rule and every letter of section headings; Section 10. BOARD CREATED - APPOINTMENT TERMS;
- the first letter of proper names: United States, John Smith, New Mexico;
- short titles of acts: Blue Sky Law, Conflict of Interest Act, Sunset Act, federal Clean Water Act of 1977 (note that "federal" is not part of short title, so it is not capitalized);
- specific divisions of the calendar: January, December, Monday, Tuesday;
- derivatives of proper names: Spanish, English, Indian, American.

Do Not Capitalize:

- general political subdivisions or geographic areas, whether used in conjunction with a proper name or not: state of New Mexico, county of Dona Ana, Chaves county, Pecos river, Elephant Butte lake, Navajo Lake state park, university of New Mexico;
- boards, commissions, institutions and other bodies: New Mexico medical board, department of health, New Mexico legislature, bureau of land management, house of representatives;
- titles of officials, whether elective or appointive: director, commissioner, secretary, governor unless the title is used in addressing them: Governor Martinez;
- time of day: 7:00 a.m. 6:30 p.m., noon;
- derivatives of proper names with acquired independent meanings: fahrenheit, arabic numbers, watt.

BOOK TITLES

Book titles should be written without quotation marks in italic font with each word capitalized except for words like and, of, the, etc. **Example:**

Legislative Drafting Manual Wild Mammals of North America National Electrical Code

LANGUAGE STYLE AND PROVISIONS

The American Heritage Dictionary of the English Language is used as the LCS primary language authority. Fowler's Modern English Usage is used by LCS proofing office for questions of grammar and syntax. Make sure to convert British English to American English. Also, proofreaders should consult with certain provisions of The Elements of Style by Strunk and White and The Chicago Manual of Style.

STATUTE AND RULE CITATIONS

Statutes:

- write as: Subsection D of Section 10-15-1 NMSA 1978; Do not write as: Section 10-15-1(D), NMSA 1978 or as: NMSA 1978, § 10-15-1(D);
- write as: Subparagraph (e) of Paragraph (1) of Subsection B of Section 14-4-5.3 NMSA 1978; Do not write as: Section 14-4-5.3(B)(1)(e), NMSA 1978 or as: NMSA 1978, § 14-4-5.3(B)(1)(e);
- for full citation, write as: Section 10 of the State Rules Act, Section 14-4-1 NMSA 1978.

Rules:

- write as: Subsection C of 12.19.2.9 NMAC; Do not write as: 12.19.2.9(C) NMAC;
- write as: Paragraph 5 of Subsection C of 12.19.2.9 NMAC; do not write as: 12.19.2.9(C)(5) NMAC;
- for full citation write as: Digital / Electronic Signature, State Commission of Public Records and State Records Administrator, 1.12.7 NMAC (7/1/2015).

¹ This document is meant to be a very condensed list of guidelines. It in no way represents any change to any of the requirements contained within 1.24.10.12 NMAC, 1.24.10.9 NMAC or the *Legislative Drafting Manual*. If you have specific questions, please do not hesitate to contact your analyst.

Billing Information Sheet

NEW MEXICO

Your agency must complete the	Your Access to Public Informatio		
Publish in the New Mexico Registe	er.		
Volume: Issue:	Publication date:		
Agency's 3-digit DFA code:			
Purchase order 15-digit number:			
Agency name: Division name (if applicable): Street address or P.O. Box: City, State and Zip code:			
Contact person's name: Contact person's phone number: Contact person's e-mail address:			

Notice name (if submitting a notice): Example: Notice of Rulemaking Hearing

Or Rule NMAC number and rule name (if filing an amendment, repeal & replace, repeal, new rule etc.) Example: 19.31.3 NMAC, Hunting and Fishing License Application



(ALD Use Only)

CPR - ALD 7/1/2018

Instructions for Completing the **BILLING INFORMATION SHEET**



New Mexico Register Volume number: Publication date:

Example: Volume: XXVIII, Issue: 19, Publication date: October 17, 2017

Agency's 3-digit DFA code: Example: 123

Agency's 15-digit purchase order number: Example: 12300-0000004567

Agency's name: Division name (if applicable): Street address or P.O. Box: City, State and Zip code:

Issue number:

Contact person's name: Contact person's Phone number: Contact person's E-mail address:

Note: Complete one or the other of the following fields unless submitting a notice AND filing a rule.

Notice name, if submitting a notice of rulemaking Example: Notice of Regular Board Meeting and Rulemaking Hearing

OR

Rule NMAC number and rule name, if filing a new rule, an amendment, a repeal or replacement. Example: 19.31.3 NMAC, Hunting and Fishing License Application

Last 2 fields are for Administrative Law Division staff use only.



NMAC			NEW MEXI	ю			
Transı		l Form	Commission	of Public Records			
Volume:	Issue:	Publication date:	Your Access	Number of pag		(ALD Use Only)	
Issuing agency na	me and addres:	5:				•	ncy DFA code
					······		
Contact person's n	iame:		Phone numbe	r: E	-mail address:	•	
				[
Type of rule action						(ALD Use Most recent fi	
New Amend	ment Re	peal Emergenc	Renu Renu	imber			
Title number:	Title name:						
Chapter number:	Chapter name	:					
	L					*****	
Part number:	Part name:						
Amendment descri	intion (If filing	an amendment):		Amondmont's N	MAC citation	(If filing an amonda]
		an amenumenty.				(If filing an amendn	
Are there any mate	erials incorpora	ted by reference?	Please list at	achments or Interr	net sites if app	licable.	
Yes No		-	[
L L If materials are at	tached, has cop	yright permission b	een received?	Yes	No	Public domain	
	Concise	Explanatory	Statem	ent For Rul	emakinç	g Adoption:	
Specific stat	tutory or o	ther authority	y authoriz	ing rulemaki	ng:		
Notice date(s):		earing date(s):	.	Rule adoption date	e:	Rule effective o	late:
Findings red	uired for	rulemaking ad	loption:				
Findings MUS	-	J					
- Reasons for a	adopting rul	e, including any ent analysis don	findings otl	nerwise require	d by law of	the agency, and	а
- Reasons for a	any change l	between the pub	lished prop	osed rule and t			
- Reasons for	not acceptin	g substantive ar	guments m	ade through pu	blic comme	nt.	
ł							

Findings required for rulemaking adoption:

continued



sesse de casas to Middoor Informaticae

Issuing authority (If delegated, authority letter must be on file with ALD): Name:

Check if authority has been delegated

Title:

Signature: (BLACK ink only)

Date signed:

Instructions for completing the NMAC TRANSMITTAL FORM

NEW MEXICO

Your agency must complete the following:

Your Access to Public Information

Volume, Issue and Publication Date. Example: Volume: XXIX , Issue: 10, Publication date: May 29, 2018.

Provide the total number of pages of the paper version of the new rule, amendment, repeal, or emergency document. Note: Do not include the pages of the transmittal form, billing sheet, PO, etc.

Sequence number is for **ALD use only**.

Issuing agency's name and mailing address.

Agency's 3-digit DFA code. Example: 123

Contact person's Name, Phone number, E-mail address.

Check type of rule action: **New** (brand new rule <u>or</u> replacement rule), **Amendment**, **Repeal** (repeal and do not replace <u>or</u> repeal and replace), **Emergency**, or **Renumber**. For a repeal and replacement rule, the agency must provide TWO signed transmittal forms; one for the repeal statement and another for the new (replacement) rule.

Most Recent Filing Date of the Part for ALD use only.

Identify NMAC Title, Chapter and Part numbers and Title, Chapter and Part names. Example:

Title 19 Natural Resources and Wildlife

Chapter 30 Wildlife Administration Aquatic

Part 14 Invasive Species

Description of Amendment: (if amending) Example: "Amending three sections".

Amendment's NMAC citation: (if amending) Example: "Sections 9 and 18 of 7.1.13 NMAC".

Are any materials incorporated by reference? Check: Yes or No. If Yes, please list attachments or provide Internet site.

If incorporated, has copyright permission been granted? Check Yes or No or check if document is in the public domain.

Concise Explanatory Statement for rulemaking adoption See 1.24.25.14 NMAC:

Provide your agency's specific statutory or other authority authorizing rulemaking: Check with your agency's general counsel office to determine the correct citation(s) authorizing your agency to make rules.

Provide your Notice date(s) (when notice of rulemaking was published in Register): Hearing date(s) (if agency has board or commission): Rule adoption date: and Rule effective date (date rulemaking becomes effective) **Note:**

- There must be at least 30 days between the notice date and hearing date.

- Your agency **must file** your rule within **15** days from rule adoption date. The date of adoption of the proposed rule shall be the date the concise explanatory statement is signed by the agency, unless otherwise specified in the conscise explanatory statement. Unless your rule is an emergency filing, the rule effective date cannot be any earlier than the publication date in the New Mexico Register.

Findings required for rulemaking adoption. If attaching a seperate document as findings or as concise explanatory statement, please indicate as such in findings section.

Check with your agency's general counsel office regarding substance of any required findings to be filed.

Issuing Authority: Name, Title Date signed and original Signature of issuing authority or their delegate in **black** ink: Note: If authority has been delegated, this box must be checked. A letter of delegation must be on file with the State Records Center and Archives, Administrative Law Division.



at the State Records Center and Archives

Your Access to Public Information

Guide to Submitting Notices and Filing Rules

Administrative Law Division July, 2018



Administrative Law Division Staff: We Are Here To Help!

Staff from the administrative law division of the state records center and archives (ALD) are dedicated to helping agencies with all aspects of rulemaking: from requesting clean versions of rules, to publishing notices of rulemaking and proposed rules, to filing and publishing rules (amendments, new rules, rule repeals, rule repealed and replaced).

All documents submitted are to be published in the **New Mexico Register**. The cost to publish in the **New Mexico Register** is currently \$3.00 per columnar inch. The columnar fee works out to approximately \$72.00 to \$80.00 for each full MS WORD page of regular, 10 point, Times New Roman text. Please note: this is only an estimate of cost. Final invoicing may differ from the cost estimate. When obtaining a purchase order for publication, please plan accordingly.

All documents submitted must conform to the statutory requirements of the State Rules Act, Section 14-4-1, et seq. NMSA 1978 and to the rule requirements of 1.24.1 NMAC, 1.24.10 NMAC, 1.24.15 NMAC, and 1.24.25 NMAC.

Every state agency, department, board or commission has a rules analyst specifically assigned to it. The role of the agency's rule analyst is to assist all filing agencies with understanding and filing documents in accord with all statutory and regulatory requirements. However, your rules analyst cannot give any help with respect to any substantive compliance with any statutory or regulatory requirements. Always check with your agency's general counsel office, and not your rules analyst, if you have questions regarding the legality of or substance of any notice of rulemaking, proposed rule, rule hearing, record of rulemaking record, findings required, or final rule to be filed and published.

To further assist rulemaking, ALD offers training. Please go to our agency's website for further information: <u>http://www.nmcpr.state.nm.us/administrative-law/rules-training/</u> on when and how training can be scheduled.

Administrative Law Division Staff

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Commission of Public Records

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NEW MEXICO

Commission of Public Records

ALL DOCUMENTS MUST

All documents submitted or filed with ALD must be accompanied by:

A **Billing Information Sheet** - one electronic copy sent via e-mail;

A **Purchase Order -** one electronic copy sent via e-mail, unless an existing purchase order is on file with the records center. A valid purchase order number **must** be included on the billing information sheet at the time of filing or submittal.

All documents submitted MUST:

1. Be a current a Word Document (.docx), <u>NOT</u> a Word 97-2003 Document.

2. Page margins must be 1 inch on all sides.

3. Footers must be set at 1/2 inch. Footers and page numbers must have the NMAC citation on the left and page numbers on the right.

4. All text must be single spaced and composed in Times New Roman, 10 point font.

5. All text must be left justified.

6. Document must follow correct Style, Citation and Language. See Appendices, page 18 in this document and in the current *New Mexico Legislative Drafting Manual*.

All documents submitted MUST NOT:

1. Documents must not have headers.

2. Notices, synopses and other material must not have headers or footers.

3. No hanging indents are allowed. Tab arrows must appear in the Show/Hide mode.

4. No auto-numbering or auto-indents are allowed.

5. There must not be empty lines between paragraphs, subparagraphs and items.

6. Document must not have unnecessary Styles, Balloon Text or Track Changes.

7. Document must not have any colored text.

VERY IMPORTANT NOTE:

Learn to use your **Show/Hide button** to discover and possibly remove the non-printing characters hidden within your document.

Also, learn to use the **Change** Styles to locate the Styles **window** to find all the styles contained in your document which can create problems when publishing your document in the New Mexico Register. Remove as many as possible. Unfortunately MS Word may not always allow you to remove all the styles in a document. Be certain to remove any Balloon text, Comment text, Track changes, Colored text, Condensed text, Auto indents, Hyperlinks, Header, Apple converted space, Catchline, HBR, other fonts, etc.



Commission of Public Records

SUBMITTING A NOTICE OF RULEMAKING

Prior to submitting your notice for review and approval, contact your rules analyst to obtain the most current version of the rule(s) also known as the "clean copy" of the rule you are proposing to amend, repeal, replace, etc.

DO NOT USE A COPY OF THE RULE OBTAINED FROM THE INTERNET!

Notice Requirements:

All notices **MUST** conform to the following requirements:

1. The notice name shall be in **bold CAPITAL** letters and centered at top of page.

2. The notice name shall simply and accurately describe the rulemaking hearing.

3. The use of legal, case, or other headings is discouraged.

4. The text of the notice shall be typed in Times New Roman 10 point font, flush with the document's left margin.

The notice text shall contain:

1. The name of agency holding the hearing.

2. A summary of or the actual full text of the proposed rule.

3. A short explanation of the purpose of the proposed rule.

4. A citation to specific legal authority authorizing the proposed rule and the adoption of the proposed rule.

Agency submits draft electronic conjector notice, billing sneet and purchase order to ALD analyst

ALD analyst proofs documents and recommends necessary changes to agency

 Information on how a copy of full text of proposed rule may be obtained, if full text is not already included within the body of the notice.
 Information on how a person may comment on proposed rule, where comments will be received and when comments are due.

 7. Where and when the public rule hearing will be held, including the address, date and time and how a person may participate in the hearing.
 8. A citation to technical information, if any, that serves as a basis for the proposed rule.
 9. Information on how the full text of the

technical information may be obtained, if not already included within the body of the notice. 10. An internet link providing free access to the full text of the proposed rule, if full text is not already included within the body of the notice.

When submitting a NOTICE, your agency MUST provide:

Notice Document - one approved electronic copy sent to ALD via e-mail;

Billing Information Sheet - one approved electronic copy sent to ALD via e-mail;

Purchase Order - one electronic copy sent to ALD via e-mail with the same PO number listed on the billing information sheet.

Transmittal Forms are NOT required for Notices.

Agencysends notice to ALD analyst Vetsmall

Administrative Law Division
NEW MEXICO Commission of Public Records

FILING RULES

There are various forms of rule filings. Each will be covered separately in the following pages. They include: amendments, short-form amendments, emergency amendments, integrated rules, rule repeals, rule repeal and replacements or new rules.

Prior to commencing rulemaking, ask your analyst for advice on which type of rule your agency should proceed with.

Once a properly formatted rule is approved and received, ALD will date stamp transmittal form and rule documents and return a copy of all documents to the agency.

FILING AMENDMENTS

Filing an amendment consists of two documents: the amendment and the entire revised rule, aka, the integrated rule. Your agency will only be charged the cost of publishing the amendment in the New Mexico Register.

The **amendment** consists of the amended sections with brackets and strikethrough text or underlined text indicating any revisions.

The **integrated rule** consists of the updated rule, incorporating all revisions W1THOUT any brackets, strikethrough, or underlined text.

The following are additional requirements for any amendment and integrated rule:

1. A sentence must be inserted at the top of the amendment declaring which section(s) of rule are to be amended.

Example:

This is an amendment to 19.31.15 NMAC, Sections 9, 10 and 15, effective 4/15/2018.

2. Only the amended section(s) should appear in the document.

3. Brackets and strikethrough are used for deleted text and underline font is used for new text. Strikethrough text always precedes underlined text. Strikethrough and underlines are to be used for complete sentences whenever possible. A space should be inserted between the closed bracket for strikethrough text and the start of the underlined text. See **BRACKETS, STRIKETHROUGH AND UNDERSCORE** on page 18.

4. For the history note of any amended section and after the last effective date or after the NMAC citation, insert a semi-colon, the letter A, a comma and the effective date of amendment.

Example:

[8.139.504.4 NMAC - N, 04/01/2013; A, 06/13/2018]

When submitting an AMENDMENT, your agency MUST provide:

Amendment - one electronic copy;

Integrated Rule - one electronic copy;

Billing Information Sheet - one electronic copy;

Purchase Order - one electronic copy; and

Transmittal Form - one paper copy which must have an authorized original signature signed in black ink. See page 24.



SHORT-FORM AMENDMENT

When changes are minor, and upon the approval by your analyst, an agency may choose to publish only the text that is actually being changed.

When less than a section is to be published, and the section is more than two pages long, the agency shall provide an explanatory paragraph describing the context and effect of the amendment.

The full text of all changes being made by the amendment shall be provided to ALD. At a minimum the published text shall not be less than a sentence, but be at least a full paragraph.

Your legal counsel shall review any explanatory paragraph to ensure that the publication gives adequate notice of the amendment. In reviewing adequacy of notice, legal counsel shall consider the same elements as contained in 1.24.15.9 NMAC.

Example:

Explanatory paragraph: This is a short-form amendment to 8.106.100 NMAC, Section 7, effective 9/1/2017. Subsection A was not published as there were no changes. Subsection B, Paragraphs 1-28 and 32-46 were not published as there were no changes.

When submitting a SHORT-FORM or EMERGENCY AMENDMENT, your agency MUST provide:

Short-Form Amendment - one electronic copy;

Full Amendment - one electronic copy;

Integrated Rule - one electronic copy;

Billing Information Sheet - one electronic copy;

Purchase Order - one electronic copy; and

Transmittal Form - one paper copy which must have an authorized original signature signed in black ink.

Your agency will only be charged the cost of publishing the short-form amendment in the New Mexico Register.

EMERGENCY AMENDMENT

An agency shall comply with the rulemaking procedures of the State Rules Act unless the agency finds that the time required to complete the procedures would:

- 1. cause an imminent peril to the public health, safety or welfare;
- 2. cause the unanticipated loss of funding for an agency program; or
- 3. place the agency in violation of federal law.

The agency shall provide to the public, a record of any finding pursuant to Subsection A of Section 14-4-5.6 NMSA 1978 and a detailed justification for that finding before issuing an emergency rule. The record shall include a statement that the emergency rule is temporary. After such record has been provided to the public, the agency may issue the emergency rule immediately without a public rule hearing or with any abbreviated notice and hearing that it finds practicable.

Example:

This is an emergency amendment to 8.139.610 NMAC, Section 12, effective 4/1/2018.

Explanatory note: HSD will be issuing a temporary emergency rule which was implemented and effective for benefit month October, 2017. HSD is amending the rule to be in compliance with the federal law which would otherwise place HSD in violation. This temporary emergency process does not permanently amend or repeal the existing rule. The emergency rule will only remain in effect until a permanent rule takes effect under normal rule making process.

Emergency Amendment continued on page 7.



EMERGENCY AMENDMENT continued

When an agency makes a finding pursuant to Subsection A of Section 14-4-5.6 NMSA 1978, the agency shall follow the provisions in addition to any more specific requirements in statute that pertain to the agency regarding promulgating emergency or interim rules.

Emergency rules may take effect immediately upon filing with the state records administrator or the administrator's designee or at a later date specified in the emergency rule. Emergency rules shall be published in the *New Mexico Register*.

No emergency rule shall permanently amend or repeal an existing rule. An emergency rule shall remain in effect until a permanent rule takes effect under the normal rulemaking process. If no permanent rule is adopted within 180 days from the effective date of the emergency rule, the emergency rule shall expire and may not be readopted as an emergency rule. If an expired emergency rule temporarily amended or repealed an existing rule, the rule shall revert to what it would have been had the emergency rule not been issued.

INTEGRATED RULE

An integrated rule must accompany ALL types of amendments. The integrated rule is the current rule with the amended text "integrated" into it **without any bracketed and strikethrough or underlined text** to create the revised rule as it will appear in the New Mexico Administrative Code.

1. All Section names must be **CAPITALIZED** and **BOLDED**.

2. There must be one empty line between sections.

3. Subsections must be indented one tab before and one tab after the subsection identifier.

4. Paragraphs must be indented two tabs before and one tab after paragraph identifier.

5. Subparagraphs must be indented three tabs before and one tab after subparagraph identifier.

6. Items must be indented four tabs before and one tab after item identifier.

7. In the integrated rule, only change the history note(s) at the end of the **amended** section(s). Do not change the history notes at the end of sections that were not amended.

Example:

[8.139.504.4 NMAC - N, 04/01/2013; A, 06/13/2018]





FILING A RULE REPEAL

The wording of a rule repeal is usually one simple statement. A rule repeal must not have a header or footer.

Example:

The New Mexico Department of Transportation approved, at its 4/27/2017 hearing, to repeal its rule 18.28.3 NMAC, Highway Contracting And Bidding - Selection Committee For Qualifications Based Proposals, filed 11/16/2004, effective 5/27/2018.

When filing a RULE REPEAL, your agency MUST provide:

Rule Repeal - one electronic copy;

Billing Information Sheet - one electronic copy;

Purchase Order - one electronic copy; and

Transmittal Form - one paper copy which must have an authorized original signature in black ink.

For ALD staff only:

When an entire rule is repealed, its history shall remain in the NMAC and the history note shall reflect the original NMAC effective date and number.

Agency submits draft electronic rule repeal, transmittal form, billing sheet and purchase order to ALD analyst ALD analyst proofs documents and returns any that require changes to agency Once corrections are made, ALD analyst proofs documents submitted by agency

ALD analyst provides paper copies of documents for filing

Agency makes appointment and brings only signed transmittal form to meeting



FILING A RULE REPEAL AND REPLACEMENT

A rule repeal and replacement is very helpful when a rule has been substantially rewritten and restructured so that a detailed section by section comparison is not possible and is often confusing.

A rule repeal and replacement consists of two documents, each with their own requirements: 1) A rule repeal and 2) a replacement rule.

For replacement rule requirements see, **Filing a New Rule** on page 10.

The wording of a Rule Repeal and

Replacement is usually a simple statement that a rule is being <u>repealed</u> (using name, NMAC citation, first filing date, and effective date) and <u>replaced</u> with a new rule with the same or new part number (using name, NMAC citation, and effective on a specific date). See example, next column.

Example:

At its 5/27/2014 meeting, the State Game Commission repealed its rule Hunting and Fishing License Revocation, 19.31.2 NMAC, filed 12/03/2001, and replaced it with a new rule entitled Hunting and Fishing License Revocation, 19.31.2 NMAC, adopted 6/1/2014 and effective 9/14/2014.

When filing a RULE REPEAL AND REPLACEMENT, your agency MUST provide:

Rule Repeal - one electronic copy;

New Rule - one electronic copy;

Billing Information Sheet - one electronic copy;

Purchase Order - one electronic copy; and

Transmittal Forms -TWO paper copies which each must have authorized original signatures in black ink (one form for the REPEAL and one for the REPLACEMENT).

Agency submits draft electronic rule repeal, replacement rule, transmittal forms, billing sheet and purchase order to ALD analyst

ALD analyst proofs documents and returns any that require changes to agency

Once corrections are made, ALD analyst proofs documents submitted by agency



NEW MEXICO Commission of Public Records

FILING A NEW RULE

The agency must request permission from its ALD analyst to file a new rule (new Part name). See New Part Name Request Letter on page 25. Once the analyst makes certain that the requested name and number are available, the analyst will reply in writing to the affirmative. If the replacement rule has the same name as the repealed rule, a request for a new name letter NOT required.

Once approval is received, the agency may draft the text of the new rule.

The following are requirements for a new rule:

1. TITLE, CHAPTER, PART names are always bolded and written in all CAPITAL LETTERS.

2. A footer showing NMAC citation and page numbers.

- 3. A new rule must NOT have a header.
- 4. Footer margins shall be set at 1/2 inch.

5. A history note shall be appended to the end of each section.

6. Section names shall be CAPITALIZED and BOLDED.

7. One empty line shall be placed between sections.

8. Empty lines are NOT be allowed between subsections, paragraphs, sub-paragraphs or items.

9. Sections numbers shall be flush with the left page margin and the section name shall be spaced one tab after the section number.

10. Sub-sections shall be indented one tab before and one tab after the capital letter.

11. Paragraphs shall be indented two tabs before the number and one tab after the number and before the text.

12. Sub-paragraphs shall be indented three tabs before the lowercase letter and one tab after the lowercase letter and before the text.

13. Items (lowercase Roman numerals) are discouraged by ALD. If necessary within a subparagraph, use a colon and wrap the text. If you must use items, they must be indented four tabs before the lowercase Roman numeral and one tab after the numeral and before the text.

Example:

TITLE 8 CHAPTER 291 **PART 430**

SECTION 10 \rightarrow Subsection \rightarrow A. → Paragraph — → (1) \rightarrow Subparagraph \rightarrow (a)

```
Item
              (i)
```

There MAY NOT be a Section A without a Section B; a Paragraph (1) without a Paragraph (2); a Subparagraph (a) without a Subparagraph (b); an Item (i) without an Item (ii).

When Filing a NEW RULE, your agency MUST provide:

New Rule - one electronic copy;

Billing Information Sheet - one electronic copy;

Purchase Order - one electronic copy; and

Transmittal Form - one paper copy which must have an authorized original signature in black ink.



FILING A NEW RULE Continued

Agency submits request letter for new rule name and number to ALD analyst for approval If approved, agency submits draft new rule, transmittal form, billing sheet and purchase order to ALD analyst

ALD analyst proofs documents and returns any that require changes to agency

Agency makes appointment and brings only signed transmittal form to meeting





UNDERSTANDING HISTORY NOTES

History notes facilitate the use of the NMAC and track the historical development of a rule provision. The section's history shall appear in chronological sequence in brackets at the end of each section. For additional information, see **1.24.10.20 NMAC** in the Appendix, page 38.

Example 1: This is how to read this history note: [1.24.10.20 NMAC - Rp 1 NMAC 3.3, 2/29/2000; A, 6/30/2004]

1.24.10.20 NMAC is the citation for the current title, chapter, part and section.

- **Rp 1 NMAC 3.3** means the current section **replaced** the previous section 1 NMAC 3.3 on 2/29/2000.

; A, 6/30/2004 means that the section was amended on June 30, 2004.

Example 2:

[1.24.15.8 NMAC; A, 7/15/2003; A, 9/15/2014; A, 11/30/2015; A, 7/1/2017]

This indicates that Section 1.24.15.8 NMAC was **amended** four times.

Example 3:

[1.24.25.1 NMAC - N, 04/10/2018] This indicates that the Section 1.24.25.1 NMAC was **new** as of April 10, 2018.

Example 4:

[16.34.3.10 NMAC - Rp, 16 NMAC 34.3.10, 06-16-01; A, 10-04-07; Repealed, 07/14/2018] This indicates that Section 16.34.3.10 NMAC **replaced** an earlier version, was **amended** once and finally **repealed** on July 14, 2018.

Use the following abbreviations in your history notes:

"A" for **amendment**, followed by a comma, a space and the effective date of amendment;

"N" for **new**, followed by a comma, a space and the effective date of the new material;

"**Rp**" for **replaced**, followed by a comma, followed by the citation of the section it replaced, followed by a comma, a space and the effective date of replacement;

"**Repealed**" for a section that is **deleted and not replaced**, followed by a comma, a space and the effective date of the deletion;

"**Rn**" for **renumbered**, followed by a comma, the former number, a space and the effective date of renumbering; and

"E" for an **emergency** filing, in combination with the appropriate action code and a slash (/).



RULE MAKING FLOW CHART



Appendix A



Visit http://www.nmcpr.state.nm.us/forms to download the current version of this form.

Commission of Public Records

BILLING INFORMATION SHEET

Billing Information	n Sheet	NEW MEXICO
Your agency must complete the follow	wing:	alle i generaten eta gelaten eratuetaren
Publish in the New Mexico Register		
Volume: Issue:	Publication date:	
Agency's 3-digit DFA code:		
Purchase order 15-digit number:		
Agency name: Division name (if applicable): Street address or P.O. Box: City, State and Zip code:		
Contact person's name: Contact person's phone number: Contact person's e-mail address:		
Notice name (if submitting a notice): Example: Notice of Rulemaking Hearing		
Dr Rule NMAC number and rule name (if f Example: 19.31.3 NMAC, Hunting and Fish	iling an amendment, repeal & ing License Application	replace, repeal, new rule etc.
lectronic file name(s): ALD Use Only)		
nalyst's initials:		
niaiyor S Illiudis.		
ALD Use Only)		

Visit http://www.nmcpr.state.nm.us/forms to download the current version of this form.

NEW MEXICO Commission of Public Records

BILLING INFORMATION SHEET

Instructions for Completing the BILLING INFORMATION SHEET

NEW MEXICO

Your agency must complete the following:

New Mexico Register Volume number: Issue number: Publication date: Example: Volume: XXVIII, Issue: 19, Publication date: October 17, 2017

Agency's 3-digit DFA code: Example: 123

Agency's 15-digit purchase order number: Example: 12300-0000004567

Agency's name: Division name (if applicable): Street address or P.O. Box: City, State and Zip code:

Contact person's name: Contact person's Phone number: Contact person's E-mail address:

Note: Complete one or the other of the following fields unless submitting a notice AND filing a rule.

Notice name, if submitting a notice of rulemaking Example: Notice of Regular Board Meeting and Rulemaking Hearing

OR

Rule NMAC number and rule name, if filing a new rule, an amendment, a repeal or replacement. Example: 19.31.3 NMAC, Hunting and Fishing License Application

Last 2 fields are for Administrative Law Division staff use only.

7/1/2018

Appendix B



Visit http://www.nmcpr.state.nm.us/forms to download the current version of this form.

Commission of Public Records

TRANSMITTAL FORM

	Issue:	Publication d		Number of pa	ages:	(ALD Use Only)	dia
Issuing agency n	ame and addre	SS:				Agency	DFA co
Contact person's	name:		Phone nun	ıber:	E-mail addres	S:	
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		epeal Emerg					
Title number:	Title name:						
]	[
Chapter number:	Chapter nam	ie:					
Part number:	Part name:						
Amendment desc	ription (If filing	g an amendment):	,	Amondmont's		- /16 Elina an annadaraat	· · · ·
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Specific sta	Concise	Explanato	on been receive	d? Yes ment For Ru	∾ Iemakin	Public domain	
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Visit http://www.nmcpr.state.nm.us/forms to download the current version of this form.

Commission of Public Records

NEW MEXICO

TRANSMITTAL FORM

Findings required for rulemaking adoption continued



Visit http://www.nmcpr.state.nm.us/forms to download the current version of this form.

Commission of Public Records

NEW MEXICO

THE TRANSMITTAL FORM

Instructions for completing the NMAC TRANSMITTAL FORM

NEW MEXICO Commission of Public Records

Your agency must complete the following:

Volume, Issue and Publication Date. Example: Volume: XXIX , Issue: 10, Publication date: May 29, 2018.

Provide the total number of pages of the paper version of the new rule, amendment, repeal, or emergency document. Note: Do not include the pages of the transmittal form, billing sheet, PO, etc.

Sequence number is for ALD use only.

Issuing agency's name and mailing address.

Agency's 3-digit DFA code. Example: 123

Contact person's Name, Phone number, E-mail address.

Check type of rule action: New (brand new rule or replacement rule), Amendment, Repeal (repeal and do not replace or repeal and replace), Emergency, or Renumber. For a repeal and replacement rule, the agency must provide TWO signed transmittal forms; one for the repeal statement and another for the replacement rule.

Most Recent Filing Date of the Part for ALD use only.

Identify NMAC Title, Chapter and Part numbers and Title, Chapter and Part names.

Example:

Title 19 Natural Resources and Wildlife

Chapter 30 Wildlife Administration Aquatic

Part 14 Invasive Species

Description of Amendment: (if amending) Example: "Amending three sections".

Amendment's NMAC citation: (if amending) Example: "Sections 9 and 18 of 7.1.13 NMAC".

Are any materials incorporated by reference? Check: Yes or No. If Yes, please list attachments or provide Internet site.

If incorporated, has copyright permission been granted? Check Yes or No or check if document is in the public domain.

Concise Explanatory Statement for rulemaking adoption See 1.24.25.14 NMAC:

Provide your agency's specific statutory or other authority authorizing rulemaking: Check with your agency general counsel office to determine the correct citation(s) authorizing your agency to make rules.

Provide your Notice date(s): Hearing date(s): Rule adoption date: and Rule effective date:

Note:

- There must be at least 30 days between the notice date and hearing date.

- Your agency must file your rule within 15 days from rule adoption date. The date of adoption of the proposed rule shall be the date the concise explanatory statement is signed by the agency, unless otherwise specified in the conscise explanatory statement.

-Unless your rule is an emergency filing, the rule effective date cannot be any earlier than the publication date in the New Mexico Register.

Findings required for rulemaking adoption. If attaching a seperate document, please indicate in findings section. Please attach and sign additional page(s) if necessary. Check with your agency's general counsel office regarding ant required findings.

Issuing Authority: Name, Title Date signed and original Signature of issuing authority or their delegate in **black** ink: Note: If authority has been delegated, this box must be checked. A letter of delegation must be on file with the State Records Center and Archives, Administrative Law Division.

7/1/2018

NEW MEXICO

STYLE, CITATIONS AND LANGUAGE PROVISIONS

Adopted From the 2016 New Mexico Legislative Drafting Manual

The legislative council service uses *The American Heritage Dictionary of the English Language* as its primary language authority. The legislative council service proofing office also uses *Fowler's Modern English Usage* for questions of grammar and syntax, making sure to convert British English to American English. Proofreaders also consult certain provisions of *The Elements of Style* by Strunk and White and *The Chicago Manual of Style*.

BRACKETS, STRIKE-THROUGH AND UNDERSCORE

- Deleted language from existing law must be [struck through and set out within brackets], and added language must be <u>underscored</u>.
- [Deleted language] always comes before <u>new</u> language.
- Do not place added underscored language in between deleted bracketed language.
- Do not delete or add parts of words.
- Do not strike through brackets.
- You do not need to strike through or underscore when the only change consists of deleting or adding punctuation.

NUMBERS

- Always spell out number values less than 10 except in tables.
- Use figures for numbers 10 or greater, except when at the beginning of a sentence.
- Do not use both alpha and numeric values together, except for dollar amounts.
- Spell out percentages and percent, except in tables, then use figures and symbols.
- Spell out fractions.
- Insert a hyphen between numerator and denominator, unless either element contains hyphen.
- Insert a hyphen within compilation numbers.
- Avoid special symbols, use common abbreviation or full spelling. In tables you may use symbols like %, \$, +, -, X; ÷. <, >

Examples:

- Eight not 8; 80 not eighty and not combined as in eighty (80).
- Ninety-five percent, not 95%; five-tenths of one percent, not 0.5%.
- One and seventy-eight one-hundredths percent, not 0.178% (14% allowed when used in a table).
- One-fourth, not 1/4; three and two-fifths, not 3 2/5.



- fifty-five degrees, not 55°; 30 pounds not 30 lbs.
- Section 10-11-12 NMSA 1978
- 12 inches, not 12"

MONEY

Figures and symbols may represent amounts of money. It is not necessary to spell out the number. If a sum of money is spelled out, follow the spelling with figures and the dollar symbol (\$) in parentheses.

Examples:

- \$1.00; \$99.99; \$4.78; \$419,057.50; \$514
- seventy-five dollars (\$75); \$450; \$3,000
- No need to include cents .00 unless cents are included elsewhere in the value.

CAPITALIZATION

Do Capitalize:

- every letter of the heading, title and enacting clause of a bill or rule and every letter of section headings.
- Section 10. BOARD CREATED APPOINTMENT TERMS:
- the first letter of proper names: United States, John Smith, New Mexico;
- short titles of acts: Blue Sky Law, Conflict of Interest Act, Sunset Act, federal Clean Water Act of 1977 (note that "federal" is not part of short title, so it is not capitalized);
- specific divisions of the calendar: January, December, Monday, Tuesday;

derivatives of proper names: Spanish, English, American and Indian.

Do Not Capitalize:

- General political subdivisions or geographic areas, whether used in conjunction with a proper name or not: state of New Mexico, county of Dona Ana, Chaves county, Pecos river, Elephant Butte lake, Navajo Lake state park, university of New Mexico;
- boards, commissions, institutions and other bodies: New Mexico medical board, department of health, New Mexico legislature, bureau of land management, house of representatives;
- titles of officials, whether elective or appointive: director, commissioner, secretary, governor unless the title is used in addressing them: Governor Martinez;
- time of day: 7:00 a.m. 6:30 p.m., noon;
- derivatives of proper names with acquired independent meanings: fahrenheit, celsius, Arabic numbers, watt.

OTHER LANGUAGE STYLES

The following punctuation rules are specific to the Legislative Council Service (LCS):

- There are always two spaces after periods, except for a title (e.g., Ms. or Mr.) or an allowed abbreviation;
- There are always two spaces after colons;



Rules:

- Language shall be gender neutral. Do not use he, she, (s)he or he/she unless referring to something specifically masculine or feminine;
- Never use "and/or". If the intent is that any of several items, including all items, is sufficient, use the disjunctive "or". If the intent is that all items are necessary, use the conjunctive "and";
- Reference to "the state of New Mexico" is unnecessary. New Mexico cannot legislate for another state. When necessary to refer to the state, use either "New Mexico" or "state".

BOOK TITLES

• Book titles should be written without quotation marks in italic font with each word capitalized except for words like and, of, the, etc.

Example:

• Legislative Drafting Manual, Wild Mammals of North America, National Electrical Code.

STATUTE AND RULE CITATIONS

Statutes:

• Write as: Subsection D of Section 10-15-1 NMSA 1978;

Do not write as: Section 10-15-1(D), NMSA 1978 or as: NMSA 1978, § 10-15-1(D);

- Write as: Subparagraph (e) of Paragraph (1) of Subsection B of Section 14-4-5.3 NMSA 1978; Do not write as: Section 14-4-5.3(B)(1)(e), NMSA 1978 or as: NMSA 1978, § 14-4-5.3(B) (1)(e);
- For full citation, write as: Section 10 of the State Rules Act, Section 14-4-1 NMSA 1978.

 Write as: Paragraph 5 of Subsection C of 12.19.2.9 NMAC.
 Do not write as: 12.19.2.9(C)(5) NMAC;

Do not write as: 12.19.2.9(C) NMAC;

Write as: Subsection C of 12.19.2.9 NMAC:

 For full citation write as: Digital / Electronic Signature, State Commission of Public Records and State Records Administrator, 1.12.7 NMAC (7/1/2015).

This is a very condensed list of guidelines. It in no way represents change to any of the requirements contained within 1.24.10.9 NMAC, 1.24.10.12 NMAC or the Legislative Drafting Manual. If you have specific questions, contact your analyst.

Appendix D

NEW MEXICO

Commission of Public Records

DEFINITIONS

"Agency" means any agency, board, commission, department, institution or officer of the state government except the judicial and legislative branches (Subsection A of Section 14-4-2 NMSA 1978).

"Amendment" means a change or modification to the existing text of a rule. An amendment can be no less than a section unless a short-form amendment is filed. A repeal of less than a part is an amendment.

"Annotation" means referenced material that is not part of the rule, located in brackets at the end of a section.

"Chapter" means the required NMAC designation for the normal division of a title. Chapter names and numbers are assigned by the records center, based upon the subject matter covered by agencies' rule filings. The chapter identifies distinct governmental functions, or subject-matter areas, usually, but not always, under the jurisdiction of a single agency.

"Cited material" means the source document from which the rule text was derived. The source document need not be consulted in order to determine what the rule is.

"Compilation" means the composition of filed rules into the New Mexico Administrative Code.

"Duration" means the length of time a rule is intended to be in effect, either permanent or for a set period of time. It is placed in the required NMAC section entitled DURATION.

"Effective date" means the date the rule goes into effect. It is placed in the required NMAC section entitled EFFECTIVE DATE. A rule's effective date cannot be earlier than the date of publication in the *New Mexico Register* unless an emergency amendment or rule is filed.

"Emergency rule" means a rule filing whose immediate implementation is necessary for the public peace, health, safety or general welfare.

"Filing" means the process by which one electronic

copy of a part or amendment, the agency billing information sheet, and the transmittal form are delivered to the records center and, if accepted by the records center, are date stamped.

"Filing date" means the date a rule filing is date stamped by the Administrative Law Division.

"History note" means the required annotation of changes or repeals to a part or a section noted at the end of a modified section. At a minimum, this note contains the section number, date of the original filing and the dates and identification numbers of any subsequent amendment(s), promulgation(s) and any repeal.

"History of the part" means the material located after the last section of the part comprising pre-NMAC history and history of repealed material.

"History of repealed material" means the listing of repealed pre-NMAC or NMAC material that pertains to the subject matter of the part. The listing contains the pre-NMAC rule number or NMAC number and the name and the effective date of repeal for each repealed rule or part. It is placed in the History of The Part.

"Incorporation by reference" see, "referenced material incorporated or adopted by rule".

"Integrated part or rule" means a compiled part that incorporates amendments to the part or rule.

"Issuing agency" means the agency that originally promulgated the rule, or its successor agency. It is listed in the required NMAC section entitled ISSUING AGENCY.

"Issuing authority" means the public official or employee of the issuing agency who is specifically authorized to approve the issuance of rules for that agency.

"Item" means the normal division of a sub-paragraph that is always the eighth level of the NMAC hierarchy. Items are identified by a lower-case roman numeral within parentheses: (i), (ii), (iii), etc.



"Name" means the textual designation of a title, chapter, part or section.	"Part" means the required NMAC designation for the normal division of a chapter. A part consists of a unified body of rule material applying to a specific
"New part" means a part which did not previously exist in the New Mexico administrative code and where no pre-NMAC rules exist covering the same subject	function or devoted to a specific subject matter. A part is equivalent to a rule.
matter, or a complete replacement of an entire part and its amendments.	"Pre-NMAC history" means the regulatory filing history (list) of filed rules, prior to converting to NMAC style and format, that provided the source
"NMAC" means the New Mexico Administrative Code, the organizing structure for rules filed by New Mexico state agencies. The NMAC is also the body of filed rules and the published versions thereof. The	material for the specific NMAC part. It contains the rule number, the rule name and the filing date for each listed rule.
hierarchy of the NMAC is structured by title, chapter, part, section, sub-section, paragraph, sub-paragraph and item.	"Promulgation" means the public declaration of the adoption of an official and final rule.
"NMAC table of contents" means the master list of approved NMAC titles maintained by the records center. It may also include chapter and part designations.	"Publication in the <i>New Mexico Register</i> " means the process of publishing in the <i>New Mexico Register</i> in accordance with 1.24.15 NMAC. The publication date is the date of the issue of the <i>New Mexico Register</i> in which a rule appears.
"Normal style" means left justified, Times New Roman, 10 point font, single-spaced text, with one inch margins and one-half inch footer.	"Recompile" means the action of renumbering, reformatting and restructuring an existing rule without changing the text so that it complies with the current NMAC style and formatting requirements. Rules are
"Notice of rulemaking" means the advertisement published in the <i>New Mexico Register</i> to provide public notice of an agency's intention to promulgate a rule(s) along with the date and time of hearings for the purpose	recompiled for the convenience of using the NMAC website. The original filing remains the official version of the rule.
of collecting public comment on the proposed rule(s). "Number" means the numerical designations assigned	"Records center" means the State Records Center and Archives, the agency responsible for administering the State Rules Act, Section 14-4-1 et seq. NMSA 1978.
to titles, chapters, parts and sections that combine	State Rules Act, Section 14-4-1 et seq. NMSA 1978.
to form a unique numerical designation for a rule. Numbers need not be sequentially assigned and	"Referenced material incorporated or adopted by rule" means a source document that must be consulted
intermediate ranges may be reserved.	in order to determine what the rule is, where such incorporated or adopted material is not stated in the
"Objective" means the purpose of the rule or the reason for its necessity. It is stated in the required	rule.
NMAC section entitled OBJECTIVE."Original filing" means the first filing of a new rule.	"Reformat" means the application of adopted style and format requirements to current rules to conform to the NMAC structure promulgated by the records center.
"Paragraph" means the normal division of a subsection and the sixth level of the NMAC hierarchy.	"Renumbering" means the assignment of a new number to an existing chapter, part or section.
Paragraphs are identified by a number within parentheses: (1), (2), (3), etc.	"Repealer" means a rule filing which revokes or annuls an entire part.



"Re-promulgation" means the filing of pre-existing rule material with the express intent that it continue in effect, or resume being in effect. This was done specifically pursuant to Subsection D of 14-4-7 NMSA 1978.

"Reserved" Chapters, parts and sections may be reserved to hold space between lower numbered and higher numbered portions of the hierarchy, or may be reserved by agencies with the intent.

"Restructuring" means the reformatting and reorganizing of the hierarchy of the NMAC by assigning new designations to existing rule material without altering the content of that material.

"Rule" means any rule, regulation, order, standard or statement of policy, including amendments thereto or repeals thereof, issued or promulgated by an agency of state government and purporting to affect one or more agencies besides the agency issuing the rule or to affect persons not members or employees of the issuing agency, and as further defined in Subsection C of Section 14-4-2 NMSA 1978 and Attorney General Opinion No. 93-1. Also see **"Part"**.

"Rule filing" means the body of rule material organized for filing in accordance with Section 14-4-3 NMSA 1978 and 1.24.10 NMAC.

"Scope" means the extent of a rule's coverage. It identifies to whom the rule applies and whom it affects - for example, a rule may apply to the general public, for-profit corporations, public utilities, all state agencies, etc. This section may include any exclusions from coverage, and cross-reference to other parts of the NMAC which deal with the same or similar subject matter. It also indicates whether the rule is exhaustive of the subject area and whether other rules may apply. It is stated in the required NMAC section entitled SCOPE. **"Section"** means the required NMAC designation for the normal subdivision of a part. It has both a name and number, is the smallest fillable unit of a rule filing of the NMAC and is the fourth level of the NMAC hierarchy. The first seven sections are always:

- **ISSUING AGENCY:**
- 2 SCOPE:

1

- **3 STATUTORY AUTHORITY:**
- 4 **DURATION:**
- 5 EFFECTIVE DATE:
- 6 **OBJECTIVE**:
- 7 **DEFINITIONS:**

"Statutory authority" means the statute or constitutional provision which authorizes the promulgation of rules concerning the topic of the part. In the absence of express legislative authority, statutory authority cites to the general legislative authority of the agency over the topic of the rule. It is stated in the required NMAC section entitled STATUTORY AUTHORITY.

"Subparagraph" means the normal subdivision of a paragraph that is always the seventh level of the NMAC hierarchy. Sub-paragraphs are identified by a lowercase letter within parentheses: (a), (b), (c), etc.

"Subsection" means the normal subdivision of a section and is always the fifth level of the NMAC hierarchy. A subsection is identified by a capital letter: A., B., C., etc.

"Synopsis" means a condensed version or outline of a rule.

"Title" means the required NMAC designation for the major divisions of the NMAC. Each title brings together broadly related governmental functions and is the first level of the NMAC hierarchy. There are 22 Titles in NMAC.

"Title case" means the style where the first letter of each significant word is capitalized.

"URL" means the internet address of a website.

"U.S. law" means the United States code, the code of federal regulations, the federal register, New Mexico statutes, published portions of the NMAC and any material referenced therein.

Appendix E

NEW MEXICO

AUTHORIZATION TO SIGN TRANSMITTAL FORM

(Date) Name of Analyst Administrative Law Division New Mexico State Records Center and Archives 1205 Camino Carlos Rey Santa Fe, NM 87505 Re: Authorization to File Adopted Rules Dear (Name of Analyst): As Chairman of the (commission, board name or agency) and pursuant to (legal citationed I hereby authorize (name of person given authorization to sign by chair), (title) of the (commission or board name), to file rules with your agency on behalf of the (commission or board) and to sign the NMAC transmittal form for filing rules as the signing authority the (commission or board). (Printed chair name and title) (Signature of chair name)		(Agency Letterhead)	
Administrative Law Division New Mexico State Records Center and Archives 1205 Camino Carlos Rey Santa Fe, NM 87505 Re: Authorization to File Adopted Rules Dear (Name of Analyst): As Chairman of the (commission, board name or agency) and pursuant to (legal citation I hereby authorize (name of person given authorization to sign by chair), (title) of the (commission or board name), to file rules with your agency on behalf of the (commission or board) and to sign the NMAC transmittal form for filing rules as the signing authority the (commission or board).	(Date)		
Administrative Law Division New Mexico State Records Center and Archives 1205 Camino Carlos Rey Santa Fe, NM 87505 Re: Authorization to File Adopted Rules Dear (Name of Analyst): As Chairman of the (commission, board name or agency) and pursuant to (legal citation I hereby authorize (name of person given authorization to sign by chair), (title) of the (commission or board name), to file rules with your agency on behalf of the (commission or board) and to sign the NMAC transmittal form for filing rules as the signing authority the (commission or board).	Name of Analyst		
1205 Camino Carlos Rey Santa Fe, NM 87505 Re: Authorization to File Adopted Rules Dear (Name of Analyst): As Chairman of the (commission, board name or agency) and pursuant to (legal citation I hereby authorize (name of person given authorization to sign by chair), (title) of the (commission or board name), to file rules with your agency on behalf of the (commission or board) and to sign the NMAC transmittal form for filing rules as the signing authority the (commission or board). (Printed chair name and title)	-	aw Division	
Santa Fe, NM 87505 Re: Authorization to File Adopted Rules Dear (Name of Analyst): As Chairman of the (commission, board name or agency) and pursuant to (legal citation I hereby authorize (name of person given authorization to sign by chair), (title) of the (commission or board name), to file rules with your agency on behalf of the (commission or board) and to sign the NMAC transmittal form for filing rules as the signing authority the (commission or board).	New Mexico State	e Records Center and Archives	
Re: Authorization to File Adopted Rules Dear (Name of Analyst): As Chairman of the (commission, board name or agency) and pursuant to (legal citation I hereby authorize (name of person given authorization to sign by chair), (title) of the (commission or board name), to file rules with your agency on behalf of the (commission or board) and to sign the NMAC transmittal form for filing rules as the signing authority the (commission or board).	1205 Camino Car	los Rey	
Dear (Name of Analyst): As Chairman of the (commission, board name or agency) and pursuant to (legal citation I hereby authorize (name of person given authorization to sign by chair), (title) of the (commission or board name), to file rules with your agency on behalf of the (commission or board) and to sign the NMAC transmittal form for filing rules as the signing authority the (commission or board).	Santa Fe, NM 875	505	
As Chairman of the (commission, board name or agency) and pursuant to (legal citation I hereby authorize (name of person given authorization to sign by chair), (title) of the (commission or board name), to file rules with your agency on behalf of the (commission or board) and to sign the NMAC transmittal form for filing rules as the signing authority the (commission or board).	Re: Authorization	to File Adopted Rules	
I hereby authorize (name of person given authorization to sign by chair), (title) of the (commission or board name), to file rules with your agency on behalf of the (commission or board) and to sign the NMAC transmittal form for filing rules as the signing authority the (commission or board).	Dear (Name of Ar	nalyst):	
``````````````````````````````````````	As Chairman of th	ne (commission, board name or agency) and pursuant to (legal citation(s))	
(Signature of chair name)	I hereby authorize (commission or bo or board) and to si	e (name of person given authorization to sign by chair), (title) of the oard name), to file rules with your agency on behalf of the (commission ign the NMAC transmittal form for filing rules as the signing authority fo	
	I hereby authorize (commission or bo or board) and to si the (commission c	e (name of person given authorization to sign by chair), (title) of the oard name), to file rules with your agency on behalf of the (commission ign the NMAC transmittal form for filing rules as the signing authority fo or board).	
(Printed name and title of person given authorization to sign by chair)	I hereby authorize (commission or bo or board) and to si the (commission of (Printed chair nam	e (name of person given authorization to sign by chair), (title) of the oard name), to file rules with your agency on behalf of the (commission ign the NMAC transmittal form for filing rules as the signing authority fo or board).	
(Signature of person given authorization to sign by chair)	I hereby authorize (commission or bo or board) and to si the (commission of (Printed chair nam (Signature of chai	e (name of person given authorization to sign by chair), (title) of the oard name), to file rules with your agency on behalf of the (commission ign the NMAC transmittal form for filing rules as the signing authority for or board). ne and title) r name)	

## **Appendix F**



Commission of Public Records

# REQUEST FOR NEW PART NAME OR PART NAME CHANGE

## (Agency Letterhead)

(Date)

Name of Analyst Administrative Law Division New Mexico State Records Center and Archives 1205 Camino Carlos Rey Santa Fe, NM 87505

Re: Authorization to Change Part Name

Dear (Name of Analyst):

As Director of the Department of Game and Fish, I am requesting permission to (add a new Part or change the name of a Part) to:

# TITLE 19NATURAL RESOURCES AND WILDLIFECHAPTER 35CAPTIVE WILDLIFE USESPART 6AUTHORIZED USES OF WILDLIFE FOR EDUCATION,<br/>LAW ENFORCEMENT, RESEARCH AND SCIENTIFIC PURPOSES

The reason for requesting the new Part is.....

Thank you for your consideration.

Sincerely,

### Appendix G



## Commission of Public Records

## 2018 New Mexico Register

**Submittal Deadlines and Publication Dates** 

Volume XXIX, Issues 1-24

Issue	Submittal Deadline	Publication Date
Issue 1	January 4	January 16
Issue 2	January 18	January 30
Issue 3	February 1	February 13
Issue 4	February 15	February 27
Issue 5	March 1	March 13
Issue 6	March 15	March 27
Issue 7	March 29	April 10
Issue 8	April 12	April 24
Issue 9	April 26	May 15
Issue 10	May 17	May 29
Issue 11	May 31	June 12
Issue 12	June 14	June 26
Issue 13	June 28	July 10
Issue 14	July 12	July 24
Issue 15	July 26	August 14
Issue 16	August 16	August 28
Issue 17	August 30	September 11
Issue 18	September 13	September 25
Issue 19	September 27	October 16
Issue 20	October 18	October 30
Issue 21	November 1	November 13
Issue 22	November 15	November 27
Issue 23	November 29	December 11
Issue 24	December 13	December 27

The New Mexico Register is the official publication for all material relating to administrative law, such as notices of rulemaking, proposed rules, adopted rules, emergency rules, and other material related to administrative law. The Commission of Public Records, Administrative Law Division, publishes the New Mexico Register twice a month pursuant to Section 14-4-7.1 NMSA 1978.

The New Mexico Register is available free online at: http://www.nmcpr.state.nm.us/nmregister. For further information, call 505-476-7942.

## **Appendix H**

NEW MEXICO

Commission of Public Records

# **STATE RULES ACT**

### 14-4-1. Short title.

Chapter 14, Article 4 NMSA 1978 may be cited as the "State Rules Act".

### 14-4-2. Definitions.

As used in the State Rules Act:

A. "agency" means any agency, board, commission, department, institution or officer of the state government except the judicial and legislative branches of the state government;

**B.** "person" includes individuals, associations, partnerships, companies, business trusts, political subdivisions and corporations;

C. "proceeding" means a formal agency process or procedure that is commenced or conducted pursuant to the State Rules Act;

D. "proposed rule" means a rule that is provided to the public by an agency for review and public comment prior to its adoption, amendment or repeal, and for which there is specific legal authority authorizing the proposed rule;
 E. "provide to the public" means for an agency to distribute rulemaking information by:

- (1) posting it on the agency website, if any;
- (2) posting it on the sunshine portal:
- (3) making it available in the agency's district, field and regional offices, if any;

(4) sending it by electronic mail to persons who have made a written request for notice from the

agency of announcements addressing the subject of the rulemaking proceeding and who have provided an electronic mail address to the agency;

(5) sending it by electronic mail to persons who have participated in the rulemaking and who have provided an electronic mail address to the agency;

(6) sending written notice that includes, at a minimum, an internet and street address where the information may be found to persons who provide a postal address; and

(7) providing it to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees;

**F.** "rule" means any rule, regulation, or standard, including those that explicitly or implicitly implement or interpret a federal or state legal mandate or other applicable law and amendments thereto or repeals and renewals thereof, issued or promulgated by any agency and purporting to affect one or more agencies besides the agency issuing the rule or to affect persons not members or employees of the issuing agency, including affecting persons served by the agency. An order or decision or other document issued or promulgated in connection with the disposition of any case or agency decision upon a particular matter as applied to a specific set of facts shall not be deemed such a rule, nor shall it constitute specific adoption thereof by the agency. "Rule" does not include rules relating to the management, confinement, discipline or release of inmates of any penal or charitable institution, the New Mexico boys' school, the girls' welfare home or any hospital; rules made relating to the management of any particular educational institution, whether elementary or otherwise; or rules made relating to admissions, discipline, supervision, expulsion or graduation of students from any educational institution; and

**G.** "rulemaking" means the process for adoption of a new rule or the amendment, readoption or repeal of an existing rule.

### 14-4-3. Format of rules; filing; distribution.

**A.** Each agency promulgating any rule shall place the rule in the format and style required by rule of the state records administrator and shall deliver the rule to the state records administrator or the administrator's designee, accompanied by the concise explanatory statement required by the State Rules Act. The state records administrator or the administrator or the administrator or the administrator or the date and hour of filing.

**B.** The state records administrator or the administrator's designee shall maintain a copy of the rule as a permanent record open to public inspection during office hours, on the website of the records center, published in a timely manner in the New Mexico register and compiled into the New Mexico Administrative Code.

C. At the time of filing, an agency may submit to the state records administrator or the administrator's



designee a copy, for annotation with the date and hour of filing, to be returned to the agency.

**D.** The state records administrator, after written notification to the filing agency, may make minor, nonsubstantive corrections in spelling, grammar and format in filed rules. The state records administrator shall make a record of the correction and shall deliver the record to the filing agency and issuing authority within ten days of the change. Within thirty days of receiving that state records administrator's record of a correction, the agency shall provide to the public notice of the correction in the same manner as the agency used to give notice of the rulemaking proceeding pursuant to Section 4 of this 2017 act [14-4-5.2 NMSA 1978].

### 14-4-4. Publication filing and distribution; official depository.

Each agency issuing any publication, pamphlet, report, notice, proclamation or similar instrument shall immediately file five copies thereof with the records center. The records center shall deliver three copies to the state library, which shall keep one copy available for public inspection during office hours. All other copies may be circulated. The state library is designated to be an official depository of all such publications, pamphlets, reports, notices, proclamations and similar instruments.

### 14-4-5. Time limit on adoption of a proposed rule; filing and compliance required for validity.

**A.** Except in the case of an emergency rule, no rule shall be valid or enforceable until it is published in the New Mexico register as provided by the State Rules Act.

**B.** An agency shall not adopt a rule until the public comment period has ended. If the agency fails to take action on a proposed rule within two years after the notice of proposed rulemaking is published in the New Mexico register, the rulemaking is automatically terminated unless the agency takes action to extend the period. The agency may extend the period of time for adopting the proposed rule for an additional period of two years by filing a statement of good cause for the extension in the rulemaking record, but it shall provide for additional public participation, comments and rule hearings prior to adopting the rule.

**C.** An agency may terminate a rulemaking at any time by publishing a notice of termination in the New Mexico register. If a rulemaking is terminated pursuant to this section, the agency shall provide notice to the public.

**D.** Within fifteen days after adoption of a rule, an agency shall file the adopted rule with the state records administrator or the administrator's designee and shall provide to the public the adopted rule. The state records administrator or the administrator's designee shall publish rules as soon as practicable after filing, but in no case later than ninety days after the date of adoption of the proposed rule. Unless a later date is otherwise provided by law or in the rule, the effective date of a rule shall be the date of publication in the New Mexico register.

E. A proposed rule shall not take effect unless it is adopted and filed within the time limits set by this section.

### 14-4-5.1. Temporary provision; savings provision.

Notwithstanding the provisions of <u>14-4-5</u> NMSA 1978, rules filed prior to July 1, 1995 shall continue in effect if such rules were filed with the state records center in accordance with the law applicable at the time of filing, and they have not otherwise been repealed, amended, or superseded.

### 14-4-5.2. Notice of proposed rulemaking.

**A.** Not later than thirty days before a public rule hearing, the agency proposing the rule shall provide to the public and publish in the New Mexico register a notice of proposed rulemaking. The notice shall include:

- (1) a summary of the full text of the proposed rule;
- (2) a short explanation of the purpose of the proposed rule;
- (3) a citation to the specific legal authority authorizing the proposed rule and the adoption of the rule;

(4) information on how a copy of the full text of the proposed rule may be obtained;

(5) information on how a person may comment on the proposed rule, where comments will be received and when comments are due;

(6) information on where and when a public rule hearing will be held and how a person may participate in the hearing; and

(7) a citation to technical information, if any, that served as a basis for the proposed rule, and information on how the full text of the technical information may be obtained.



**B.** An agency may charge a reasonable fee for providing any records in non-electronic form when provided to a person pursuant to this section. An agency shall not charge a fee for providing any records in electronic form when provided to a person pursuant to this section.

**C.** An internet link providing free access to the full text of the proposed rule shall be included on the notice of proposed rulemaking.

**D.** If the agency changes the date of the public rule hearing or the deadline for submitting comments as stated in the notice, the agency shall provide notice to the public of the change.

E. The state records administrator or the administrator's designee shall timely publish the notice of proposed rulemaking in the next publication of the New Mexico register.

### 14-4-5.3. Public participation, comments and rule hearings.

A. The notice of proposed rulemaking shall specify a public comment period of at least thirty days after publication in the New Mexico register during which a person may submit information and comment on the proposed rule. The information or comment may be submitted in an electronic or written format or at a public rule hearing pursuant to Subsection B of this section. The agency shall consider all information and comment on a proposed rule that is submitted within the comment period.

**B.** At the public rule hearing, members of the public shall be given a reasonable opportunity to submit data, views or arguments orally or in writing. Each agency shall determine, in accordance with governing statutory and case law, the manner in which parties to the proceeding and members of the public will be able to participate in public hearings. All public hearings shall be conducted in a fair and equitable manner. Except as otherwise provided by law, an agency representative or hearing officer shall preside over a public rule hearing.

C. The public rule hearing shall be open to the public and be recorded.

### 14-4-5.4. Agency record in rulemaking proceeding.

A. An agency shall maintain a rulemaking record for each rule it proposes to adopt. The record and materials incorporated by reference in the proposed rule shall be readily available for public inspection in the central office of the agency and available for public display on the state sunshine portal. If an agency determines that any part of the rulemaking record cannot be practicably displayed or is inappropriate for public display on the sunshine portal, the agency shall describe that part of the record, shall note on the sunshine portal that the part of the record is not displayed and shall provide instructions for accessing or inspecting that part of the record.

- **B.** A rulemaking record shall contain:
  - (1) a copy of all publications in the New Mexico register relating to the proposed rule;
  - (2) a copy of any technical information that was relied upon in formulating the final rule;

(3) any official transcript of a public rule hearing or, if not transcribed, any audio recording or verbatim transcript of the hearing, and any memoranda summarizing the contents of the hearing prepared by the hearing officer or agency official who presided over the hearing;

(4) a copy of all comments and other material received by the agency during the public comment period and at the public hearing;

(5) a copy of the full text of the initial proposed rule and the full text of the final adopted rule and the concise explanatory statement filed with the state records administrator or the administrator's designee; and

any corrections made by the state records administrator pursuant to Section <u>14-4-3</u> NMSA 1978.

14-4-5.5. Concise explanatory statement. At the time it adopts a rule, an agency shall provide to the public a concise explanatory statement containing:

- A. the date the agency adopted the rule;
- **B.** a reference to the specific statutory or other authority authorizing the rule; and
- C. any findings required by a provision of law for adoption of the rule.

### 14-4-5.6. Emergency rule.

(6)

A. An agency shall comply with the rulemaking procedures of the State Rules Act unless the agency finds that the time required to complete the procedures would:



- (1) cause an imminent peril to the public health, safety or welfare;
- (2) cause the unanticipated loss of funding for an agency program; or
- (3) place the agency in violation of federal law.

**B.** The agency shall provide to the public a record of any finding pursuant to Subsection A of this section and a detailed justification for that finding before issuing an emergency rule. The record shall include a statement that the emergency rule is temporary. After such record has been provided to the public, the agency may issue the emergency rule immediately without a public rule hearing or with any abbreviated notice and hearing that it finds practicable.

**C.** When an agency makes a finding pursuant to Subsection A of this section, the agency shall follow the provisions of this section in addition to any more specific requirements in statute that pertain to the agency regarding promulgating emergency or interim rules.

**D.** Emergency rules may take effect immediately upon filing with the state records administrator or the administrator's designee or at a later date specified in the emergency rule. Emergency rules shall be published in the New Mexico register.

**E.** No emergency rule shall permanently amend or repeal an existing rule. An emergency rule shall remain in effect until a permanent rule takes effect under the normal rulemaking process. If no permanent rule is adopted within one hundred eighty days from the effective date of the emergency rule, the emergency rule shall expire and may not be readopted as an emergency rule. If an expired emergency rule temporarily amended or repealed an existing rule, the rule shall revert to what it would have been had the emergency rule not been issued.

### 14-4-5.7. Conflicts between rule and statute; variance between proposed and final action.

**A.** No rule is valid or enforceable if it conflicts with statute. A conflict between a rule and a statute is resolved in favor of the statute.

**B.** A word or phrase that is defined in an applicable statute should not be defined in rule. A conflict between a definition that appears in a rule and in an applicable statute is resolved in favor of the statute.

### 14-4-5.8. Procedural rules.

No later than January 1, 2018, the attorney general shall adopt default procedural rules for public rule hearings for use by agencies that have not adopted their own procedural rules consistent with the State Rules Act. Each agency may adopt its own procedural rules, or continue in effect existing rules, which 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. 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.

### 14-4-6. [Trade, sale and exchange of agency rules, publications and reports by records center.]

The records center is hereby authorized to trade, sell or exchange such rules, pamphlets, reports or similar instruments for rules, pamphlets, reports or similar instruments of similar value and to sell the same at a reasonable price.

### 14-4-7. Current listing of rules; rule repeals.

A. The state records administrator shall prepare and publish a listing and index of all current rules which are filed with the records center.

**B.** All pamphlets, reports, proclamations or similar instruments which are filed with the librarian of the supreme court law library of the state of New Mexico on the effective date of the State Rules Act and which would, if filed after the effective date of the State Rules Act, be filed with the records center shall be transferred to the records center.

**C.** The records center shall be furnished a reasonable opportunity to obtain copies of all rules, as defined in the State Rules Act, filed with the librarian of the supreme court law library of the state of New Mexico on the effective date of the State Rules Act.

**D.** All rules filed with the librarian of the supreme court law library that have not been filed with the records center pursuant to the State Rules Act by June 30, 1991 are repealed.

### 14-4-7.1. New Mexico register.

A. The state records administrator shall provide for publication of a New Mexico register at least twice a



month. The New Mexico register shall be published in such a way as to minimize the cost to the state. To accomplish this, the state records administrator is authorized to provide for charges for subscriptions and for publication of notice and other items, including advertising, in the register.

**B.** The New Mexico register shall be the official publication for all notices of rule makings and filings of adopted rules, including emergency rules, by agencies.

(1) The register shall include the full text of any adopted rules, including emergency rules. Proposed rules may be published in full or in part at the discretion of the issuing agency.

(2) Upon request of an issuing agency, the state records administrator may determine that publication in the register of the full text of an adopted rule would be unduly cumbersome, expensive or otherwise inexpedient, and may publish instead a synopsis of the adopted rule and a statement that a copy of the rule is available from the issuing agency.

**C.** The New Mexico register shall be available by subscription and single copy purchase to any person, including agencies of the executive, judicial and legislative branches of state government and its political subdivisions, at a reasonable charge approved by the state records administrator. The administrator may authorize distribution of a certain number of copies of the register without charge to agencies or political subdivisions as deemed economically feasible and appropriate.

**D.** The New Mexico register may include a summary or the text of any governor's executive order, a summary, listing or the text of any attorney general's opinion, a calendar listing the date, time and place of all or selected agency rule-making hearings, a list of gubernatorial appointments of state officials and board and commission members or other material related to administrative law and practice.

**E.** The state records administrator shall adopt and promulgate rules necessary for the implementation and administration of this section.

### 14-4-7.2. New Mexico Administrative Code.

A. The state records administrator shall create and have published a New Mexico Administrative Code, which shall contain all adopted rules. The administrator shall adopt regulations setting forth procedures for the compilation of the code and prescribing the format and structure of the code, including provisions for at least annual supplementation or revision.

**B.** All rulemaking agencies shall revise, restate and repromulgate their existing rules as needed to expedite publication of the New Mexico Administrative Code.

### 14-4-8. Documents not required to be filed with state library.

The state librarian may by appropriate written instructions advise the records center that he no longer desires a particular class of instrument to be filed with the state library and thereafter such records center shall no longer file such class of documents with the state library unless such rejection is rescinded in writing and sent to such agency or agencies.

### 14-4-9. [Law governing filing of agency rules, documents and publications.]

Wherever any law requires an agency to file a rule, pamphlet, document or publication with the librarian of the supreme court law library such shall be accomplished by the delivery and filing as provided in the State Rules Act.

### 14-4-10. State publications for sale or issue by state agencies; listing by state records administrator.

The state records administrator shall maintain a file of all state publications which are for sale or issue by agencies of the state. He shall prepare and publish a list of all such publications which are current and effective. The list shall include such documents as books, manuals, pamphlets, bulletins, monographs and periodicals designed to instruct, inform or direct either the general public or public officers and employees. Correspondence and those documents developed by agencies for their own internal administration are excluded.

## 14-4-11. [Personal files, records and documents of elected state officials; placing in state archives by the state records administrator.]

The state records administrator may accept and place in the state archives the personal files, records and documents of elected state officials or of former elected state officials, subject to any reasonable restrictions, moratoriums and requirements concerning their use by other persons. Such restrictions, moratoriums and requirements made by the donor, however, shall not prevent the archivist of the state records center from having access to the files, records and documents for indexing and cataloguing purposes.

Appendix I

NEW MEXICO Commission of Public Records

# **NEW MEXICO ADMINISTRATIVE CODE** (NMAC)

TITLE 1 **GENERAL GOVERNMENT ADMINISTRATION** CHAPTER 24 RULES **PART 10** NEW MEXICO ADMINISTRATIVE CODE (NMAC)

1.24.10.1 **ISSUING AGENCY:** State Records Administrator. [1.24.10.1 NMAC - Rp 1 NMAC 3.3.10.1, 2/29/2000; A, 9/15/2014]

SCOPE: All state agencies. General provisions, including applicable definitions, are found in 1.24.1 1.24.10.2 NMAC. There are additional requirements on submitting a rule filing for publication in the New Mexico register (see 1.24.15 NMAC), for emergency rule filings (see 1.24.20 NMAC) and for transition to a new NMAC structure (see 1.24.11 NMAC). [1.24.10.2 NMAC - Rp 1 NMAC 3.3.10.2, 2/29/2000]

1.24.10.3 STATUTORY AUTHORITY: Section 14-4-7.2 NMSA 1978 directs the state records administrator to create and publish a New Mexico administrative code, and to adopt regulations setting forth procedures for compiling the code and prescribing the format and structure of the code. Section 14-4-3 NMSA 1978 directs that promulgated rules shall be in style and format required by and delivered to the state records administrator together with a concise explanatory statement to be filed noting the date and hour of filing.

[1.24.10.3 NMAC - Rp 1 NMAC 3.3.10.3, 2/29/2000; A, 7/1/2017]

1.24.10.4 **DURATION:** Permanent.

[1.24.10.4 NMAC - Rp 1 NMAC 3.3.10.4, 2/29/2000]

EFFECTIVE DATE: February 29, 2000, unless a later date is cited at the end of a section. 1.24.10.5 [1.24.10.5 NMAC - Rp, 1 NMAC 3.3.10.5, 2/29/2000; A, 9/15/2014; A, 11/30/2015]

1.24.10.6 OBJECTIVE: The objective of this rule is to establish standards for uniform rule filings in an easily understood and common format. These standards are designed to ensure that rules are readily identifiable and available for public inspection; that each rule filing can be historically traced from its current status back to the original rule filing; and that rule filings are structured for expeditious compilation into the NMAC. The NMAC is designed to promote access and assist research by adopting a system for uniformly organizing state rules that facilitates fully searchable electronic access. Additionally, it is designed to facilitate electronic publication and availability via the internet. [1.24.10.6 NMAC - Rp 1 NMAC 3.3.10.6, 2/29/2000]

### **DEFINITIONS:** [RESERVED] 1.24.10.7

[1.24.10.7 NMAC - Rp 1 NMAC 3.3.10.7, 2/29/2000]

### 1.24.10.8 NMAC STRUCTURE AND IDENTIFICATION:

The NMAC, a hierarchical structure, is divided into titles, chapters and parts, on the basis of subject A. matter. A title broadly organizes related governmental rule material in the first level of the hierarchy. The title is divided into chapters that identify distinct governmental functions. The chapter is divided into parts. The part relates to specific subject matter. It is at this level that rules are organized. The part is subdivided into sections. The section may be further subdivided into subsections, paragraphs and sub-paragraphs.

Each division of the NMAC through the section level shall have a name and number.

The names and numbers of NMAC titles are listed in 1.24.10.26 NMAC, TABLE OF (1)

CONTENTS. Chapter names and numbers shall be assigned and maintained by the records center. (2)

The individual number of a title, chapter, part or section shall be expressed as a whole number.

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Titles shall be limited to two arabic digits; chapters shall be limited to three arabic digits; and parts and sections shall be limited to four arabic digits.

**C.** Subsections shall be indicated by at least one, but not more than three, upper-case alphabetic characters. Paragraphs are indicated by at least one, but not more than three, arabic digits within parentheses. Sub-paragraphs shall be indicated by at least one, but not more than three, lower-case alphabetic characters within parentheses.

**D.** The part name and number shall be assigned by the filing agency and subject to approval by the administrative law division of the state commission of public records.

(1) The part names shall be descriptive and not exceed 120 characters. Agencies shall use names that provide adequate notice of the nature and content of the part.

(2) The individual part number shall not exceed four arabic digits and shall not include dashes or alphabetic characters.

(3) "Part 1" of each chapter shall be used or reserved for the general provisions that apply to all the parts in that chapter.

E. At the beginning of each part, an agency shall identify the part by title number and name, chapter number and name, and part number and name.

**F.** The first seven sections of each part shall state:

(1) Section 1 - name of the issuing agency in a section entitled "ISSUING AGENCY";

(2) Section 2 - the scope of the part in a section entitled "SCOPE";

(3) Section 3 - the statutory authority under which a part is issued, in a section entitled "STATUTORY AUTHORITY";

(4) Section 4 - the intended duration of the part in a section entitled "DURATION";

(5) Section 5 - the effective date of the part in a section entitled "EFFECTIVE DATE";

(6) Section 6 - the objective of the part in a section entitled "OBJECTIVE";

(7) Section 7 - the definitions that apply just to the part in a section entitled "DEFINITIONS." If there are no definitions for the part, Section 7 shall be reserved i.e., [RESERVED]. An annotation to general provisions may be included.

G. Section 8, and all subsequent sections, shall encompass the body of rule material specific to the part.

**H.** A section has both a name and number assigned by the promulgating agency. Each section shall be identified at the beginning by the full NMAC number (title number, followed by a period, chapter number, followed by a period, part number, followed by a period and the section number) followed by the name of the section. Example: Section 12 of this part is 1.24.10.12 STYLE

I. A section may be divided into subsections. Subsections may be used to further group similar paragraphs.

**J.** A paragraph is a unit of grammatical, tabular or other discrete, organized information that may be, although not advisably, divided into further units.

[1.24.10.8 NMAC - Rp 1 NMAC 3.3.10.15, 2/29/2000; A, 6/30/2004; A, 11/30/2015]

### 1.24.10.9 NMAC CITATION:

**A.** The format for full citation of material contained in the NMAC shall be the name of the part, followed by a comma, a space, the name of the issuing agency, followed by a comma, a space, the title number, followed a period, the chapter number, followed by a period, the part number, followed by a period, the section number, a space and the initials "NMAC." The citation shall be followed by the effective date in parentheses. Example: Disclosure of Taxpayer Information, New Mexico Taxation and Revenue Department, 3.1.3.8 NMAC (10/31/1996)

**B.** A modified full citation where the name of the issuing agency is omitted from the citation may be used. Example: Disclosure of Taxpayer Information, 3.1.3.8 NMAC (10/31/1996)

**C.** The short-form citation of the NMAC is the title, chapter, part and section number separated by periods and followed by "NMAC". Example: 3.1.3.8 NMAC

**D.** Where a provision has been amended, the effective date shall be the effective date of the version that is being cited.

E. Where reference is to the whole part, the reference date shall be the original effective date together with the date of last amendment, i.e., (7/1/94 as amended through 1/1/2000.)



**F.** Where citation below the level of a section is desired, designations below the section shall precede the citation. Example: Subsection A of 3.1.3.8 NMAC.

[1.24.10.9 NMAC - Rp 1 NMAC 3.3.10.8, 2/29/2000; A, 6/30/2004]

### 1.24.10.10 ISSUING AUTHORITY:

A. The issuing authority is responsible for ensuring compliance with the requirements set forth in this part.

**B.** Where delegation is authorized, the agency may, by rule or formal appointment, specify an issuing authority other than that named in statute. The agency shall forward, in writing, the title, name and signature of the designee to the state records administrator. The agency shall notify, in writing, the state records administrator of any change in the designation. Designation shall only be made by the issuing authority. Formally appointed designees are not allowed to appoint other designees.

**C.** The administrative law division shall not accept a rule filing or a concise explanatory statement signed by other than the issuing authority, or a formally appointed designee.

[1.24.10.10 NMAC - Rp 1 NMAC 3.3.10.9, 2/29/2000; A, 6/30/2004; A, 11/30/2015; A, 7/1/2017]

### 1.24.10.11 WHAT CONSTITUTES A RULE:

"Rule" and "proposed rule" have been defined and set forth within statute (See Section 14-4-2 NMSA 1978). [1.24.10.11 NMAC - N, 2/29/2000; A, 6/30/2004; A, 7/1/2017]

### 1.24.10.12 STYLE:

**A.** Style shall be guided by relevant portions of the current edition of the legislative drafting manual of the New Mexico legislature published by the New Mexico legislative council service. The following provisions are specifically adopted.

(1) Chapter 4, Bill Drafting, the portion dealing with brackets, line-through and underscoring shall apply to proposed amendments and amendments for publication in the New Mexico register. This style shall not be applied to the integrated part.

(2) Chapter 7, Legislative Style and Language Provisions, except for the portion dealing with numbers, formulas and charts, as set forth:

(a) use words for numbers zero to nine (except for dates, numbers with decimals, money or technical, scientific or statistical matter;

(b) use figures for numbers 10 and greater, except when beginning a sentence;

(c) spell out numerical figures when using percentages; the word "percent" shall be spelled out except in tables, which use the percent symbol (%); (e.g., twenty-five percent)

(d) spell out fractions standing alone (e.g., one-half, one-third, etc.);

(e) insert a hyphen between the numerator and the denominator of a fraction, unless either

element already contains a hyphen; do not spell out a portion of a fraction and express the other part as a figure; and (f) use figures for fractions with numbers 10 and greater.

(3) Figures and symbols may represent amounts of money. It is not necessary to spell out the number. If a sum of money is spelled out, follow the spelling with figures and money symbol (\$) in parenthesis.

**B.** Special symbols shall be avoided and the common abbreviation or full spelling used instead. For example, deg. for degree and lbs. for pounds.

**C.** No rule filing shall be typed in all capital letters.

**D.** Indentions shall be standardized as follows.

(1) Section numbers shall be flush with the part's one-inch margin.

(2) One tab shall be used to indent the first line of a subsection. Tab once after the subsection designation before beginning the text.

(3) Paragraphs shall be indented two tabs. Tab once after the paragraph designation before beginning the text.

(4) Subparagraphs shall be indented three tabs. Items are to remain within the text of subparagraph. Upon request for need and upon approval by administrative law division, items may be indented four tabs. Tab once after the

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subparagraph or item designation before the beginning of the text.

(5) Automatic indents are not permitted.

- **E.** Sections shall be clearly separated.
- F. The name of the issuing agency in Section 1 and in full citation shall be typed in title case.

**G.** The first page of a new part or integrated part shall begin with the title, chapter and part numbers and

names. The information shall be flush with the document's one-inch margin and typed in bold capital letters.

**H.** Use of tables is permissible but shall be used sparingly because tables may cause difficulties in the rule filing process and may increase publication costs. The agency shall be guided by the following when using tables.

- (1) Tables shall be in portrait orientation.
- (2) Text in tables shall be Times New Roman, 10-point font.

I. No rule filing shall contain footnotes.

[1.24.10.12 NMAC - N, 2/29/2000; A, 6/30/2004; A, 9/15/2014; A, 11/30/2015]

### **1.24.10.13 ELECTRONIC STANDARDS:**

Α.

Electronic storage media for rule filings shall be one of the following:

- (1) USB-flash-drive; or
- (2) CD; or,
- (3) as an attachment via an e-mail address.

**B.** For rule filings, the electronic format shall be *MS Windows* version of *MS Word* software using Times New Roman, 10-point font, normal style.

C. Special coding, such as hanging indents, automatic tabbing, automatic numbering, body text style, non-breaking hyphens, automatic tracking, or any other special font shall not be used.

**D.** Use of images shall be limited. If necessary, they shall be included in the electronic version of the document as GIF or PDF files.

- E. Page Layout:
  - (1) A rule filing shall be single-spaced with double spacing between sections.
  - (2) The original paper version of a rule filing shall be single-sided.
  - (3) Margins shall be a minimum of one inch on all four sides, excluding the footer.
  - (4) Tabs shall be set at 0.5 inches.

(5) The document shall have a footer for page identification which shall appear at the midpoint within the one-inch margin on the foot of every page. The footer shall contain the NMAC number down through the part number in the bottom left corner of the footer. The page number shall be located at the bottom right corner of the footer. [1.24.10.13 NMAC - Rp, 1 NMAC 3.3.10.13, 2/29/2000; A, 6/30/2004; A, 9/15/2014]

### **1.24.10.14 PAPER VERSION STANDARDS:**

### A. Paper:

- (1) Output shall be produced from, and not vary from, the electronic version of the rule filing.
- (2) Size shall be  $8.5 \times 11$  inches.
- (3) Weight shall be a minimum of 20-lb. bond or copier paper.
- (4) Color shall be white.
- **B.** Ink: Color shall be black and uniform throughout.
- C. Binding: Rule filings shall be unbound and consist of individual sheets.
- D. Page Layout: In all other respects, paper version shall conform to the page layout described in 1.24.10.13

### NMAC above.

[1.24.10.14 NMAC - Rp, 1 NMAC 3.3.10.13, 2/29/2000; A, 6/30/2004; A, 9/15/2014]

### 1.24.10.15 NMAC TRANSMITTAL FORM:

**A.** Each rule filing delivered to the records center shall be accompanied by a completed NMAC transmittal form in hard copy with an original signature in black ink or with a valid digital signature.

**B.** The administrative law division shall provide agencies with blank NMAC transmittal forms in electronic format.

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С. The filing agency shall complete the NMAC transmittal form and submit to the administrative law division for review and approval prior to adoption of any rulemaking.

- The NMAC transmittal form shall not be handwritten and shall be suitable for reproduction. D. E.
  - The following shall appear on the NMAC transmittal form:
    - issuing agency name and address; (1)
    - (2) three digit DFA account code for the agency (if applicable);
    - (3) volume, issue, publication date in register for rule filing;
    - (4) contact person's name, phone number, and e-mail address;
    - type of filing i.e., new, amendment, renumber, repeal, repeal/replace or emergency filing; (5)
    - total number of pages; (6)
    - date(s) of any public hearing(s) on the proposed rule or amendment; (7)
    - (8) effective date of the rule filing;
    - (9) NMAC title, chapter and part name and number;
    - (10)description of amendment (for amendment filing only, i.e. "amending two sections");
    - (11)amendment's NMAC citation (i.e. 1.24.10.15 and 16 NMAC);

(12) sequence number and most recent filing date of the part (if applicable and designated for administrative law division use only);

- (13)declaration of incorporated material:
- (14)if reference materials are attached and are protected by copyright:
  - indication if copyright permission was obtained; **(a)**
  - (b) the proof of permission; or
  - (c) material is within the definition of public domain;

(15)specific statutory or other authority authorizing the rulemaking by the issuing agency to

promulgate rules;

- (16) any findings required by a provision of law for adoption of the rule;
- (17)rule adoption date; and
- (18)rule effective date.

F. Each rule filing shall bear the original signature of the issuing authority or authorized designee in black ink on the paper copy of the NMAC transmittal form. If authority is delegated, the box shall be checked.

G. Those portions of the transmittal form that are completed by the issuing agency under the concise explanatory statement heading shall be considered sufficient compliance with State Rules Act and shall be provided to the public at the time the issuing agency adopts any rule making.

[1.24.10.15 NMAC - Rp, 1 NMAC 3.3.10.11, 2/29/2000; A, 6/30/2004; A, 9/15/2014; A, 11/30/2015; A, 7/1/2017]

### 1.24.10.16 **FILING A RULE:**

At the time of filing the filing agency shall present the following, which has been reviewed and pre-Α. approved by administrative law division:

- (1) one paper version of the completed NMAC transmittal form;
- (2) one electronic version of the text of the rule or amendment;
- (3) one electronic version of the integrated part (if filing an amendment); and
- (4) one electronic version of the billing information sheet.

Other material to be published in the New Mexico register in conjunction with promulgation of the rule or В. amendment shall be delivered to the administrative law division at the time of filing. Examples include synopses, short-form publication, conversion tables, any technical information relied upon in formulating the final rule, any comments or other material received by agency during rule hearing, and summaries of public comment.

С. At the time of filing, an agency may submit to the administrative law division an additional paper copy, for annotation on the first page of the rule with the date and hour of filing, to be returned to the agency (Section 14-4-3 NMSA 1978).

D. If a short-form publication or synopsis is made in accordance with the requirements of 1.24.15 NMAC, the full text of the rule shall be submitted as part of the rule filing. The full text shall be published in the NMAC at no additional cost to the agency.



**E.** No rule shall be valid and enforceable until it is filed with the administrative law division and published in the New Mexico register as provided by the State Rules Act. If properly submitted and not published as a result of error, the rule shall be deemed to have been published three weeks after filing with the records center (Sections 14-4-3 and 14-4-5 NMSA 1978).

**F.** A valid purchase order number must be included on the billing information sheet at the time of filing. A purchase order must be submitted to the records center by paper or electronic version at least one business day prior to the publication date.

[1.24.10.16 NMAC - Rp, 1 NMAC 3.3.10.10, 2/29/2000; A, 6/30/2004; A, 9/15/2014; A, 11/30/2015; A, 7/1/2017]

### **1.24.10.17 REJECTED RULE FILINGS:**

**A.** The administrative law division shall refuse to file written material if it is not a rule as defined in the State Rules Act or if the materials submitted for rule filing do not conform to the style and format requirements detailed in 1.24.10 NMAC.

(1) Materials that are not rules may be filed as a publication.

(2) Rule filings that do not conform to style and format requirements shall be returned to the filing agency and shall not be filed or published in the New Mexico register.

(3) Rule filings that do not meet the minimum statutory time periods for notice of proposed rulemaking, public participation, and public comments shall be returned to the filing agency and shall not be filed or published in the New Mexico register.

**B.** The administrative law division shall identify material previously filed as a rule but not conforming to the definition of a rule. The material shall be removed from the rules collection and rule history database with 30 days written notice to the affected agency.

**C.** If an affected agency finds it previously filed material as a rule that does not conform to the definition of a rule, that agency shall notify the administrative law division in writing. If the administrative law division agrees the material does not conform to the definition of a rule, the material shall be removed from the rules collection and the rule history database within 30 days of receiving the notice.

[1.24.10.17 NMAC - N, 2/29/2000; A, 6/30/2004; A 9/15/2014; A, 11/30/2015; A, 7/1/2017]

### 1.24.10.18 AMENDMENTS OR REPEALS OF EXISTING RULES:

**A.** Amendments to a part shall be prepared by the agency in such a manner as to provide for full- section addition, substitution or deletion. Parts shall only be amended by replacement, deletion or addition of whole sections. Deleting, replacing or adding words and sentences to a section shall be accomplished by replacement of the whole section.

(1) If a section contains entirely new material, unrelated to the material formerly contained in the section with the same NMAC number, then the former section shall be repealed. The repeal shall be identified within the history note at the end of the section with the appropriate notation (see 1.24.10.20 NMAC).

(2) An addition of a new section is an amendment to the part.

(3) If an entire part is being amended, agencies shall have to file a repeal and replace of the part.

(4) The first sentence on the first page of the text of an amendment shall state, "This is an amendment to (insert appropriate title number, chapter number, part number) NMAC, Section (insert the section number of the amended sections), effective (insert appropriate effective date)." Example: This is an amendment to 1.12.10 NMAC, Sections 8, 9 & 10, effective June 1, 2015.

(5) For clarity, agencies may precede the text of an amendment with an explanatory paragraph to be published in the New Mexico register but which shall not be part of the rule or may publish a synopsis thereof.

**B.** Repeals shall be done by the issuing agency at the part level by identifying an expiration in the duration section of the part or by issuing a repealer. If less than a full part is being repealed, the rule filing shall be treated as an amendment. If other parts are affected by the repeal, they shall be amended as appropriate.

(1) If a part has been entirely rewritten and restructured so that a detailed section by section comparison is not possible, the agency may repeal the existing part and issue a new part with either the same or new part number as a repeal and replace. Where a new part number is used, an agency may record a reference to the pre-existing part in the historical note of the new part.

(2) The history note shall reflect the original NMAC effective date and number. When a part has been entirely repealed, its history shall be reflected in the history of the part, which shall remain in the NMAC.



(3) Once a part number has been used in the NMAC, the history of the part shall continue to contain all NMAC history for that part, regardless of repealers.

С. Superseding rule filings are not permitted. This activity shall be handled through amendment of the part or by repeal and replacement of the part.

[1.24.10.18 NMAC - Rp, 1 NMAC 3.3.10.12, 2/29/2000; A, 6/30/2004; A, 9/15/2014; A, 11/30/2015]

### 1.24.10.19 ERRORS IN THE NEW MEXICO ADMINISTRATIVE CODE:

Agencies may report errors at any time. Differences detected between the official and compiled rules shall A. be reported to the administrative law division, in writing, as soon as possible.

The administrative law division shall effect correction of differences detected in the NMAC as soon as В. possible.

In instances where there is a difference between the filed rule and the NMAC, the filed rule prevails.

D. If the filed rule is in error it shall be corrected by agency amendment or by written authority by agency to correct minor stylistic changes (numerical, punctuation, misspellings) if caught by administrative law division post-filing. [1.24.10.19 NMAC - N, 2/29/2000; A, 11/30/2015]

1.24.10.20 HISTORY NOTE: History notes facilitate the use of the NMAC and track the historical development of a rule provision.

A. There shall be a history note appended at the end of each section.

В. The history note shall contain the original effective date of sections filed after the implementation of NMAC. It shall also detail all subsequent amendments and number changes by section. Standard notations identified in this section shall be used to minimally identify the types of modifications made to sections.

(1)History shall appear in chronological sequence in brackets at the end of each section. A semicolon shall separate each significant change noted in the sequence of a section's history. Significant changes are: an amendment; a section number or name change; and an insertion of new rule material at a section number where previously repealed material had been located. Minimum dates required for each change are:

- effective date of new material; **(a)**
- **(b)** effective date of amended sections;
- (c) effective date of repealed material; and
- (d) effective date of the change to section numbers and names.

(2) If the section has been amended, note the new effective date and the nature of changes if possible. If the section has been renumbered, list the former number and the effective date of change.

(3)Agencies shall provide information, in addition to dates, in the history using the following system: Identify the short form of the affected part or section followed by a space, a dash, a space and then the letter or combination of letters identifying the type of change. The last date in a series indicates the date of the last change to the section. Use:

promulgation;

С.

(c) "Rp" for replaced, followed by a comma, followed by the short form citation of the rule

"A" for amendment, followed by a comma, a space and the effective date of amendment; "Re-pr" for re-promulgated, followed by a comma, a space and the effective date of re-

replaced, followed by a comma, a space and the effective date of replacement;

"Rn" for renumbered, followed by a comma, the former number, a space and the effective (d) date of renumbering; and

> "N" for new, followed by a comma, a space and the effective date of the new material; **(e)**

**(f)** "Repealed" for a section that is deleted and not replaced, followed by a comma, a space and the effective date of the deletion; and "E" for an emergency filing, in combination with the appropriate action code and a slash

(/).

С. The history note is not part of the rule.

(g)

(a)

(b)

[1.24.10.20 NMAC - Rp 1 NMAC 3.3.10.15.11.1 through 1 NMAC 3.3.10.15.11.3, 2/29/2000; A, 6/30/2004]



### 1.24.10.21 **HISTORY OF THE PART:**

Pre-NMAC history is the first division of the history of the part and shall contain the pre-NMAC Α. development of the rule material included in the part. The records center may add this material in brackets where it has not previously been part of the NMAC.

B. History of repealed material is the second division of the history of the part and shall contain repeals of NMAC parts or sections in full.

When a section is repealed and not replaced, using the short form, followed by a space, a dash, a (1)space, and then the word" repealed", a comma, a space and the effective date of the repeal.

> (2)When only a section is repealed, and replaced, that history remains in the section history note.

(3)When a part is repealed, the history of the part shall identify the part using the short form and the name, followed by a space, a dash, a space, the word "repealed", a comma, a space, and the effective date of the repeal. The history of repealed material shall be retained in the NMAC.

[1.24.10.21 NMAC - Rp 1 NMAC 3.3.10.15.11.1 & 1 NMAC 3.3.10.15.11.4, 2/29/2000; A, 11/30/2015]

### 1.24.10.22 **MATERIAL REFERENCED IN RULES:**

The source of material, which is fully included in the text of the rule, may be given as a citation. Where A. there is no intent to include in the rule additional material by incorporation from the cited reference, the source material need not be attached.

R. Referenced material (including standards, codes and manuals) incorporated or adopted by rule must be filed as part of that rule which may be accomplished by attachment.

(1) Referenced material that has been formally published does not need to meet style and format requirements of 1.24.10 NMAC. A copy of this formally published material must be filed.

Other attachments must meet all style, format and filing requirements, including provision of an (2) electronic copy, unless an exception has been granted pursuant to 1.24.10.24 NMAC.

References to United States U.S. law shall be deemed to be references to the current version of (3)such law, including subsequent amendments, unless otherwise expressly stated in the rule. References to U.S. law do not require submittal or a copy. In lieu of submitting a paper copy of these references, the issuing authority shall on the NMAC transmittal form list the references and internet site. This information shall be verified by the records center at the appropriate internet site to ensure access is available to users of the NMAC. If an internet site is not available or cannot be located, one paper copy of the attachment shall be filed with the rule for historical reference.

Referenced material, other than U.S. law (including material referenced in New Mexico statutes (4) or the NMAC), shall be the version filed with or referenced by the rule and shall not include any subsequent amendments or changes to the referenced material, unless otherwise expressly stated in the rule.

С. Referenced material that is not incorporated in the rule may be referenced in either the text or in an annotation. Annotations are not part of the rule.

[1.24.10.22 NMAC - Rp 1 NMAC 3.3.10.17.1 & 1 NMAC 3.3.10.17.2, 2/29/2000; A, 6/30/2004; A, 11/30/2015]

**REFERENCES TO COPYRIGHTED MATERIAL:** If an agency chooses to incorporate copyrighted 1.24.10.23 material into a rule, it shall receive permission from the copyright holder prior to such incorporation. Such permission shall include the right to incorporate such material into the NMAC and to have such material subject to the laws, rules and contractual obligations of the state with respect to the NMAC. Any costs for such permission shall be the responsibility of the incorporating agency. A copy of such copyright permission shall be submitted with the filing. Failure to provide copyright permission shall result in rejection of the rule filing.

[1.24.10.23 NMAC - Rp 1 NMAC 3.3.10.17.3, 2/29/2000]

1.24.10.24 EXCEPTIONS: Exceptions to any provision of 1.24.10 NMAC shall be requested in writing to the state records administrator and may be approved by the state records administrator on a filing-by-filing basis. [1.24.10.24 NMAC - Rp 1 NMAC 3.3.10.18, 2/29/2000]



### **1.24.10.25 PROCEDURE FOR APPROVAL OF NEW CHAPTERS AND PARTS:**

**A.** If a chapter on a specific subject does not exist in the NMAC hierarchy, an agency may send a written request to the state records administrator for the creation of a new chapter. If the state records administrator approves the request, a new chapter will be created in the NMAC.

**B.** In order to avoid any delay in filing a rule, agencies shall submit, in writing, proposed part names and numbers to the administrative law division of the records center. The administrative law division of the records center shall approve or reject proposed part names and numbers within two weeks or shall notify the agency of further delay in approval. When the administrative law division of the records center rejects part names and numbers, it shall propose alternative names and numbers for submitted parts and state the reason why the proposed names and numbers were unsatisfactory. [1.24.10.25 NMAC - Rp 1 NMAC 3.3.10.20, 2/29/2000; A, 6/30/2004]

### 1.24.10.26 NMAC TABLE OF CONTENTS:

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[1.24.10.26 NMAC - Rp 1 NMAC 3.3.10.21, 2/29/2000]

### HISTORY of 1.24.10 NMAC:

**Pre-NMAC History:** Material in the part was derived from that previously filed with the Commission of Public Records - State Records Center and Archives:

- SRC Rule 67-13, Style and Format for State Rules, 12/15/67
- SRC Rule 70-2, Style and Format for State Rules, 7/1/70
- SRC Rule 71-1, Style and Format for State Rules, 5/3/71
- SRC Rule 74-1, State Rules Format and Style, 4/8/74
- SRC Rule 79-2, State Rules Format and Style, 2/7/79
- SRC Rule 79-3, State Rules: Format, Style and Filing Requirements, 6/21/79
- SRC Rule 81-3, State Rules: Format, Style and Filing Requirements, 6/1/81 as amended through 6/16/95.

### History of the Repealed Material:

SRC 67-13 Style and Format for State Rules - Superseded, 7/1/70
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SRC 70-2 Style and Format for State Rules - Superseded, 5/3/71 SRC Rule 71-1 Style and Format for State Rules - Superseded, 4/8/74 SRC Rule 74-1 Style and Format for State Rules - Superseded, 2/7/79 SRC Rule 79-2 Style and Format for State Rules - Superseded, 6/21/79 SRC Rule 79-3 State Rules: Format, Style and Filing Requirements - Superseded, 6/1/81 SRC Rule 81-3 State Rules: Format, Style and Filing Requirements - Repealed, 1/1/96 1 NMAC 3.1 New Mexico Administrative Code - Repealed, 7/1/96 1 NMAC 3.3.10 New Mexico Administrative Code - Repealed, 2/29/2000

## **NEW MEXICO REGISTER**

TITLE 1GENERAL GOVERNMENT ADMINISTRATIONCHAPTER 24RULESPART 15NEW MEXICO REGISTER

**1.24.15.1 ISSUING AGENCY:** State Records Administrator. [1.24.15.1 NMAC - Rp 1 NMAC 3.3.15.1, 2/29/2000; A, 9/15/2014]

**1.24.15.2 SCOPE:** All state agencies. General provisions, including applicable definitions, are found in 1.24.1 NMAC. There are additional requirements on submitting a rule filing to the records center, see 1.24.10 NMAC. [1.24.15.2 NMAC - Rp 1 NMAC 3.3.15.2, 2/29/2000]

**1.24.15.3 STATUTORY AUTHORITY:** Subsection E of Section 14-4-7.1 NMSA 1978 directs the state records administrator to adopt and promulgate rules necessary for the implementation and administration of the New Mexico register. [1.24.15.3 NMAC - Rp 1 NMAC 3.3.15.3, 2/29/2000; A, 7/1/2017]

1.24.15.4 DURATION: Permanent.

[1.24.15.4 NMAC - Rp 1 NMAC 3.3.15.4, 2/29/2000]

**1.24.15.5 EFFECTIVE DATE:** February 29, 2000, unless a later date is cited at the end of a section. [1.24.15.5 NMAC - Rp 1 NMAC 3.3.15.5, 2/29/2000; A, 9/15/2014; A, 11/30/2015]

**1.24.15.6 OBJECTIVE:** The State Rules Act, Section 14-4-1 et seq. NMSA 1978, directs the state records administrator to publish a state register twice a month for notices of rule-making, proposed rules, adopted rules and other material relative to administrative law. The register provides a method for informing the public of rule-making activity within the executive branch of state government.

[1.24.15.6 NMAC - Rp 3.3.15.6, 2/29/2000]

#### 1.24.15.7 DEFINITIONS: [RESERVED]

[1.24.15.7 NMAC - Rp 1 NMAC 3.3.15.7, 2/29/2000]

## **1.24.15.8 REQUIREMENTS FOR AGENCIES RELATIVE TO PUBLISHING NOTICES AND RULES IN THE NEW MEXICO REGISTER:**

- A. Agencies shall publish in the New Mexico register:
  - (1) notices of rule-making; and

(2) adopted rules filed with the administrative law division of the state records center under the State Rules Act, either in full text, short-form publication or in synopsis; synopses shall have prior approval of the state records administrator and such approval shall also be published;

(3) emergency rules.

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B. Agencies may publish other materials related to administrative law at their discretion.

**C.** History notes, histories of the part, and amendments to history notes need not be published in the New Mexico register.

[1.24.15.8 NMAC - Rp 1 NMAC 3.3.15.8, 2/29/2000; A, 7/15/2003; A, 9/15/2014; A, 11/30/2015; A, 7/1/2017]

## **1.24.15.9 REQUIREMENTS FOR NOTICES:** All notices submitted for filing must conform to the following requirements:

The content of any notice of proposed rulemaking must have at least the following:

- (1) name of agency holding the hearing;
- (2) a summary of or the actual full text of the proposed rule;
- (3) a short explanation of the purpose of the proposed rule;
- (4) a citation to specific legal authority authorizing the proposed rule and the adoption of the proposed

(5) information on how a copy of full text of proposed rule may be obtained, if full text is not already included within the body of the notice;

(6) information on how a person may comment on proposed rule, where comments will be received and when comments are due;

(7) where and when the public rule hearing will be held, that includes the address, date and time and how a person may participate in the hearing;

(8) a citation to technical information, if any, that serves as a basis for the proposed rule and information on how the full text of the technical information may be obtained, if not already included within the body of the notice;

(9) an internet link providing free access to the full text of the proposed rule, if full text is not already included within the body of the notice.

The form of any notice must conform to the following:

- (1) the notice heading shall be in bold or capital letters and be centered at top of page;
- (2) the notice heading shall simply and accurately describe the rulemaking hearing;
- (3) the text of the notice shall be flush with the document's left margin; and,
- (4) the use of legal, case, or other headings is discouraged.

**C.** The administrative law division, as designation by the state records administrator, shall not accept for publication any notice of proposed rulemaking that does not on its face meet the statutory 30 day minimum time periods for public rule hearing, public participation and public comments. [1.24.15.9.NIMAC_N_11/202015: A. 7/1/2017]

[1.24.15.9 NMAC - N, 11/30/2015; A, 7/1/2017]

A.

В.

rule:

**1.24.15.10 REQUIREMENTS FOR SYNOPSES:** Synopses of adopted rules must be certified as giving adequate notice of the contents of the rule. If an agency chooses to submit to the register a synopsis of an adopted rule in place of the full text it shall:

A. Have legal counsel (the in-house attorney or its assigned assistant attorney general) review the synopsis for its adequacy of notice.

**B.** Have legal counsel certify that the synopsis gives adequate notice of the content of the rule, considering at least the following:

- (1) whether the subject matter is fully disclosed;
- (2) whether the persons affected are fully disclosed;
- (3) whether the interests of the persons affected are described;
- (4) whether geographical applicability is clearly stated;

(5) where a rule incorporates commercially published material (such as the Code of Federal

Regulations, Uniform Plumbing Code, etc.) and such material is a substantial portion of the rule, whether such material is clearly identified in the synopsis;

(6) whether the telephone number and address of the issuing agency or a URL are provided for obtaining the full text of the rule; and

(7) whether the effective date of the rule is clearly stated.

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**C.** Include with the synopsis the following certification by the agency's legal counsel that will be printed in the register along with the synopsis:

## I CERTIFY THAT THIS SYNOPSIS GIVES ADEQUATE NOTICE OF THE CONTENTS OF THE RULE DESCRIBED ABOVE

THIS _____ DAY OF ______ 20___

BY: (name of certifying attorney)

(3)

**D.** The records center shall not ordinarily accept synopses of rules for publication in the register.

(1) Exceptions may be granted for a rule on a one-time-only basis if the state records administrator determines "that publication in the register of the full text of an adopted rule would be unduly cumbersome, expensive or otherwise inexpedient."

(2) Exceptions may be granted for a rule when an agency can demonstrate that a synopsis might be more informative than publication. This might be the case when a single word is added, grammar is corrected or the proposed change is so minor as to make publication of the full section unreasonable.

If an agency wishes to request an exception:

(a) the request must be submitted to the state records administrator in writing, in hard copy, along with hard copies of the proposed synopsis, the certificate of adequate notice, and the full text of the rule at least 30 days prior to the intended filing date of the rule;

(b) the request shall disclose how the agency intends to provide complete copies of the rule to the affected persons and entities.

(4) The state records administrator shall provide a written response to the request.

(5) If the synopsis is approved, a copy of the written approval for the exception by the state records administrator must be included as part of the synopsis when it is published.

(6) For guidance on filing temporary emergency rules in synopsis form see 1.24.20 NMAC. [1.24.15.9 NMAC - Rp 1 NMAC 3.3.15.8, 2/29/2000; 1.24.15.10 NMAC - Rn, 1.24.15.9 NMAC, 11/30/2015]

#### 1.24.15.11 REQUIREMENTS FOR SHORT-FORM PUBLICATION:

A. Where a part is amended, an agency may select to publish just the section being modified.

**B.** Where changes are minor, an agency may choose to publish only the full text that is actually being changed.

(1) When less than a section is proposed to be published, the agency shall provide an explanatory paragraph describing the context and effect of the amendment.

(2) The full text of all changes being made by the amendment shall be published. At a minimum the published text shall be a full paragraph, but not less than a sentence.

(3) Legal counsel shall review any explanatory paragraph to ensure that the publication gives adequate notice of the amendment. In reviewing adequacy of notice, legal counsel shall consider the same elements as contained in 1.24.15.9 NMAC.

**C.** Publication of less than the full rule in the New Mexico register shall not affect filing requirements under 1.24.10 NMAC.

[1.24.15.10 NMAC - N, 2/29/2000; 1.24.15.11 NMAC - Rn, 1.24.15.10 NMAC, 11/30/2015]

#### 1.24.15.12 TECHNICAL REQUIREMENTS FOR PUBLISHING IN THE NEW MEXICO REGISTER:

**A.** All agencies shall submit adopted rules in electronic format according to criteria established in 1.24.10.13 NMAC. Where requirements of 1.24.10 NMAC are met, referenced material need not otherwise be included. Electronic copies of notices and proposed rules may be submitted via e-mail, provided a paper copy is also faxed to the records center.

**B.** Each rule filing or notice shall be accompanied by a separate electronic document called the billing information sheet that contains the following information:

- (1) agency and division (if applicable) names;
- (2) three-digit agency DFA account code (for billing);
- (3) contact person's name, address, phone number and e-mail address;

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- (4) part name(s) or document name(s);
- (5) part number(s), if applicable;
- (6) file names of electronic documents with application extension;
- (7) New Mexico register volume number, issue number, and publication date;
- (8) name of assigned administrative law division analyst; and
- (9) purchase order number.

**C.** The agency shall submit one electronic copy of notices of rule-making or adopted rules to the administrative law division for submission to the New Mexico register.

(1) Agencies that do not deliver both an original paper copy and one electronic version of an adopted rule shall have the rule rejected.

(2) Material that is filed after the cut-off date for publication shall be published in the next issue, and, if necessary, the effective date shall be modified. For emergency rule filings under unique circumstances and only if not in conflict with any other statute, the state records administrator has authority to allow publication of material filed after submittal deadline.

(3) Submissions for publication in the New Mexico register shall comply with the standards established in Subsections B and C of 1.24.10.13 NMAC.

[1.24.15.11 NMAC - Rp, 1 NMAC 3.3.15.9, 2/29/2000; A, 7/15/2003; A, 9/15/2014; 1.24.15.12 NMAC - Rn & A, 1.24.15.11 NMAC, 11/30/2015]

**1.24.15.13 CHARGES FOR PUBLISHING IN THE NEW MEXICO REGISTER:** There shall be a \$3.00 per column inch charge to agencies publishing material in the New Mexico register. All material shall be published in the New Mexico register shall use Word document Times New Roman, 10-point font.

[1.24.15.12 NMAC - Rp, 1 NMAC 3.3.15.10, 2/29/2000; A, 7/15/2003; A, 7/1/2009; A, 10/15/2014; 1.24.15.13 NMAC - Rn, 1.24.15.12 NMAC, 11/30/2015; A, 1/1/2017; A, 7/1/2017]

[Charges for publishing in the New Mexico register are also found in 1.13.2.18 NMAC.]

#### 1.24.15.14 FEES FOR COPIES OF THE NEW MEXICO REGISTER:

- A. Individual copies of the New Mexico register shall be \$12.00.
- **B.** Annual paper subscription fees for the New Mexico register shall be \$270.00.

[1.24.15.13 NMAC - Rp, 1 NMAC 3.3.15.11 & 1 NMAC 3.3.15.12 & 1 NMAC 3.3.15.13 & 1 NMAC 3.3.14, 2/29/2000; A, 7/15/2003; A, 7/1/2009; 1.24.15.14 NMAC - Rn, 1.24.15.13 NMAC, 11/30/2015] [Fees for copies of the New Mexico register are also found in 1.13.2.19 NMAC.]

#### HISTORY OF 1.24.15 NMAC:

**Pre-NMAC History:** Material in this part was derived from that previously filed with the Commission of Public Records - State Records Center and Archives: SRC Rule 90-10, Requirements for the Submission of Notices, Rule Material, and Other Material Relative to Administrative Law to the New Mexico State Register, 8/1/90.

#### **History of Repealed Material:**

SRC 90-10 Requirements for the Submission of Notices, Rule Material, and Other Material Relative to Administrative Law to the New Mexico State Register - Superseded, 1/1/95

1 NMAC 3.3.15 New Mexico Register - Repealed, 2/29/2000

**Appendix K** 

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Commission of Public Records

## DEFAULT PROCEDURAL RULE FOR RULEMAKING

## TITLE 1GENERAL GOVERNMENT ADMINISTRATIONCHAPTER 24RULESPART 25DEFAULT PROCEDURAL RULE FOR RULEMAKING

1.24.25.1ISSUING AGENCY: New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM87501.

[1.24.25.1 NMAC - N, 04/10/2018]

**1.24.25.2 SCOPE:** State agencies that have not adopted their own procedural rules consistent with the State Rules Act, Sections 14-4-1 to -11 NMSA 1978 (1967, as amended through 2017). [1.24.25.2 NMAC - N, 04/10/2018]

**1.24.25.3 STATUTORY AUTHORITY:** Section 14-4-5.8 NMSA 1978. [1.24.25.3 NMAC - N, 04/10/2018]

**1.24.25.4 DURATION:** Permanent.

[1.24.25.4 NMAC - N, 04/10/2018]

**1.24.25.5 EFFECTIVE DATE:** April 10, 2018, unless a later date is cited at the end of a section. [1.24.25.5 NMAC - N, 04/10/2018]

**1.24.25.6 OBJECTIVE:** To provide default procedural rules for public rule hearings for use by agencies that have not adopted their own procedural rules consistent with the State Rules Act and to facilitate public engagement with the administrative rulemaking process in a transparent, organized, and fair manner. [1.24.25.6 NMAC - N, 04/10/2018]

**1.24.25.7 DEFINITIONS:** This rule adopts the definitions found in Section 14-4-2 NMSA 1978. [1.24.25.7 NMAC - N, 04/10/2018]

#### 1.24.25.8 AGENCY ADOPTION OF PROCEDURAL RULES:

**A.** Agencies that have not adopted their own procedural rules consistent with the State Rules Act shall apply these default rules, until such time as they have adopted their own rules.

**B.** Agencies may adopt these default rules, in whole or in part as their own, or continue to use their existing rules, so long as those rules satisfy the requirements of the State Rules Act and provide as much opportunity for public participation as provided by these rules.

**C.** Agencies that adopt their own rules must submit a copy to the office of the attorney general within 30 calendar days of adoption, and post a copy of those rules on the agency's website, if one exists. [1.24.25.8 NMAC - N, 04/10/2018]

#### 1.24.25.9 INITIATION OF THE RULEMAKING PROCESS BY AN AGENCY:

A. The rulemaking process may be initiated by an agency when a notice for a rule hearing is publicly posted pursuant to this rule.

**B.** The agency shall proceed with the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing in accordance with the State Rules Act and any other applicable law.

**C.** If the agency is a public body subject to the Open Meetings Act, the decision to initiate the rulemaking process must be an action taken by vote of the public body in open session.



D. Once the agency initiates the rulemaking process, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978.
[1.24.25.9 NMAC - N, 04/10/2018]

1.24.25.10 INITIATION OF THE RULEMAKING PROCESS BY THE PUBLIC:

**A.** Any person may file a petition for rulemaking with an agency.

**B.** A petition for rulemaking shall be made in writing and include an explanation of the purpose or statement of reasons for the proposed rule. A petition shall include a citation to the legal authority authorizing the agency to adopt the rule and a copy of or citation to technical information, if any, that serves as the basis for the proposed rule. A petition should be as clear as possible and may include the proposed rule in underline and strikethrough format, consistent with requirements of the state records administrator.

**C.** The agency to which a petition is made shall, if required by law, consider the petition and make a determination whether to grant or deny the petition. If the agency denies the petition, it shall issue a concise written statement explaining its reason for denial. No affirmative duty to respond to a public petition is created by these rules. If a public right to petition an agency exists in law, the agency must follow all timelines or responses governed by law of the agency.

**D.** If the agency is a public body subject to the Open Meetings Act, the decision to grant a petition must be an action taken by vote of the public body in open session.

E. Once the agency initiates the rulemaking process, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978.

[1.24.25.10 NMAC - N, 04/10/2018]

**1.24.25.11 RULEMAKING NOTICE:** The agency shall provide to the public, as defined in Section 14-4-2 NMSA 1978, notice of the proposed rulemaking a minimum of 30 calendar days prior to the public rule hearing and in accordance with requirements of Section 14-4-5.2 NMSA 1978. [1.24.25.11 NMAC - N, 04/10/2018]

#### 1.24.25.12 WRITTEN COMMENT PERIOD:

A. The public comment period must be at least 30 calendar days, beginning after publication of the notice in the New Mexico register and issuance of the rulemaking notice. The agency shall not adopt a proposed rule before the end of the public comment period.

**B.** A person may submit, by mail or electronic form, written comments on a proposed rule, and those comments shall be made part of the record. Written comments may be submitted through the end of the public comment period.

**C.** The agency may decide to amend the comment period if it provides to the public, as defined in Section 14-4-2 NMSA 1978, notice of the changes.

**D.** The agency shall 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. All written comments received by the agency shall also be available for public inspection at the main office of the agency. [1 24 25 12 NMAC + N + 04/10/2018]

[1.24.25.12 NMAC - N, 04/10/2018]

#### 1.24.25.13 PUBLIC HEARING:

**A.** Prior to adopting a proposed rule, the agency must hold a public rule hearing. The purpose of the hearing is to provide all interested persons a reasonable opportunity to submit data, views or arguments orally or in writing on the proposed rule. The agency, at its sole discretion, may determine whether to hold more than one hearing.

**B.** The agency may act as the hearing officer or designate an individual hearing officer to preside over the hearing. The hearing officer may ask questions and provide comments for clarification purposes only, but should refrain from providing opinions or engaging in discussion regarding the merits of the proposed rule or any public comment presented.. The hearing officer shall identify and mark all written comments submitted during the public comment period, as well as any written comments submitted during the hearing. The public comment should be labeled as exhibits for reference, but do not require formal admission into the hearing record.

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**D.** Individuals wishing to provide public comment or submit information at the hearing must state their name and any relevant affiliation for the record and be recognized before presenting. Public comment shall not be taken under oath unless required by law or separate rule of the agency. Any individual who provides public comment at the hearing may be questioned by the agency or hearing officer or, at the discretion of the agency or hearing officer, or as otherwise provided by law, by other persons at the hearing.

**E.** The hearing shall be conducted in a fair and equitable manner. The agency or hearing officer may determine the format in which the hearing is conducted (e.g. introduction of each part or section one at a time for comment), but the hearing should be conducted in a simple and organized manner that facilitates public comment and a clear rulemaking record.

**F.** The rules of evidence do not apply to public rule hearings and the agency or hearing officer may, in the interest of efficiency, exclude or limit comment or questions deemed irrelevant, redundant, or unduly repetitious.

**G.** The agency must hold the hearing in a venue that reasonably accommodates all persons who wish to participate or observe, and appropriate audio equipment should be secured to ensure all in attendance can hear the proceeding and be heard when presenting comment. Reasonable efforts shall be made to accommodate the use of audio and video recording devices. Hearings shall be open to the public, but are not subject to the New Mexico Open Meetings Act, unless conducted by a quorum of a public body.

**H.** The hearing shall be recorded by any stenographic method in use in the district court or by audio recording. [1.24.25.13 NMAC - N, 04/10/2018]

#### 1.24.25.14 RULEMAKING RECORD AND ADOPTION OF RULE:

**A.** The agency shall maintain a record of the rulemaking proceeding as required in Section 14-4-5.4 NMSA 1978, and any written comment, document, or other exhibit entered into the record during the rule hearing shall be labeled clearly. Pre-filed written comments are part of the rulemaking record without the need for formal admission. Pre-filed comments include, but are not limited to: the petition; public notices of the rulemaking, including any lists of individuals to whom notice was mailed or sent electronically; the proposed rule in underline and strikethrough format; and any written comment submitted during the comment period prior to the rule hearing. Written comments or other documents introduced during the hearing should be admitted into the record after being marked as an exhibit.

**B.** If the rule hearing is conducted by a designated hearing officer, the complete rulemaking record, including any memoranda summarizing the contents of the hearing, if written, shall be compiled and forwarded to the agency head or members of the board or commission with sufficient time to review. The agency head or members of the board or commission shall familiarize themselves with the rulemaking record before rendering a decision on the proposed rule.

**C.** The agency may adopt, amend or reject the proposed rule. Any amendments to the proposed rule must fall within the scope of the current rulemaking proceeding. Amendments that exceed the scope of the noticed rulemaking may require a new rulemaking proceeding. Amendments to a proposed rule may fall outside of the scope of the rulemaking based on the following factors:

(1) any person affected by the adoption of the rule, if amended, could not have reasonably expected that the change from the published proposed rule would affect the person's interest;

(2) subject matter of the amended rule or the issues determined by that rule are different from those in the published proposed rule; or

(3) effect of the adopted rule differs from the effect of the published proposed rule.

**D.** In instances where the agency is a board or commission, consideration and approval of adoption of the proposed rule shall occur during a public meeting.

**E.** The date of adoption of the proposed rule shall be the date the concise explanatory statement is signed by the agency, unless otherwise specified in the concise explanatory statement.

The concise explanatory statement shall include, but not limited to, the following:

- (1) citation to specific statutory or other authority authorizing the rule;
- (2) effective date of the rule;
- (3) date of adoption of the rule, if different than the date of the concise explanatory statement;

(4) if the agency is a board or commission, the date of the meeting at which the agency voted to approve the adoption of the rule;

F.

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(5) reasons for adopting the rule, including any findings otherwise required by law of the agency, and a summary of any independent analysis done by the agency;

(6) reasons for any change between the published proposed rule and the final rule; and

(7) reasons for not accepting substantive arguments made through public comment.

[1.24.25.14 NMAC - N, 04/10/2018]

#### **1.24.25.15** FILING AND PUBLICATION; EFFECTIVE DATE:

A. Within 15 calendar days after the date of adoption of a rule, the agency shall file the adopted rule with the state records administrator and shall provide to the public the adopted rule and concise explanatory statement in accordance with the State Rules Act.

**B.** Unless another date is stated in the agency's concise explanatory statement, or otherwise provided by law, the effective date of the rule shall be the date of publication in the New Mexico register.

[1.24.25.15 NMAC - N, 04/10/2018]

1.24.25.16 EMERGENCY RULES:

The agency shall comply with the rulemaking procedures in Section 14-4-5.6 NMSA 1978, regarding the promulgation of emergency rules.

[1.24.25.16 NMAC - N, 04/10/2018]

#### HISTORY OF 1.24.25 NMAC: [RESERVED]

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## **NOTES:**

Administrative Law Division

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# Effective Practice and Practice Pitfalls to Avoid in Administrative Proceedings

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## EFFECTIVE PRACTICE AND PRACTICE PITFALLS TO AVOID IN ADMINISTRATIVE PROCEEDINGS

## Administrative Adjudicatory Hearing at New Mexico Public Regulation Commission

- Commission may appoint hearing examiner to preside: § 8-8-14(A)
- Witnesses prefile written testimony in question and answer format before the hearing
- Hearing Examiner issues recommended decision or certification of stipulation: § 8-8-14(B)
- Parties may file exceptions: § 8-8-14(B)
- Commission issues final order
- Commission final orders appealed directly to New Mexico Supreme Court
- ✤ NMPRC Rules of Procedure: 1.2.2 NMAC

## Standard of Proof in Administrative Proceedings



- The standard of proof in administrative proceedings is, unless expressly provided otherwise, the preponderance of the evidence. 4 Stein & Mitchell, Administrative Law, § 24.03 (2016).
- Preponderance of the evidence means the greater weight of the evidence. Campbell v. Campbell, 1957-NMSC-001, ¶ 24, 62 N.M. 330. It is evidence that, when weighed with that opposed to it, has more convincing force. It has superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. Black's Law Dictionary 547 (2nd pocket ed. 2001).
- The evidentiary standard of proof for orders and decisions issued in administrative adjudications (preponderance of the evidence) is often confused with the appellate standard of review of substantial evidence, which is applied by the New Mexico Supreme Court in reviewing NMPRC orders. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. E.g., New Mexico Attorney General vs. New Mexico Pub. Regulation Comm'n, 2015-NMSC-032, ¶ 9.



## Hearsay



- Rules of evidence generally do not apply to administrative hearings. E.g., Scanlon v. Las Cruces Pub. Sch., 2007-NMCA-150, ¶ 21, 143 N.M. 48
- Subject to legal residuum rule: when a substantial right, such as one's ability to earn a livelihood, is at stake, administrative action must be supported by some evidence that would be admissible in a trial. *Bransford v. State*, 1998-NMCA-077, ¶ 18, 125 N.M. 285
- PRC Rule 1.2.2.35(A)(2) NMAC: "In passing upon the admissibility of evidence the presiding officer shall give consideration to, but shall not be bound by, the New Mexico rules of evidence which govern proceedings in the courts of this state."
- A common ruling is that an objection goes to the weight, not admissibility, of challenged testimony or documents.



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## Cross Examination of Expert Witness



#### 1. Rule 11-703 NMRA

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

#### Notes:

- Permits expert to base opinion on evidence that is inadmissible under the hearsay, authentication and best evidence rules
- Expert can testify about that inadmissible evidence if its probative value outweighs its prejudicial effect
- Expert cannot testify about nontestifying expert's report if testifying expert did not rely on report. Wilson v. Leonard Tire Co., 1976-NMCA-111, ¶ 9, 90 N.M. 74

## **Cross Examination of Expert Witness**

#### 2. Rule 11-803(18) NMRA

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(18) Statements in learned treatises, periodicals, or pamphlets. A statement contained in a treatise, periodical, or pamphlet, if

(a) the statement is called to the attention of an expert witness on crossexamination or relied on by the expert on direct examination, and

(b) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

#### Notes:

- Expert must be on stand to explain and assist in application of treatise
- Treatise becomes substantive evidence
- Proponent of treatise must prove that it is reliable. Factors include whether treatise was prepared for litigation purposes, whether it was subjected to peer review or public scrutiny and whether it is generally accepted as authoritative in the professional community
- Provides alternative to expert testimony in that the treatise writer is not testifying
- Treatise that satisfies Rule 11-803(18) NMRA may be excluded under Rule 11-702 NMRA if unreliable
- Absent highly unusual circumstances, articles not subject to peer review should not be admitted under the learned-treatise exception. Examples: articles from popular magazines, books on medical topics published for general public
- A periodical article should be considered a reliable authority only if the article reflects a "textbook" theory or has been subject to sufficient efforts at replication and reinterpretation to be considered "standard and trustworthy in the profession." Kaye, Bernstein & Mnookin, The New Wigmore: Expert Evidence. § 5.4.2(f) (2nd ed. 2010).

## **Cross Examination of Expert Witness**



#### 3. Rule 11-602 NMRA

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to testimony by an expert witness under Rule 11-703 NMRA.

#### Note:

If expert did not rely on facts or data in forming opinion, testimony about facts or data is subject to personal knowledge requirement. Huffman v. Turner Indus. Group, 2013 WL 2297206 (E.D. La. 5-24-13)

# ALJ has authority to issue bench requests. See Las Cruces Professional Fire Fighters v. City of Las Cruces, 1997-NMCA-031, 123 N.M. 239 Mountain States Tel & Tel Co. v. New Mexico State Corp. Comm'n, 1977-NMSC-032, 1 19, 90 N.M. 325 ("It is difficult to conceive of a more clear and all-inclusive grant of power to a governmental agency. The Commission has a duty to be a prime mover in the procedure to see that the public interest is protected by establishing reasonable rates and that the utility is fairly treated so as to avoid confiscation of its property. Considering this broad mandate it could hardly be envisioned that the commissioners would sit as spectators, like Roman Emperors in the collseum, and sin the arena.") National Labor Relations Bd. v. Overseas Motors, Inc., 818 F.2d 517, 520 (6th Cir, 1987) ("An ALJ can interrupt or question witnesses in order to clarify testimony."). Focus of administrative hearings not on winners/losers but on public interest, best interest of child, etc. Due process requires opportunity to reply to response to bench request.

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## Whether Agency Guidance Documents Are Rules

- On Jan. 25, 2018, the Department of Justice issued a memorandum prohibiting DOJ litigators from treating any agency guidance document as presumptively or conclusively establishing that a party violated an applicable statute or regulation in a DOJ enforcement action brought in federal court. The memorandum does not prohibit a regulated entity from relying on guidance documents for legal defense.
- Examples of agency guidance documents:
  - a) questions and answers posted on agency website
  - **b)** agency forms
  - c) training materials for agency staff
  - d) guides directed to the general public
  - e) memoranda from agency leaders to agency staff

## Whether Agency Guidance Documents Are Rules

- Federal Administrative Procedures Act generally requires notice-and-comment procedure in rulemaking but exempts two subcategories of guidance documents: "interpretative rules" and "general statements of policy" (5 U.S.C. § 553(b)(A)). Interpretive rules are used to explain the meaning of an existing provision of law. Policy statements are used to explain how an agency intends to use a discretionary power. Under the federal APA, rules have the force of law; guidance documents do not. A common issue is whether a guidance document is really a rule in disguise that should have been subject to a notice and comment procedure. See Ronald Levin, Rulemaking and the Guidance Exemption, 70 Admin. L. Rev. 263 (2018); Connor Raso, Strategic or Sincere? Analyzing Agency Use of Guidance Documents, 119 Yale L.J. 782 (2010).
- The NM State Rules Act (§§ 14-4-1 to 14-4-11) requires that, to have any validity, a rule must be submitted to the state records administrator for publication. State Rules Act says that a "rule":

means any rule, regulation, or standard, including those that explicitly or implicitly implement or interpret a federal or state legal mandate or other applicable law and amendments thereto or repeals and renewals thereof, issued or promulgated by any agency and purporting to affect one or more agencies besides the agency issuing the rule or to affect persons not members or employees of the issuing agency, including affecting persons served by the agency. (§ 14-4-2(F))

## Whether Agency Guidance Documents Are Rules



#### Relevant New Mexico Cases

1. Princeton Place v. New Mexico Human Servs. Dep't, 2018-NMCA-036, cert. granted (5-21-18): HSD proposed recoupment of Medicaid payments for services provided to nursing home (Princeton) because Princeton did not comply with DOH nursing home preadmission screening regulations for resident "J.F." On appeal, amicus argued that HSD could not treat failure to comply with instructions appended to screening Form as a rule violation. The Court of Appeals said that because the Form and instructions were not promulgated pursuant to the State Rules Act, errors in completing the form could not serve as the basis for the proposed recoupment. The Court held that "insofar as the Director and district court's decisions upholding the proposed Medicaid recoupment from Princeton relied upon the finding that [Princeton] incorrectly checked 'No' to Question 5 on the PASARR Form, this determination was not a violation of law." 2018-NMCA-036, ¶ 31.

## Whether Agency Guidance Documents Are Rules



#### 2. State v. Joyce, 1980-NMCA-086,

**94 N.M. 618**: statement of policy by State Museum Board of Regents reserving particular area exclusively for Native American merchants was a "rule" within meaning of State Rules Act. However, policy was unenforceable because it had not been filed with the State Records Office. At the time, State Rules Act included "statement of policy" in definition of "rule." State Rules Act was amended in 2017 to delete "statement of policy" from definition of "rule." 3. See also Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 1979-NMSC-090, 93 N.M. 546: a standard is a rule if the proper procedure has been followed in promulgating it. Reversing Court of Appeals' holding that it had no power to review standards, which the Court of Appeals distinguished from regulations.

## Whether Agency Guidance Documents Are Rules



**4.** But see Muffoletto v. Christus St. Vincent Reg'l Med. Ctr., 157 F. Supp. 3d 1107 (D. N.M. 2015): Court relied on guidance on Human Rights Bureau's website to refute plantiff's argument that she should not have been required to exhaust her administrative remedies

## Objecting

- Once is plenty
- Don't argue with the ALJ

#### Effective Practice and Practice Pitfalls to Avoid Administrative Proceedings

#### Hon. Rachel A. Bayless

#### 2018 Administrative Law Institute October 19, 2018

#### **DUE PROCESS AND DISCOVERY IN ADMINISTRATIVE PROCEDURES**

- Due Process
  - Notice and Opportunity to be Heard
    - "In general, the right to due process in administrative proceedings contemplates only notice of the opposing party's claims and a reasonable opportunity to meet them." [Archuletaⁱ, ¶¶ 32-36]
  - How Much Process is Due? "It Depends"
    - Due Process is "not a technical conception with a fixed content unrelated to time, place, and circumstances." [Mathews ii]
    - Due Process is "flexible and calls for such procedural protections as the particular situation demands." [*Mathews*]
    - New Mexico courts have held that the *Mathews* test determines what process is due in an administrative proceeding. [*City of Albuquerque v. Chavez* ⁱⁱⁱ, ¶13; *Archuleta*, ¶31]
    - *Mathews v. Eldridge* test involves balancing:
      - (1) Individual's interests
      - (2) Administrative body's interests
      - (3) Risk of erroneous deprivation of private interest through procedures used
      - (4) Probable value of additional or substitute procedural safeguards
  - Administrative proceedings "that affect a property or liberty interest [also] must comply with due process." [*Archuleta*, ¶31]

#### • Right to Discovery?

- Generally no, BUT
  - When governing statutes and regulations are silent regarding discovery, as a general rule "there is no constitutional right to pretrial discovery in administrative hearings."^{iv}
- Judge' Discretion Given Deference
  - ALJs have discretion in deciding whether to require, permit, or disallow discovery. To constitute a proper exercise of discretion, the decision regarding discovery must be reasonable and grounded in a rational basis. [Archuleta, ¶¶ 17, 20]
  - "Since administrative agency hearings are less formal than court proceedings, and agencies are ordinarily entrusted with judging the conduct and extent of discovery in the first place, courts generally review such determinations with extreme deference." [Archuleta, ¶16].
  - While a party has no constitutional right to pre-trial discovery, the facts and circumstances of a particular case might call for depositions or other discovery "to afford a party a meaningful opportunity to prepare" and ensure fundamental fairness, as required by the Due Process Clause. [Dente¹, ¶ 8 (citing Silverman^v].
- Rules of Evidence do not apply ... unless they do
  - "The rules of evidence are inapplicable [in administrative proceedings] in order to facilitate rather than hinder discovery and to allow a full opportunity to prepare." [Archuleta, ¶ 21 (citing Redman ^{vi})]
  - Rules of Evidence apply to hearings before the Workers' Compensation Administration
    - Director's Administrative Hearings 11.4.5.15(A)
    - Adjudicated Claims Before WC Judges 11.4.4.13(K) (10/01/2015) and Valenzula vii

#### • Practice Pointer: Learn Agency Discovery Processes

- Processes and rules governing administrative hearings are different across agencies, so know what applies to your proceeding
- First Step: Review agency's enabling statute and learn what hearing powers are vested in agency and ALJ
  - Ex. "Good Cause" is standard in workers' compensation matters. [NMSA 1978, 52-5-7]
- Review agency regulations or other internal procedures that govern hearings
  - New Mexico Administrative Code (NMAC)
  - Agency Website
  - Agency interpretative memos
  - Sunshine Portal

#### • Inspection of Public Records Act (IPRA)

- Can be a discovery tool to gather information about the agency, whether as a party or as the tribunal
  - Decisions similar to your case
  - Research decisions by your ALJ
  - Agency interpretation of regulations or enabling statute
- Narrowly tailor to get what you really need i.e., avoid putting the agency's legal staff on the defensive

#### • Depositions

- If permitted, will likely be governed by Rules of Civil Procedure for District Courts (1-030 NMRA)
- Objections Rule 1-030(D)(1)
  - Stated concisely and in an non-argumentative and non-suggestive manner
  - Only made as to "form" and "foundation", unless questioning party asks for specification of the defect

- What would you do in this deposition?
  - Q: Have you learned employer's policies?
  - A: Yes. We review them once a year.
  - Q: That wasn't my question. I asked have you learned employer's policies? [Any objection?]
  - A: Yes. I review them once a year.
  - Q: That wasn't my question. Reviewing isn't the same as learning. Have you learned employer's policies? [Any objection? How does defending attorney make a record?]
- Remember to make your record
  - If taking attorney, ask objecting attorney to state basis of a form objection and then try to correct any deficiency to avoid later disputes over the objection of admissibility of testimony
  - While speaking objections are not permitted, most judges won't fret over limited, rule abiding speaking objections necessary to make a record or to lay a foundation for suspending the deposition
  - If the deposition is your only trial testimony from that witness, it may be necessary to file a pretrial motion to obtain a ruling on objections

#### VIEW FROM THE BENCH

- **Preparation Matters** "By failing to prepare, you are preparing to fail." Benjamin Franklin
  - Get to Know Your ALJ
    - Are prior decisions available to review?
      - How has ALJ decided similar cases?
      - Do past decisions give insight into how ALJ applies procedures or rules?
    - Ask for feedback from others who have experience with that judge
      - What about openings, findings / conclusions, closings?
    - Does the ALJ have quirks? Do your best to adapt to them
    - Does the ALJ have pet peeves? Do your best to avoid them
    - Read notices and orders from the court, especially if you have little experience with that ALJ
  - Know Your Evidence
    - Identify the elements you have to prove and identify all evidence that proves that element
    - Don't take for granted that your best evidence will be admitted. Have a backup plan
    - Organize and bate stamp your evidence for easy reference
    - Draft Findings and Conclusions to prepare for trial, with specific references to evidence
  - Make Your Record especially is you anticipate an appeal
    - If allowed, submit written pretrial motions to narrow issues where possible
    - Best places to make your record
      - Written pretrial motions or trial preliminary matters
      - At conclusion of case in chief
      - Motions to reconsider
    - Offers of Proof
      - Don't forget about them when evidence is excluded!
      - "A hearing officer cannot rule on the factual and legal issues and at the same time both deny offers of proof and strike from the record the evidence on which the determinations are made." [*Erica* viii]

#### • Manners Maketh the Lawyer

- Every lawyer earns a reputation based on their manners, behavior, and work ethic
- Avoid becoming "THAT" lawyer
  - That lawyer who fails to check their ego at the door
  - That lawyer who makes all matters and cases personal
  - That lawyer who fights for the sake of fighting
  - That lawyer who makes every case more difficult that it needs to be
  - That lawyer who never responds to emails or calls
  - That lawyer opposing counsel dread dealing with
  - That lawyer who makes judges groan when seeing the lawyer's name on the docket
    - Assume your hearing officer or judge will find out if you behave badly and always strive to go high, even when "THAT" lawyer goes low
- Be Respectful always and no matter what
  - Treat others as you would want yourself, your client, or your witnesses to be treated
  - Give your ALJ the same level of respect you would give a district court judge in a court room proceeding [may not wear a robe, but called on to make decisions that affect individual's lives]
  - Cell phones just don't. Nothing annoys an administrative law judge more than catching an attorney texting or checking their email during a hearing.
- Be Punctual
  - Follow court deadlines. It is better to ask permission for an extension than forgiveness for missing a deadline
  - Be on time especially for telephonic hearings
  - Prepare your argument for the amount of time allowed for hearing
  - Be mindful that your case may not be the only case on your ALJ's docket for the day
  - Manage your schedule to avoid conflicts
    - Don't assume hearing will take less time than noticed
    - Don't schedule hearings so close that you could be double booked

#### • Never Make Your Judge Break a Sweat

- Don't Ask Your Judge to Referee Spats
  - Work out disagreements before involving the judge whether about written discovery, depositions, or trial objections
  - Always confer in good faith
  - If you find yourself saying "he started it", assess what you did to contribute to the situation and admit it
  - If you are going to file for sanctions, have a really good reason and be prepared for the fallout
- Avoid Document Dump and Runs
  - If both parties want to offer the same exhibit, agree on joint exhibits
  - Stipulate to admission of exhibits whenever possible
  - Give your ALJ organized exhibits with a table of contents and bate stamped page references
  - Direct the ALJ to the evidence that supports your arguments findings and conclusions with citations are a perfect tool
  - Make arguments based on actual evidence -- don't make your ALJ search for evidence that doesn't exist
- Case Law Citations
  - Cite the case correctly i.e., make sure the case you cite actually stands for the proposition
  - Have the citation handy
  - Have a copy of the case as a courtesy to the ALJ
- Avoid *ex parte* communications
  - Emails to a judge are almost always a bad idea
    - Someone almost always forgets to "reply all"
    - How do these become part of the Court record?
    - If you "need" to say it, put it in a pleading
  - Don't risk your judge walking away from an innocent hallway conversation thinking "was that inappropriate?"

ⁱⁱ Mathews v. Eldridge, 424 U.S. 319, 334, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)

v Silverman v. Commodity Futures Trading Comm'n., 549 F.2d 28, 33 (7th Cir. 1977)

¹ Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe, 2005-NMSC-006, 137 N.M. 161, 108 P.3d 1019

iii City of Albuquerque v. Chavez, 1998-NMSC-33, 125 N.M. 809, 965 P.2d 928

^{iv} Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe, 2005-NMSC-006, 137 N.M. 161, 108 P.3d 1019; Dente v. State Taxation & Revenue Dep't, 1997-NMCA-099, 124 N.M. 93, 946 P.2d 1104, overruled on other grounds, State Taxation & Revenue Dep't v. Bargas, 2000-NMCA-103, 129 N.M. 800, 14 P.3d 538; Lopez v. United States, 129 F. Supp. 2d 1284, 1289 (D.N.M. 2000)

^{vi} Redman v. Bd. Of Regents of the N.M. Sch. For the Visually Handicapped, 102 N.M. 234, 238, 693 P.2d 1266, 1270 (Ct. App. 1984)

vii Valenzula v. A.S. Horner, Inc., 2016-NMCA-031, 367 P.3d 901.

viii Erica, Inc. v. N.M. Regulation & Licensing Dep't, 2008-NMCA-065.

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NOTES

Administrative Hearings Practice- Administrative Law Judge, Hearing Officer and Hearing Examiner's Perspective

NOTES

# Administrative Appeals-Judge's Perspective

Administrative Appeals 2018 Administrative Law Institute Judge Celia Foy Castillo (Ret.) Judge Michael Bustamante (Ret.) Judge David Thompson, First Judicial District Court October 19, 2018 Judge Celia Foy Castillo (Ret.) Judge Michael Bustamante (Ret.) Judge David Thomson, First Judicial District Court October 19, 2018

# Original Jurisdiction vs. Appellate Jurisdiction

N.M. Const. art. VI, § 1: "Judicial power" vested in the Supreme Court, Court of Appeals, District Courts, Probate Courts, Magistrate Courts and "such other courts inferior to the district courts as may be established by law from time to time in any district, county or municipality of the state."

#### N.M. Const. art. VI, § 13 • N.M. Const. art. VI, § 13: District Courts

- Original jurisdiction over "all matters and causes not excepted" in the N.M. Constitution and "such jurisdiction of special cases and proceedings as may be conferred by law"
- Appellate jurisdiction of "all cases originating in inferior courts and tribunals in their respective districts"
- Supervisory control "over the same."
- Power to issue writs, including mandamus, injunction, certiorari, prohibition and "all other writs, remedial or otherwise in the exercise of their jurisdiction"
- This might include Declaratory Judgment actions

## Rule 1-074 NMRA

- Rule 1-074 NMRA: Appeals from "administrative agencies" when there is a statutory right of review to the district court, "whether by appeal, right to petition for a writ of certiorari, or other statutory right of review."
  - "This rule does not create a right to appeal."
  - "If there is no statutory right of appeal or statutory right to writ of certiorari, an aggrieved person may be entitled to a constitutional review of an administrative decision or order pursuant to Rule 1-075"

## Rule 1-074 NMRA (continued)

- By its terms, Rule 1-074 does not apply to:

- appeals under the Human Rights Act (governed by Rule 1-076)
- review of decisions relating to unemployment compensation claims under the Unemployment Compensation Law (governed by Rule 1-077)

## Rule 1-075 NMRA

 Rule 1-075 NMRA: "writs of certiorari to administrative officers and agencies pursuant to the New Mexico Constitution when there is no statutory right to an appeal or other statutory right of review." (Emphasis added.)

## Rule 1-075 NMRA (continued)

"Independent of statute, the right to seek a constitutional writ of certiorari in the district court 'will lie when it is shown that the inferior court or tribunal has exceeded its jurisdiction or has proceeded illegally,' *Regents of Univ. of N.M. v. Hughes*, [1992-NMSC-049, ¶ 16], and generally not when there exists a right to appeal. Roberson, 78 N.M. at 300, 430 P.2d at 871; see also Hughes, 114 N.M. at 310, 838 P.2d at 464 (reiterating Roberson 's statement)." Moriarty Mun. Sch., 2001-NMCA-096, ¶ 34.



## Selected Statutes (continued)

- Professional or occupational license denial, revocation or suspension. NMSA 1978 § 61-1-17.
- Tax & Rev. Dept. denial, cancellation or suspension of driver license. NMSA 1978 §§ 66-5-36 & 66-5-204.
- Oil Conservation Commission decision or order, other than rulemaking order. NMSA 1978 §§ 70-5-16 & 70-2-25; NMSA 1978 § 70-2-12.2 (direct appeal to Court of Appeals from OCC rulemaking order).


#### Selected Statutes – COA (continued)

- Tax & Rev. Dept. hearing officer decision on tax protest. NMSA 1978 § 7-1-25; but see NMSA 1978 § 7-1-26 (right of action district court for refund of overpayment)
- Oil Conservation Commissioner rulemaking. NMSA 1978 § 70-2-12.2.
- Mining Commissioner rulemaking. NMSA 1978 § 69-36-16.



# Certification to Court of Appeals (continued)

- (6) likelihood of further appeal making certification a more efficient means of resolution; or
- (7) important local question which should receive consideration from the district court in the first instance.

### Who Is a "Party" Having Standing to Appeal

- Rule 12-601(C) and (D) NMRA: added in 2013 in response to New Energy Economy, Inc. v. Vanzi, 2012-NMSC-005, 274 P.3d 53, which addresses what level of participation in an administrative proceeding is required before a participant may be considered a "party" that is entitled to notice of an appeal challenging the administrative action and is permitted, but not required, to intervene as an appellee for the purpose of defending the action.
- What is an aggrieved party



reverse or remand the final agency decision if:

- (1) the agency acted fraudulently, arbitrarily or capriciously;
- (2) the final decision was not supported by substantial evidence; or
- (3) the agency did not act in accordance with law.
- Rule 1-074(R)/Rule 1-075(R):
  - (1) whether the agency acted fraudulently, arbitrarily, or capriciously;



### Explanatory Decision Rule 1-074(T)/Rule 1-075(T):

- The district court, in its appellate capacity, shall issue a written decision, which may include:
  - (1) remanding the case to the administrative agency with specific instructions for further proceedings and determinations; the remand may also include instructions to make the case ripe for judicial review;
  - (2) reversing the decision under review, with a statement of the basis for the reversal . . .; and
  - (3) affirming the decision under review, with a statement of the basis for affirmance.



<u>Hotle v. State, Pub. Employees Ret. Bd.</u>, 2018 WL 2999929, at *2 (N.M. Ct. App. May 31, 2018)

 "Upon a grant of a petition for writ of certiorari under Rule 12–505 [NMRA], this Court conducts the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal." *City of Albuquerque v. AFSCME Council 18 ex rel. Puccini*, 2011–NMCA–021, ¶ 8, 149 N.M. 379, 249 P.3d 510 (alteration, internal quotation marks, and citation omitted). "This Court applies the same statutorily defined standard of review as the district court. The district court may



<u>Hotle v. State, Pub. Employees Ret. Bd.</u>, 2018 WL 2999929, at *2 (N.M. Ct. App. May 31, 2018) (continued)

record[,]" and in evaluating the reasonableness of an agency's action, we "may take into account an agency's expertise." Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe, 2005–NMSC– 006, ¶ 17, 137 N.M. 161, 108 P.3d 1019. "Substantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." Gallup Westside Dev., LLC v. City of Gallup, 2004–NMCA–010, ¶ 11, 135 N.M. 30, 84 P.3d 78. "We apply a de novo standard of review to administrative rulings

<u>Hotle v. State, Pub. Employees Ret. Bd.</u>, 2018 WL 2999929, at *2 (N.M. Ct. App. May 31, 2018) (continued)

regarding statutory construction." N.M. Corr. Dep't v. AFSCME Council 18, AFL–CIO, 2018– NMCA–007, ¶ 9, 409 P.3d 983 (alteration, internal quotation marks, and citation omitted). New Mexico Corr. Dep't v. Am. Fed'n of State, County, & Mun. Employees, Council 18, AFL-<u>CIO</u>, 2018-NMCA-007, ¶ 9, 409 P.3d 983, 987–88, <u>cert. denied</u> (Oct. 24, 2017)

 "Upon a grant of a petition for writ of certiorari under Rule 12-505, this Court conducts the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal." *City of Albuquerque v. AFSCME Council 18 ex rel. Puccini*, 2011-NMCA-021, ¶ 8, 149 N.M. 379, 249 P.3d 510 (alteration, internal quotation marks, and citation omitted). "In reviewing an administrative decision, we apply a whole-record standard of review." *Town & Country*



<u>New Mexico Corr. Dep't v. Am. Fed'n of State, County, & Mun. Employees, Council 18,</u> <u>AFL-CIO</u>, 2018-NMCA-007, ¶ 9, 409 P.3d 983, 987–88, <u>cert. denied</u> (Oct. 24, 2017) (continued)

we review de novo." *Id*. We "apply a de novo standard of review to [administrative] rulings regarding statutory construction." *Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Reg. Comm'n* (*ABCWUA*), 2010-NMSC-013, ¶ 50, 148 N.M. 21, 229 P.3d 494. We "will generally defer to an agency's reasonable interpretation of its own ambiguous regulations, especially where the subject of the regulation implicates agency expertise[.]" *Id.* ¶ 51 (internal quotation marks and *988 citation omitted). However, we are "not bound by the agency's

New Mexico Corr. Dep't v. Am. Fed'n of State, County, & Mun. Employees, Council 18, AFL-CIO, 2018-NMCA-007, ¶ 9, 409 P.3d 983, 987–88, cert. denied (Oct. 24, 2017) (continued)

interpretation," and we may substitute our own "independent judgment for that of the agency if the agency's interpretation is unreasonable or unlawful." *Id.* (omission, internal quotation marks, and citation omitted). Davis v. Town of Taos, Human Res. Div., 2018 WL 1325043, at *1–2 (N.M. Ct. App. Feb. 20, 2018)
In its memorandum in support to our notice of proposed dismissal, the Town of Taos notes that it had pointed out in its statement of review issues below that Davis should have filed a petition for writ of certiorari in the district court under Rule 1–075 instead of a notice of appeal under Rule 1–074 [MIS 1 (citing RP 1278 n.1)]; this point was raised again at oral argument in the district court [MIS 1 (citing MIO 3)]; and Defendant acknowledged that the appeal to the district court should have been brought pursuant to Rule 1–075 instead of Rule 1–074 [MIO 1 (citing MIO 3)].



<u>Davis v. Town of Taos, Human Res. Div.</u>, 2018 WL 1325043, at *1–2 (N.M. Ct. App. Feb. 20, 2018) (continued)

2012–NMCA–021, ¶ 20; Bransford–Wakefield v. State Taxation and Revenue Dep't, 2012–NMCA– 025, ¶ 9, 274 P.3d 122. Such unusual circumstances might include court error that causes the party to miss the deadline, or an unusual delay in the postal service that causes a timely-mailed pleading to arrive after the deadline. See, e.g., Trujillo v. Serrano, 1994– NMSC–024, ¶ 16, 117 N.M. 273, 871 P.2d 369; Schultz v. Pojoaque Tribal Police Dep't, 2010– NMSC–034, ¶ 21, 148 N.M. 692, 242 P.3d 259. Davis has not demonstrated that such



#### **Evidentiary** Issues

- The requirement of some legally admissible evidence, also known as the legal residuum rule, mandates that the decision of the Board be based on "a residuum of competent evidence to support the findings of an administrative agency where a substantial right is at stake." Duke City Lumber Co., 1984–NMSC–042, ¶ 19.
- <u>Shaver v. Bd. of Ethics & Campaign Practices for</u> <u>City of Albuquerque</u>, 2018 WL 898099, at *4 (N.M. Ct. App. Jan. 22, 2018)

Smith v. City of Santa Fe, 2007-NMSC-055, ¶¶ 22-26, 142 N.M. 786, 793–94, 171 P.3d 300, 307–08

- 3. Is the Stillmans' declaratory judgment action precluded because of a failure to exhaust administrative remedies?
- 1516 {26} Even though the Stillmans' decision to avoid the City's administrative process did not impact the time by which they needed to file their declaratory judgment action, the City argues that the Stillmans' nevertheless did not have standing to bring a declaratory judgment action because they failed to exhaust any administrative remedies available through

#### CAUTION: Original v. Appellate Jurisdiction

the City. "Under the exhaustion of administrative remedies doctrine, ' [w]here relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts; and until that recourse is exhausted, suit is premature and must be dismissed.' " U.S. West Commc'ns, Inc. v. N.M. State Corp. Comm'n, 1998–NMSC–032, ¶ 9, 125 N.M. 798, 965 P.2d 917 (quoting Reiter v. Cooper, 507

#### CAUTION: Original v. Appellate Jurisdiction (continued)

U.S. 258, 269, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993)); see also McDowell v. Napolitano, 119 N.M. 696, 700, 895 P.2d 218, 222 (1995) ("The doctrine of exhaustion of remedies is absolute where a claim is cognizable in the first instance by an administrative agency alone.... [J]udicial interference is withheld until the administrative process has run its course.") (internal quotation marks and citation omitted). Administrative remedies are proper, and the exhaustion doctrine exists because "the interests of justice are best served by permitting the agency to CAUTION: Original v. Appellate Jurisdiction (continued) resolve factual issues within its peculiar expertise." U.S. West Commc'ns, 1998–NMSC– 032, ¶ 11, 125 N.M. 798, 965 P.2d 917 (internal quotation marks and citation omitted). Therefore, if a plaintiff is seeking resolution of a dispute arising out of an ordinance, he or she will usually bring the claim to the municipality and exhaust any administrative remedies provided by the municipality before seeking judicial review.







<u>El Castillo Ret. Residences v. Martinez</u>, 2017-NMSC-026, ¶¶ 20-25, 401 P.3d 751, 757–58 (continued)

considered by an agency, where the appeal also asserts constitutional and other claims in the district court that were beyond the scope of the agency's adjudicative authority, "the district court should consider each claim according to its appropriate standard of review and maintain the distinction between the court's appellate and original jurisdiction in rendering its decision." *Id.* 

 10{24} The district court should have exercised its appellate jurisdiction over the Board's determination regarding the applicability of

<u>El Castillo Ret. Residences v. Martinez</u>, 2017-NMSC-026, ¶¶ 20-25, 401 P.3d 751, 757–58 (continued)

Section 7-36-7(B)(1)(d) to El Castillo and reviewed whether the Board's decision was arbitrary and capricious, unsupported by substantial evidence, or otherwise contrary to law as required under Section 39-3-1.1(D). Exercising its original jurisdiction over the statutory claim and issuing new findings of fact which contradicted the findings of the Board was error. In issuing new findings of fact, the district court acted outside its proper appellate jurisdiction. *See, e.g., Cadena v. Bernalillo Cty. Bd. of Cty. Comm'rs,* 2006-NMCA-036, El Castillo Ret. Residences v. Martinez, 2017-NMSC-026, ¶¶ 20-25, 401 P.3d 751, 757–58 (continued)

¶ 3, 139 N.M. 300, 131 P.3d 687 (concluding that "the district court acted outside of its capacity as an appellate court by engaging in factfinding"); VanderVossen v. City of Espanola, 2001-NMCA-016, ¶ 26, 130 N.M. 287, 24 P.3d 319 ("[T]he district court exercising appellate jurisdiction under Section 39-1-1.1[] is not a fact-determining body."); Hahn v. Cty. Assessor for Bernalillo Cty. (In re Miller), 1975-NMCA-116, ¶ 52, 88 N.M. 492, 542 P.2d 1182 ("If there is substantial evidence in the record to support a decision of a county valuation protests board,

<u>El Castillo Ret. Residences v. Martinez</u>, 2017-NMSC-026, ¶¶ 20-25, 401 P.3d 751, 757–58 (continued)

[an appellate court is] bound thereby."), rev'd on other grounds, 1976-NMSC-039, 89 N.M. 547, 555 P.2d 142. Had the district court reviewed the Board's determination under the proper standard of review, it is likely the district court's determination would have been different.

 2. The Court of Appeals Erred When It Refused Jurisdiction to Review the Constitutionality of the Section 7-36-7(B)(1)(d) Exemption as Applied to El Castillo El Castillo Ret. Residences v. Martinez, 2017-NMSC-026, ¶¶ 20-25, 401 P.3d 751, 757–58 (continued)

1112{25} In addition to the district court's jurisdictional error, the Court of Appeals erred when it reviewed the constitutional question apart from the statutory question. The Court of Appeals took the position that it did "not have jurisdiction to review the question of whether El Castillo is entitled to a charitable property-tax exemption under Section 7-36-7(B)." *El Castillo*, 2015-NMCA-041, ¶ 12, 346 P.3d 1164. This determination by the Court of Appeals improperly disregards the relationship between the New Mexico enacted by the Legislature.

<u>El Castillo Ret. Residences v. Martinez</u>, 2017-NMSC-026, ¶¶ 20-25, 401 P.3d 751, 757–58 (continued)

A statute must be interpreted and applied in harmony with constitutionally imposed limitations. *See* NMSA 1978, § 12-2A-18(A)(3) (1997) ("A statute or rule is construed ... [to] avoid an unconstitutional ... result."); *Wells v. Cty. of Valencia*, 1982-NMSC-048, ¶ 11, 98 N.M. 3, 644 P.2d 517 ("[T]he Legislature is presumed to have enacted the statute within the bounds of the constitution, and, to that end, we must so construe the statute."). The constitutional and statutory claims as argued by the parties,



considered and decided by the district court, and raised on appeal to the Court of Appeals were intertwined and inseparable. The Court of Appeals erred when it did not decide whether El Castillo could be exempt from property taxation under Section 7-36-7(B)(1)(d) despite its constitutional ineligibility for exemption. Accordingly, we granted certiorari to address this issue.

### Caution: Claim Preclusion: Strickland 130 F.3d 1408

 The Restatement rules lead us to conclude that plaintiff's allegations under § 1983 are part of the same claim he asserted in Bernalillo County District Court. In "Strickland I" plaintiff challenged his termination under the City's Merit System Ordinance. He argued that the drug test and the procedures used by the City to terminate him *1412 were faulty. In terms of time, space, and origin, these allegations are almost identical to those underlying plaintiff's § 1983 claims.

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## Ethical Considerations for Government Lawyers

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# Inspection of Public Records Act: 2018 Primer and Panel Discussion































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