

NOTICE OF TERMINATION OF RULEMAKING The New Mexico Office of the Attorney General (OAG) is providing notice to terminate the public rule hearing scheduled on Monday, December 4, 2017 at 9:30 a.m., in accordance with Subsection C of Section 14-4-5 NMSA 1978. The proposed new rule, 1.24.25 NMAC is being terminated.

NOTICE OF RULEMAKING The New Mexico Office of the Attorney General is proposing to adopt a new rule, 1.24.25 NMAC, Default Procedural Rule for Rulemaking, in accordance with Section 14-4-5.8 NMSA 1978 of the State Rules Act, that directs the Attorney General to adopt default procedural rules for public rules hearings for use by agencies that have not adopted their own procedural rules. The proposed rule is intended to comport with House Bill 58 (Laws 2017, Chapter 137), and addresses the initiation of and public participation in the rulemaking process, as well as the conduct and record of the public hearing. Copies of the new rule (printed below) are available at the New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501 and on the website at, <http://www.nmag.gov/>.

The Open Government Division of the Office of the Attorney General currently is accepting public comment on the proposed new rule. Please submit written comments on the proposed changes to P. O. Drawer 1508, Santa Fe, NM 87504-1508 or Renee K. Romero via email at rromero@nmag.gov by January 18, 2018.

The Office of the Attorney General will hear public comment and consider adoption of the proposed new rule at a rule hearing on Friday, January 19, 2018, at 9:00 a. m., Toney Anaya Building, Rio Grande Conference Room, 2nd Floor, 2550 Cerrillos Road, Santa Fe, New Mexico.

If you are an individual with a disability who is in need of reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing, please contact: Renee K. Romero at rromero@nmag.gov or 505-490-4861.

TITLE 1 GENERAL GOVERNMENT ADMINISTRATION

CHAPTER 24

RULES PART 25 DEFAULT PROCEDURAL RULE FOR RULEMAKING 1.24.25.1 ISSUING AGENCY: New Mexico Office of the Attorney General, 408 Galisteo Street, Santa Fe, NM 87501. [1.24.25.1 NMAC - N, 01/01/2018]

1.24.25.2 SCOPE: State agencies that have not adopted their own procedural rules consistent with the State Rules Act and agencies that have expressly incorporated this rule by reference are covered by the scope of this rule. If an agency has adopted its own procedural rules in accordance with Section 14-4-5.8 NMSA 1978, those rules shall provide at minimum the opportunities for public participation in the rulemaking process as included in these default rules. [1.24.25.2 NMAC - N, 01/01/2018]

1.24.25.3 STATUTORY AUTHORITY: Section 14-4-5.8 NMSA 1978. [1.24.25.3 NMAC - N, 01/01/2018]

1.24.25.4 DURATION: Permanent. [1.24.25.4 NMAC - N, 01/01/2018]

1.24.25.5 EFFECTIVE DATE: January 1, 2018 unless a later date is cited at the end of a section. [1.24.25.5 NMAC - N, 01/01/2018]

1.24.25.6 OBJECTIVE: To provide default procedural rules for rulemaking and 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, 01/01/2018]

1.24.25.7 DEFINITIONS: This rule adopts the definitions found in Section 14-4-2 NMSA 1978. [1.24.25.7 NMAC - N, 01/01/2018]

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.

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 is maintained by the agency. [1.24.25.15 NMAC - N, 01/01/2018]

1.24.25.9 AGENCY INITIATION OF THE RULEMAKING PROCESS; ~~PETITIONS:~~

A. The rulemaking ~~process for purposes of this rule~~ may be initiated by either of the following:

(1) when a notice for a rule hearing is publicly posted pursuant to this rule; or

(2) ~~if authorized by law or practice of the agency,~~ a petition for rulemaking is filed with the agency.

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.

C. If the agency is a public body subject to the Open Meetings Act, the decision to initiate the rulemaking process by posting a notice for rule hearing 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.

~~C. A petition for rulemaking shall be made in writing and include an explanation of the purpose or statement of reasons for the proposed rule and a citation to the legal authority authorizing the agency to adopt the rule. A petition shall include the proposed rule in underline and strikethrough format, with new language underlined and any deletions to be included with a strikethrough line across the text. A~~

~~petition shall also include a copy of or citation to technical information, if any, that serves as the basis for the proposed rule.~~

~~D. If a petition is initiated internally, the agency shall consider whether to grant the petition and proceed with the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing.~~

~~E. If a petition is filed by a third party, and such practice is authorized by the agency, the agency shall, within 120 60 calendar days of receipt, consider the petition and make a determination whether to grant or deny the petition. The agency's decision to deny the petition is not subject to judicial review unless otherwise provided by law.~~

~~F. If the agency is a public body subject to the Open Meetings Act, the decision to grant a petition, or the decision to initiate the rulemaking process by posting a notice for rule hearing, must be an action taken by vote of the public body in open session.~~

~~G. Once the agency initiates the rulemaking process, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978. [1.24.25.8 NMAC – N, 01/01/2018]~~

1.24.25.10 PETITIONS FOR RULEMAKING

A. Any person has the right to petition an agency head to adopt, amend, or repeal a rule.

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 and a citation to the legal authority authorizing the agency to adopt the rule. A petition shall include the proposed rule in underline and strikethrough format, with new language underlined and any deletions to be included with a strikethrough line across the text. A petition shall also include a copy of or citation to technical information, if any, that serves as the basis for the proposed rule.

C. The agency to which the petition is made shall, within 60 calendar days of receipt, consider the petition and make a determination whether to grant or deny the petition. If the agency determines that it will grant the petition, it shall initiate the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing, consistent with the requirements of these rules. If the agency declines to initiate a rulemaking, it must deny the petition in writing to the petitioner and state its reasons for the denial.

D. If the agency initiates a rulemaking process, the agency must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978. The petition for rulemaking, including the explanation of the purpose of statement of reasons for the proposed rule and a citation to the legal authority authorizing the agency to adopt the rule shall be published as part of the public record for the rulemaking. [1.24.25.10 NMAC – N, 01/01/2018]

1.24.25.110-RULEMAKING NOTICE:

A. The agency shall provide to the public notice of the proposed rulemaking at least 30 calendar days before a public hearing by:

- (1) posting it on the agency website, if one is maintained by the agency;
- (2) posting it on the sunshine portal;
- (3) making it available by posting it in a publicly visible location in the agency's district, field and regional offices, if any;
- (4) sending it by electronic mail to persons who have made a request for notice from the agency of rulemaking proceedings 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, by petition or other act, and who have provided an electronic mail address to the agency;
- (6) sending it by mail to persons who have made a written request for mailed notice from the agency of rulemaking proceedings and who have provided a postal address to the agency;
- (7) providing it to the New Mexico legislative council for distribution to appropriate interim and standing legislative committees; and
- (8) publish the notice in the New Mexico Register and in a newspaper of general circulation in the state.

B. The notice shall include:

- (1) a concise 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 adoption of the proposed rule;
- (4) information on how and where a copy of the full text of the proposed rule may be obtained;
- (5) an internet link or web address providing free access to the full text of the proposed rule;
- (6) information on how a person may comment on the proposed rule, where written comments will be received, and when comments are due;
- (7) information on where and when the a public rule hearing will be held and how a person may participate in the hearing and provide public comment; and
- (8) 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.

C. If the agency changes the date of the public rule hearing or shortens the deadline for submitting comments as stated in the notice, the agency shall provide notice to the public of the change as provided above. [1.24.25.9 NMAC - N, 01/01/2018]

1.24.25.1211 WRITTEN COMMENT PERIOD:

A. The public comment period must be at least 30 calendar days and shall commence upon publication of the rulemaking notice in the New Mexico register, unless a later date is specified in the notice. The agency shall not adopt a proposed rule or hold a rulemaking hearing 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 before, during, or after the public rule hearing to extend the comment period by providing public notice, to include:

(1) posting it on the agency website, if one is maintained by the agency;

(2) making it available by posting notice in a publicly visible location in the agency's district, field and region offices, if any;

(3) sending notice by electronic mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceedings and provided an electronic mail address to the agency; and

(4) sending notice by regular mail to persons who have participated in the rulemaking proceeding or made a written request for notice of rulemaking proceeding and provided a postal address and specifically requested notice by regular mail;

D. The agency shall post all written comments on its website, if one is maintained by the agency, ~~as soon as practicable upon~~ within 7 days of receipt, but and no less than 7 30 calendar days prior to the rule hearing to allow for public review. All written comments received by the agency shall be available for public inspection. [1.24.25.10 NMAC - N, 01/01/2018]

1.24.25.1312 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 more than one hearing is necessary.

B. The agency may act as the hearing officer or designate a representative or hearing officer to preside over the public rule hearing. The agency representative or hearing officer may ask questions and provide

comments for clarification purposes only, and should refrain from providing opinions or engaging in discussion regarding the merits of the proposed rule or any public comment presented.

C. At the start of the hearing, any pre-filed exhibits should be introduced and admitted into the rulemaking record. Pre-filed exhibits should include the petition, if filed; copies of the public notices of the rulemaking, including, but not limited to, any lists of individuals to whom notice was mailed or sent electronically; copies of the proposed rule in underline and strikethrough format; and copies of any written comment submitted during the comment period prior to the rule hearing. The agency representative or hearing officer will allow the petitioner or agency representative an opportunity to present the petition, if applicable. Any written comments or other documents introduced during the hearing should be admitted into the record after being marked as an exhibit.

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

E. The rule hearing shall be conducted in a fair and equitable manner. The agency representative 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. The rules of evidence do not apply to public rule hearings and the agency representative or hearing officer may, in the interest of efficiency, exclude or limit comment that is deemed irrelevant, redundant, or unduly repetitious.

F. The agency must hold the hearing in a venue that reasonably accommodates all interested 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. Public rule hearings shall be open to the public, but are not subject to the New Mexico Open Meetings Act, Section 10-15-1 NMSA 1978, unless the hearing is conducted by a quorum of a public body. [1.24.25.11 NMAC - N, 01/01/2018]

G. A recording of the public rule hearing shall be incorporated in the rulemaking record and be made available to the public by posting it on the sunshine portal and the state agency's website within 15 days of the public rule hearing.

1.24.25.~~1413~~ 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.

B. If the rule hearing is conducted by an agency representative or 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 thoroughly 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. Amendments that exceed the scope of the noticed rulemaking may require a new rulemaking process with a rulemaking notice, comment period, and public rule hearing so that the public has an adequate opportunity to review and comment on the changes.

i. Amendments to a proposed rule that fall within the scope of the currently rulemaking shall be defined by a three factor test:

(1) Any person affected by the adopted rule could not have reasonably expected that the change from the published proposed rule would affect the person's interest;

(2) The subject matter of the adopted rule or the issues determined by that rule are different from the subject matter or issues involved in the published rule proposed to be adopted; and

(3) The effect of the adopted rule differs from the effect of the rule proposed to be adopted or amended.

D. In instances where the agency is a board or commission, the consideration and adoption of the proposed rule shall occur during a public meeting. The adoption date of the proposed rule shall be the date of the public meeting at which the vote occurred, unless the board or commission directs that a written order be issued, in which case the adoption date shall be the date the written order is signed. The board or commission may provide reasoning for the adopted rule through comments or discussion during its meeting, or by providing a statement of reasons in a written order.

E. In instances where the agency is a department or any of its divisions, the adoption of the proposed rule shall occur through the issuance of a written order by the department head, which shall include a statement of reasons. The adoption date of the proposed rule shall be the date the written order is signed.

F. The agency shall provide a concise explanatory statement that contains the date of adoption; the specific legal authority authorizing the rule; and any findings required by law for adoption of the rule. The explanatory statement may be included in an order adopting the rule or provided separately. The explanatory statement shall be posted on the agency website, if one is maintained by the agency, and sent to any persons entitled to notice of the rulemaking within 15 calendar days after the date of adoption. [1.24.25.12 NMAC - N, 01/01/2018]

(1) The agency's concise explicatory statement shall include:

a. An agency's reasons for adopting the rules, including the reasons for not accepting substantial arguments made at the public rule hearing and in testimony and in written comments;

b. The agency's reasons for any change between the test of the proposed rule and the final rule; and

c. A summary of any independent analysis done by the agency.

G. An agency may consider any other information it receives concerning a proposed rule during the rulemaking period. Any information considered by the agency must be incorporated into the record. This information need not be submitted in an electronic or written format. Nothing in this section prohibits an agency from discussing with any person at any time the subject of a proposed rule.

1.24.25.1514-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 center and shall provide to the public the adopted rule. The agency shall post the adopted rule on its website, if one is maintained by the agency, and send the adopted rule to any persons entitled to notice of the rulemaking.

B. Unless provided for by law, no rule shall be valid or enforceable until it is filed with the state records center and published in the New Mexico register. Unless another date is provided in the written order, the effective date of the rule shall be the date of publication in the New Mexico register. [1.24.25.13 NMAC - N, 01/01/2018]

1.24.25.1615 EMERGENCY RULES:

A. The agency shall comply with the rulemaking procedures herein and 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 the 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. If the agency is a board or commission, the adoption must occur during a public meeting pursuant to the requirements of the Open Meetings Act.

C. The emergency rule shall be published with the New Mexico register within 30 calendar days of the rule becoming effective.

D. When the 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.

E. 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.

F. 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 calendar 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. [1.24.25.14 NMAC - N, 01/01/2018] HISTORY OF 1.24.25 NMAC: [RESERVED]