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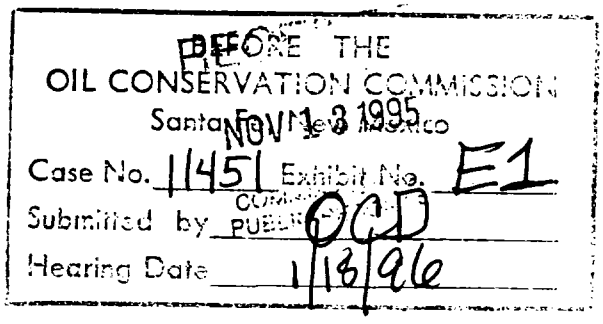

L. Elaine Olah
Administrator, State Records
Center and Archives
404 Montezuma Street
Santa Fe, NM 87501

Re: Opinion Request of September 19, 1995

Dear Ms. Olah:

You have posed the following question: When an agency has not changed the text of a rule, but has merely reformatted it to comply with the format requirements of 1 NMAC 3.1, must that agency conduct public hearings and refile the rule (including publication in the New Mexico Register) to maintain its validity and enforceability? We answer in the affirmative.

NMSA 1978, §14-4-2(C) (1995 Repl.Pamp.), defines "rule" as:

> any rule, regulation, standard, statement of policy, including amendments thereto or repeals thereof issued or promulgated by any agency and purporting to affect one or more agencies besides the agency issuing such rule or to affect persons not members or employees of such issuing agency.
>
> (emphasis added)

Black's Law Dictionary, Fifth Edition (1979), defines "amendment" to mean "[t]o alter by modification, deletion, or addition."

1. Notice and Hearing

State statutes and case law require that State agencies promulgating "rules" or amendments to rules which affect the rights of other agencies or persons provide some level of due process in the form of notice and opportunity to comment. See, *inter alia*, the Uniform Licensing Act, NMSA 1978, §61-1-29(B) ("No regulation or amendment or repeal thereof shall be adopted by [a State occupational

licensing] board until after a public hearing by the board.") and (C) ("The board shall make reasonable efforts to give notice of any rulemaking proceeding to its licensees and to the members of the public."); the Environmental Improvement Act, NMSA 1978, §74-1-9(B) (public hearing required) and (D) (notice of hearing required); and the Administrative Procedures Act, NMSA 1978, §12-8-4(A).

Applying the definition of "amendment" cited above, it appears that the reformatting of all rules to comply with the requirements of 1 NMAC 3.1 is an alteration of the existing rules by a modification of their systems of identification or designation. For example, "Rule 2 - Definitions" of the Acupuncture Board is now "Title 16, Chapter 62, Part 1, General Provisions, §7. Definitions." Further, within Part 1 there are added the following new sections: 1 - Issuing Agency; 2 - Scope; 3 - Statutory Authority; 4 - Duration; 5 - Effective Date; 6 - Objective. The Objective section in each Part will have to be crafted carefully as it will be used as an aid in interpretation of the substantive portions of the rules by the agency, the public and the courts. Thus, the new format results in both modifications to existing rules, as well as additions to existing rules. The changes must be viewed as "amendments".

In administrative law, a "legislative" rule is one that is enacted pursuant to delegated statutory authority and which has the legal effect of binding the public. *See*, "Interpretive Rules, Policy Statements, Guidance Manuals, and the Like - Should Federal Agencies Use Them to Bind the Public", by Robert A. Anthony, 41 Duke Law Journal No. 6, p. 1311 (June, 1992). The most important aspect of such a legislative rule is that its "promulgation must observe procedures mandated by the agency's organic statute...." *Id.*, page 1322. All nonlegislative rules issued by an agency that merely interpret the agency's organic statute or which are simply policy statements cannot and do not bind the courts, the agency or the public. *Id.*, pages 1327-1328.

In the circumstances at issue, it is the purpose and intention of the NMAC legislation (NMSA 1978, §14-4-7.2 (1995 Repl.Pamp.)) that the new Administrative Code be binding on all persons and entities in New Mexico. *See*, §14-4-7.2(A). To be binding, a rule must be "legislative", which requires proper advance notice and opportunity for public comment. More importantly, and in direct answer to the question posed by the State Records Administrator, §14-4-7.2(B) mandates full notice and opportunity for public input by implication: "All rulemaking agencies shall revise, restate and repromulgate their existing rules as needed to expedite publication of the New Mexico Administrative Code." (emphasis added). "Promulgate" means "[t]he formal act of announcing a statute or rule of court." Black's Law Dictionary, *supra.*; or, "to make public as having the force of law." Webster's Third New International Dictionary (1986). What is required of any State

rulemaking body in order to formally issue a rule having the force of law is found in the organic statute of that entity, and, in New Mexico, generally involves some form of notice and opportunity to comment. See, again, the statutes cited in the first paragraph of this section.

If "promulgate" means a formal process which includes notice and hearing, then "repromulgate" means the same thing. Stated differently, since the Legislature mandated the "repromulgation" of all rules into the NMAC format, it necessarily mandated that all reformatted rules be subjected to full rulemaking procedures provided by the organic statutes of rulemaking bodies. In virtually all cases, this will require notice and opportunity to comment.

The consequences of an agency's failure to provide notice and hearing when making, amending or repealing a rule include a nullification of the effort in question. In Rivas v. Board of Cosmetologists, 101 N.M. 592, 686 P.2d 934 (1984), the issue was whether the Board had properly repealed a regulation when it failed to provide notice or hold a public hearing. The Supreme Court began its analysis by noting that the Uniform Licensing Act (NMSA 1978, §61-1-1, *et seq.*), which governed the issues, paralleled the requirements of the State Rules Act in regard to repeal of regulations: NMSA 1978, §61-1-29(B) states that "[n]o regulation or amendment or repeal thereof shall be adopted by [any subject] board until after a public hearing by the board." The Court held that the attempted repeal was void because of the Board's failure to conduct a hearing: "Agencies are required to give notice of proposed action regarding the adoption, amendment or repeal of any rule...." 101 N.M. at 593. The Court went on to hold further that the repeal also required filing with the State Records Administrator, citing State v. Joyce, 94 N.M. 618, 614 P.2d 30 (Ct.App. 1980). *See*, 101 N.M. at 594.

The instant circumstances differ than those presented in Joab v. Espinoza, 116 N.M. 554, 865 P.2d 1198 (Ct.App. 1993), *cert. denied*, 116 N.M. 801. There, New Mexico Environment Department regulations provided that the Director "shall not issue any [landfill] permit for a period longer then 10 years...." Though prior permits had been issued for periods of ten years, with new landfill regulations pending, the Director issued appellant's permit for only five years out of fairness to future applicants. Appellant's challenge included an assertion that because the period radically departed from past practice and because it was without proper notice, the Director's decision was arbitrary and capricious. The Court of Appeals rejected this argument, finding that because of the discretion granted the Director by the regulation, the decision was nothing more than a policy change. In contrast, the reformatting is a change in the structure and identification system of all rules.

Likewise, the circumstances here are different than those discussed in Attorney General Opinion No. 87-59, in which this Office determined that mere typographical or grammatical errors discovered in rules after rulehearing, but before filing, could be corrected without new notice and hearing. The changes at issue there were "nonsubstantive" and "would not affect the regulation's content." Here, especially with an entirely new numbering system and a statement of Objective for each Part being added, the changes do go to substance and content (particularly to the extent that a statement of Objective is used to interpret a rule).

The State Rules Act, NMSA 1978, §14-4-1, *et seq.*, does not deal with rulemaking requirements or procedures. These are found in the dozens of organic statutes of individual agencies. The State Records Administrator has no responsibility in regard to such procedures, and, as to rules, is limited to decisions related to publication in the New Mexico Register (§14-4-7.1) and to filing (§14-4-5). In other words, the Administrator has no duty or authority to oversee the notice and hearing requirements, if any, of agencies, boards and commissions endeavoring to comply with §14-4-7.2. The consequence of failing to hold due process proceedings while reformatting to meet the standards of 1 NMAC 3.1 will fall on the agencies, not on the State Records Center and Archives. While the Administrator may advise other entities of the content of this informal opinion, it cannot force any agency to comply with it if the agency chooses not to follow formal rulemaking procedures.

2. Filing

NMSA 1978, §14-4-5 (1995 Repl.Pamp.), states that "[n]o rule shall be valid or enforceable until it is filed with the records center and published in the New Mexico register...." In State v. Joyce, *supra.*, the New Mexico Court of Appeals held that the failure of the Museum of New Mexico to follow the State Rules Act in adopting a "policy" affecting the general public, including its failure to file the policy with the State Records Center as required by §14-4-5, rendered it void and unenforceable:

> Before the policy could be deemed violated, it must have been valid and could be enforced. Failure to follow the State Rules Act caused the policy to be invalid and unenforceable under the terms of §14-4-5, *supra*. The failure of the State to show that the policy was enforceable resulted in a failure of proof on their part....
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> 94 N.M. at 621

The Attorney General has issued Opinion No. 93-1, addressed to the State Records Administrator. There, this Office concluded that state agencies subject to the State Rules Act were required to file all policy directives and policy manuals as rules, including procedural matters, if they met the definition of "rule" under §14-

4-2(C). As long as the directive, policy statement, procedure, standard, etc., affected agencies and persons other than the issuing agency or its members or employees, filing was required. Here, it is clear that the reformatted rules are intended to affect agencies and persons other than the issuing agency, just as the original rules were. Therefore, they must be filed with the State Records Center and Archives in order to be valid and enforceable.

Realizing that going through full rulemaking proceedings, including publication in the Register, for all rulemaking bodies will result in considerable expense to the State, we point out that an issuing agency may reduce the cost of publication of the proposed rule by publishing it in part. §14-4-7.1(B)(1). If an agency merely renumbers its rules, leaving the content of the rules unchanged, it may opt to publish some form of parallel table or matrix by which the old rule numbers are correlated with the new numbers.

The State Records Center can further assist in reducing the costs of publication in the Register after the rules have been repromulgated. Section 14-4-7.1(B)(2) empowers the Administrator, upon request from the issuing agency, to publish a synopsis of the newly amended rule, rather than the full text.

To summarize, we conclude that rule hearings and filings are required in order to validate rules which have been reformatted to meet the requirements of 1 NMAC 3.1, even though the substance of the rules does not change. The assumption under which you have been operating, as stated in your opinion request, that hearings and filings are not required, is incorrect and should be abandoned.

Your request was for a formal Attorney General's Opinion. Such an Opinion would be a public document, and, as such, would be available to the general public. Although we are providing our legal advice in the form of a letter instead of a formal Opinion, we believe that this letter is a public document also, which is not subject to the attorney-client privilege. Therefore, copies of this letter may be provided by us to the public.

Thank you.

Sincerely,

William S. Keller

WILLIAM S. KELLER
Assistant Attorney General

cc: Gerald Gonzáles, Esq.,
Civil Division Director

William Brancard, Esq.,
Assistant Attorney General