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NEW MEXICO ENVIRONMENT DEPARTMENT

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James C. Kenney
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Deputy Secretary

April 17, 2020

Via Electronic Mail

Rick Hendricks, PhD
State Records Administrator
New Mexico State Records and Archives
1205 Camino Carlos Rey
Santa Fe, New Mexico 87507
rick.hendricks@state.nm.us

RE: Request for Allowing Digital Signatures on Rule Transmittal Forms

Dear Dr. Hendricks:

Due to the current public health emergency, the New Mexico Environment Department (“NMED”) and the New Mexico Water Quality Control Commission (“WQCC”) respectfully request that, pursuant to your authority under 1.24.10.23 NMAC,¹ the filing requirements for transmittal forms be waived for the WQCC’s current rule amendments to 20.6.4 NMAC, *Standards for Interstate and Intrastate Surface Waters*. The transmittal form is due to be filed no later than April 22, 2020. We request that the amendment filing be accepted by email, with a valid digital signature on the transmittal form, and that a paper copy of the same be accepted after-the-fact with a postmark of no later than April 22, 2020. The Department has met all other requirements for the rulemaking.

On March 11, 2020, the Governor issued Executive Order 2020-004 (“Emergency Order”), declaring a public health emergency in response to the first reported cases of COVID-19 in New Mexico. Pursuant to the Public Health Emergency Response Act, NMSA 1978, 12-10A-1 through -19 (2003), the Emergency Order applies to all political subdivisions to the extent permitted by law. On March 23, 2020, the New Mexico Department of Health issued a Public Health Order temporarily closing all non-essential businesses and limiting mass gatherings. The Order applies to all public and private employers and requires that social distancing be practiced.

The WQCC is administratively attached to NMED, per NMSA 1978, 74-6-3(F). After a rule is adopted by the WQCC, NMED manages and executes the administrative filing of the rule with the Administrative Law Division of State Records and Archives. As an executive department, NMED is currently required to implement teleworking for all staff. This is critical and necessary. NMED has a large and diverse staff, many of who are considered high-risk candidates for serious or fatal infections. The original signature

¹ **1.24.10.24 NMAC:** “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.”

requirement in 1.24.10.15(F) NMAC² will force NMED staff to unnecessarily violate the social distancing requirements under the Emergency Order. Obtaining an original signature will require NMED staff to meet in person, and given the short period of time until April 22, require NMED staff to make an in-person filing at the State Records Center and Archives. NMED and the WQCC feel that this is an unnecessary risk for all involved and that under the circumstances, waiving the original signature requirement is reasonable.

NMED and the WQCC are making this request because the Administrative Law Division is still requiring an original signature on a paper transmittal form for rule filings. We have been informed by Matt Ortiz of the Administrative Law Division that the continued requirement of a signed paper copy is based on an apparent conflict between subsections (A) and (F) of 1.24.10.15 NMAC. Subsection (A) permits a transmittal form in either “hard copy with an original signature in black ink or with a valid digital signature,” while subsection (F) states that a “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.” The Administrative Law Division has informed NMED that the conflict between subsections (A) and (F) has been resolved in favor of subsection (F) because it is considered more specific. The Office of the Attorney General has attempted to discuss this matter with Mr. Ortiz, but it is clear the decision is being made outside of any legal counsel available to State Records and Archives. NMED takes no position regarding the Division’s interpretation of 1.24.10.15 NMAC at this time. Our request is driven by the Emergency Order, the need to maintain social distancing, and our priority of keeping our staff as safe as possible throughout the duration of the public health emergency.

In addition to your authority under 1.24.10.23 NMAC, valid digital signatures are authorized by 1.24.10.15(A),³ and by Section 7 of the Uniform Electronic Transactions Act, NMSA 1978, 14-16-1 through -21 (2001), which states that “[a] record or signature may not be denied legal effect or enforceability solely because it is in electronic form . . . [and] [i]f a law requires a signature, an electronic signature satisfies the law.” It is our view that the original signature requirement can lawfully be waived, providing for the efficient administration of public affairs, while maintaining social distancing.

During this public health emergency, virtually all subdivisions of state government have implemented accommodations to minimize in-person contact and the spread of the virus: The Supreme Court has issued Order No. 20-850-02, authorizing telephonic/video proceedings for court cases statewide, and the Legislature has closed the State Capitol until further notice. In a series of executive Orders, the Governor has closed all public schools (Order 2020-012), released certain incarcerated persons (Order 2020-021), and required a quarantine for all persons arriving in the state by air travel (Order 2020-013). Closer to our request in this letter, the Governor has also issued Order 2020-015, waiving the in-person requirements for notarization of documents. These actions taken by all three branches of state government make it clear that reasonable accommodations that facilitate the administration of public affairs while maintaining social distancing is the standard preferred practice under the Emergency Order.

NMED and the WQCC respectfully request that the filing of amendments to 20.6.4 NMAC, *Standards for Interstate and Intrastate Surface Waters*, implementing a temporary standard for the City of Raton’s

² **1.24.10.15(F) NMAC:** “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.”

³ **1.24.10.15(A) NMAC:** “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.”

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wastewater treatment plant, be accepted by email, with a valid digital signature on the transmittal form, and that a paper copy of the same be accepted after-the-fact with a postmark of no later than April 22, 2020.

Thank you,

Jennifer Pruett Digitally signed by Jennifer Pruett
Date: 2020.04.17 14:53:01 -06'00'

Jennifer Pruett
Deputy Cabinet Secretary, New Mexico Environment Department
Chair, Water Quality Control Commission

Cc: Matt Ortiz, Administrative Law Division, SRA
Matt Garcia, General Counsel, Office of the Governor
Tania Maestas, Chief Deputy Attorney General
Sally Malavé, Open Meetings Division, Office of the Attorney General
Jennifer L. Hower, General Counsel, New Mexico Environment Department