

Hendricks, Rick, SRCA

From: Chris Mechels <cmechels@q.com>
Sent: Tuesday, September 29, 2020 10:41 AM
To: CPR, RMD, SRCA
Cc: Hendricks, Rick, SRCA; Ortiz, Matt, SRCA; Sally Malave; John Kreienkamp
Subject: [EXT] 1.24.10 Public Hearing Comments #2

Dear Sir,

This email is to make further comments on this Public Hearing.

On examining the following language, from the Notice of Public Hearing on the SRCA webpage, it seems there is actually an INTENT to mislead.

It claims the focus of the proposed change is the "digital signal" and that this was due to the Governor's declaration. In fact the Emergency Rule in April made NO mention of the digital signature, its focus was on the rules filing. So, the REAL effect of the proposed change is that it continues the changes to the rules filing, and eliminates the tie to the public health thus making the change permanent. This all seems a rather shifty dodge, with the real purpose of the change screened from view.

Synopsis:

Due to the governor's declaration of a public health emergency, the SRA issued an emergency amendment on April 29, 2020, to section 15 allowing for transmittal form filing with a digital signature. The proposed amendment of [1.24.10.15](#) NMAC consists of continuing to accept digital signature by eliminating the public health emergency predicate language.

Looking back to the history of this proposed modification, on March, it seems intent to bypass the filing provisions contained in the Rules Act statute.

"In light of the governor's executive order 2020-004 declaring a public health emergency and in the interest of the health and safety of our staff and rule filers, all rule filings will take place on submittal deadline dates only, until further notice. See, <http://www.srca.nm.gov/nmac/nmregister/pdf/2020-schedule.pdf>. If your agency needs to file on a different date, pursuant to Subsection D of Section 14-4-5 or Section 14-4-5.6 NMSA 1978, alternate arrangements can be made on a case by case basis. If you need to file anytime other than on a submittal deadline date, please send your request to Matthew Ortiz at 505-476-7941 (matt.ortiz@state.nm.us).

Thus, under cover of the emergency, bypasses the filing requirements contained in the Rules Act.

Then, in the 29 April Emergency Rule, the UNSUPPORTED claim is made; "Despite this notice and change in rule filing protocols, additional changes are needed to mitigate against the imminent threat to public health and safety during the public health emergency." The 24 March modification now becomes part of the Rule, but still has the linkage to the emergency, which provides cover for bypassing the Rules Act requirement, on a temporary basis.

Now, with the current proposal, the emergency language is stripped from the language, making it permanent, under the guise of dealing with the "digital signature", when in fact the real effect is to bypass the filing requirements of the Rules Act.

This all seems very calculated, and making use of the "emergency" to modify the Rules Act filing requirement to the liking of the Administrative Law Division (ALD). They would no longer have to file submittals reflecting their date and time, but at the convenience of ALD.

However, this seems to encounter some legal problems. Without the cover of the emergency, this seems to fall under NMSA 14-4-5.7.A which reads;

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.

Without the cover of the emergency, which is stripped from the current proposal, the rule conflicts with the statute, and is invalid.

I hope that this is sufficiently clear. Troubling is that SRCA/ALD seems intent on using the "emergency" to justify the use of an Emergency Rule (with no public input), then presenting that change as fact.

This pattern is seen throughout the Rules changes under the current Administration. The Dept of Health is one of the worst offenders. Overall, this administration used 23 Emergency Rules in 2019, before Covid. This contrasts with 10 per year in the 7 years prior to 2019. Thus far in 2020 some 26 Emergency Rules have been filed. Like the current 1.24.10 change, most of those Emergency Rules seem inappropriate, and simply efforts to get desired changes without public input.

The SRCA effort is disappointing, as rather than standing against the overuse of Emergency Rules to bypass the Rules Act, they have chosen to join in. This sets an extremely bad precedent, in the "pot calling the kettle black" for future Rules Act compliance, which is a duty of SRCA.

SRCA has submitted a rule with egregious violations of procedure, false statements of fact, and apparent intent to bypass the Rules Act filing requirements.

This should noted by their superiors, and dealt with.

Regards,

Chris Mechels
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