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November 11, 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: New Mexico Environment Department Comments on Proposed Amendments to 1.24.10 NMAC

Dear Dr. Hendricks;

The New Mexico Environment Department (“NMED”) applauds your continued efforts to make rule filings easier and more efficient for state agencies by supporting the use of electronic and digital technology. NMED respectfully submits the following comments to be included in the administrative record of the public hearing scheduled November 13, 2020 regarding the State Records Center and Archives’ (“SRCA”) proposed amendments to 1.24.10 NMAC. Previously, NMED submitted comments in relation to the proposed September 30, 2020 hearing. While NMED recognizes that the current proposed changes to 1.24.10.15(F) NMAC for allowing “valid digital signatures” and electronic filings are a step in the right direction, the proposed changes do not resolve NMED’s concerns.

As previously emphasized, the current public health emergency has highlighted the need for rule-based processes allowing electronic rule signing and filing. In addition, as state agencies increasingly integrate electronic processes into their work serving the people of New Mexico, it is important that the peoples’ business be as streamlined, efficient, and cost effective as possible. These comments help accomplish that.

The comments and proposed language offered here and provided previously by NMED are aimed at ensuring that the Administrative Law Division is authorized to accept electronic rule filings without the need of “wet signatures” or paper copy submittals, and that fully-electronic rule filings will be accepted as in full compliance with 1.24.10 NMAC. In addition to comments on 1.24.10.15(F) NMAC, NMED again respectfully proposes three other amendments (attached as NMED Exhibit 1).

First, NMED proposes amending 1.24.10.15(A) and 1.24.10.16(A) NMAC to eliminate the requirement to submit a paper copy of the transmittal form when an agency chooses to submit an electronic filing. Subsections 15(A) and 16(A) both contain language that require a paper-copy submittal of all transmittal forms. It is the position of NMED that the requirement for paper copies along with an electronic filing is unnecessary and duplicative. NMED has experienced several demands from SRCA Administrative Law Division (“ALD”) staff this year for paper copy filings with wet ink signatures (even during the pandemic

and on-going Public Health Orders), so NMED suggests making the rules very clear that these are not required. Our letters of April 17, 2020 and August 19, and your letters of April 20, 2020 and August 20, 2020 granting to NMED exceptions allowing the agency to file electronically with electronic signatures are attached to these comments (NMED Exhibits 2, 3, 4, and 5).

Next, NMED proposes the removal of the word “valid” from 1.24.10.15(A) and (F) NMAC. In the recent past, NMED has been obliged to seek guidance from the ALD on what a “valid digital signature” is. NMED still has no definitive clarity on the issue. According to the United States Cybersecurity & Infrastructure Agency, a “digital signature” is a type of electronic signature that “is a mathematical algorithm routinely used to validate the authenticity and integrity of a message (e.g., an email, a credit card transaction, or a digital document).”¹ The federal definition of digital signatures is very precise. If an agency has software that can generate digital signatures, then those signatures should be recognized as valid on their face. NMED’s concern is that the word “valid” is a euphemism for a particular brand or type of software, rather than a requirement for a particular technology. The question remains – what makes it “valid”? Based on the definition above, presumably Adobe Acrobat’s digital signatures would be acceptable. However, within the last two months, NMED has had to manage a situation in which it was unclear as to whether the ALD would accept Adobe digital signatures based upon this question. To eliminate confusion on this point, NMED proposes that the word “valid” be removed from the 1.24.10.15(A) and (F) NMAC.

Third, NMED opposes authorizing the ALD to exercise discretion on whether to accept otherwise legally sufficient digital rule filings. As stated above, state agencies are increasingly using electronic processes to streamline state business and allowing for discretion on this point introduces an unnecessary element of uncertainty into an already rigorous and complex process. To this end, NMED proposes the phrase “may be accepted” be struck from 1.24.10.15(F) NMAC. Leaving in that language creates confusion and uncertainty about what might be accepted or rejected by the ALD.

SRCA staff have cited discrepancies between 1.24.10.15(A) and (F) NMAC as the reason for continuing to require wet ink signatures and hard copy filings. For this reason, NMED urges you to revise and clarify both subsections of 1.24.10.15 and 1.24.10.16(A) NMAC. In addition, removing discretion over the acceptance of digital signatures and digital filings will provide reliable guidance for agencies and minimize the need for agencies to rely on step-by-step authorizations by ALD staff. Clarifying your regulations and clearly allowing all digital signatures and filings should eliminate any alleged conflict or discrepancy. This will significantly ease the burden on all state agencies filing with SRCA.

Thank you,

Jennifer Pruett
Deputy Secretary

Cc:

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

¹ United States Cybersecurity & Infrastructure Agency, *Understanding Digital Signatures* (<https://us-cert.cisa.gov/ncas/tips/ST04-018>).

Attachments

- NMED Proposed Changes to 1.24.10 NMAC (NMED Exhibit 1)
- April 17, 2020 Letter Pruett to Hendricks (NMED Exhibit 2)
- April 20, 2020 Letter Hendricks to Pruett (NMED Exhibit 3)
- August 19, 2020 Letter Pruett to Hendricks (NMED Exhibit 4)
- August 20, 2020 Letter Hendricks to Pruett (NMED Exhibit 5)