Opinion No. 87-59

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OPINION OF: HAL STRATTON, Attorney General

BY: Alicia Mason, Assistant Attorney General

TO: Michael J. Burkhart, Director, Environmental Improvement Division, New Mexico Health and Environment Department, P.O. Box 968, Santa Fe, New Mexico 87504-0968

QUESTIONS

Can the Environmental Improvement Board make minor, non-substantive corrections, such as typographical and grammatical corrections, to its regulations after a public hearing on the regulations but prior to filing?

CONCLUSIONS

Yes.

ANALYSIS

The New Mexico Environmental Improvement Act, Sections 74-1-1 through 74-1-10 NMSA 1978 (1986 Repl.), establishes the procedures that the New Mexico Environmental Improvement Board (hereinafter "EIB") must follow in adopting, amending, or repealing regulations. Section 74-1-9 provides in pertinent part that:

B. No regulation shall be adopted until after a public hearing by the board. As used in this section, "regulation" includes any amendment or repeal thereof...In making its regulations the board shall give the weight it deems appropriate to all relevant facts and circumstances....

D. Notice of the hearing shall be given at least sixty days prior to the hearing date and shall state the subject, the time and the place of the hearing and the manner in which interested persons may present their views. The proposed language amending any existing regulation or any proposed new regulation shall be made available to the public as of the date the notice of the hearing is given....

E. At the hearing, the board shall allow all interested persons reasonable opportunity to submit data, proposed changes to the proposed regulation, views or arguments orally or in writing and to examine witnesses testifying at the hearing. Any person heard or represented at the hearing shall be given written notice of the action of the board.

Section 74-1-9 does not state whether the procedures set forth therein apply when EIB makes non-substantive changes, meaning typographical and grammatical corrections

for clarity, to the proposed regulations before filing pursuant to Section 74-1-9(G). New Mexico courts have not addressed the issue. The focus of the analysis therefore should be whether the purposes of Section 74-1-9 would be frustrated if this section were to apply to non-substantive corrections of regulations. See State v. Doe, 95 N.M. 88,89, 619 P.2d 192, 193 (Ct. App. 1980) (statute must be interpreted so that ends sought to be accomplished by legislature shall not be thwarted).

The procedures set forth in Section 74-1-9 are comparable to Sections 4(a), (b) of the Federal Administrative Procedures Act (herinafter "APA"), codified in 5 U.S.C. § 553(b) (1977).[1] Federal courts of appeal have addressed the similar issue of whether rules promulgated pursuant to Sections 4(a), (b) are invalid for lack of public notice and of an opportunity for public comment be cause of minor, substantive deviations from the rules originally proposed. See, e.g., Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency, 824 F.2d 1258 (1st Cir. 1987).

Federal courts strictly review an agency's compliance with the APA's procedural rules. BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 641 (1st Cir. 1979), cert. denied, 444 U.S. 1096 (1980). The determination whether the procedure was adequate depends upon how well the notice served the policies underlying the notice requirement. Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency, 705 F.2d 506, 547 (D.C. Cir. 1983). The policies served by notice include: improving the quality of rule-making by exposing rule-makers to diverse public comment; insuring fairness to affected parties by providing an opportunity to be heard; and, enhancing the quality of judicial review by giving the affected parties an opportunity to develop evidence in the record to support their objections to a rule. Id. The courts balance these values against the public interest in expedition and finality. "The notice requirement should not force an agency endlessly to repropose a rule because of minor changes, nor should a court vacate and remand an otherwise reasonable rule because of a minor procedural flaw." Id. The procedural issue, therefore, must be resolved case by case, depending on the character of the change.

The requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions...Even substantive changes in the original plan may be made so long as they are "in character with the original scheme" and "a logical outgrowth" of the notice and comment already given... The essential inquiry is whether the commentors have had a fair opportunity to present their views on the contents of the final plan.

BASF Wyandotte Corp. v. Costle, 598 F.2d at 642. Accord, Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency, 705 F.2d at 547.

Statutes must be interpreted to facilitate their operation and to achieve their goals. Mutz v. Mun. Boundary Comm'n, 101 N.M. 694, 698, 688 P.2d 12, 16 (1984). If the procedural requirements of Section 74-1-9 were applied to EIB's non-substantive changes in a proposed regulation, such application would not serve the purpose of the

public notice and hearing requirements because the non-substantive changes would not affect the regulation's content. See Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency, 705 F.2d at 547 (purpose of notice and hearing is to improve the quality of rule-making, to ensure fairness to affected parties and to enhance the quality of judicial review). EIB's typographical and grammatical corrections would affect no interested parties within the area of EIB's regulatory responsibility. Further, such application would frustrate the competing public interest in expedition and finality. Statutes must be construed to promote public convenience and to avoid inequity, absurdity, and hardship. State ex rel. Bd. of County Commissioners of Bernalillo County v. Jones, 101 N.M. 660, 661, 687 P.2d 95, 96 (1984). It therefore is our opinion that Section 74-1-9 does not require EIB to provide public notice and a hearing merely to make minor, non-substantive corrections to regulations after hearing but prior to filing.

This conclusion is consistent with a somewhat similar situation that this office addressed in 1957-1958 Op. Att'y Gen. No. 58-196. That opinion considered whether the Secretary of State could correct an obvious misreference to the New Mexico Constitution in a Senate Joint Resolution without complying with the procedures set forth in article IV, section 20 of the New Mexico Constitution for amending previously-signed bills. The opinion concluded that article IV, section 20 did not apply to the errors that were apparent on the face of the resolution, that required no search behind the enrolled and engrossed copy filed with the Secretary of State, and that must be corrected to give meaning and effect to the Legislature's efforts.[2] Similarly, to give meaning and effect to EIB's regulations, EIB may correct typographical and grammatical errors without public notice and hearing.

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GENERAL FOOTNOTES

n1 The APA, Section 4(a), codified in 5 U.S.C. Section 553 (b)(3)(B) provides for agency waiver of the APA's procedural requirements when the agency for good cause finds "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." The agency, however, must "incorporate the finding and a brief statement of reason therefor in the rules issued." Id. Section 78-1-9 contains no comparable provision. Nevertheless, this distinction does not preclude APA decisions from being instructive in the instant issue. Section 553(b)(3)(B) has no bearing on whether an agency violates APA procedural requirements when the agency adopts a rule that varies, either substantively or non-substantively, from the proposed rule, because the provision contemplates no notice, no proposed rule, and consequently, no deviation.

n2 This opinion is qualified by the following:

However this opinion does not purport to establish precedent discretionary authority in the office of the Secretary of State for making changes or corrections in enrolled and engrossed legislative enactments which changes have not been previously called to the attention of the Attorney General's Office for determination of the nature of the alleged errors.

1957-1958 Op. Att'y. Gen. No. 58-196, at 804.