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# NMAC Transmittal Form

Volume:  Issue:  Publication date:  Number of pages:  (ALD Use Only) Sequence No.

Issuing agency name and address:  Agency DFA code:

Contact person's name:  Phone number:  E-mail address:

Type of rule action: (ALD Use Only) Most recent filing date:   
New  Amendment  Repeal  Emergency  Renumber

Title number:  Title name:

Chapter number:  Chapter name:

Part number:  Part name:

Amendment description (If filing an amendment):

Amendment's NMAC citation (If filing an amendment):

Are there any materials incorporated by reference? Yes  No

Please list attachments or Internet sites if applicable.

If materials are attached, has copyright permission been received? Yes  No  Public domain

### Specific statutory or other authority authorizing rulemaking:

This rulemaking by the Secretary of the Department of Health is made in accordance with the following authorities: Sections 9-7-6, 26-2a-17, and § 24-1-3(S) NMSA 1978.

Notice date(s):  Hearing date(s):  Rule adoption date:  Rule effective date:

# Concise Explanatory Statement For Rulemaking Adoption:

## Findings required for rulemaking adoption:

Findings **MUST** include:

- Reasons for adopting rule, including any findings otherwise required by law of the agency, and a summary of any independent analysis done by the agency;
- Reasons for any change between the published proposed rule and the final rule; and
- Reasons for not accepting substantive arguments made through public comment.

The findings in support of this rulemaking are as stated in the attached Statement of Reasons for Adoption of the rule, which is hereby incorporated by reference.

Issuing authority (If delegated, authority letter must be on file with ALD):

Name:

Kathleen M. Kunkel

Check if authority has been delegated

Title:

Cabinet Secretary

Signature: (BLACK ink only)

*Kathleen M. Kunkel*

Date signed:

8-26-20

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STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF HEALTH

IN THE MATTER OF THE PROPOSED  
ADOPTION OF 7.1.30 NMAC

STATEMENT OF REASONS  
FOR ADOPTION OF RULE

The Cabinet Secretary for the New Mexico Department of Health (“Department”), Kathyleen M. Kunkel, hereby adopts the rule 7.1.30 NMAC. This decision is based on the record in this matter, which includes Exhibits 1 through 10, the recording of the hearing, and the Report and Recommendation of the Hearing Officer, Craig Erickson, Esq., dated August 20, 2020 and received by the Cabinet Secretary on August 21, 2020 via FedEx Express. The rule shall become effective on September 15, 2020, upon publication in the New Mexico Register.

In further support of this action, the Cabinet Secretary finds the following:

1. The Department of Health is authorized to promulgate rules as may be necessary to carry out the duties of the Department and its divisions. NMSA 1978, § 9-7-6(E).
2. The Department of Health is also required, pursuant to the Public Health Emergency Response Act (PHERA) at NMSA 1978, § 12-10a-17, to “promulgate and implement rules that are reasonable and necessary to implement and effectuate the Public Health Emergency Response Act.”
3. By a letter dated June 15, 2020, the Cabinet Secretary designated Mr. Erickson to serve as Hearing Officer for the purpose of conducting the hearing, receiving and reviewing public comment, and submitting a recommendation regarding the proposed rule.
4. Notice of the July 23, 2020 hearing for the proposed rule was provided to the public in accordance with NMSA 1978, Section 9-7-6(E) and NMSA 1978, § 14-4-5.2, which

the New Mexico Register on June 23, 2020.

5. A public rule hearing was held via the Internet-based video conference platform Cisco Webex on July 23, 2020 in accordance with NMSA 1978, Section 9-7-6(E). The hearing was conducted entirely via video conference, rather than in-person, due to the ongoing declared public health emergency concerning the novel coronavirus disease COVID-19.

6. Members of the public were afforded the opportunity to submit data, views, and arguments on the proposed rule orally and in writing, and those comments were received by the Hearing Officer until the close of the hearing. The deadline for the receipt of written public comment was later extended by the Hearing Officer to the close of business on August 4, 2020, and public comment was received until that time.

7. The purpose of the proposed rule 7.1.30 NMAC is to adopt a rule to govern the procedure for administrative hearings conducted pursuant to the Public Health Emergency Response Act (PHERA), NMSA 1978, §§ 12-10a-1 through 12-10a-19.

8. Rule part 7.1.30 NMAC was initially adopted by the Cabinet Secretary as an emergency rule on March 20, 2020 and published in the NM Register, Vol. XXXI, Issue 7 on April 7, 2020.

9. Changes between the original, emergency rule, and changes between the rule draft that was offered at the rule hearing and the final rule, are as stated in the record of the hearing and as described in the Hearing Officer's Report and Recommendation, the recommendations of which are adopted herein by the Cabinet Secretary.

10. The Cabinet Secretary has familiarized herself with the rulemaking record, including the Report and Recommendation of the Hearing Officer, and finds that the Hearing

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Officer has appropriately considered the proposed rule changes and the substantive comments made through public comment; and the Secretary hereby adopts the Hearing Officer's recommendations concerning the proposed rule.

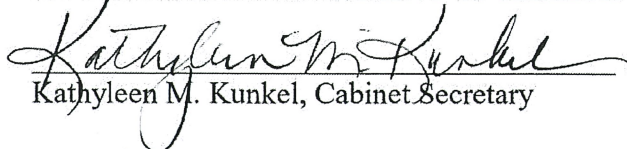
11. The Cabinet Secretary finds that the Department has shown that the proposed rule is reasonable and necessary; that it is in harmony with the agency's express statutory authority under the Public Health Emergency Response Act at NMSA 1978, § 26-2a-17, the Department of Health Act at NMSA 1978, § 9-7-6(E), and the Public Health Act at NMSA 1978, § 24-1-3(S); and that it further springs from the powers that are fairly implied therefrom.

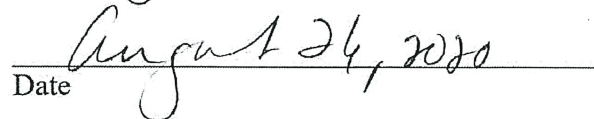
12. The Cabinet Secretary finds that the proposed rule 7.1.30 NMAC has been shown to be reasonably consistent with the statutory purposes of the New Mexico Department of Health. *See, e.g.*, NMSA 1978, § 9-7-3.

13. The Cabinet Secretary further finds that the rule promulgation process met the requirements of the State Rules Act and the New Mexico Attorney General's Default Procedural Rule for Rulemaking at 1.24.25 NMAC.

14. The Cabinet Secretary further finds that the proposed rule, as modified after the hearing based upon the Hearing Officer's recommendation, is appropriate and consistent with authorizing laws, and accordingly, the rule 7.1.30 NMAC is hereby adopted.

NEW MEXICO DEPARTMENT OF HEALTH

  
Kathyleen M. Kunkel, Cabinet Secretary

  
Date

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**TITLE 7 HEALTH**  
**CHAPTER 1 HEALTH - GENERAL PROVISIONS**  
**PART 30 ADMINISTRATIVE HEARINGS FOR CIVIL MONETARY PENALTIES ISSUED PURSUANT TO PHERA**

**7.1.30.1 ISSUING AGENCY:** New Mexico department of health.  
[7.1.30.1 NMAC - N/E, 3/20/2020]

**7.1.30.2 SCOPE:** This rule applies to all persons who receive a notice of contemplated action for imposition of a civil monetary penalty pursuant to the Public Health Emergency Response Act (“Act”), Section 12-10A-19 NMSA 1978.  
[7.1.30.2 NMAC - N/E, 3/20/2020]

**7.1.30.3 STATUTORY AUTHORITY:** Public Health Emergency Response Act (“Act”), Section 12-10A-1 *et seq.*, NMSA 1978; and Subsection E of Section 9-7-6, NMSA 1978.  
[7.1.30.3 NMAC - N/E, 3/20/2020]

**7.1.30.4 DURATION:** Permanent.  
[7.1.30.4 NMAC - N/E, 3/20/2020]

**7.1.30.5 EFFECTIVE DATE:** March 20, 2020, unless a later date is cited at the end of a section.  
[7.1.30.5 NMAC - N/E, 3/20/2020]

**7.1.30.6 OBJECTIVE:** The objective of this rule is to provide administrative procedural rules to govern the appeal of a civil monetary penalty that is assessed by the department under the Act.  
[7.1.30.6 NMAC - N/E, 3/20/2020]

**7.1.30.7 DEFINITIONS:**

**A. “Appellant”** means a person who is served a notice of contemplated action for imposition of a civil monetary penalty pursuant to the Act at Section 12-10A-19 NMSA 1978, who timely submits a request for hearing, in accordance with this rule, to contest the proposed penalty.

**B. “Department”** means the New Mexico department of health.

**C. “Notice of contemplated action”** means a notice that is issued by the department to a person pursuant to the Section 12-10A-19, NMSA 1978.

**D. “Person”** means a living person or a legal entity.

**E. “Recipient”** means a recipient of a notice of contemplated action.

**F. “Secretary”** means the cabinet secretary of the New Mexico department of health.

[7.1.30.7 NMAC - N/E, 3/20/2020]

**7.1.30.8 HEARINGS PURSUANT TO THE PUBLIC HEALTH EMERGENCY RESPONSE ACT:**

**A. Right to hearing:** A person may request an administrative hearing before a hearing officer appointed by the secretary or his or her designee, to appeal the proposed imposition of a civil monetary penalty pursuant to the Act at Section 12-10A-19 NMSA 1978. An appellant may request the hearing by mailing a certified letter, return receipt requested, to the New Mexico department of health at the mailing address that is specified on the notice of contemplated action within five days after service of the notice of the contemplated action. If the recipient fails to request a hearing in the time and manner required by this section, the recipient shall forfeit the right to a hearing, and the proposed action shall become final.

**B. Scheduling the hearing:**

**(1) Appointment of hearing officer:** Upon the department’s receipt of a timely request for a hearing, the department shall appoint an impartial hearing officer and schedule a hearing.

**(2) Hearing date:** The hearing shall be held not more than 60 days and not less than 12 days from the date of service of the notice of the hearing.

**(3) Notice of hearing:** The department shall notify the appellant of the date, time, and place of the hearing and the identity of the hearing officer, within twenty days of the department’s timely receipt of the request for hearing.

**(4) Hearing venue:** The hearing shall be held in Santa Fe, NM; provided that the hearing

officer may, with the agreement of the parties, hold the hearing in another location within the state of New Mexico. Hearings may be held in whole or in part via telephone or live video, upon the request of either party, at the hearing officer's discretion.

**C. Method of service:** Any notice or decision required to be served under this section may be served either personally or by certified mail, return receipt requested, directed to the appellant at the appellant's last known mailing address; provided that, if the appellant is a company registered with the New Mexico secretary of state, the notice shall be served upon the company's duly registered agent. If the notice or decision is served personally, service shall be made in the same manner allowed by the rules of civil procedure for the state district courts of New Mexico. Where the notice or decision is served by certified mail, it shall be deemed to have been served on the date borne by the return receipt showing delivery, or the date of the last attempted delivery of the notice or decision, or the date of the addressee's refusal to accept delivery.

**D. Hearing officer duties:** The hearing officer shall conduct the hearing, rule on any motions or other matters that arise prior to the hearing, and issue a written report and recommendation(s) to the secretary following the close of the hearing.

**E. Official file:** Upon appointment, the hearing officer shall establish an official file which shall contain all notices, hearing requests, pleadings, motions, written stipulations, evidence, briefs, and correspondence received in the case. The official file shall also contain proffered items not admitted into evidence, which shall be so identified and shall be separately maintained. Upon conclusion of the proceeding and following issuance of the final decision, the hearing officer shall tender the complete official file to the department for its retention as an official record of the proceedings.

**F. Powers of hearing officer:** The hearing officer shall have all the powers necessary to conduct a hearing and to take all necessary action to avoid delay, maintain order, and assure development of a clear and complete record, including but not limited to the power to: administer oaths or affirmations; schedule continuances; direct discovery; examine witnesses and direct witnesses to testify; subpoena witnesses and relevant books, papers, documents, and other evidence; limit repetitious and cumulative testimony; set reasonable limits on the amount of time a witness may testify; decide objections to the admissibility of evidence or receive the evidence subject to later ruling; receive offers of proof for the record; take notice of judicially cognizable facts; direct parties to appear and confer for the settlement or simplification of issues, and otherwise conduct pre-hearing conferences; impose appropriate evidentiary sanctions against a party who fails to provide discovery or who fails to comply with a subpoena; dispose of procedural requests or similar matters; require the parties to submit proposed findings of fact and conclusions of law, as well as written closing arguments; and enter the hearing officer's own proposed findings of fact and conclusions of law, orders, reports and recommendations for the consideration of the secretary. The hearing officer may utilize his or her experience, technical competence, or specialized knowledge in the evaluation of evidence presented.

**G. Minimum discovery; inspection and copying of documents:** Upon written request to another party, any party shall have access to documents in the possession of the other party that are relevant to the subject matter of the appeal, except confidential or privileged documents.

**H. Minimum discovery; witnesses:** The parties shall each disclose to each other and to the hearing officer, either orally or in writing, the names of witnesses to be called, together with a brief summary of the testimony of each witness, by a deadline established by the hearing officer. In situations where written statements will be offered into evidence in lieu of a witness's oral testimony, the names of the persons making the statements and a brief summary of the statements shall be disclosed.

**I. Pre-hearing disposition:** The subject matter of any hearing may be disposed of by stipulation, settlement or consent order, unless otherwise precluded by law. Any stipulation, settlement, or consent order reached between the parties shall be written and shall be signed by the hearing officer and the parties or their attorneys.

**J. Postponement or continuance:** The hearing officer, at his or her discretion, may postpone or continue a hearing upon his or her own motion, or upon the motion of a party, for good cause shown. Notice of any postponement or continuance shall be given in person, by telephone, or by mail to all parties within a reasonable time in advance of the previously scheduled hearing date.

**K. Conduct of hearing:** Pursuant to the Open Meetings Act, Section 10-15-1, *et seq.*, NMSA 1978, hearings shall be open to the public; provided, however, that hearings may be closed in part to prevent the disclosure of confidential information, including but not limited to health information protected by state and federal laws.

**L. Telephonic testimony:** Upon timely notice to the opposing party and the hearing officer, and with the approval of the hearing officer, the parties may present witnesses by telephone or live video (if available).

**M. Legal representation:** An appellant may be represented by an attorney licensed to practice in

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New Mexico, by a non-attorney representative, or by both. The department may be represented by an attorney licensed to practice in New Mexico, a department employee, or by both.

**N. Recording:** The hearing officer or a designee shall record the hearing by means of a mechanical sound recording device provided by the department for a record of the hearing. Such recording need not be transcribed, unless requested by a party who shall arrange and pay for the transcription.

**O. Burden of proof:** Except as otherwise provided in this rule, the department has the burden of proving by a preponderance of the evidence the basis for the proposed action.

**P. Order of presentation; general rule:** Except as provided in this rule, the order of presentation for hearings in all cases shall be:

- (1) **appearances:** opening of proceeding and taking of appearances by the hearing officer;
- (2) **pending matters:** disposition by the hearing officer of preliminary and pending matters;
- (3) **opening statements:** the opening statement of the department, if any; and then the opening statement of the appellant, if any;
- (4) **cases:** the department's case-in-chief, and then the case-in-chief of the appellant;
- (5) **rebuttal:** the department's case-in-rebuttal, if any;
- (6) **closing argument:** the department's closing statement, if any, which may include legal argument; and then the closing statement of the party opposing the department's action or proposed action, if any, which may include legal argument; and
- (7) **close:** close of proceedings by the hearing officer.

**Q. Admissible evidence; rules of evidence not applicable:** The hearing officer may admit evidence and may give probative effect to evidence that is of a kind commonly relied on by reasonably prudent persons in the conduct of serious affairs. Rules of evidence, such as the New Mexico rules of evidence for the district courts, shall not apply but may be considered in determining the weight to be given any item of evidence. The hearing officer may at his or her discretion, upon his or her motion or the motion of a party or a party's representative, exclude incompetent, irrelevant, immaterial, or unduly repetitious evidence, including testimony, and may exclude confidential or privileged evidence.

**R. Objections:** A party may timely object to evidentiary offers by stating the objection together with a succinct statement of the grounds for the objection. The hearing officer may rule on the admissibility of evidence at the time an objection is made or may receive the evidence subject to later ruling.

**S. Official notice:** The hearing officer may take notice of any facts of which judicial notice may be taken. When the hearing officer takes notice of a fact, the parties shall be notified either before or during the hearing of the fact so noticed and its source, and the parties shall be afforded an opportunity to contest the fact so noticed.

**T. Record content:** The record of a hearing shall include all documents contained in the official file maintained by the hearing officer, including all evidence received during the course of the hearing, proposed findings of fact and conclusions of law, the recommendations of the hearing officer, and the final decision of the secretary.

**U. Written evidence from witnesses:** The hearing officer may admit evidence in the form of a written statement made by a witness, when doing so will serve to expedite the hearing and will not substantially prejudice the interests of the parties.

**V. Failure to appear:** If a party who has requested a hearing or a party's representative fails to appear on the date, time, or location announced for a hearing, and if no continuance was previously granted, the party shall be deemed to be in default; the hearing officer shall issue his or her report, noting the default; and the secretary may subsequently render a final decision adopting the proposed action. Where a person fails to appear at a hearing because of accident, sickness, or other cause, the person may within a reasonable time apply to the hearing officer to reopen the proceeding, and the hearing officer may, upon finding sufficient cause, fix a time and place for a hearing and give notice to the parties.

**W. Hearing officer written report and recommendation(s):** The hearing officer shall submit a written report and recommendation(s) to the secretary that contains a statement of the issues raised at the hearing, proposed findings of fact and conclusions of law, and a recommended determination. Proposed findings of fact shall be based upon the evidence presented at the hearing or known to all parties, including matters officially noticed by the hearing officer. The hearing officer's recommended decision is a recommendation to the secretary of the New Mexico department of health and is not a final order.

**X. Submission for final decision:** The hearing officer's report and recommendation(s) shall be submitted together with the complete official file to the secretary of the New Mexico department of health for a final decision no later than 30 days after the hearing.

**Y. Secretary's final decision:** The secretary shall render a final decision within 45 calendar days of



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the submission of the hearing officer's written report. A copy of the final decision shall be mailed to the appealing party by certified mail, return receipt requested, within 15 days after the final decision is rendered and signed.  
[7.1.30.8 NMAC - N/E, 3/20/2020]

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**History of 7.1.30 NMAC: [RESERVED]**