

**MINUTES
of the
FIRST MEETING
of the
REGULATORY PROCESS SUBCOMMITTEE**

**August 2-3, 2010
Room 307, State Capitol
Santa Fe**

The first meeting of the Regulatory Process Subcommittee (RPS) was called to order by Senator Bernadette M. Sanchez, chair, at 9:15 a.m. on Monday, August 2, 2010, in Room 307 of the State Capitol.

Revenue Stabilization and Tax Policy Committee Members

Present

Rep. Edward C. Sandoval, Co-Chair
Sen. Steven P. Neville
Rep. Don L. Tripp
Rep. Jim R. Trujillo

Absent

Sen. Tim Eichenberg
Sen. Howie C. Morales

Economic and Rural Development Committee Members

Present

Sen. Bernadette M. Sanchez, Co-Chair
Rep. William J. Gray (8/2)
Rep. Patricia A. Lundstrom (8/2)
Sen. George K. Munoz
Rep. Debbie A. Rodella
Sen. William E. Sharer

Courts, Corrections and Justice Committee Members

Present

Rep. Zachary J. Cook
Sen. Linda M. Lopez
Sen. John C. Ryan (8/3)
Rep. Mimi Stewart
Sen. David Ulibarri

Absent

Rep. Al Park

Guest Legislator

Sen. Timothy M. Keller

(Attendance dates are noted for those members not present for the entire meeting.)

Staff

Peter Kovnat
Sandy Mitchell

Guests

The guest list is in the meeting file.

Handouts

All handouts and written testimony are in the meeting file.

Monday, August 2**Administrative Procedures Act (APA) Task Force Update and Recommendations**

Kelly O'Donnell, superintendent, Regulation and Licensing Department, provided the subcommittee with an update on the activities of the lieutenant governor's task force on the model APA. The purpose of the task force is to review the proposed model APA, state agency rulemaking processes and rulemaking processes in other states and to make recommendations concerning the adoption of part or all of the model APA. She said the task force will most likely propose legislation for consideration during the 2011 legislative session. The form of the legislation has not yet been decided. Superintendent O'Donnell reported that the meetings of the task force have been well attended. She provided the subcommittee with a list of the members of the task force and the web address where minutes of the meetings can be found (www.rld.state.nm.us).

Superintendent O'Donnell explained that the model APA is a large document; there is more in it than the task force would like to deal with in one piece of legislation. The task force is focusing on three aspects of the model APA: public access, rulemaking and rules review. The task force has determined that its first priority is to address the rulemaking process. The task force has laid out the following objectives: improve transparency; allow earlier involvement by a wider variety of stakeholders in the drafting of the rules; allow greater access for the general public; identify the optimum level of uniformity across agencies while maintaining the necessary flexibility; establish minimum standards; limit the costs and burdens on agencies, the legislature, businesses and the public; and prepare recommendations in time for the 2011 legislative session.

Superintendent O'Donnell explained that the purpose of the rules is to clarify statutes. Ideally, the rulemaking process would include two steps: (1) a pre-petition outline; and (2) notice. The pre-petition outline would be made available to the public via web sites or electronic mailing or it could be mailed to those requesting it, which would be used to solicit early public input on draft rules. The pre-petition outline would include a brief explanation of the proposed change, when it is proposed to happen, how the changes will proceed and the statutory authority. The task force has looked at the types of notice that should be required, including who should get notice and what should be included in the notice. The task force concluded that it would be advantageous to have several ways to receive comments.

Superintendent O'Donnell was asked to whom the task force reports. She said the task force was organized by the lieutenant governor, but that the RPS seems an appropriate body to which to provide a report.

Superintendent O'Donnell was asked whether there is currently a mandatory process for public input. She replied that there are processes in place, but they are not uniform. How public notice is provided is not consistent among agencies. Subcommittee members asked questions concerning the process for formulating rules from statutory language. Superintendent O'Donnell explained that the process varies among the different agencies and that it is usually the legal staff of an agency that ensures that rules are compatible with the statutes. Superintendent O'Donnell was asked how other state legislatures deal with conflicts that arise between rules and statutes. She said she is not familiar with other states, but in New Mexico, the conflicts are resolved in court. John Martinez, director, Administrative Law Division, State Commission of Public Records, commented that different states have different procedures. In Arizona, rules are reviewed by the governor's and attorney general's offices. In California, there is an administrative law office that reviews every rule. In Connecticut, legislative committees review rules. He said that most states have some centralized substantive review process for rules prior to their adoption. Mr. Martinez was asked about processes for review after adoption. He said that there are a number of states where the legislature reviews rules after adoption. He explained that in Connecticut and Idaho, rules can be struck down, but that is rare among legislatures. Other options include a joint resolution to the governor requesting review of the rule or a bill that repeals the objectionable rule.

Subcommittee members expressed their concerns that regulators may be legislating rather than merely clarifying statutory language and that rules are being promulgated without providing adequate time for public input or despite strong public objections. Superintendent O'Donnell said that there will be advocates and opponents of most every rule, but commissioners have to make independent decisions. She said the goal should be to have broad input into the drafting of rules and there should be a process for the public to object after rules are promulgated.

Subcommittee members expressed their concerns that the rules process may be hurting small businesses because the business owners cannot afford to leave work to attend rulemaking hearings or hire attorneys, and, if the costs of the new rules are too high, they end up going out of business.

Superintendent O'Donnell was asked about the proposed rule for sprinklers in homes. She said the sprinkler requirement was not adopted; consideration on the proposal has been deferred until 2013. She said that the fire marshals were the only ones who wanted the rule. Builders were against it. She said public input in this case was very effective. She said the costs outweighed the benefit.

Superintendent O'Donnell was asked when the task force would have its recommendations completed. She said probably in October. It was suggested that the subcommittee could review the recommendations if it meets again. Representative Sandoval said he would like the subcommittee members to review the recommendations ahead of the next meeting, if another meeting day is approved by the New Mexico Legislative Council.

Subcommittee members expressed concern over the membership of the task force. Superintendent O'Donnell explained that anyone who is interested can attend and participate in the meetings. A motion was made by Senator Munoz for the subcommittee to send a letter to state agencies and stakeholders inviting them to attend and participate in the task force meetings. The motion was seconded by Representative Sandoval and adopted without objection. Superintendent O'Donnell requested that she be able to review the letter before it is mailed.

Overview of New Mexico APA, Model APA, New Mexico Uniform Licensing Act (ULA) and New Mexico State Rules Act

Mr. Martinez provided an overview of rulemaking in New Mexico. He explained that rules are a category of state law that implements statutes. Rules are law, but statutes always prevail over rules if there is a conflict. He stated that there must be authorization by the legislature to issue rules, unless there is implied constitutional authority.

Mr. Martinez discussed the State Rules Act. It establishes some basic requirements for the rulemaking process, but it does not cover all the steps. For example, it does not cover adjudication. He then discussed New Mexico's APA. It is based on the 1961 model act. It sets out basics for rulemaking and adjudication, but state agencies for the most part are exempted from its provisions. He also discussed the ULA, which was enacted in 1957, and the Executive Reorganization Act, which was enacted in 1977. The ULA covers most professional licensing entities and includes elements of an APA. The Executive Reorganization Act covers agencies in the governor's cabinet and allows secretaries of those agencies to make and adopt reasonable and procedural rules. Mr. Martinez explained that some agencies have rulemaking requirements that were enacted as part of the legislation that created the agency. Those requirements can vary greatly from agency to agency. Mr. Martinez was asked if he could provide an organizational chart showing how the processes are interrelated. He said yes.

Mr. Martinez explained the differences between promulgating a new rule, amending a rule and repealing a rule. He also explained how proposed rules are published in the New Mexico Register, which is published twice each month, and how current rules are published in the New Mexico Administrative Code (NMAC). He explained that the NMAC is organized by topic, is updated monthly and is available only in electronic media (free of charge).

Mr. Martinez explained that the model APA was first issued in 1946. New Mexico adopted a version of the 1961 model act. He explained the difference between a model act and a uniform act. With a model act, the states pick and choose among options. The same language is not adopted by all the states. He said the latest revision of the model APA began in 2004 and is designed to accommodate changes in technology and to align with new case law. The final version was approved in July 2010. He explained that there is no one uniform APA in use among the states because every state approaches it differently.

Mr. Martinez was asked how members of the public without computer access can read the rules if they are only published electronically. Mr. Martinez said there is no funding for publications. Every year, he attends public librarian conferences and trains librarians on helping

the public access the information. Interest was expressed by subcommittee members in receiving issues of the New Mexico Register, and a request was made that the Legislative Council Service librarian include the New Mexico Register in the list of publications that legislators may opt to receive. Interest was also expressed in having Mr. Martinez provide recommendations to the subcommittee at a future meeting.

Agency Rule Promulgation

A panel of presenters, including Willie Brown, general counsel, Public Education Department (PED), Mark Reynolds, acting general counsel, Human Services Department (HSD), Felicia Orth, hearing officer, Department of Environment, and Jim Noel, secretary-designate, Energy, Minerals and Natural Resources Department (EMNRD), discussed how rules are promulgated in the agencies they represent.

Mr. Brown explained that the PED follows the State Rules Act and the Public Education Department Act in promulgating its rules. He said that most of the PED's rulemaking involves amendments. The PED programs are responsible for drafting changes, and the changes are then reviewed by the PED's legal staff. After a working draft is completed, the PED posts a press release on its web site with a link to the rule. The PED also publishes a notice of proposed rulemaking in the legal notices of the *Albuquerque Journal* and in the New Mexico Register. A public hearing is held no sooner than 30 days after the notice of proposed rulemaking is published in the New Mexico Register.

Mr. Brown reported that in the last four years, the PED has promulgated 40 new rules, 11 of which were separated from one large rule that the PED repealed because it was too cumbersome to allow its stakeholders to have effective access. He provided the subcommittee with a list of the rules.

Mr. Reynolds explained the rulemaking process at the HSD. He said that there are four divisions that make up the HSD, and, over the last four years, three of those divisions have engaged in rulemaking. He said that 107 rules have been promulgated by the HSD since 2006. He said that a majority of the rules were Medicaid-related and many of the changes were made to comply with federal requirements. Some of the rules that were not federally driven concerned optional New Mexico benefits.

Mr. Reynolds provided the subcommittee with a sample time line showing the rulemaking process at the HSD. He said it takes about five weeks to go through the internal process. Notice of the proposed rule is provided to the State Commission of Public Records for publication in the New Mexico Register. He said that since 1991, the HSD has published a human services register (which is not statutorily required) that provides notice of what the HSD is doing. A public hearing must be held at least 30 days after public notice is provided. After the public hearing, another internal review process is conducted. He said he is not aware of any lawsuits concerning the promulgation of rules, but there have been lawsuits concerning the interpretation of its rules (i.e., whether someone is entitled to a benefit, etc.).

Ms. Orth said the Department of Environment adopts very few rules. Most of the rules administered by the department to protect air and water, worker safety and public health are presented to the Environmental Improvement Board or the Water Quality Control Commission for promulgation. The process includes: (1) the filing of a petition, which may be filed by any person; (2) notice of the proposed rule change and the time and date of a hearing at least 60 days in advance of the hearing; (3) a public hearing held in Santa Fe or other locations affected by the proposed rule change; and (4) a post-hearing process where parties are invited to submit closing arguments.

Ms. Orth provided the subcommittee with a summary of the responsibilities of the Department of Environment, the Environmental Improvement Board and the Water Quality Control Commission. She said it is important to note that the board and commission are provided legal advice by the Attorney General's Office. Rules promulgated by the department are primarily administrative and relate to funds. She provided the subcommittee with a chart showing the rules promulgated by the department, board and commission since 2006.

Secretary-Designate Noel discussed the rulemaking process at the EMNRD, which is governed by the Executive Reorganization Act and by EMNRD Policy OFS-118. The process also applies to all EMNRD divisions adopting rules that are approved by the cabinet secretary (generally the State Parks Division, the Forestry Division and the Energy Conservation and Management Division). The Oil Conservation Commission (OCC), the Mining Commission and the Coal Surface Mining Commission have their own statutory rulemaking procedures. The New Mexico Youth Conservation Corps Commission follows the procedures in the Executive Reorganization Act. EMNRD Policy OFS-118 does not apply to the commissions. Secretary-Designate Noel explained that there are two paths for rulemaking: one is through the cabinet secretary and the other is through the commissions. The commissions have independent authority to promulgate rules.

Secretary-Designate Noel reported that the department has promulgated 23 rules in the last four years. There have been appeals of three OCC rules. The 2007 surface waste management rule was upheld. The 2008 and 2009 pit rule amendments have not been acted on by the district court.

Ms. Orth was asked to explain the procedure for notice when there is no newspaper of general circulation in an area. She said the Department of Environment's rules require publication in at least one other area (i.e., a library, restaurant, etc.). She said it has become a challenge to provide notice because one newspaper in general circulation is no longer available in some areas. A subcommittee member suggested that the Open Meetings Act be amended to allow other methods for notice.

Subcommittee members discussed the regulatory process concerning the pit rule. Concern was expressed that the rule has cost the state millions of dollars and hurt employment. The need to protect water quality in the state was also expressed. Mark Fesmire, chair, OCC, was asked why the Oil Conservation Division (OCD) of the EMNRD seems to have recently

begun to take action that hinders industry. Mr. Fesmire said the regulators need to protect all of New Mexico, not just industry. A subcommittee member noted that many new wells are being drilled in New Mexico and there has not been one incident of water contamination from a pit since the rule was implemented. Mr. Fesmire was asked to explain how the pit rule was promulgated despite the fact that it was rejected by the legislature. He said authority was given to the OCC and the OCD to protect water resources in the state. Mr. Fesmire was asked about the OCD's authority to shut down a well. He said that he will provide that information the following day.

Mr. Reynolds was asked to provide examples of the types of rule changes that have affected health benefits. He mentioned changes to vision care and emergency response devices. He said the HSD attempted to make the budget cuts it needed that would have the least impact on services. Senator Sanchez asked him to provide the subcommittee with a list of the reductions to services, including income support.

Subcommittee members asked about changes to behavioral health services that require services to be provided by core service agency (CSA) designees. A representative from the Interagency Behavioral Health Purchasing Collaborative (IBHPC) stated that it is a new service, not a reduction in service, to improve outcomes for people who have behavioral health difficulties and to ensure that providers can provide treatment regardless of a person's behavioral disability.

Industry Concerns with Administrative Procedures and Rules Promulgation

A panel of presenters, including Dr. Beverlee McClure, president and CEO, Association of Commerce and Industry (ACI), Louis W. Rose, shareholder, Montgomery & Andrews, and chair, ACI Environment Committee, Charlie Marquez, lobbyist, New Mexico Health Care Association (NMHCA), and T.J. Trujillo, chair, ACI, discussed industry concerns regarding rulemaking.

Dr. McClure commented that businesses want a fair hearing process. She said that businesses are concerned about the lack of economic impact studies on rule changes. She said there is also a problem with rules of different agencies conflicting with one another and there is no process in place for an agency to determine if its proposed rule conflicts with another agency rule. She said there is also no requirement to take public comments into consideration when deciding on the adoption of a rule change.

Mr. Rose discussed proposed greenhouse gas rules. He said there have been two procedures. There is one rule that was proposed by a public interest group that will be discussed in a hearing this month. There is also a parallel proceeding with the Environmental Improvement Board. He said a challenge was raised against the board going forward and the parties sought relief in the supreme court. The court ordered the process to go forward. Mr. Rose commented that the process will cost participants hundreds of thousands of dollars. He said the board gave the parties three weeks to get technical testimony ready. He said the board normally has a post-hearing process, but in this case, the board has not scheduled a post-hearing

process. He explained that both of these proposed rules will have a broad impact on the economy.

Mr. Marquez told the committee that the NMHCA supports adherence to a uniform APA. He said it is important for health care providers to understand the rulemaking process so that they can be involved and actively participate when regulatory changes are proposed. The NMHCA also believes that an economic impact assessment should be a component of the process.

He described how fiscal impact reports help legislators and the public understand the impact of a bill; however, there is not something similar for rules. He said there needs to be consistency in the process and legislative oversight is important.

Mr. Trujillo suggested areas for the subcommittee to look at as it goes forward. He noted that more rules are passed than statutes. He said that at least 37 other states have a constitutional or statutory process by which the legislature can review rules. He said the legislature needs to step up and provide oversight. He said legislation that was authored by the speaker of the house of representatives asked agencies to make a comprehensive review of all rules, but this has not happened. He said the ACI also believes that the number of boards and commissions should be reduced. He suggested two that should be eliminated: the Water Quality Control Commission and the Environmental Improvement Board.

Mr. Trujillo was asked what happened to the legislation authored by the speaker of the house and what agency was responsible for its implementation. Mr. Trujillo said he believed it was the Economic Development Department. Mr. Trujillo was asked his thoughts on the lieutenant governor's task force and whether some of its recommendations can be implemented administratively. He replied that the task force is doing some good work and it is having good public input. He said the task force is looking at statutory changes.

Mr. Trujillo was asked to provide some historical perspective on the regulatory process. He said the regulatory role has been expanding. He said the best way to delegate authority is either to write very prescriptive statutes or delegate review of rules to an interim committee. A subcommittee member expressed concern that rules can have harmful unintended consequences and, therefore, every rule should be reexamined every three years.

Effect of Rules on Advocates

A panel of presenters, including David Ley, Ph.D., executive director, New Mexico Solutions, and co-chair, New Mexico Youth Provider Alliance, Patsy Romero, C.P.H.Q., owner-manager, Romero and Associates, Inc., Anna Otero Hatanaka, executive director, Association of Developmental Disabilities Community Providers, and Elaine Solimon, executive director, ARCA, discussed the impact of rules on behavioral health services in New Mexico.

Dr. Ley explained that the IBHPC was established in 2005. He provided a list of the member agencies on the collaborative and the numbers and types of Medicaid service providers. He described how service providers are in the situation of jumping through hoops and then

finding out they have to jump in a different way. He said the people affected by rules need to be included in the rulemaking process.

Ms. Romero discussed the challenges with the current management strategy. She said there is inconsistent implementation and a lack of clarity on the responsibility for system changes and that the specific needs of the community are not incorporated into an overall strategy. She said rulemaking decisions are not data-driven and all the critical stakeholders are not included in the decisions.

Dr. Ley described how the state is putting forth a concept of CSAs. The intent is to develop integrated services to ensure that clients with mental illnesses receive services from one core provider. The difficulty, he said, is that rules do not exist on this right now and the outcomes are uncertain. He said he believes that there may be negative outcomes. Ms. Romero expressed the following concerns with CSA implementation and the provision of comprehensive community support services (CCSS): (1) there are no standards of practice to regulate the performance and service delivery of the CSA; (2) there are no contracts or scopes of work outlined for effective implementation; (3) there are no funds to appropriately fund CSAs to meet IBHPC expectations; (4) there are no provisions for addressing the non-CSA designees; (5) there are no mechanisms in place to preserve freedom of choice for consumers; and (6) the state is terminating all CCSS licensure from all existing providers in New Mexico who are not CSA designees. Ms. Romero expressed concern that the state is creating monopolies of care under this system. Ms. Romero introduced several consumers of health care services who expressed their gratitude for the services they have been provided and concern that they will have to switch providers.

Ms. Solimon described the burdens that rules can have on staff. She said it takes away from service delivery. Ms. Hatanaka described how sometimes the final result of hearings does not reflect public input and ends up making the participants feel like they wasted their time. She also expressed concern over the executive order that requires every service provider to provide health care benefits to its employees.

Subcommittee members expressed concern that agencies may not be aware of what other agencies are doing when they initiate new rules and that there may be overregulation in some instances.

The subcommittee recessed at 5:35 p.m.

Tuesday, August 3

Representative Sandoval reconvened the meeting at 9:18 a.m. Mr. Kovnat announced that a sign-up sheet was being distributed so that members could sign up to receive the New Mexico Register from the Legislative Council Service library.

New Mexico Court Cases on Rulemaking

Al Lama, chief deputy attorney general, Office of the Attorney General, provided an overview of some of the activities that the Office of the Attorney General is involved in concerning the rulemaking process. He explained that the office represents 100 state boards and commissions and most of those have some authority to make rules. He explained that the office has 13 lawyers in its Civil Division, and each of those lawyers represents seven to 12 state agency clients.

Mr. Lama explained that the Office of the Attorney General does not act as a policymaker. It assists boards in exercising their statutory authority to promulgate rules. He said when there is a proposal for rule adoption, the Civil Division makes an assessment as to whether the board has the authority to promulgate the rule and whether the rule fits within the board's scope of authority. The Civil Division works with agency staff to ensure that the process complies with statutory requirements. He explained that licensing boards fall under the ULA; other agencies have their own statutory authority and do not fall under the ULA. If there is an appeal over a rule, a Civil Division lawyer will assist the board in preparing arguments for trial.

Mr. Lama was asked questions about the Office of the Attorney General's role in representing agencies. Mr. Lama said the role of the office is not to act as a prosecutor or advocate of a rule. Instead, it advises boards on the process and ensures that statutory requirements are followed. He said that, in that sense, the office is an advocate for the public. He said that if a board wants to enact a rule outside of its authority or in violation of the constitution, the Office of the Attorney General will advise the board that it is going outside of its authority. Mr. Lama was asked about the procedure for those agencies his office does not represent. Mr. Lama said those entities are normally authorized to hire their own counsel. Representative Sandoval asked Mr. Lama to provide the subcommittee with a list of those boards or agencies that the Office of the Attorney General does not represent.

Mr. Lama was asked if rules can be promulgated without statutory authority. Mr. Lama stated that an agency can enact rules dealing with internal policies and procedures, but if the rule impacts entities outside the agency, it must have statutory authority. Mr. Lama was asked how often the office gets requests for opinions regarding the rulemaking authority of a board or commission. He said the office gets a lot of inquiries, although not necessarily formal requests, for opinions. He said that in the last year, the office has received five or six formal requests concerning the scope of authority of a rulemaking body.

Mr. Lama was asked whether a cabinet secretary is the ultimate decision-maker regarding rule promulgation. He said not necessarily; that is just one scenario. He explained that there are a variety of rulemaking models:

- a stand-alone board or commission with rulemaking authority;
- a policymaking body that is not a stand-alone agency (it is part of a department), but the body has the same independent authority to make policymaking decisions ; and
- an advisory board that can engage in rulemaking, but the head of the department is the final decision-maker.

Mr. Lama was asked whether the IBHPC, in mandating CSA providers to do case management, went through the rulemaking process. Mr. Lama said that he would assume there was some rule allowing the process. He said a federal requirement may also be implicated.

Mr. Lama was asked to provide examples of rules brought forth by the public. Mr. Lama said sometimes that happens with licensing boards concerning the scope of practice of a profession. Mr. Lama was asked about the Environmental Improvement Board's authority to make rules on greenhouse gases. Mr. Lama said that the New Mexico Supreme Court ruled under current law that the board has authority to engage in rulemaking; the court did not rule on the merits of the rule.

Rulemaking Begins with the Legislature

Jonelle Maison, senior drafter, Legislative Council Service, discussed the role of the legislature in rulemaking. She said an agency cannot implement a rule beyond its legislative authority. If the legislature gives an agency sweeping authority and does not draw a dark border on where it can go, then the agency may go into territory that the legislature does not want it to go. She said the executive branch will always interpret a statute to its best advantage. Ms. Maison provided an example of where an agency interpreted the word "campus" to mean the municipal boundaries of where a school is located rather than a more commonly accepted meaning of the term. In that way, the agency was able to subvert the will of the legislature.

Ms. Maison said the options of the legislature in reviewing rules are limited because it is a part-time legislature. She said there is not enough staff or subject-matter experts to determine if an agency is overstepping its boundaries. Interim committees can only make recommendations to the full legislature; they cannot act on their own. She said if the legislature does not like a rule, it can always change the law to limit the rule.

Ms. Maison was asked about the options available when an agency oversteps its bounds. She said the Office of the Attorney General reviews rules for this purpose, but, generally speaking, one has to change the law when one thinks an agency has overstepped its bounds. She said a review process by the legislature is a good idea if the legislature has the resources to review rules. Ms. Maison was asked about the practicality of passing laws as a remedy because the governor will veto them. She said the power to override rules could be placed in the Constitution of New Mexico by constitutional amendment. Subcommittee members discussed various other options, including asking the agencies to come before the subcommittee and justify their current rules, having interim committees vote on rules that fall within their purview and, if the committees have concerns, slowing down the process on rulemaking.

Overview of Recent Regulatory Process Legislation in New Mexico

Mr. Kovnat provided an overview of regulatory process legislation in the last four years. For the legislative sessions from 2006 to 2010, 37 pieces of legislation were introduced that related to the regulatory process; three in 2006, 11 in 2007, seven in 2008, 11 in 2009 and five in 2010. Legislation that passed included bills relating to mine safety rule enforcement (HB 682 and SB 819 in 2007), behavioral health purchasing rulemaking (HB 181 in 2008) and Water

Quality Act rulemaking limits (SB 206 in 2009) and memorials concerning review of bingo and raffle rules (HM 114 in 2007), creation of a regulatory reform task force (HM 111 in 2007) and a committee to study state government process and rules (SM 101 in 2009). He cautioned that this list is not exhaustive. Mr. Kovnat also provided information on the number and types of presentations that have been made concerning agency rules to the Revenue Stabilization and Tax Policy Committee, the Economic and Rural Development Committee and the Courts, Corrections and Justice Committee in the last four years.

Next Steps; Where We Go From Here

The subcommittee formulated its options to move forward. It will ask the New Mexico Legislative Council for two more meeting days to finalize matters. A handout was provided listing some of the suggestions that had been made at the meeting the day before. Representative Sandoval summarized some of the concerns, including a timetable for public input, greater transparency in the process and agency rulemaking that is limited to the areas where the agencies have statutory authority to promulgate rules. Mr. Kovnat asked the members to let him know if they had any points they wanted added to the list. He said he would write a letter or make a presentation to the New Mexico Legislative Council asking it for two more meeting days for the subcommittee.

Senator Ulibarri made a motion for the subcommittee to draft a letter to the Environmental Improvement Board asking it to follow the normal review process on the proposed greenhouse gas rules rather than fast-tracking the hearings. Senator Sharer seconded the motion. Representative Stewart questioned whether the subcommittee had enough information to know if the board was following proper procedures or not. She expressed concern that the subcommittee was taking action based on one anecdote from one attorney and that the subcommittee may not have all the facts. She suggested letting each individual member of the subcommittee decide whether or not to sign the letter. The subcommittee decided to return to the question of the letter later in the day after a draft was completed for members to look at.

Senator Sanchez clarified item three on the handout concerning CSAs. She said the subcommittee needs a list of what the Medical Assistance Division of the HSD has proposed and a description of each rule. She said the subcommittee also needs clarification on the statutory authority for this policy.

The subcommittee returned to the issue of the letter to the Environmental Improvement Board, and a draft of the letter was handed out to the members. The members discussed whether the language was too broad in some areas. The language was amended, without objection, to end the last sentence of the second paragraph after the word "positions" and to end the third paragraph after the first sentence. A roll call vote was taken on the adoption of the motion to send the letter to the board. The motion passed 10 to 2, with Representative Sandoval and Representative Stewart voting in the negative.

On a motion by Senator Lopez, the subcommittee staff was instructed to prepare a letter to the IBHPC giving it notice that the subcommittee is concerned about the CSA provider policy and to allow input on the policy. The motion was seconded by Representative Sandoval. The subcommittee staff was also instructed to provide subcommittee members with information on recommendations by the lieutenant governor's APA task force. If the subcommittee is granted two extra meeting days, the subcommittee will make its recommendations concerning the task force's ideas at that time.

On a motion by Representative Rodella, the subcommittee staff was instructed to send a letter to all agencies and boards requesting them to provide a list of all the rules they promulgated in the last eight years, the justifications for those rules and whether the rules were done via a general grant of statutory authority or statute-specific authority. The motion was seconded by Senator Ulibarri.

Subcommittee members discussed further ideas for improving the rulemaking process, including having some standard language in all bills to limit an agency's rulemaking authority, establishing a standing committee during the legislative session on rules and establishing an interim committee that is a subcommittee of the Legislative Finance Committee to review rules.

Gregory Green, vice chair, Environmental Improvement Board, who was present in the audience, was asked to comment on the letter that the subcommittee drafted. He said the board is allowing the statutorily required amount of time for hearings on the proposed greenhouse gas emission rules. He said the board has devoted more time to this issue than any other rule it has looked at, but that the board is required by statute to move forward on these hearings. He said the board is already doing everything that is being asked of it by the subcommittee's letter. Subcommittee members clarified that they are not attacking the board, but that they want to let the board know their concerns about the process.

Representative Sandoval thanked the subcommittee members for their participation.

The meeting adjourned at 1:38 p.m.