

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

December 16, 2019

Joanna Prukop, Chair
New Mexico Game Commission
PO Box 25112
Santa Fe, NM 87504

Michael Sloane, Director
Department of Game and Fish
PO Box 25112
Santa Fe, NM 87504

Dear Chair Prukop and Director Sloane,

Our office received a direct inquiry regarding correspondence of November 25, 2019 from Director Sloane to a landowner applicant, denying that individual's request for a designation of non-navigable water segment pursuant to Game and Fish Rule 19.31.22 NMAC. Your letter states that the reason for denial is that the Office of the Attorney General advised the Game Commission that the rule cannot be constitutionally enforced. As the Attorney General has stated, our office is committed to assisting in a process to strengthen the rule, however, we are concerned that the denial on this basis prematurely exposes the Commission and the State to extreme litigation risk. Accordingly, we respectfully advise you to administer the rule in a consistent manner until a proper rule change can take place, and we continue to offer our assistance to the Commission in order to reduce this risk.

With respect to the litigation risk, it is my understanding that your denial relies on a document from your assigned counsel, which does not constitute a formal Attorney General opinion, and notably does not have the force of law. To rely solely upon it as a basis for denying an application to what until now has been a properly promulgated rule, is tenuous, at best. Further, the denial, which comes after several approvals were issued under the same rule, raises serious

TOLL FREE 1-844-255-9210 TELEPHONE: (505)490-4060 FAX: (505)490-4883 www.nmag.gov
MAILING ADDRESS: P.O. DRAWER 1508 - SANTA FE, NEW MEXICO 87504-1508
STREET ADDRESS: 408 GALISTEO STREET - SANTA FE, NEW MEXICO 87501

due process and equal protection concerns that make that risk untenable. Moreover, there is nothing within said document that advises such rash action.

Further, without a conclusive finding that the rule is unconstitutional, the Commission is effectively repealing an otherwise validly promulgated rule based on its own opinion of the legal status of the rule. State law makes clear that if the Commission does want to repeal a rule, under the State's Administrative Procedures Act, the Commission must take specific steps to withdraw the rule, if it so chooses. *See* NMSA 12-8-4 (1969) (providing the process for repealing a rule); and *Rivas v. Board of Cosmetologists*, 1984-NMSC-076, ¶ 8, 686 P.2d 934, 935-936 ("Agencies are required to give notice of proposed action regarding the adoption, amendment or repeal of any rule . . . [and] if the agency adopts or repeals a contested rule, a concise statement of rationale must be issued by the agency."). Absent a determination that the rule is in fact unconstitutional, and absent a proper procedure, the Commission's actions may be deemed arbitrary or capricious, which even further increases the risk of litigation.

As the Attorney for the State of New Mexico, we take seriously the correct application of the New Mexico Constitution, work to support agencies in proper rulemaking, and we work zealously to protect the State from unnecessary litigation risk. Because all New Mexicans deserve certainty in the administrative process to ensure fairness and equal application of the law, we reiterate that disparate treatment of applicants under the rule, without a judicial determination or a proper remedial course, exposes the Commission and the State to untenable litigation risk. Accordingly, we respectfully advise you to enforce the rule in a consistent manner or to consider any other steps that would eliminate this risk.

Sincerely,

A handwritten signature in black ink that reads "Tania Maestas". The signature is written in a cursive, flowing style.

Tania Maestas
Chief Deputy Attorney General