CHAPTER 74
ENVIRONMENTAL IMPROVEMENT

ARTICLE 1
GENERAL PROVISIONS

74-1-1. Short title.

Sections 74-1-1 through 74-1-10 NMSA 1978 may be cited as the "Environmental Improvement Act".

History: 1953 Comp., § 12-19-1, enacted by Laws 1971, ch. 277, § 1; recompiled as 1953 Comp., § 12-12-1 by Laws 1972, ch. 51, § 9; 1973, ch. 340, § 1.

ANNOTATIONS

Cross-references. - As to environmental compliance, see 74-7-1 NMSA 1978 et seq.

Law reviews. - For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

For note, "Preemption - Atomic Energy," see 24 Nat. Resources J. 761 (1984).

For note, "Look Out States . . . Your Environmental Liability Could Be Bigger Than You Think", see 30 Nat. Resources J. 929 (1990).

For note, "The Toxic Time Bomb in the Borderland: Can the 'Emergency Planning and Community Right to Know Act' Help?", see 30 Nat. Resources J. 969 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 1 et seq.

Liability insurance coverage for violations of antipollution laws, 87 A.L.R.4th 444.

Governmental recovery of cost of hazardous waste removal under Comprehensive Environmental Response, Compensation, and Liability Act (42 USCS § 9601 et seq.), 70 A.L.R. Fed. 329.

39A C.J.S. Health and Environment § 1 et seq.

74-1-2. Purpose of Environmental Improvement Act.

The purpose of the Environmental Improvement Act [74-1-1 to 74-1-10 NMSA 1978] is to create an agency which will be responsible for environmental management and

consumer protection in this state in order to ensure an environment that in the greatest possible measure: will confer optimum health, safety, comfort and economic and social well-being on its inhabitants; will protect this generation as well as those yet unborn from health threats posed by the environment; and will maximize the economic and cultural benefits of a healthy people.

History: 1953 Comp., § 12-19-2, enacted by Laws 1971, ch. 277, § 2; recompiled as 1953 Comp., § 12-12-2 by Laws 1972, ch. 51, § 9.

ANNOTATIONS

Common-law remedy for nuisance survives the enactment of the Environmental Improvement Act. Gonzalez v. Whitaker, 97 N.M. 710, 643 P.2d 274 (Ct. App. 1982).

Board has paramount environmental improvement authority. - It is the intention of the legislature to give the environmental improvement board statewide, paramount authority to enforce regulations and standards in the various areas listed and that all other entities of government and political subdivisions thereof must conform. New Mexico Mun. League, Inc. v. New Mexico Envtl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Law reviews. - For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

74-1-3. Definitions.

As used in the Environmental Improvement Act [74-1-1 to 74-1-10 NMSA 1978]:

A. "agency" or "environmental improvement agency" means the department of environment;

B. "board" means the environmental improvement board; and

C. "person" means the state or any agency, institution or political subdivision thereof, any public or private corporation, individual, partnership, association or other entity and includes any officer or governing or managing body of any political subdivision or public or private corporation.

History: 1953 Comp., § 12-19-3, enacted by Laws 1971, ch. 277, § 3; recompiled as 1953 Comp., § 12-12-3 by Laws 1972, ch. 51, § 9; 1973, ch. 340, § 2; 1977, ch. 253, § 34; 1982, ch. 73, § 21; 1991, ch. 25, § 29.

ANNOTATIONS

The 1991 amendment, effective March 29, 1991, substituted "department of environment" for "environmental improvement division of the health and environment

department" in Subsection A; deleted former Subsection B which read "'director' means the director of the environmental improvement division"; and designated former Subsections C and D as present Subsections B and C.

Law reviews. - For annual survey of New Mexico law relating to administrative law, see 13 N.M.L. Rev. 235 (1983).

74-1-4. Environmental improvement board; creation; organization.

A. The board shall consist of five members appointed by the governor, by and with the advice and consent of the senate. The members of the board shall be appointed for overlapping terms, with no term exceeding five years. No more than three members shall be appointed from any political party. At least a majority of the membership of the board shall be individuals who represent the public interest and do not derive any significant portion of their income from persons subject to or who appear before the board on issues related to the federal Clean Air Act, 42 U.S.C. Sections 7401 et seq. or the Air Quality Control Act [Chapter 74, Article 2 NMSA 1978]. Any vacancy occurring in the membership of the board shall be filled by appointment by the governor for the unexpired term.

B. The members of the board shall be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

C. The board shall elect from its membership a chairman, vice chairman and secretary and shall establish the tenure of these offices. The board shall convene upon the call of the chairman or a majority of its members.

History: 1953 Comp., § 12-19-5, enacted by Laws 1971, ch. 277, § 5; recompiled as 1953 Comp., § 12-12-5 by Laws 1972, ch. 51, § 9; 1990, ch. 31, § 1.

ANNOTATIONS

Cross-references. - As to exemption of environmental improvement board from authority of secretary of environment, see 9-7A-12 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 39A C.J.S. Health and Environment § 133.

74-1-5. Environmental improvement board; duties.

The board shall promulgate all regulations applying to persons and entities outside of the agency.

History: 1953 Comp., § 12-19-6, enacted by Laws 1971, ch. 277, § 6; recompiled as 1953 Comp., § 12-12-6 by Laws 1972, ch. 51, § 9; 1973, ch. 340, § 3.

ANNOTATIONS

Cross-references. - For definition of "agency," see 74-1-3 NMSA 1978.

Board's duty to prepare regulations. - The environmental improvement board has a duty to have the regulations prepared by a staff of its own. It has no right to delegate this authority to one who is an "interested person" at a public hearing. Kerr-McGee Nuclear Corp. v. New Mexico Envtl. Imp. Bd., 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 6, 134.

39A C.J.S. Health and Environment §§ 137, 138.

74-1-6. Department; powers.

The department shall have power to:

A. sue and be sued;

B. make contracts to carry out its delegated duties;

C. enter into agreements with environmental and consumer protection agencies of other states and the federal government pertaining to duties of the agency;

D. serve as agent of the state in matters of environmental management and consumer protection not expressly delegated by law to another agency, commission or political subdivision in which the United States is a party;

E. enforce the rules, regulations and orders promulgated by the board and environmental management and consumer protection laws for which the agency is responsible by appropriate action in courts of competent jurisdiction;

F. on the same basis as any other person, recommend and propose regulations for promulgation by the board;

G. on the same basis as any other person, present data, views or arguments and examine witnesses and otherwise participate at all hearings conducted by the board or any other administrative agency with responsibility in the areas of environmental management or consumer protection, but shall not be given any special status over any other party; and

H. have such other powers as may be necessary and appropriate for the exercise of the powers and duties delegated to the agency.

History: 1953 Comp., § 12-19-9, enacted by Laws 1971, ch. 277, § 9; recompiled as 1953 Comp., § 12-12-9 by Laws 1972, ch. 51, § 9; 1977, ch. 253, § 35; 1982, ch. 73, § 22; 1991, ch. 25, § 30.

ANNOTATIONS

Cross-references. - For definition of "agency" and "board," see 74-1-3 NMSA 1978.

As to creation of environmental improvement division, see 9-7-4 NMSA 1978.

The 1991 amendment, effective March 29, 1991, substituted "Department" for "Agency" in the catchline; substituted "department" for "agency shall be organized within the health and environment department and" in the introductory phrase; and made a minor stylistic change in Subsection D.

Environmental improvement division has primary jurisdiction over pollution control. 1978 Op. Att'y Gen. No. 78-12.

Supreme court holds that action brought by attorney general and certain private citizens for injunction to abate alleged public nuisance caused by emissions from coal-burning power plant should have been dismissed in trial court since environmental improvement division has primary jurisdiction over pollution control and means are available to compel division to perform its duties, should it fail to do so. State ex rel. Norvell v. Arizona Pub. Serv. Co., 85 N.M. 165, 510 P.2d 98 (1973).

But agency is not given all-encompassing power to abate nuisances. Gonzalez v. Whitaker, 97 N.M. 710, 643 P.2d 274 (Ct. App. 1982).

Because that is within jurisdiction of courts. - It readily falls within the traditional jurisdiction of the court to enjoin, abate or impose damages for creation of a nuisance. Gonzalez v. Whitaker, 97 N.M. 710, 643 P.2d 274 (Ct. App. 1982).

Nature of agency. - The environmental improvement division is an environmental regulatory and enforcement agency in addition to being an environmental management agency. 1987 Op. Att'y Gen. No. 87-22.

Article does not prohibit or limit environmental improvement division from obtaining injunctive relief. Environmental Imp. Div. v. Aguayo, 99 N.M. 497, 660 P.2d 587 (1983).

Law reviews. - For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

For annual survey of New Mexico law relating to administrative law, see 13 N.M.L. Rev. 235 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 6, 134.

39A C.J.S. Health and Environment § 133.

74-1-7. Environmental improvement agency; duties.

A. The agency is responsible for environmental management and consumer protection programs. In that respect, the agency shall maintain, develop and enforce regulations and standards in the following areas:

(1) food protection;

(2) water supply, including regulations establishing a reasonable system of fees for the provision of services by the agency to public water supply systems, and water pollution as provided in the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978];

(3) liquid waste;

(4) air quality management as provided in the Air Quality Control Act [Chapter 74, Article 2 NMSA 1978];

(5) radiation control as provided in the Radiation Protection Act [74-3-1 to 74-3-16 NMSA 1978];

(6) noise control;

(7) nuisance abatement;

(8) vector control;

(9) occupational health and safety as provided in the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978];

(10) sanitation of public swimming pools and public baths;

(11) plumbing, drainage, ventilation and sanitation of public buildings in the interest of public health;

(12) medical radiation, health and safety certification and standards for radiologic technologists as provided in the Medical Radiation Health and Safety Act [61-14E-1 to 61-14E-12 NMSA 1978];

(13) hazardous wastes and underground storage tanks as provided in the Hazardous Waste Act [Chapter 74, Article 4 NMSA 1978]; and

(14) solid waste as provided in the Solid Waste Act.

B. Nothing in Subsection A of this section imposes requirements for the approval of subdivision plats in addition to those required elsewhere by law. Nothing in Subsection A of this section preempts the authority of any political subdivision to approve subdivision plats.

History: 1953 Comp., § 12-19-10, enacted by Laws 1971, ch. 277, § 10; recompiled as 1953 Comp., § 12-12-10 by Laws 1972, ch. 51, § 9; 1973, ch. 340, § 5; 1977, ch. 122, § 5; 1983, ch. 317, § 13; 1989, ch. 223, § 1; 1989, ch. 289, § 2; 1990, ch. 99, § 64.

ANNOTATIONS

Cross-references. - For definition of "agency," see 74-1-3 NMSA 1978.

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

Agency is not given all-encompassing power to abate nuisances. Gonzalez v. Whitaker, 97 N.M. 710, 643 P.2d 274 (Ct. App. 1982).

Because that is within jurisdiction of courts. - It readily falls within the traditional jurisdiction of the court to enjoin, abate or impose damages for creation of a nuisance. Gonzalez v. Whitaker, 97 N.M. 710, 643 P.2d 274 (Ct. App. 1982).

No authority to deputize local officials. - The environmental improvement division (EID) may seek assistance from city and county law enforcement agencies to enforce asbestos disposal regulations pursuant to the Mutual Aid Act, 29-8-1 to 29-8-3 NMSA 1978, but it cannot deputize city or county law enforcement officials to act as EID agents to enforce the division's asbestos disposal regulations. 1987 Op. Att'y Gen. No. 87-48.

Law reviews. - For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

For note, "State Control of Low-Level Nuclear Waste Disposal," see 17 Nat. Resources J. 683 (1977).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 39A C.J.S. Health and Environment § 133.

74-1-8. Environmental improvement board; duties.

A. The board is responsible for environmental management and consumer protection. In that respect, the board shall promulgate regulations and standards in the following areas:

(1) food protection;

(2) water supply, including regulations establishing a reasonable system of fees for the provision of services by the agency to public water supply systems;

(3) liquid waste;

(4) air quality management as provided in the Air Quality Control Act [Chapter 74, Article 2 NMSA 1978];

(5) radiation control as provided in the Radiation Protection Act [74-3-1 to 74-3-16 NMSA 1978];

(6) noise control;

(7) nuisance abatement;

(8) vector control;

(9) occupational health and safety as provided in the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978];

(10) sanitation of public swimming pools and public baths;

(11) plumbing, drainage, ventilation and sanitation of public buildings in the interest of public health;

(12) medical radiation, health and safety certification and standards for radiologic technologists as provided in the Medical Radiation Health and Safety Act [61-14E-1 to 61-14E-12 NMSA 1978];

(13) hazardous wastes and underground storage tanks as provided in the Hazardous Waste Act [Chapter 74, Article 4 NMSA 1978]; and

(14) solid waste as provided in the Solid Waste Act.

B. Nothing in Subsection A of this section imposes requirements for the approval of subdivision plats in addition to those required elsewhere by law. Nothing in Subsection A of this section preempts the authority of any political subdivision to approve subdivision plats.

C. Effective July 1, 1992, all fees collected pursuant to Subsection A of this section shall be deposited in the general fund.

History: 1953 Comp., § 12-19-11, enacted by Laws 1971, ch. 277, § 11; recompiled as 1953 Comp., § 12-12-11 by Laws 1972, ch. 51, § 9; 1973, ch. 340, § 6; 1977, ch. 122, § 6; 1983, ch. 317, § 14; 1989, ch. 223, § 2; 1989, ch. 289, § 3; 1990, ch. 99, § 65.

ANNOTATIONS

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

Board has paramount environmental improvement authority. - It is the intention of the legislature to give the environmental improvement board statewide, paramount authority to enforce regulations and standards in the various areas listed and that all other entities of government and political subdivisions thereof must conform. New Mexico Mun. League, Inc. v. New Mexico Envtl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Board promulgates regulations. - There is no inconsistency or conflict between 3-48-2 NMSA 1978 and this section. The latter gives the board statewide responsibility for environmental management and protection, making the promulgation of regulations and standards by the board in the areas of liquid waste and solid waste sanitation and refuse disposal mandatory. The former merely gives municipalities the option or discretion to enact ordinances governing the collection and disposal of refuse. New Mexico Mun. League, Inc. v. New Mexico Envtl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

For liquid and solid waste and refuse. - The phrase "solid waste sanitation," as used in Subsection A(3) is not limited or qualified by the phrase, "refuse disposal." "Liquid waste," "solid waste" and "refuse" constitute three distinct categories of environmental concern. New Mexico Mun. League, Inc. v. New Mexico Envtl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Board's duty to prepare regulations. - The environmental improvement board has a duty to have the regulations prepared by a staff of its own. It has no right to delegate this authority to one who is an "interested person" at a public hearing. Kerr-McGee Nuclear Corp. v. New Mexico Envtl. Imp. Bd., 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

Administrative bodies and officers cannot delegate power, authority and functions which under the law may be exercised only by them, which are quasi-judicial in character or which require the exercise of judgment. Kerr-McGee Nuclear Corp. v. New Mexico Envtl. Imp. Bd., 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

Board cannot act lawfully alone in adopting radiation regulations. The board must obtain "the advice and consent" of the radiation technical advisory council before it can adopt regulations. Kerr-McGee Nuclear Corp. v. New Mexico Envtl. Imp. Bd., 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

Liquid waste disposal regulations not vague. - The revised liquid disposal regulations adopted pursuant to Subsection A(3) of this section are not facially vague. Climax Chem. Co. v. New Mexico Envtl. Imp. Bd., 106 N.M. 14, 738 P.2d 132 (Ct. App. 1987).

Requirements of cleaning refuse transportation vehicle. - Regulations adopted under this article requiring that any vehicle employed in collection or transportation of waste and refuse be cleaned at such times and in such manner as to prevent offensive odors and unsightliness are not constitutionally repugnant for vagueness. The question to be asked is: What might a reasonable person of average sensibilities consider to be an offensive odor or unsightly condition, and the answer is capable of common understanding. New Mexico Mun. League, Inc. v. New Mexico Envtl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Providing sound storage facilities. - Regulations adopted pursuant to this article requiring that storage facilities shall be fly proof, rodent proof and leak proof are neither unconstitutionally vague nor impossible of accomplishment. New Mexico Mun. League, Inc. v. New Mexico Envtl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Registering prior to modification of solid waste disposal system. - Regulation adopted pursuant to this article which provides that prior to the creation or modification of a system for the collection, transportation or disposal of solid waste the person who is operating or will operate the system shall obtain a registration certificate from the board, where "modification" is defined as any significant change in the physical characteristics or method of operation of a system for the collection, transportation or disposal of solid waste, is not unconstitutionally vague. New Mexico Mun. League, Inc. v. New Mexico Envtl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Adequate fire prevention at sanitary landfill sites. - Requirements of "adequate" means to prevent and extinguish fires at sanitary landfill sites and requirements of one or more sanitary landfills or other disposal facilities, except modified landfills, for populations exceeding 3,000 and one or more sanitary landfills or other disposal facilities, not excluding modified landfills, for populations under 3,000 and for disposal of waste collected from parks, recreational areas and highway rest areas, "as necessary," found in regulations adopted under this article, are not unconstitutionally vague. New Mexico Mun. League, Inc. v. New Mexico Envtl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Traditional jurisdiction of courts to enjoin or abate nuisances. - It readily falls within the traditional jurisdiction of the court to enjoin, abate or impose damages for creation of a nuisance. Gonzalez v. Whitaker, 97 N.M. 710, 643 P.2d 274 (Ct. App. 1982).

Law reviews. - For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 39A C.J.S. Health and Environment § 133.

74-1-8.1. Legal advice [; environmental improvement board].

A. In the exercise of any of its powers or duties, the board shall act with independent legal advice. The manner in which such advice is provided shall be determined by the board, but from among one of the following:

(1) the office of the attorney general;

(2) independent counsel hired by the board, whether full- or part-time; or

(3) another state agency whose function is sufficiently distinct from the department of environment to assure independent, impartial advice.

B. Notwithstanding the provisions of Subsection A of this section, attorneys from the agency may act for the board in lawsuits filed against or on behalf of the board, and the attorney general may, at the request of the board, file and defend lawsuits on behalf of the board.

History: 1978 Comp., § 74-1-8.1, enacted by Laws 1982, ch. 73, § 23; 1991, ch. 25, § 31.

ANNOTATIONS

The 1991 amendment, effective March 29, 1991, in Subsection A, substituted "department of environment" for "health and environment department" in Paragraph (3) and made a minor stylistic change in the second sentence.

74-1-8.2. Legal advice [; water quality control commission].

A. In the exercise of any of its powers or duties, the water quality control commission shall act with independent legal advice. The manner in which such advice is provided shall be determined by the commission, but from among one of the following:

(1) the office of the attorney general;

(2) independent counsel hired by the commission, whether full- or part-time; or

(3) another state agency whose function is sufficiently distinct from the department of environment and each constituent agency to assure independent, impartial advice.

B. Notwithstanding the provisions of Subsection A of this section, attorneys from constituent agencies may act for the water quality control commission in lawsuits filed against or on behalf of the commission, and the attorney general may, at the request of the commission, file and defend lawsuits on behalf of the commission.

History: 1978 Comp., § 74-1-8.1, enacted by Laws 1982, ch. 73, § 28; recompiled as 1978 Comp., § 74-1-8.2; 1991, ch. 25, § 32.

ANNOTATIONS

The 1991 amendment, effective March 29, 1991, inserted "the water quality control" and "water quality control" preceding "commission" in the first sentence in Subsection A and in Subsection B; and, in Subsection A, substituted "department of environment" for "health and environment department" in Paragraph (3) and made a minor stylistic change.

Compiler's note. - Laws 1982, ch. 73, § 28, enacted this section as 74-1-8.1 NMSA 1978, but since Laws 1982, ch. 73, § 23, had already enacted 74-1-8.1 NMSA 1978, this section has been compiled as 74-1-8.2 NMSA 1978. See 74-6-2 NMSA 1978 for the definition of "commission" and 74-6-4 NMSA 1978 for the general powers and duties of the commission.

74-1-9. Adoption of regulations; notice and hearing; appeal.

A. Any person may recommend or propose regulations to the board for promulgation. The board shall determine whether or not to hold a hearing within sixty days of submission of a proposed regulation.

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. Hearings on regulations of nonstatewide application shall be held within that area which is substantially affected by the regulation. Hearings on regulations of statewide application may be held at Santa Fe or within any area of the state substantially affected by the regulation. In making its regulations, the board shall give the weight it deems appropriate to all relevant facts and circumstances presented at the public hearing, including but not limited to:

(1) character and degree of injury to or interference with health, welfare, animal and plant life, property and the environment;

(2) the public interest, including the social, economic and cultural value of the regulated activity and the social, economic and cultural effects of environmental degradation; and

(3) technical practicability, necessity for and economic reasonableness of reducing, eliminating or otherwise taking action with respect to environmental degradation.

C. The standards for regulations set forth in Subsection A [Subsection B] of this section do not apply to the promulgation of regulations under the Air Quality Control Act [Chapter 74, Article 2 NMSA 1978]; or any other act in which specific standards are set forth for the board's consideration.

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. The notice shall also state where interested persons may secure copies of any proposed amendment or new regulation. The notice shall be published in a newspaper of general circulation in the area affected. Reasonable effort shall be made to give notice to all persons who have made a written request to the board for advance notice of hearings.

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.

F. The board may designate a hearing officer to take evidence in the hearing. A transcript shall be made of the entire hearing proceedings.

G. No regulation or amendment or repeal thereof adopted by the board shall become effective until thirty days after its filing under the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978].

H. Any person who is or may be affected by a regulation adopted by the board may appeal to the court of appeals for further relief. All such appeals shall be upon the transcript made at the hearing and shall be taken to the court of appeals within thirty days after filing of the regulation under the State Rules Act.

I. The procedure for perfecting an appeal to the court of appeals under this section consists of the timely filing of a notice of appeal with a copy attached to the regulation from which the appeal is taken. The appellant shall certify in his notice of appeal that arrangements have been made with the board for preparation of a sufficient number of transcripts of the record of the hearing on which the appeal depends to support his appeal to the court, at the expense of the appellant, including three copies which he shall furnish to the board.

J. Upon appeal, the court of appeals shall set aside the regulation only if found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence in the transcript; or

(3) otherwise not in accordance with law.

History: 1953 Comp., § 12-19-13, enacted by Laws 1971, ch. 277, § 13; recompiled as 1953 Comp., § 12-12-13, by Laws 1972, ch. 51, § 9; 1973, ch. 340, § 7; 1974, ch. 64, § 1; 1982, ch. 73, § 24; 1985, ch. 17, § 1.

ANNOTATIONS

Cross-references. - For notice by publication, see 14-11-1 NMSA 1978 et seq.

Bracketed material. - The bracketed reference to "Subsection B" in Subsection C was inserted by the compiler as that appears to be the intended reference. The bracketed insertion was not enacted by the legislature and is not part of the law.

Board's duty to prepare regulations. - The environmental improvement board has a duty to have the regulations prepared by a staff of its own. It has no right to delegate this authority to one who is an "interested person" at a public hearing. Kerr-McGee Nuclear Corp. v. New Mexico Envtl. Imp. Bd., 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

Rules and regulations for radiation protection. - The environmental improvement board is authorized to promulgate rules and regulations for radiation protection without the radiation technical advisory council approving the terms of such rules and regulations, if the board promulgates regulations pursuant to the Medical Radiation Health and Safety Act (61-14E-1 NMSA 1978 et seq.); but the board may not do so without the council's approval if the regulations are promulgated pursuant to the Radiation Protection Act (74-3-1 NMSA 1978 et seq.). 1988 Op. Att'y Gen. No. 88-39.

Board not authorized to plan industrial development. - There is nothing in the board's mandate that gives it the authority to plan for the industrial development of any area in the state; although the standards and regulations promulgated by the board will have an impact on the industrial development of the area, such an impact should be as a consequence, not by design. Public Serv. Co. v. New Mexico Envtl. Imp. Bd., 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

Board not authorized to set standards more restrictive than federal regulations. - There is no authority given to the board to promulgate regulations more restrictive than those under federal law in order for New Mexico to regain control over its air. Public Serv. Co. v. New Mexico Envtl. Imp. Bd., 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

Substantial evidence required basis of administrative regulations. - An administrative board in making its determinations may give greater credence to some evidence rather than to some other, and it is not a court's function to substitute its opinion for that of the administrative board, but this is in situations where there is a difference or a conflict in the evidence, not a complete absence of evidence. Public Serv. Co. v. New Mexico Envtl. Imp. Bd., 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

There is no substantial evidence in the record to support one of the board's final reasons for adopting amended regulations as to sulfur dioxide emissions, namely, because of their effects on visibility, since by definition sulfur dioxide in a gaseous form is a heavy colorless nonflammable gas of pungent suffocating odor, and whether sulfur dioxide emissions can or do combine with other elements in the atmosphere to produce a visible gas, or whatever, is not shown in the record. Public Serv. Co. v. New Mexico Envtl. Imp. Bd., 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

Formal findings not required. - In adopting regulations, administrative agencies must give some indication of their reasoning and of the basis upon which the regulations are adopted in order for the courts to be able to perform their reviewing function, but formal findings in a judicial sense are not required, and where each of 12 reasons listed for adopting regulations is based upon evidence and testimony accumulated at several hearings, it is held that the environmental improvement board has given sufficient indication of its reasoning and of the basis upon which it adopts its regulations. New Mexico Mun. League, Inc. v. New Mexico Envtl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Board bound by its standards. - The board, in promulgating an ambient air quality standard, establishes the criterion for determining what concentration or quantity of sulfur dioxide in the specified time periods constitutes air pollution; it makes the judgment that concentrations over the quantity prescribed would injure health, interfere with visibility and adversely affect the public welfare. Having set the standard, it is bound by it, the same as anyone else. Public Serv. Co. v. New Mexico Envtl. Imp. Bd., 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

Modification authorized to explain standard and to prevent pollution. - The board has the continuing authority to change the ambient air quality standard for sulfur dioxide after proper notice and hearing and to adopt regulations to implement or explain it, but it may not set a new standard or adopt regulations implementing or explaining it for any reason other than to prevent or abate air pollution. Public Serv. Co. v. New Mexico Envtl. Imp. Bd., 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

Adequate notice of hearing. - Notice of meeting at which regulations are to be adopted mailed to numerous individuals, committees and organizations, and issued in a news release stating time, place and purpose of meeting and published in two newspapers is adequate. New Mexico Mun. League, Inc. v. New Mexico Envtl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

No hearing on minor corrections to regulation. - This section does not require the board to provide public notice and a hearing merely to make minor, nonsubstantive corrections to regulations after hearing but prior to filing. 1987 Op. Att'y Gen. No. 87-59.

Failure to preserve an error at a public hearing does not defeat a person's right to appeal the validity of a regulation adopted at that hearing. Kerr-McGee Nuclear Corp. v. New Mexico Envtl. Imp. Bd., 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

Relief for a lay person is justified in an appeal, notwithstanding the failure to raise legal or factual issues at the public hearing. Kerr-McGee Nuclear Corp. v. New Mexico Envtl. Imp. Bd., 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

When a board adopts a regulation, which, when applied, leads to an unfavorable result to any "person," that "person" can appeal to the court of appeals to challenge the validity of the regulation. This "person" may be an ordinary lay person, unlearned in the

law and procedural process. Kerr-McGee Nuclear Corp. v. New Mexico Envtl. Imp. Bd., 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

Company's right to appeal liquid waste disposal regulations. - Section 74-1-9H NMSA 1978 gives any person who is or may be affected by a regulation adopted by the environmental improvement board a right of appeal to the court of appeals, and a company is such a person where it maintains two septic systems, each with capacities within the reach of the liquid waste disposal regulations adopted pursuant to 74-1-8A(3) NMSA 1978. Climax Chem. Co. v. New Mexico Envtl. Imp. Bd., 106 N.M. 14, 738 P.2d 132 (Ct. App. 1987).

Law reviews. - For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

For comment, "Delegation of Legislative Authority on the State Level; Environmental Protection in New Mexico: Public Service Co. of New Mexico et al. v. New Mexico Environmental Improvement Board," see 17 Nat. Resources J. 521 (1977).

For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 6, 134.

39A C.J.S. Health and Environment §§ 138, 142, 145.

74-1-10. Penalty.

A person who violates any regulation of the board is guilty of a petty misdemeanor. This section does not apply to any regulation for which a criminal penalty is otherwise provided by law.

History: 1953 Comp., § 12-12-14, enacted by Laws 1973, ch. 340, § 8.

ANNOTATIONS

Cross-references. - As to sentencing for petty misdemeanors, see 31-19-1 NMSA 1978.

Requirements of cleaning refuse transportation vehicle. - Regulations adopted under this article requiring that any vehicle employed in collection or transportation of waste and refuse be cleaned at such times and in such manner as to prevent offensive odors and unsightliness are not constitutionally repugnant for vagueness. The question to be asked is: What might a reasonable person of average sensibilities consider to be an offensive odor or unsightly condition, and the answer is capable of common

understanding. New Mexico Mun. League, Inc. v. New Mexico Envtl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Providing sound storage facilities. - Regulations adopted pursuant to this article requiring that storage facilities shall be fly proof, rodent proof and leak proof are neither unconstitutionally vague nor impossible of accomplishment. New Mexico Mun. League, Inc. v. New Mexico Envtl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Registering prior to modification of solid waste disposal system. - Regulation adopted pursuant to this article which provides that prior to the creation or modification of a system for the collection, transportation or disposal of solid waste the person who is operating or will operate the system shall obtain a registration certificate from the division, where "modification" is defined as any significant change in the physical characteristics or method of operation of a system for the collection, transportation or disposal of solid waste, is not unconstitutionally vague. New Mexico Mun. League, Inc. v. New Mexico Envtl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Adequate fire prevention at sanitary landfill sites. - Requirements of "adequate" means to prevent and extinguish fires at sanitary landfill sites and of one or more sanitary landfills or other disposal facilities, except modified landfills, for populations exceeding 3,000 and one or more sanitary landfills or other disposal facilities, not excluding modified landfills, for populations under 3,000 and for disposal of waste collected from parks, recreational areas and highway rest areas, "as necessary," found in regulations adopted under this article, are not unconstitutionally vague. New Mexico Mun. League, Inc. v. New Mexico Envtl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 590 to 602.

Validity of state statutory provision permitting administrative agency to impose monetary penalties for violation of environmental pollution statute, 81 A.L.R.3d 1258.

39A C.J.S. Health and Environment § 139.

74-1-11. Repealed.

ANNOTATIONS

Repeals. - Laws 1989, ch. 223, § 4 repeals 74-1-11 NMSA 1978, as enacted by Laws 1989, ch. 223, § 3, relating to creation of the water supply fund, effective July 1, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

ARTICLE 2
AIR POLLUTION

74-2-1. Short title.

Chapter 74, Article 2 NMSA 1978 may be cited as the "Air Quality Control Act".

History: 1953 Comp., § 12-14-1, enacted by Laws 1967, ch. 277, § 1; 1972, ch. 51, § 1; 1989, ch. 278, § 1.

ANNOTATIONS

Cross-references. - For the Environmental Improvement Act, see 74-1-1 to 74-1-10 NMSA 1978.

For the Pollution Control Revenue Bond Act, see 3-59-1 to 3-59-14 NMSA 1978.

Comparison to Federal Clean Air Act. - New Mexico's Air Quality Control Act is not generally more stringent than the Federal Clean Air Act except in areas of air pollution prevention not preempted by the Federal Clean Air Act and not precluded by the limiting provisions in the Air Quality Control Act. 1987 Op. Att'y Gen. No. 87-11.

Application of state antipollution laws to industries located on Indian land is valid, provided that the operation of those laws neither impairs the proprietary interest of the Indian people in their lands nor limits the right of the tribe or pueblo to govern matters of tribal relations. The regulation of industrial discharges is not a matter fundamental to tribal relations, and the state supervision of environmental pollution will not limit, in any meaningful manner, the right of the several Indian peoples to govern themselves. The extension of pollution controls to industries located on Indian land will not affect the ownership or control of the land. 1970 Op. Att'y Gen. No. 70-5.

Law reviews. - For comment, "Delegation of Legislative Authority on the State Level; Environmental Protection in New Mexico: Public Service Co. of New Mexico et al. v. New Mexico Environmental Improvement Board," see 17 Nat. Resources J. 521 (1977).

For note, "The 1977 Procedural Amendments to the Clean Air Act - Have They Made a Difference?," see 24 Nat. Resources J. 745 (1984).

For note, "Judicial Review of Environmental Protection Agency Rule Promulgation - Clean Air Act State Implementation Plan Requirement - New Mexico EID v. Thomas, 789 F.2d 825 (10th Cir. 1986)," see 27 Nat. Resources J. 723 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 55 et seq.

Validity of regulation of smoke and other air pollution, 78 A.L.R.2d 1305.

Liability insurance coverage for violations of antipollution laws, 87 A.L.R.4th 444.

Control of interstate pollution under Clean Air Act as amended in 1977 (42 USCS §§ 7401 - 7626), 82 A.L.R. Fed. 316.

Application of air quality modeling to decisionmaking under Clean Air Act (42 USCS §§ 7401 - 7426), 84 A.L.R. Fed. 710.

Standing of air pollution source to challenge Clean Air Act (42 USCS §§ 7401-7626) or its implementation, 85 A.L.R. Fed. 515.

Construction and application of § 307(b)(1) of Clean Air Act (42 USCS § 7607(b)(1)) pertaining to judicial review by courts of appeals, 86 A.L.R. Fed. 604.

What constitutes modification of stationary source, under § 111 (a)(3), (4) of Clean Air Act (42 USCS § 7411 (a)(3), (4)), so as to subject source to Environmental Protection Agency's new source performance standards, 94 A.L.R. Fed. 750.

39A C.J.S. Health and Environment § 130.

74-2-2. Definitions.

As used in the Air Quality Control Act [this article]:

A. "air contaminant" means any substance, including but not limited to any particulate matter, fly ash, dust, fumes, gas, mist, smoke, vapor, micro-organisms, radioactive material, any combination thereof or any decay or reaction product thereof;

B. "air pollution" means the emission, except emission that occurs in nature, into the outdoor atmosphere of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property;

C. "department" means the department of environment;

D. "director" means the administrative head of a local agency;

E. "emission limitation" and "emission standard" mean a requirement established by the environmental improvement board or the local board, the department, the local authority or the local agency or pursuant to the federal act that limits the quantity, rate or concentration, or combination thereof, of emissions of air contaminants on a continuous basis, including any requirements relating to the operation or maintenance of a source to assure continuous reduction;

F. "federal act" means the federal Clean Air Act, its subsequent amendments and successor provisions;

G. "federal standard of performance" means any standard of performance, emission limitation or emission standard adopted pursuant to 42 U.S.C. Section 7411 or 7412;

H. "hazardous air pollutant" means an air contaminant that has been classified as a hazardous air pollutant pursuant to the federal act;

I. "local agency" means the administrative agency established by a local authority pursuant to Paragraph (2) of Subsection A of Section 74-2-4 NMSA 1978;

J. "local authority" means any of the following political subdivisions of the state that have, by following the procedure set forth in Subsection A of Section 74-2-4 NMSA 1978, assumed jurisdiction for local administration and enforcement of the Air Quality Control Act:

(1) a county that was a class A county as of January 1, 1980; or

(2) a municipality with a population greater than one hundred thousand located within a county that was a class A county as of January 1, 1980;

K. "local board" means a municipal, county or joint air quality control board created by any local authority;

L. "mandatory class I area" means any of the following areas in this state that were in existence on August 7, 1977:

(1) national wilderness areas that exceed five thousand acres in size; and

(2) national parks that exceed six thousand acres in size;

M. "modification" means any physical change in, or change in the method of operation of, a source that results in an increase in the potential emission rate of any regulated air contaminant emitted by the source or that results in the emission of any regulated air contaminant not previously emitted, but does not include:

(1) a change in ownership of the source;

(2) routine maintenance, repair or replacement;

(3) installation of air pollution control equipment, and all related process equipment and materials necessary for its operation, undertaken for the purpose of complying with regulations adopted by the environmental improvement board or the local board or pursuant to the federal act; or

(4) unless previously limited by enforceable permit conditions:

(a) an increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(b) an increase in the hours of operation; or

(c) use of an alternative fuel or raw material if, prior to January 6, 1975, the source was capable of accommodating such fuel or raw material, or if use of an alternate fuel or raw material is caused by any natural gas curtailment or emergency allocation or any other lack of supply of natural gas;

N. "nonattainment area" means for any air contaminant an area that is designated "nonattainment" with respect to that contaminant within the meaning of Section 107(d) of the federal act;

O. "person" includes an individual, partnership, corporation, association, the state or political subdivision of the state and any agency, department or instrumentality of the United States and any of their officers, agents or employees;

P. "potential emission rate" means the emission rate of a source at its maximum capacity in the absence of air pollution control equipment that is not vital to production of the normal product of the source or to its normal operation;

Q. "regulated air contaminant" means any air contaminant, the emission or ambient concentration of which is regulated pursuant to the Air Quality Control Act or the federal act;

R. "secretary" means the secretary of environment;

S. "significant deterioration" means any increase in the ambient concentrations of any air contaminant above the levels allowed by the federal act or federal regulations for that air contaminant in the area within which the increase occurs;

T. "source" means any structure, building, equipment, facility, installation or operation that emits or may emit any air contaminant;

U. "standard of performance" means a requirement of continuous emission reduction, including any requirement relating to operation or maintenance of a source to assure continuous emission reduction;

V. "state implementation plan" means any plan submitted by New Mexico to the federal environmental protection agency pursuant to 42 U.S.C. Section 7410; and

W. "toxic air pollutant" means any air contaminant, except a hazardous air pollutant, classified by the environmental improvement board or the local board as a toxic air pollutant.

History: 1953 Comp., § 12-14-2, enacted by Laws 1967, ch. 277, § 2; 1970, ch. 58, § 1; 1971, ch. 277, § 20; 1972, ch. 51, § 2; 1973, ch. 322, § 1; 1977, ch. 253, § 36; 1979, ch. 393, § 1; 1981, ch. 373, § 1; 1983, ch. 34, § 1; 1989, ch. 278, § 2; 1992, ch. 20, § 1.

ANNOTATIONS

Cross-references. - For the definition of "class A county," see 4-44-1 NMSA 1978.

The 1992 amendment, effective March 5, 1992, deleted former Subsections C and D, defining "board" and "delayed compliance order"; rewrote former Subsection E and redesignated it as present Subsection C; redesignated former Subsection F as present Subsection D, while substituting therein "a local agency" for "the department"; redesignated former Subsection G as present Subsection E, while inserting therein "environmental improvement board or the local" and "the local authority or the local agency"; deleted former Subsection H, defining "environmental improvement division"; rewrote former Subsection I and redesignated it as present Subsection F; redesignated former Subsections J and K as present Subsections G and H; added present Subsections I, J and K; inserted "environmental improvement board or the local" in Subsection M(3); rewrote Subsection N; added present Subsection R; redesignated former Subsections R through U as present Subsections S through V; added Subsection W; and made minor stylistic changes throughout the section.

Clean Air Act. - The federal Clean Air Act, referred to in this section appears as 42 U.S.C. § 7401 et seq. Section 107(d) of that act, referred to in Subsection N, appears as 42 U.S.C. § 7407.

Board may not expand definition of "air pollution" from "reasonable probability" of injury to health to a mere showing that condition "tends to cause harm." Duke City Lumber Co. v. New Mexico Envtl. Imp. Bd., 101 N.M. 291, 681 P.2d 717 (1984).

Air Quality Standards' margin of safety does not contemplate excursions beyond legal limits. - Petitioner's argument that Congress, by allowing an adequate margin of safety, not only contemplated but countenanced occasional excursions beyond the limits of the National Ambient Air Quality Standards is meritless since it is clear that the margin of safety protects against effects which have not yet been uncovered by research or whose medical significance is a matter of disagreement. Duke City Lumber Co. v. New Mexico Envtl. Imp. Bd., 102 N.M. 8, 690 P.2d 451 (Ct. App. 1984).

Board may rely on division's modeling results to deny variance application. - The environmental improvement board may rely on the environmental improvement division's modeling results, showing particulate concentrations in excess of the legal limit, in arriving at its decision to deny a lumber company's application for a variance

from air quality control regulations. Duke City Lumber Co. v. New Mexico Envtl. Imp. Bd., 102 N.M. 8, 690 P.2d 451 (Ct. App. 1984).

Public nuisance laws deemed alternative means of enforcement. - Where air quality standards or regulations have not been established as to what constitutes "air pollution" and thus no violation of this article or regulations and standards is apparent, New Mexico's public nuisance law may provide an alternative means for the environmental improvement division to abate noxious odors. 1978 Op. Att'y Gen. No. 78-12.

Law reviews. - For comment, "Delegation of Legislative Authority on the State Level; Environmental Protection in New Mexico: Public Service Co. of New Mexico et al. v. New Mexico Environmental Improvement Board," see 17 Nat. Resources J. 521 (1977).

For article, "Substantial Evidence Reconsidered: The Post-Duke City Difficulties and Some Suggestions for Their Resolution," see 18 N.M.L. Rev. 525 (1988).

74-2-3. Environmental improvement board.

A. In taking any action under the Air Quality Control Act [this article], a majority of the environmental improvement board constitutes a quorum, but any action, order or decision of the environmental improvement board requires the concurrence of three members present at a meeting.

B. Except as provided in the Air Quality Control Act, the jurisdiction of the environmental improvement board extends to all areas of the state except within the boundaries of a local authority.

History: 1953 Comp., § 12-14-3, enacted by Laws 1967, ch. 277, § 3; 1970, ch. 58, § 2; 1971, ch. 277, § 21; 1973, ch. 322, § 2; 1992, ch. 20, § 2.

ANNOTATIONS

Cross-references. - As to definition of "board," "department" and "director," see 74-2-2 NMSA 1978.

As to definition of "A class county," see 4-44-1 NMSA 1978.

As to exemption of environmental improvement board from authority of secretary of environment, see 9-7A-12 NMSA 1978.

The 1992 amendment, effective March 5, 1992, substituted the present section catchline for "State air pollution control agency"; deleted the former first sentence of Subsection A, defining the environmental improvement board; rewrote the former second paragraph of Subsection A and designated it as present Subsection B; and deleted former Subsection B, relating to duties of the director of the department.

Air pollution controlled by subjecting entire state to regulatory authority. - Under this article, air pollution throughout the state is controlled by subjecting every area of the state to the regulatory authority of some board: either the environmental improvement board or a board created in accordance with 74-2-4 NMSA 1978. 1982 Op. Att'y Gen. No. 82-7.

Responsibility for enforcing act. - Enforcement of New Mexico regulations and standards more stringent than, or in addition to, the federal standards and regulations is the state's responsibility; the environmental improvement board has state-wide responsibility for enforcing this article, but the Albuquerque-Bernalillo county air quality control board has this responsibility in the Albuquerque-Bernalillo county area. 1987 Op. Att'y Gen. No. 87-11.

Requiring use of oxygenated fuels. - The environmental improvement board and/or the Albuquerque-Bernalillo county air quality control board may require the use of oxygenated fuels without violating the constitutional prohibition against interference with interstate commerce, but may only do so if that requirement is contained in the state's implementation plan. 1987 Op. Att'y Gen. No. 87-11.

Law reviews. - For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

For comment, "Delegation of Legislative Authority on the State Level; Environmental Protection in New Mexico: Public Service Co. of New Mexico et al. v. New Mexico Environmental Improvement Board," see 17 Nat. Resources J. 521 (1977).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 51 et seq.

Orders or penalties against state or its officials for failure to comply with regulations directing state to regulate pollution-creating activities of private parties, under § 113 of Clean Air Act (42 U.S.C.S. § 1857c-8), 31 A.L.R. Fed. 79.

39A C.J.S. Health and Environment § 130.

74-2-4. Local authority.

A. A county or municipality meeting the qualifications set forth in Paragraph (1) or (2) of Subsection J of Section 74-2-2 NMSA 1978 may assume jurisdiction as a local authority by adopting an ordinance providing for the local administration and enforcement of the Air Quality Control Act [this article]. The ordinance shall:

(1) create a local board to perform, within the boundaries of the local authority, those functions delegated to the environmental improvement board under the Air Quality Control Act, except any functions reserved exclusively for the environmental improvement board;

(2) create a local agency to administer and enforce the provisions of the Air Quality Control Act within the boundaries of the local authority that shall, within the boundaries of the local authority, perform all of the duties required of the department and exert all of the powers granted to the department except for those duties and powers reserved exclusively for the department; and

(3) provide for the appointment of a director who shall perform for the local authority the same duties as required of the secretary under the Air Quality Control Act, except the duties and powers reserved exclusively for the secretary.

B. At least a majority of the members of a local board shall be individuals who represent the public interest and do not derive any significant portion of their income from persons subject to or who appear before the local board on issues related to the federal act or the Air Quality Control Act.

C. Prior to adopting any ordinance regulating air pollution, public hearings and consultations shall be held as directed by the local authority adopting the ordinance. The provisions of any ordinance shall be consistent with the substantive provisions of the Air Quality Control Act and shall provide for standards and regulations not lower than those required by regulations adopted by the environmental improvement board.

D. Notwithstanding the provisions of Subsection A of this section, the environmental improvement board and the secretary shall retain jurisdiction and control for the administration and enforcement of the Air Quality Control Act as determined in that act with respect to any act or failure to act, governmental or proprietary, of any local authority that causes or contributes to air pollution, including proceeding against a local authority as provided in Section 74-2-12 NMSA 1978. "Failure to act", as used in this section, includes failure to act against any person violating the applicable ordinance or regulation adopted pursuant thereto.

E. Any local authority that is located within a transportation-related pollutant nonattainment area may provide for a vehicle emission inspection and maintenance program for vehicles under twenty-six thousand pounds gross vehicle weight powered by a spark-ignited internal combustion engine, which program shall be no more stringent than that required under the federal act or under federal air quality standards. Any two or more local authorities may adopt identical rules and regulations necessary to implement the vehicle emission inspection and maintenance program, including examining the alternatives of public or private operation of the program.

F. Any local authority that has implemented a vehicle emission inspection and maintenance program may extend the enforcement of that program by entering into joint powers agreements with any contiguous municipality or county within the designated airshed or with the department.

G. No tax shall be imposed to fund any vehicle emission inspection and maintenance program until the local authority has submitted the question of imposition of a tax to the

registered voters of the local authority and those registered voters have approved the imposition of the tax.

H. No vehicle emission inspection fee may be imposed by a local authority that exceeds two dollars ($2.00) for each vehicle subject to an emission inspection and maintenance program. The above fee limitation shall not limit any charges for vehicle inspections by a private vehicle emission inspection and maintenance station.

I. A local authority having a vehicle emission inspection and maintenance program is authorized to adopt rules, regulations and guidelines governing the establishment of private vehicle emission inspection and maintenance stations. No private vehicle emission inspection and maintenance station shall test vehicles unless the station possesses a valid permit issued by the local agency. Permit fees shall be determined by ordinance of the local authority and shall not exceed two hundred dollars ($200) per year per station. Additionally, a local authority may charge a permit fee of up to thirty-five dollars ($35.00) per year for each vehicle emissions mechanic and for each vehicle emissions inspector. The imposition of permit fees does not require a vote of the registered voters of the local authority.

History: 1953 Comp., § 12-14-4, enacted by Laws 1967, ch. 277, § 4; 1970, ch. 58, § 3; 1971, ch. 277, § 22; 1973, ch. 322, § 3; 1981, ch. 373, § 2; 1985, ch. 95, § 1; 1988, ch. 128, § 1; 1989, ch. 278, § 3; 1990, ch. 31, § 2; 1992, ch. 20, § 3.

ANNOTATIONS

Cross-references. - For definition of "class A county", see 4-44-1 NMSA 1978.

The 1992 amendment, effective March 5, 1992, rewrote this section to the extent that a detailed comparison would be impracticable.

Meaning of "federal act". - See Paragraph F of 74-2-2 NMSA 1978 and notes thereto.

Air pollution controlled by subjecting entire state to regulatory authority. - Under this article, air pollution throughout the state is controlled by subjecting every area of the state to the regulatory authority of some board: either the environmental improvement board or a board created in accordance with this section. 1982 Op. Att'y Gen. No. 82-7.

Municipality not exempt from regulations adopted by county board. - Section 4-37-2 NMSA 1978 does not exempt a municipality from regulations adopted by a county air quality control board which has the authority to adopt regulations to prevent or abate air pollution within the geographic boundaries of that county. 1982 Op. Att'y Gen. No. 82-7.

Localities may impose criminal penalties for violations of act. - This article does not expressly deny to counties and municipalities the power to impose criminal penalties for violations of the act, thus such penalties are valid under N.M. Const., art. X, § 6.

Chapman v. Luna, 101 N.M. 59, 678 P.2d 687 (1984), cert. denied, 474 U.S. 947, 106 S. Ct. 345, 88 L. Ed. 2d 292 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 51 et seq.

What are "land-use and transportation controls" which may be imposed, under § 100(a)(2)(B) of Clean Air Act of 1970 (42 U.S.C.S. § 7405), to insure maintenance of national primary ambient air quality standards, 30 A.L.R. Fed. 156.

39A C.J.S. Health and Environment § 130.

74-2-5. Duties and powers; environmental improvement board; local board.

A. The environmental improvement board or the local board shall prevent or abate air pollution.

B. The environmental improvement board or the local board shall:

(1) adopt, promulgate, publish, amend and repeal regulations consistent with the Air Quality Control Act [this article] to attain and maintain national ambient air quality standards and prevent or abate air pollution, including regulations prescribing air standards, within the geographic area of the environmental improvement board's jurisdiction or the local board's jurisdiction, or any part thereof; and

(2) adopt a plan for the regulation, control, prevention or abatement of air pollution, recognizing the differences, needs, requirements and conditions within the geographic area of the environmental improvement board's jurisdiction or the local board's jurisdiction or any part thereof.

C. Regulations adopted by the environmental improvement board or the local board may:

(1) include regulations to protect visibility in mandatory class I areas to prevent significant deterioration of air quality and to achieve national ambient air quality standards in nonattainment areas; provided that such regulations:

(a) shall be no more stringent than but at least as stringent as required by the federal act and federal regulations pertaining to visibility protection in mandatory class I areas, pertaining to prevention of significant deterioration and pertaining to nonattainment areas; and

(b) shall be applicable only to sources subject to such regulation pursuant to the federal act;

(2) prescribe standards of performance for sources and emission standards for hazardous air pollutants that, except as provided in Paragraph (3) of this subsection:

(a) shall be no more stringent than but at least as stringent as required by federal standards of performance; and

(b) shall be applicable only to sources subject to such federal standards of performance;

(3) include regulations governing emissions from solid waste incinerators that shall be at least as stringent as, and may be more stringent than, any applicable federal emission limitations;

(4) require notice to the department or the local agency of the intent to introduce or permit the introduction of an air contaminant into the air within the geographical area of the environmental improvement board's jurisdiction or the local board's jurisdiction; and

(5) require any person emitting any air contaminant to:

(a) install, use and maintain emission monitoring devices;

(b) sample emissions in accordance with methods and at locations and intervals as may be prescribed by the environmental improvement board or the local board;

(c) establish and maintain records of the nature and amount of emissions;

(d) submit reports regarding the nature and amounts of emissions and the performance of emission control devices; and

(e) provide any other reasonable information relating to the emission of air contaminants.

D. Any regulation adopted under this section shall be consistent with federal law, if any, relating to control of motor vehicle emission.

E. In making its regulations, the environmental improvement board or the local board shall give weight it deems appropriate to all facts and circumstances, including but not limited to:

(1) character and degree of injury to or interference with health, welfare, visibility and property;

(2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and

(3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

History: 1953 Comp., § 12-14-5, enacted by Laws 1967, ch. 277, § 5; 1970, ch. 58, § 4; 1972, ch. 51, § 3; 1979, ch. 393, § 2; 1981, ch. 373, § 3; 1983, ch. 34, § 2; 1987, ch. 293, § 1; 1990, ch. 99, § 66; 1992, ch. 20, § 4.

ANNOTATIONS

Cross-references. - For definitions of "board" and "federal act," see 74-2-2 NMSA 1978.

The 1992 amendment, effective March 5, 1992, substituted the present section catchline for "Duties and powers of board"; inserted "environmental improvement board" in Subsection A, rewrote the provisions of former Subsection B and redesignated them as present Subsections B, C, and D; and deleted former Subsections C, D, and E, relating to notice of intent to introduce air contaminants, compacts with other states, and installation of monitoring devices, samples, records, and reports respectively.

Meaning of "federal act". - See Paragraph F of 74-2-2 NMSA 1978 and notes thereto.

Responsibility for enforcing act. - Enforcement of New Mexico regulations and standards more stringent than, or in addition to, the federal standards and regulations is the state's responsibility; the environmental improvement board has state-wide responsibility for enforcing this article, but the Albuquerque-Bernalillo county air quality control board has this responsibility in the Albuquerque-Bernalillo county area. 1987 Op. Att'y Gen. No. 87-11.

Board's authority limited to pollution control. - Administrative bodies are the creatures of statutes, and as such they have no common-law or inherent powers and can act only as to those matters which are within the scope of the authority delegated to them. The legislative mandate under this article is that the board should prevent or abate air pollution, and although the authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy, such an approach to construction does not warrant allowing an administrative agency to amend or enlarge its authority under the guise of making rules and regulations. Public Serv. Co. v. New Mexico Envtl. Imp. Bd., 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

No authority to plan industrial development. - There is nothing in the board's mandate that gives it the authority to plan for the industrial development of any area in the state; although the standards and regulations promulgated by the board will have an impact on the industrial development of the area, such an impact should be as a consequence, not by design. Public Serv. Co. v. New Mexico Envtl. Imp. Bd., 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

No authority to require more restrictive standards than federal regulations. - There is no authority given to the board to promulgate regulations more restrictive than those under federal law in order for New Mexico to regain control over its air. Public Serv. Co. v. New Mexico Envtl. Imp. Bd., 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

Requiring use of oxygenated fuels. - The environmental improvement board and/or the Albuquerque-Bernalillo county air quality control board may require the use of oxygenated fuels without violating the constitutional prohibition against interference with interstate commerce, but may only do so if that requirement is contained in the state's implementation plan. 1987 Op. Att'y Gen. No. 87-11.

Board's regulation following federal requirements not automatically illegal. - The board's adoption of a regulation which adheres to federal requirements does not create the automatic conclusion that it has ignored its obligations under state law. Kennecott Copper Corp. v. New Mexico Envtl. Imp. Bd., 94 N.M. 610, 614 P.2d 22 (Ct. App. 1980).

Substantial evidence required to support regulations. - There is no substantial evidence in the record to support one of the board's final reasons for adopting amended regulations as to sulfur dioxide emissions, namely, because of their effects on visibility, since by definition sulfur dioxide in a gaseous form is a heavy colorless nonflammable gas of pungent suffocating odor, and whether sulfur dioxide emissions can or do combine with other elements in the atmosphere to produce a visible gas, or whatever, is not shown in the record. Public Serv. Co. v. New Mexico Envtl. Imp. Bd., 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

But not required for every particular. - Regulations adopted by a board, pursuant to this section after substantial compliance with the public hearing requirements, need not be supported by substantial evidence in every material portion thereof. Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Bd., 80 N.M. 633, 459 P.2d 159 (Ct. App. 1969).

Board bound by its standard. - The board, in promulgating an ambient air quality standard, establishes the criterion for determining what concentration or quantity of sulfur dioxide in the specified time periods constitutes air pollution; it makes the judgment that concentrations over the quantity prescribed would injure health, interfere with visibility and adversely affect the public welfare. Having set the standard, it is bound by it, the same as anyone else. Public Serv. Co. v. New Mexico Envtl. Imp. Bd., 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

Modification authorized to prevent pollution. - The board has the continuing authority to change the ambient air quality standard for sulfur dioxide after proper notice and hearing and to adopt regulations to implement or explain it, but it may not set a new standard or adopt regulations implementing or explaining it for any reason other than to prevent or abate air pollution. Public Serv. Co. v. New Mexico Envtl. Imp. Bd., 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

Upon showing of present or future need for new standard. - New emission regulations may be adopted by the board if there is substantial evidence in the record of a present or reasonably anticipated future need for a stricter regulation in order to prevent air pollution in excess of the standard. Thus, if the board can demonstrate that reasonably anticipated future growth in the area will, as a factual matter, result in pollution emissions which exceed present ambient air standards, the board may enact stricter regulations for both existing and proposed sources. The board may act to prevent or abate air pollution when presented with persuasive evidence that emission sources are growing in number and that the totality of new and existing emissions will, if left at presently regulated rates, exceed the ambient air quality standard. 1977 Op. Att'y Gen. No. 77-15.

Board obligated to amend standards to comply with federal requirements. - When New Mexico standards are amended and thus made more stringent in order to comply with federal requirements, the board is doing no more than it is obliged to do by its mandate under the federal Clean Air Act. Kennecott Copper Corp. v. New Mexico Envtl. Imp. Bd., 94 N.M. 610, 614 P.2d 22 (Ct. App. 1980).

Law reviews. - For comment, "Delegation of Legislative Authority on the State Level; Environmental Protection in New Mexico: Public Service Co. of New Mexico et al. v. New Mexico Environmental Improvement Board," see 17 Nat. Resources J. 521 (1977).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 51, 52, 55 et seq.

Validity of regulation of smoke and other air pollution, 78 A.L.R.2d 1305.

Air pollution control: validity of legislation permitting administrative agency to fix permissible standards of pollutant emission, 48 A.L.R.3d 326.

Validity of state and local air pollution administrative rules, 74 A.L.R.4th 566.

Construction and application of preemption sections (§§ 208, 210(c)(4)) of Clean Air Act (42 U.S.C.S. §§ 1857f-6a, 1857f-6c(c)(4)), 18 A.L.R. Fed. 971.

What are "land-use and transportation controls" which may be imposed, under § 100(a)(2)(B) of Clean Air Act of 1970 (42 U.S.C.S. § 1857c-5(a)(2)(B)), to insure maintenance of national primary ambient air quality standards, 30 A.L.R. Fed. 156.

Construction, applicability and effect of § 304 of Clean Air Amendments of 1970 (42 U.S.C.S. § 1857h-2) in actions against alleged violators, 37 A.L.R. Fed. 320.

Clean Air Act implementation plans for nonattainment areas, 90 A.L.R. Fed. 481.

39A C.J.S. Health and Environment § 130.

74-2-5.1. Duties and powers of the department and the local agency.

The department and the local agency for their respective jurisdictions shall:

A. develop facts and make investigations and studies consistent with the Air Quality Control Act [this article] and, as required for enforcement of that act, enter at all reasonable times in or upon any private or public property, except private residences, that the department or the local agency has reasonable cause to believe is or will become a source contributing to air pollution and require the production of information relating to emissions that cause or contribute to air pollution. The results of any such investigations shall be reduced to writing if any enforcement action is contemplated, and a copy shall be furnished to the owner or occupants of the premises before the action is filed;

B. institute legal proceedings to compel compliance with the Air Quality Control Act or any regulation of the environmental improvement board or the local board;

C. encourage and make every reasonable effort to obtain voluntary cooperation by the owner or occupants to preserve, restore or improve air purity;

D. consult with any person proposing to construct, install or otherwise acquire an air contaminant source, device, system or control mechanism concerning the efficiency of the device, system or mechanism or the air pollution problem that may be related to the source, device, system or mechanism; provided that consultation shall not relieve any person from compliance with the Air Quality Control Act, regulations in force pursuant to that act or any other provision of law;

E. establish a small business stationary source technical and environmental compliance assistance program, consistent with the provisions of Section 507 of the federal act;

F. accept, receive and administer grants or other funds or gifts from public and private agencies, including the federal government, or from any person;

G. classify and record air contaminant sources that, in its judgment, may cause or contribute to air pollution, according to levels and types of emissions and other characteristics that relate to air pollution; provided, classifications may be for application to the entire geographical area of the department's responsibility or the local authority's responsibility or to any designated portion of that area and shall be made with special reference to the effects on health, economic and social factors and physical effects on property; and

H. develop and present to the environmental improvement board or the local board a plan for the regulation, control, prevention or abatement of air pollution, recognizing the differences, needs, requirements and conditions in the different portions of the

geographical area of the department's responsibility or the local authority's responsibility.

History: 1978 Comp., § 74-2-5.1, enacted by Laws 1992, ch. 20, § 5.

ANNOTATIONS

Repeals and reenactments. - Laws 1992, ch. 20, § 5 repeals former 74-2-5.1 NMSA 1978, as enacted by Laws 1985, ch. 95, § 6, relating to joint air quality control board reports, and enacts the above section, effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

"Section 507 of the Federal act". - The phrase "section 507 of the federal act", referred to in Subsection E, means section 507 of the federal Clean Air Act, which appears as 42 U.S.C. § 7661f.

74-2-5.2. State air pollution control agency; specific duties and powers of the department.

The department is the state air pollution control agency for all purposes under federal legislation relating to air pollution. The department shall:

A. take all action necessary to secure for the state and its political subdivisions the benefits of federal legislation;

B. advise, consult, contract with and cooperate with local authorities, other states, the federal government and other interested persons or groups in regard to matters of common interest in the field of air quality control and initiate cooperative action between a local authority and the department, between one local authority and another or among any combination of local authorities and the department for control of air pollution in areas having related air pollution problems that overlap the boundaries of political subdivisions; and

C. enter into agreements and compacts with adjoining states and Indian tribes, where appropriate.

History: 1978 Comp., § 74-2-5.2, enacted by Laws 1992, ch. 20, § 6.

ANNOTATIONS

Repeals and reenactments. - Laws 1992, ch. 20, § 6 repeals former 74-2-5.2 NMSA 1978, as enacted by Laws 1990, ch. 99, § 67, relating to solid waste incinerator regulations, and enacts the above section, effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

74-2-6. Adoption of regulations; notice and hearings.

A. Any person may recommend or propose regulations to the environmental improvement board or the local board for adoption. The environmental improvement board or the local board shall determine whether to hold a hearing within sixty days of submission of a proposed regulation.

B. No regulations or emission control requirement shall be adopted until after a public hearing by the environmental improvement board or the local board. As used in this section, "regulation" includes any amendment or repeal thereof. Hearings on regulations of nonstatewide application shall be held within that area that is substantially affected by the regulation. Hearings on regulations of statewide application may be held in Santa Fe or within any area of the state substantially affected by the regulation.

C. Notice of the hearing shall be given at least thirty 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 notice shall also state where interested persons may secure copies of any proposed regulation or air quality standard. The notice shall be published in a newspaper of general circulation in the area affected. Reasonable effort shall be made to give notice to all persons who have made a written request to the environmental improvement board or the local board for advance notice of its hearings.

D. At the hearing, the environmental improvement board or the local board shall allow all interested persons reasonable opportunity to submit data, 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 environmental improvement board or the local board.

E. The environmental improvement board or the local board may designate a hearing officer to take evidence in the hearing.

F. No regulations or emission control requirement adopted by the environmental improvement board or the local board shall become effective until thirty days after its filing under the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978].

History: 1953 Comp., § 12-14-6, enacted by Laws 1967, ch. 277, § 6; 1970, ch. 58, § 5; 1974, ch. 64, § 2; 1981, ch. 373, § 4; 1982, ch. 73, § 25; 1992, ch. 20, § 7.

ANNOTATIONS

Cross-references. - For definition of "board," see 74-2-2 NMSA 1978.

As to notice by publication, see 14-11-1 NMSA 1978 et seq.

The 1992 amendment, effective March 5, 1992, substituted "adoption" for "promulgation" in the first sentence of Subsection A, substituted "environmental improvement board or the local board" for "board" several times throughout the section,

deleted former Subsection G relating to appeals, and made minor stylistic changes throughout the section.

Temporary provisions. - Laws 1992, ch. 20, § 22, effective March 5, 1992, provides that all rules, regulations and administrative determinations of the environmental improvement board or a local board created by any local air quality authority and the department of environment or the administrative agency of a local air quality authority pertaining to air quality that existed prior to the effective date of the 1992 amendments to the Air Quality Control Act (March 5, 1992) set forth in that act shall remain in effect after that date until repealed or amended unless in conflict with, prohibited by or inconsistent with, the provisions of the Air Quality Control Act, as amended, and provides that all enforcement actions taken before or after the effective date of the amendments to the Air Quality Control Act (March 5, 1992) set forth in this 1992 act shall be valid if based upon an act or failure to act that violated a provision of law or regulation in effect at the time of the act or failure to act.

Production at hearing of supporting substantial evidence not required. - An adjudicatory or trial-type hearing is not contemplated by this section; the validity of a regulation is not dependent upon support by substantial evidence adduced at a hearing. Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo County Air Quality Control Bd., 80 N.M. 633, 459 P.2d 159 (Ct. App. 1969).

Notice and hearing prerequisite to granting variance. - The environmental improvement board cannot grant a variance without first having given the public reasonable notice and a hearing on the contemplated variance. Where the notice of the hearing on a proposed amendment contains no mention of a variance, the board cannot legally grant a variance after the hearing. The order granting the variance is, therefore, void. 1976 Op. Att'y Gen. No. 76-23.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 6, 134.

Validity of state and local air pollution administrative rules, 74 A.L.R.4th 566.

39A C.J.S. Health and Environment §§ 138, 142.

74-2-7. Permits; permit appeals to the environmental improvement board or the local board; permit fees.

A. By regulation the environmental improvement board or the local board shall require:

(1) any person intending to construct or modify any source, except as otherwise specifically provided by regulation, to obtain a construction permit from the department or the local agency prior to such construction or modification; and

(2) any person intending to operate any source for which an operating permit is required by the 1990 amendments to the federal act, except as otherwise specifically provided by regulation, to obtain an operating permit from the department or the local agency.

B. Regulations adopted by the environmental improvement board or the local board shall include at least the following provisions:

(1) requirements for the submission of relevant information, including but not limited to information the department or the local agency deems necessary to ensure that regulations and standards under the Air Quality Control Act [this article] or the federal act will not be violated;

(2) specification of the deadlines for processing permit applications; provided, the deadline for a final decision by the department or the local agency on a construction permit application may not exceed:

(a) one hundred eighty days after the application is determined to be complete, if the application is not affected by requirements for prevention of significant deterioration; or

(b) two hundred forty days after the application is determined to be complete, if the application is affected by requirements for prevention of significant deterioration;

(3) specification of the public notice, comment period and public hearing, if any, required prior to the issuance of a permit; provided the permit regulations adopted:

(a) by the environmental improvement board shall include provisions governing notice to nearby states; and

(b) by any local board shall include provisions requiring that notice be given to the department of all permit applications by any source that emits, or has a potential emission rate of, one hundred tons per year or more of any regulated air contaminant, including any source of fugitive emissions of each regulated air contaminant at least sixty days prior to the date on which construction or major modification is to commence;

(4) a schedule of construction permit fees sufficient to cover:

(a) the reasonable costs of reviewing and acting upon any application for such permit; and

(b) the reasonable costs of implementing and enforcing the terms and conditions of the permit, excluding any court costs or other costs associated with an enforcement action;

(5) a schedule of emission fees consistent with the provisions of Section 502(b)(3) of the 1990 amendments to the federal act;

(6) specification of the maximum length of time for which a permit shall be valid; provided that for an operating permit, such period may not exceed five years; and

(7) for an operating permit only:

(a) provisions consistent with Sections 502(b) and 505(b) of the federal act providing: 1) notice to and review and comment by the United States environmental protection agency; and 2) that if the department or local agency receives notice of objection from the United States environmental protection agency before the operating permit is issued, the department or the local agency shall not issue the permit unless it is revised and issued under Section 505(c) of the federal act;

(b) provisions governing renewal of the operating permit; and

(c) specification of the conditions under which the operating permit may be terminated, modified or revoked and reissued prior to the expiration of the term of the operating permit.

C. The department or the local agency may deny any application for:

(1) a construction permit if it appears that the construction or modification will not meet applicable requirements of the Air Quality Control Act, the federal act or any regulation adopted pursuant to either; or

(2) an operating permit if:

(a) the source for which the permit is sought will emit a hazardous air pollutant or any air contaminant in excess of a federal standard of performance or a regulation of the environmental improvement board or the local board;

(b) it appears that the source for which the permit is sought will cause or contribute to air contaminant levels in excess of any national or state standard or, within the boundaries of a local authority, applicable local ambient air quality standards; or

(c) any other provision of the Air Quality Control Act or the federal act will be violated.

D. The department or the local agency may specify conditions to any permit granted under this section, including:

(1) for a construction permit, a requirement that such source install and operate control technology, determined on a case-by-case basis, sufficient to meet the requirements of the Air Quality Control Act, the federal act and regulations promulgated pursuant to either; and

(2) for an operating permit:

(a) imposition of individual emission limits, determined on a case-by-case basis, but only as restrictive as necessary to meet the requirements of the Air Quality Control Act and the federal act or the emission rate specified in the operating permit application, whichever is more stringent;

(b) compliance with applicable federal standards of performance;

(c) imposition of reasonable restrictions and limitations not relating to emission limits or emission rates; or

(d) any combination of the conditions listed above.

E. This section does not authorize the department or the local agency to require the use of machinery, devices or equipment from a particular manufacturer if the federal standards of performance, state regulations and permit conditions may be met by machinery, devices or equipment otherwise available.

F. The issuance of a permit does not relieve any person from the responsibility of complying with the provisions of the Air Quality Control Act and any applicable regulations of the environmental improvement board or the local board. Any conditions placed upon a permit by the department or the local agency shall be enforceable to the same extent as a regulation of its board.

G. Any person who participated in a permitting action before the department or the local agency shall be notified by the department or the local agency of the action taken and the reasons for the action. Notification of the applicant shall be by certified mail.

H. Any person who participated in a permitting action before the department or the local agency and who is adversely affected by such permitting action may file a petition for hearing before the environmental improvement board or the local board. The petition shall be made in writing to the environmental improvement board or the local board within thirty days from the date notice is given of the department's or the local agency's action. Unless a timely request for hearing is made, the decision of the department or the local agency shall be final.

I. If a timely petition for hearing is made, the environmental improvement board or the local board shall hold a hearing within ninety days after receipt of the petition. The environmental improvement board or the local board shall notify the petitioner and the applicant or permittee, if other than the petitioner, by certified mail of the date, time and place of the hearing. If the subject of the petition is a permitting action deemed by the environmental improvement board or the local board to substantially affect the public interest, the environmental improvement board or the local board shall ensure that the public receives notice of the date, time and place of the hearing. The public in such circumstances shall also be given a reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. Any

person submitting data, views or arguments orally or in writing shall be subject to examination at the hearing.

J. The environmental improvement board or the local board may designate a hearing officer to take evidence in the hearing. All hearings shall be recorded.

K. The burden of proof shall be upon the petitioner. Based upon the evidence presented at the hearing, the environmental improvement board or the local board shall sustain, modify or reverse the action of the department or the local agency respectively.

L. Notwithstanding any other provision of law and subject to the provisions of Section 74-2-4 NMSA 1978, a final decision on a permit by the department, the environmental improvement board, the local agency, the local board or the court of appeals that a new source will or will not meet applicable local, state and federal air pollution standards and regulations shall be conclusive and is binding on every other state agency and as an issue before any other state agency shall be deemed resolved in accordance with that final decision.

M. Subject to the provisions of Section 74-2-4 NMSA 1978, if the local board has adopted a permit regulation pursuant to this section, persons constructing or modifying any new source within the boundaries of the local authority shall obtain a permit from the local agency and not from the department.

N. Fees collected pursuant to this section shall be deposited in:

(1) the state air quality permit fund created by Section 74-2-15 NMSA 1978 if collected by the department; or

(2) a fund created pursuant to Section 74-2-16 NMSA 1978 if collected by a local agency pursuant to a permit regulation adopted by the local board pursuant to this section.

History: 1953 Comp., § 12-14-7, enacted by Laws 1972, ch. 51, § 4; 1973, ch. 322, § 4; 1979, ch. 393, § 3; 1981, ch. 373, § 5; 1983, ch. 34, § 3; 1987, ch. 293, § 2; 1992, ch. 20, § 8.

ANNOTATIONS

Cross-references. - For definitions of "department," "board" and "federal act," see 74-2-2 NMSA 1978.

The 1992 amendment, effective March 5, 1992, rewrote this section to the extent that a detailed comparison would be impracticable.

Meaning of "federal act". - See Paragraph F of 74-2-2 NMSA 1978 and notes thereto. Section 502(b) of that act appears as 42 U.S.C. § 7661a(b). Section 505(c) of that act appears as 42 U.S.C. § 7661d.

Law reviews. - For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity, construction and application of statutes requiring assessment of environmental information prior to grants of entitlements for private land use, 76 A.L.R.3d 388.

Application of § 165 of Clean Air Act (42 USCS § 7475), pertaining to preconstruction requirements for prevention of significant deterioration, to particular emission sources, 86 A.L.R. Fed. 255.

39A C.J.S. Health and Environment §§ 134 to 149.

74-2-8. Variances.

A. The environmental improvement board or the local board may grant an individual variance from the limitations prescribed under the Air Quality Control Act [this article], any regulation of the environmental improvement board or the local board or any permit condition imposed by the department or the local agency whenever it is found, upon presentation of adequate proof:

(1) that compliance with any part of that act, any regulation of the environmental improvement board or the local board or any permit condition will:

(a) result in an arbitrary and unreasonable taking of property; or

(b) impose an undue economic burden upon any lawful business, occupation or activity; and

(2) that the granting of the variance will not:

(a) result in a condition injurious to health or safety; or

(b) cause or contribute to an air contaminant level in excess of any primary national ambient air quality standards.

B. No variance shall be granted pursuant to this section until the environmental improvement board or the local board has considered the relative interests of the applicant, other owners of property likely to be affected by the discharges and the general public.

C. Any variance or renewal thereof shall be granted within the requirements of Subsection A of this section and for time periods and under conditions consistent with the reasons therefor and within the following limitations:

(1) if the variance is granted on the ground that there are no practicable means known or available for the adequate prevention, abatement or control of the air pollution involved, it shall be only until the necessary means for prevention, abatement or control become known and available;

(2) if the variance is granted on the ground that compliance with the particular requirement from which variance is sought will necessitate the taking of measures that because of their extent or cost, must be spread over a considerable period of time, it shall be for a period not to exceed such reasonable time as, in the view of the environmental improvement board or the local board, is requisite for the taking of the necessary measures. A variance granted on the ground specified in this paragraph shall contain a timetable for the taking of action in an expeditious manner and shall be conditioned on adherence to the timetable; or

(3) if the variance is granted on the ground that it is justified to relieve or prevent hardship of a kind other than that provided for in Paragraphs (1) and (2) of this subsection, it shall be for not more than one year.

D. Any person seeking a variance shall do so by filing a petition for variance with the secretary or the director charged with implementation of the Air Quality Control Act at the site where the variance will apply. The secretary or the director shall promptly investigate the petition and make recommendation to his respective board as to the disposition of the petition.

E. Upon receiving the recommendation of the secretary or the director on the variance, the environmental improvement board or the local board shall:

(1) if the secretary or the director favors a variance, hold a public hearing prior to the granting of any variance; and

(2) if the secretary or the director is opposed to the granting of the variance, hold a hearing only upon the request of the petitioner.

F. In the hearing, the burden of proof shall be upon the petitioner.

History: 1953 Comp., § 12-14-8, enacted by Laws 1967, ch. 277, § 8; 1970, ch. 58, § 6; 1973, ch. 322, § 5; 1979, ch. 393, § 4; 1992, ch. 20, § 9.

ANNOTATIONS

Cross-references. - For definitions of "board" and "director," see 74-2-2 NMSA 1978.

The 1992 amendment, effective March 5, 1992, revised the internal subsection designations in Subsection A, added Subsection A(2)(b), substituted "environmental improvement board or the local board" for "board" several times throughout the section, substituted "secretary or the director" for "director" several times throughout the section, added all of the present language of the first sentence of Subsection D following "director", and made stylistic changes throughout the section.

Criterion for denial of variance. - Board may deny variance when the air pollution that would result from granting variance would with reasonable probability injure health, but board may not deny variance upon mere showing that condition tends to cause harm. Duke City Lumber Co. v. New Mexico Envtl. Imp. Bd., 101 N.M. 291, 681 P.2d 717 (1984).

Air Quality Standards' margin of safety does not contemplate excursions beyond legal limits. - Petitioner's argument that Congress, by allowing an adequate margin of safety, not only contemplated but countenanced occasional excursions beyond the limits of the National Ambient Air Quality Standards is meritless since it is clear that the margin of safety protects against effects which have not yet been uncovered by research or whose medical significance is a matter of disagreement. Duke City Lumber Co. v. New Mexico Envtl. Imp. Bd., 102 N.M. 8, 690 P.2d 451 (Ct. App. 1984).

Board may rely on division's modeling results to deny variance application. - The environmental improvement board may rely on the environmental improvement division's modeling results, showing particulate concentrations in excess of the legal limit, in arriving at its decision to deny a lumber company's application for a variance from air quality control regulations. Duke City Lumber Co. v. New Mexico Envtl. Imp. Bd., 102 N.M. 8, 690 P.2d 451 (Ct. App. 1984).

Smoke may be "injurious to health and safety". - Smoke, in a given situation, may be composed of elements which at a given density or opacity may be "injurious to health or safety," as these words are used in Subsection A, but something more than the percentage of opacity must be shown. Duke City Lumber Co. v. New Mexico Envtl. Imp. Bd., 95 N.M. 401, 622 P.2d 709 (Ct. App. 1980), rev'd on other grounds, 101 N.M. 291, 681 P.2d 717 (1984).

Notice and hearing prerequisite to granting variance. - The environmental improvement board cannot grant a variance without first having given the public reasonable notice and a hearing on the contemplated variance. Where the notice of the hearing on a proposed amendment contains no mention of a variance, the board cannot legally grant a variance after the hearing. The order granting the variance is, therefore, void. 1976 Op. Att'y Gen. No. 76-23.

Burden of proving safety of variance on applicant. - The effect of the requirement of this section that the granting of the variance must not result in a condition injurious to health or safety is to impose the duty of proving a negative on the applicant for a

variance. Duke City Lumber Co. v. New Mexico Envtl. Imp. Bd., 95 N.M. 401, 622 P.2d 709 (Ct. App. 1980), rev'd on other grounds, 101 N.M. 291, 681 P.2d 717 (1984).

But once party makes showing, burden of going forward shifts. - Once the party who seeks a variance and thus bears the burden of proof has made a prima facie showing, the burden of going forward with the evidence shifts to the opposing party. Duke City Lumber Co. v. New Mexico Envtl. Imp. Bd., 95 N.M. 401, 622 P.2d 709 (Ct. App. 1980), rev'd on other grounds, 101 N.M. 291, 681 P.2d 717 (1984).

Law reviews. - For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

For article, "Substantial Evidence Reconsidered: The Post-Duke City Difficulties and Some Suggestions for Their Resolution," see 18 N.M.L. Rev. 525 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity, construction, and application of variance provisions in state and local air pollution control laws and regulations, 66 A.L.R.4th 711.

39A C.J.S. Health and Environment § 135.

74-2-9. Judicial review; administrative actions.

A. Any person adversely affected by an administrative action taken by the environmental improvement board, the local board, the secretary or the director may appeal to the court of appeals. All appeals shall be upon the record made at the hearing and shall be taken to the court of appeals within thirty days following the date of the action.

B. For appeals of regulations, the date of the action shall be the date of the filing of the regulation by the environmental improvement board or the local board pursuant to the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978].

C. Upon appeal, the court of appeals shall set aside the action only if found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence in the record; or

(3) otherwise not in accordance with law.

D. After a hearing and a showing of good cause by the appellant, a stay of the action being appealed may be granted:

(1) by the environmental improvement board, the local board, the department or the local agency, whichever took the action being appealed; or

(2) by the court of appeals if the environmental improvement board, the local board, the department or the local agency denies a stay or fails to act upon an application for a stay within sixty days after receipt of the application.

History: 1953 Comp., § 12-14-8.1, enacted by Laws 1971, ch. 57, § 1; 1979, ch. 393, § 5; 1992, ch. 20, § 10.

ANNOTATIONS

The 1992 amendment, effective March 5, 1992, substituted the present section catchline for "Variances; judicial review"; in Subsection A, substituted all of the present language of the first sentence preceding "may appeal" for "Any person to whom the board denies a variance, after a hearing," and substituted "following the date of the action" for "after the board's denial" in the second sentence; rewrote Subsection B; substituted "action" for "board's denial of the variance request" in the introductory paragraph of Subsection C; and rewrote Subsection D.

Standard of judicial review. - The substantial evidence rule for administrative appeals is supplemented with a "whole record" standard for judicial review of findings of fact made by administrative agency, so that the standard for upholding a decision by the environmental improvement board is whether the decision is supported by substantial evidence in record as a whole. Duke City Lumber Co. v. New Mexico Envtl. Imp. Bd., 101 N.M. 291, 681 P.2d 717 (1984).

Law reviews. - For article, "Substantial Evidence Reconsidered: The Post-Duke City Difficulties and Some Suggestions for Their Resolution," see 18 N.M.L. Rev. 525 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 39A C.J.S. Health and Environment §§ 146 to 149.

74-2-10. Emergency powers of the secretary and the director.

A. Notwithstanding any other provision of the Air Quality Control Act [this article], if the secretary or the director determines that a source or combination of sources presents an imminent and substantial endangerment to the public health or welfare or to the environment, he may bring suit in the district court for the county in which the source is located to restrain immediately any person causing or contributing to the alleged air pollution to stop the emission of air contaminants causing or contributing to such air pollution or to take such other action as may be necessary.

B. If it is not practicable to assure prompt protection of the public health or welfare or the environment by commencement of a civil action, the secretary or the director may issue orders necessary to protect the public health or welfare or the environment. An order shall be effective for a period of not more than twenty-four hours, unless the secretary or the director brings a civil action before the expiration of twenty-four hours. If the

secretary or the director brings an action within that time, the order shall be effective thereafter for forty-eight hours or for such longer period as may be authorized by the court pending litigation.

History: 1978 Comp., § 74-2-10, enacted by Laws 1992, ch. 20, § 11.

ANNOTATIONS

Cross-references. - For definition of "secretary" and "director," see 74-2-2 NMSA 1978.

Repeals and reenactments. - Laws 1992, ch. 20, § 11 repeals former 74-2-10 NMSA 1978, as amended by Laws 1981, ch. 373, § 6, and enacts the above section, effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 493, 538, 539.

74-2-11. Confidential information.

A. Any records, reports or information obtained under the Air Quality Control Act [this article] by the department, the environmental improvement board, the local board or the local agency shall be available to the public, except that upon a satisfactory showing to the secretary, the director, the environmental improvement board, the local board or the local agency, as applicable, by any person that records, reports or information, or particular parts thereof, except emission data, to which the department, the local agency, the environmental improvement board or the local board has access under the Air Quality Control Act, if made public, would divulge confidential business records or methods or processes entitled to protection as trade secrets of that person, the secretary, the director, the environmental improvement board or the local board, as applicable, shall consider such record, report or information, or particular portion thereof, confidential in accordance with the provisions of Section 14-2-1 NMSA 1978 and 18 U.S.C. Section 1905, except that such record, report or other information may be disclosed:

(1) to other officers, employees or authorized representatives of the department, the local agency, the environmental improvement board or the local board concerned with carrying out the Air Quality Control Act;

(2) to officers, employees or authorized representatives of the United States environmental protection agency concerned with carrying out the federal act; or

(3) when relevant, in any proceeding under the Air Quality Control Act or the federal act.

B. The environmental improvement board or the local board shall adopt regulations to implement this section, including regulations specifying those business records entitled to treatment as confidential records.

History: 1978 Comp., § 74-2-11, enacted by Laws 1992, ch. 20, § 12.

ANNOTATIONS

Cross-references. - For definitions of "board" and "department," see 74-2-2 NMSA 1978.

Repeals and reenactments. - Laws 1992, ch. 20, § 12 repeals former 74-2-11 NMSA 1978, as amended by Laws 1979, ch. 393, § 6, and enacts the above section, effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

Board may publish nonconfidential contaminant data. - The environmental improvement board, subject to the confidentiality provision contained in this section, may make air contaminant emission data and other information available to the public. 1972 Op. Att'y Gen. No. 72-17.

Operator of contaminant source must demonstrate confidentiality. - The owner or operator of an air contaminant source has the burden to establish whether records or information furnished to or obtained by the environmental improvement board or any other air quality control board are entitled to confidentiality. 1972 Op. Att'y Gen. No. 72-42.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 2 Am. Jur. 2d Administrative Law § 258.

74-2-11.1. Limitations on regulations.

The Air Quality Control Act [this article] does not:

A. authorize the environmental improvement board or the local board to make any regulation with respect to any condition or quality of the outdoor atmosphere if the condition or air quality level and its effect are confined entirely within the boundaries of the industrial or manufacturing property within which the air contaminants are or may be emitted and public access is restricted within such boundaries;

B. grant to the environmental improvement board or the local board any jurisdiction or authority affecting the relation between employers and employees with respect to or arising out of any condition of air quality; or

C. supersede or limit the applicability of any law relating to industrial health, safety or sanitation.

History: 1978 Comp., § 74-2-11.1, enacted by Laws 1979, ch. 393, § 7; 1992, ch. 20, § 13.

ANNOTATIONS

The 1992 amendment, effective March 5, 1992, substituted "environmental improvement board or the local board" for "board" near the beginning of Subsections A and B, and deleted "except that a source which uses a supplemental or intermittent control system for purposes of complying with a primary nonferrous smelter order may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent control system or other dispersion dependent control system" at the end of Subsection B.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity of state and local air pollution administrative rules, 74 A.L.R.4th 566.

74-2-12. Enforcement; compliance orders; field citations.

A. Whenever, on the basis of any information, the secretary or the director determines that any person has violated or is violating any requirement or prohibition of the Air Quality Control Act [this article], any regulation promulgated pursuant to that act or any condition of a permit issued under that act, the secretary or the director may:

(1) issue a compliance order stating with reasonable specificity the nature of the violation and requiring compliance immediately or within a specified time period or assessing a civil penalty for any past or current violation, or both; or

(2) commence a civil action in district court for appropriate relief, including a temporary or permanent injunction.

B. Any order issued pursuant to Subsection A of this section may include a suspension or revocation of any permit, or portion thereof, issued by the secretary or the director. Any penalty assessed in the order shall not exceed fifteen thousand dollars ($15,000) per day of noncompliance for each violation.

C. Any order issued pursuant to Subsection A of this section shall become final unless, no later than thirty days after the order is served, the person named therein submits a written request to the secretary or the director for a public hearing. Upon such request, the secretary or the director shall promptly conduct a public hearing. The secretary or the director shall appoint an independent hearing officer to preside over the public hearing. The hearing officer shall make and preserve a complete record of the proceedings and forward his recommendation based thereon to the secretary or the director, who shall make the final decision.

D. The environmental improvement board or the local board may implement a field citation program through regulations establishing appropriate minor violations for which field citations assessing civil penalties not to exceed one thousand dollars ($1,000) per day of violation may be issued by officers or employees of the department or the local agency as designated by the secretary or the director.

E. Any person to whom a field citation is issued pursuant to Subsection D of this section may, within a reasonable time as prescribed by regulation by the environmental improvement board or the local board, elect to pay the penalty assessment or to request a hearing by the issuing agency on the field citation. If a request for hearing is not made within the time specified in the regulation, the penalty assessment in the field citation shall be final.

F. Payment of a civil penalty required by a field citation issued pursuant to Subsection D of this section shall not be a defense to further enforcement by the department or the local agency to correct a violation or to assess the maximum statutory penalty pursuant to other authorities in the Air Quality Control Act if the violation continues.

G. In determining the amount of any penalty to be assessed pursuant to this section, the secretary, the director or the person issuing a field citation shall take into account the seriousness of the violation, any good-faith efforts to comply with the applicable requirements and other relevant factors.

H. In connection with any proceeding under this section, the secretary or the director may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents and may adopt rules for discovery procedures.

I. Penalties collected pursuant to an administrative order or a field citation shall be deposited in the:

(1) municipal or county general fund, as applicable, if the administrative order or field citation was directed to a source located within a local authority; or

(2) state general fund if the administrative order or field citation was directed to any other source.

History: 1978 Comp., § 74-2-12, enacted by Laws 1992, ch. 20, § 14.

ANNOTATIONS

Cross-references. - For definitions of "department," "board", "secretary", and "director," see 74-2-2 NMSA 1978.

Repeals and reenactments. - Laws 1992, ch. 20, § 14 repeals former 74-2-12 NMSA 1978, as amended by Laws 1990, ch. 99, § 68, and enacts the above section, effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

Responsibility for enforcement. - Enforcement of New Mexico regulations and standard's more stringent than, or in addition to, the federal standards and regulations is the state's responsibility; the environmental improvement board has state-wide responsibility for enforcing the Air Quality Control Act but the Albuquerque-Bernalillo

county air quality control board has this responsibility in the Albuquerque-Bernalillo county area. 1987 Op. Att'y Gen. No. 87-11.

Law reviews. - For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 6.

Validity of regulation of smoke and other air pollution, 78 A.L.R.2d 1305.

Necessity of showing scienter, knowledge or intent, in prosecution for violation of air pollution or smoke control statute or ordinance, 46 A.L.R.3d 758.

Maintainability in state court of class action for relief against air or water pollution, 47 A.L.R.3d 769.

Propriety of court's consideration of ecological effects of proposed project in determining right of condemnation, 47 A.L.R.3d 1267.

Air pollution control: sufficiency of evidence of violation in administrative proceeding terminating in abatement order, 48 A.L.R.3d 795.

Pollution control: preliminary mandatory injunction to prevent, correct or reduce effects of polluting practices, 49 A.L.R.3d 1239.

Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency, 60 A.L.R.3d 665.

Recovery in trespass for injury to land caused by airborne pollutants, 2 A.L.R.4th 1054.

When statute of limitations begins to run as to cause of action for nuisance based on air pollution, 19 A.L.R.4th 456.

Standing to sue for violation of state environmental regulatory statute, 66 A.L.R.4th 685.

Construction, applicability and effect of § 304 of Clean Air Amendments of 1970 (42 U.S.C.S. § 1857h-2) in actions against alleged violators, 37 A.L.R. Fed. 320.

Construction and application of 42 USCS § 7604(d) pertaining to recovering costs of litigation in suits under Clean Air Act, 85 A.L.R. Fed. 118.

39A C.J.S. Health and Environment § 150.

74-2-12.1. Civil penalty; representation of department or local authority.

A. Any person who violates any provision of the Air Quality Control Act [this article] or any regulation, permit condition or emergency order adopted or issued pursuant to that act may be assessed a civil penalty not to exceed fifteen thousand dollars ($15,000) for each day during any portion of which a violation occurs.

B. In any action to enforce the provisions of the Air Quality Control Act or any ordinance, regulation, permit condition or emergency order, adopted, imposed or issued pursuant to that act:

(1) the department shall be represented by the attorney general;

(2) a local authority that is a municipality shall be represented by the attorney of the municipality; and

(3) a local authority that is a county shall be represented by the district attorney within whose judicial district the county lies.

History: 1978 Comp., § 74-2-12.1, enacted by Laws 1992, ch. 20, § 15.

ANNOTATIONS

Emergency clauses. - Laws 1992, ch. 20, § 23 makes the act effective immediately. Approved March 5, 1992.

74-2-13. Inspection.

The secretary or the director or an authorized representative of either, upon presentation of his credentials:

A. shall have a right of entry to, upon or through any premises on which an emission source is located or on which any records required to be maintained by regulations of the environmental improvement board, the local board or by any permit condition are located; and

B. may at reasonable times:

(1) have access to and copy any records required to be established and maintained by regulations of the environmental improvement board or the local board or any permit condition;

(2) inspect any monitoring equipment and method required by regulations of the environmental improvement board, the local board or by any permit condition; and

(3) sample any emissions that are required to be sampled pursuant to regulation of the environmental improvement board, the local board or any permit condition.

History: 1953 Comp., § 12-14-11.1, enacted by Laws 1972, ch. 51, § 8; 1992, ch. 20, § 16.

ANNOTATIONS

Cross-references. - For definitions of "department" and "board," see 74-2-2 NMSA 1978.

The 1992 amendment, effective March 5, 1992, rewrote the introductory paragraph, which formerly read: "Any employee of the department or board, upon presentation of proper department or board credentials:"; in Subsection A, deleted "at reasonable times" following "have" and substituted all of the present language of the subsection following "regulations" for "of the board"; and rewrote Subsection B, which formerly read: "may at reasonable times have access to and copy any records required to be established and maintained by regulations of the board".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 73 C.J.S. Public Administrative Law and Procedure § 22; 73A C.J.S. Public Administrative Law and Procedure §§ 126, 127.

74-2-14. Criminal penalties.

A. Notwithstanding any other provision of the Air Quality Control Act [this article], a local authority may prescribe penalties for violations of an ordinance:

(1) regulating open-fire burning or residential incineration; or

(2) prohibiting the removal of motor vehicle emission control devices installed as required by law and requiring the maintenance of such devices in operating condition.

B. Notwithstanding any other provision of the Air Quality Control Act, it is a petty misdemeanor to violate any regulations of the environmental improvement board:

(1) regulating open-fire burning or residential incineration; or

(2) prohibiting the removal of motor vehicle emission control devices installed as required by law or requiring the maintenance of such devices in operating condition.

C. Any person who knowingly commits any of the following acts is guilty of a fourth degree felony and shall be sentenced in accordance with the provisions of Section 31-18-15 NMSA 1978:

(1) violation of any regulation relating to commercial or industrial incineration;

(2) violation of any regulation adopting any federal standard of performance;

(3) violation of any regulation relating to control of hazardous air pollutants; or

(4) violation of any regulation relating to control of toxic air pollutants.

D. Any person who knowingly commits any violation of a regulation of the environmental improvement board or the local board not listed in Subsection B or C of this section is guilty of a misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

E. Any person who knowingly makes any false statement, representation or certification in any application, record, report, plan or other document filed or required to be maintained under the Air Quality Control Act or who falsifies, tampers with or knowingly renders inaccurate any monitoring device or method required to be maintained under the Air Quality Control Act or any ordinance or regulation adopted pursuant thereto is guilty of a petty misdemeanor and shall, upon conviction, be punished by a fine of not more than ten thousand dollars ($10,000), or by imprisonment for not more than six months, or by both.

F. Any person who knowingly releases into the ambient air any hazardous air pollutant or extremely hazardous substance listed pursuant to Section 302(a)(2) of the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 1102(a)(2) that is not listed in Section 112 of the federal act, and who knows at the time of the release that he creates a substantial danger of death or serious bodily injury to another person is guilty of a second degree felony and, upon conviction, shall be sentenced to a term of imprisonment not to exceed nine years or a fine not to exceed one hundred thousand dollars ($100,000), or both. Any person, other than an individual or a governmental entity, that commits such violation is guilty of a second degree felony and shall be fined in an amount not to exceed two hundred fifty thousand dollars ($250,000). If a conviction of any person under this subsection is for a second or subsequent violation, the maximum punishment shall be doubled with respect to both the fine and the imprisonment.

History: 1953 Comp., § 12-14-12, enacted by Laws 1967, ch. 277, § 11; 1970, ch. 58, § 9; 1971, ch. 277, § 25; 1973, ch. 322, § 7; 1990, ch. 99, § 69; 1992, ch. 20, § 17.

ANNOTATIONS

The 1992 amendment, effective March 5, 1992, in Subsection A, substituted "a local authority" for "any class A county or municipality within a class A county" in the introductory paragraph; in Subsection B, substituted "knowingly commits any of the following acts" for "violates any regulation of the board regulating commercial or industrial incineration" in the introductory paragraph, while substituting a colon for a period at the end of the paragraph, and added paragraphs (1) to (4); and added Subsections D to F.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 51, 52.

Construction and application of preemption sections (§§ 208, 210(c)(4)) of Clean Air Act (42 U.S.C.S. §§ 1857f-6a, 1857f-6c(c)(4)), 18 A.L.R. Fed. 971.

What are "land-use and transportation controls" which may be imposed, under § 100(a)(2)(B) of Clean Air Act of 1970 (42 U.S.C.S. § 1857c-5(a)(2)(B)), to insure maintenance of national primary ambient air quality standards, 30 A.L.R. Fed. 156.

39A C.J.S. Health and Environment § 139.

74-2-15. State air quality permit fund.

A. There is created in the state treasury the "state air quality permit fund" to be administered by the department. All fees collected by the department pursuant to Section 74-2-7 NMSA 1978 shall be deposited in the state air quality permit fund.

B. Money in the state air quality permit fund is appropriated to the department for the purpose of paying the reasonable costs of:

(1) reviewing and acting upon any application for a permit;

(2) if the owner or operator receives a permit, implementing and enforcing the terms and conditions of such permit not including any court costs or other costs associated with any enforcement action;

(3) emissions and ambient monitoring;

(4) preparing generally applicable regulations or guidance;

(5) modeling, analysis and demonstrations; and

(6) preparing inventories and tracking emissions.

History: 1978 Comp., § 74-2-15, enacted by Laws 1992, ch. 20, § 18.

ANNOTATIONS

Repeals and reenactments. - Laws 1992, ch. 20, § 18 repeals former 74-2-15 NMSA 1978, as amended by Laws 1979, ch. 393, § 9, relating to additional means of enforcement, and enacts the above section, effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

74-2-15.1. Repealed.

ANNOTATIONS

Repeals. - Laws 1992, ch. 20, § 21 repeals 74-2-15.1 NMSA 1978, as enacted by Laws 1979, ch. 393, § 10, relating to primary nonferrous smelter orders, effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

74-2-16. Municipal or county air quality permit fund.

A. A local authority shall create within the municipal or county treasury a fund to be known as the "_____ (name of municipality or county) air quality permit fund". All fees collected by a municipality or county pursuant to Section 74-2-7 NMSA 1978 shall be deposited in the fund created pursuant to this section.

B. Money in the fund created pursuant to this section shall be used by the municipality or county only for the purpose of paying the reasonable costs of:

(1) appealing, reviewing and acting upon any application for a permit;

(2) if the owner or operator receives a permit, implementing and enforcing the terms and conditions of such permit, not including any court costs or other costs associated with any enforcement action;

(3) emissions and ambient monitoring;

(4) preparing generally applicable regulations or guidance;

(5) modeling, analysis and demonstrations; and

(6) preparing inventories and tracking emissions.

History: 1978 Comp., § 74-2-16, enacted by Laws 1992, ch. 20, § 19.

ANNOTATIONS

Repeals and reenactments. - Laws 1992, ch. 20, § 19 repeals former 74-2-16 NMSA 1978, as enacted by Laws 1970, ch. 58, § 11, relating to declaratory judgement on regulations, effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

74-2-17. Continuing effect of existing laws, rules and regulations.

A. The Air Quality Control Act [this article] is supplementary to other legislation and does not repeal any laws but takes precedence over any law that conflicts with the provisions of that act.

B. All county and municipal ordinances and all state, county and municipal regulations relating to air quality and air pollution are continued in effect until revised or repealed by the governmental body or administrative agency having jurisdiction; provided that copies of each ordinance and regulation:

(1) were filed under the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978] on or before May 3, 1967; or

(2) if adopted after May 3, 1967:

(a) were adopted by a governmental body or administrative agency having jurisdiction to do so under the Air Quality Control Act as in effect at the time of such adoption; and

(b) if required by the Air Quality Control Act as in effect at the time of such adoption, have been filed under the State Rules Act.

History: 1953 Comp., § 12-14-13, enacted by Laws 1967, ch. 277, § 13; 1970, ch. 58, § 12; 1992, ch. 20, § 20.

ANNOTATIONS

The 1992 amendment, effective March 5, 1992, substituted "existing" for "present" in the section catchline; designated the formerly undesignated first sentence as Subsection A, while therein substituting all of the present language following "repeal any laws" for "except those in direct conflict therewith"; rewrote and restructured the formerly undesignated second sentence as the introductory paragraph of Subsections B and B(1); and added Subsection B(2).

74-2-18 to 74-2-22. Repealed.

ANNOTATIONS

Repeals. - Laws 1981, ch. 373, § 7, repeals 74-2-18 to 74-2-22 NMSA 1978, relating to interstate cooperation concerning air pollution, effective April 10, 1981.

ARTICLE 2A
WOOD BURNING STOVES AND FIREPLACES

74-2A-1. Wood burning stoves and fireplaces; findings; county and municipal wood burning laws; exemption for indigents.

A. The legislature finds that many persons have acquired wood burning stoves to heat their homes. The legislature further finds that wood burning stoves have been encouraged as a means of reducing our country's dependence on foreign oil and are therefore in the public interest. The legislature further finds that many of the poorer citizens of our state have acquired wood burning stoves or residences with fireplaces as a means of providing cost efficient heating for their families.

B. The legislature further finds that counties and municipalities have adopted and may continue to adopt wood burning laws to prevent or reduce serious pollution problems associated with wood burning. The legislature further finds that while these laws are in the public interest, it is also in the public interest to protect the poor in our society who have wood burning stoves or fireplaces to provide cost efficient heating for their families.

C. Any county or municipality which adopts a wood burning law to prohibit burning from occurring at certain times or in certain locations shall provide an exemption procedure for indigent families who need wood burning as an essential form of cost-efficient heating for their families. The exemption procedure shall include a standard for determining when a family is considered indigent for purposes of the exemption.

History: Laws 1989, ch. 150, § 1.

ARTICLE 3
RADIATION CONTROL

74-3-1. Short title.

Sections 74-3-1 through 74-3-16 NMSA 1978 may be cited as the "Radiation Protection Act".

History: 1953 Comp., § 12-9-1, enacted by Laws 1971, ch. 284, § 1; 1977, ch. 343, § 1.

ANNOTATIONS

Cross-references. - For the Environmental Improvement Act, see 74-1-1 NMSA 1978 et seq.

As to promulgation of standards of radiation control, see 74-1-7 and 74-1-8 NMSA 1978.

Repeals and reenactments. - Laws 1971, ch. 284, § 1, repealed former 12-9-1, 1953 Comp., a definitions section for radiation control, and enacted a new 74-3-1 NMSA 1978.

Law reviews. - For note, "Preemption - Atomic Energy," see 24 Nat. Resources J. 761 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Liability for injury by X-ray, 41 A.L.R.2d 329.

Tort liability incident to nuclear accident or explosion, 21 A.L.R.3d 1356.

74-3-2. Radiation technical advisory council; creation and organization.

A. There is established a "radiation technical advisory council" consisting of seven members. The members shall be appointed by the governor, after consultation with the director of the agency for five-year staggered terms. The governor shall fill any vacancy occurring on the council. The replacement appointee shall serve the remainder of the original member's unexpired term.

B. The members of the radiation technical advisory council shall be individuals with scientific training in one or more of the following fields: diagnostic radiology, radiation therapy, nuclear medicine, radiation or health physics or related sciences with specialization in radiation.

C. Notwithstanding the provisions of Subsections A and B of this section, the radiation technical advisory council includes four additional members who shall sit as full council members on matters to which the Medical Radiation Health and Safety Act [61-14E-1 to 61-14E-12 NMSA 1978] applies, including but not limited to regulations necessary to effectuate the provisions of that act. The additional members shall be four radiologic technologists appointed by the governor whose initial appointments shall be made in such manner that two members shall be appointed for terms of three years and two members who shall be appointed for terms of five years. Thereafter, the additional members shall be appointed by the governor for staggered terms of five years each. The radiologic technologist members of the council shall be appointed from lists submitted to the governor by any generally recognized organization of radiologic technologists in this state. Vacancies shall be filled by appointment by the governor for the unexpired term within sixty days of the vacancy.

History: 1953 Comp., § 12-9-2, enacted by Laws 1959, ch. 185, § 2; 1971, ch. 284, § 2; 1977, ch. 343, § 2; 1983, ch. 317, § 15.

ANNOTATIONS

Cross-references. - For definitions of "director" and "agency," see 74-3-4 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 6.

74-3-3. Council duties; per diem.

It is the duty of the council to advise the agency and the board on technical matters relating to radiation. Members of the council shall receive per diem and mileage as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978], and shall receive no other compensation, perquisite or allowance. Money expended for these purposes shall be paid from agency funds.

History: 1953 Comp., § 12-9-3, enacted by Laws 1959, ch. 185, § 3; 1963, ch. 43, § 1; 1971, ch. 284, § 3; 1977, ch. 343, § 3.

ANNOTATIONS

Cross-references. - For definitions of "council," "agency" and "board," see 74-3-4 NMSA 1978 and notes thereto.

Advisory duties required in adoption of radiation regulations. - The environmental improvement board cannot act lawfully alone in adopting radiation regulations. The board must obtain "the advice and consent" of the radiation technical advisory council before it can adopt regulations. Kerr-McGee Nuclear Corp. v. New Mexico Envtl. Imp. Bd., 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

74-3-4. Definitions.

As used in the Radiation Protection Act [74-3-1 to 74-3-16 NMSA 1978]:

A. "board" means the environmental improvement board;

B. "agency" means the environmental improvement agency [department of environment];

C. "council" means the radiation technical advisory council;

D. "radiation" includes particulate and electromagnetic radiation and ultrasound, but does not include audible sound;

E. "radioactive material" includes any materials or sources, regardless of chemical or physical state, which emit radiation;

F. "radiation equipment" means any device which is capable of producing radiation;

G. "agreement state" means any state with which the nuclear regulatory commission, or its successor, has entered into an agreement under Section 274(b) of the Atomic Energy Act of 1954, as amended;

H. "person" means any individual, partnership, firm, public or private corporation, association, trust, estate, political subdivision or agency, or any other legal entity or their legal representatives, agents or assigns;

I. "continued care fund" means the radiation protection continued care fund;

J. "director" means the director of the environmental improvement agency [department of environment]; and

K. "nuclear regulatory commission" means the United States atomic energy commission, the United States nuclear regulatory commission or its successor.

History: Laws 1959, ch. 185, § 1; 1953 Comp., § 12-9-1; Laws 1971, ch. 277, § 17; reenacted as 1953 Comp., § 12-9-4 by Laws 1971, ch. 284, § 4; 1977, ch. 253, § 33; 1977, ch. 343, § 4.

ANNOTATIONS

Cross-references. - As to exemption of environmental improvement board from authority of secretary of environment, see 9-7A-12 NMSA 1978.

Repeals and reenactments. - Laws 1971, ch. 284, § 4, repealed former 12-9-4, 1953 Comp., relating to promulgation of radiation regulations, and enacted a new 74-3-4 NMSA 1978.

Bracketed material. - The bracketed material in Subsections B and J was inserted by the compiler, as the environmental improvement agency, referred to in those subsections, was abolished by Laws 1977, ch. 253, § 5. Former 9-7-4 NMSA 1978 created the health and environment department and the environmental improvement division therein. Laws 1977, ch. 253, § 14, provided that all references to the agency meant the division. Laws 1991, ch. 25, § 4 establishes the department of environment and provides that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment. The bracketed material was not enacted by the legislature and is not part of the law.

Atomic Energy Act. - For § 274(b) of the Atomic Energy Act of 1954, referred to in Subsection G, see 42 U.S.C. § 2021(b).

United States nuclear regulatory commission. - As to the United States nuclear regulatory commission, referred to in Subsection K, see 42 U.S.C. § 5841.

74-3-5. Radiation protection consultant; radiation regulations; inspection.

A. The board shall be the radiation protection consultant for all agencies and institutions of the state and shall, with the advice and consent of the council, have the authority, after considering the facts and circumstances and following the procedures set forth in Section 74-1-9 NMSA 1978, to promulgate rules and regulations:

(1) concerning the health and environmental aspects of radioactive material and radiation equipment;

(2) prescribing license fees, all of which shall be deposited in the general fund;

(3) requiring the posting of a bond running only to the state for licensed activities, which bond shall be adequate to insure, in the event of abandonment, default or other performance inabilities of the licensee, compliance with the requirements of the regulations or license conditions, including actions of the licensee required during or after the cessation of operations, which bond shall be released upon demonstration by the licensee that the conditions of the license have been satisfied; and

(4) establishing continued care fund deposit requirements and other continued care requirements as provided in Section 74-3-6 NMSA 1978.

B. Upon adoption, regulations shall be furnished to interested parties upon request.

C. In order to carry out the purposes of the Radiation Protection Act [74-3-1 to 74-3-16 NMSA 1978], the director of the agency or his authorized representatives may, as a condition of license or registration, enter at all reasonable times in or upon any private or public property where the director has reasonable cause to believe there is radioactive material or radiation equipment.

History: Laws 1959, ch. 185, § 4; 1953 Comp., § 12-9-4; Laws 1971, ch. 277. § 18; reenacted as 1953 Comp., § 12-9-5 by Laws 1971, ch. 284, § 5; 1977, ch. 343, § 5.

ANNOTATIONS

Cross-references. - For definitions of "board," "council," "director" and "agency," see 74-3-4 NMSA 1978 and notes thereto.

Repeals and reenactments. - Laws 1971, ch. 284, § 5 repealed former 12-9-5, 1953 Comp., relating to the registration of radiation sources, and enacted a new 74-3-5 NMSA 1978.

Council's "advice and consent" must be clear before regulation adopted. - Before the environmental improvement board can formally adopt a regulation, it must obtain the express recommendation and approval of the regulation by the radiation technical

advisory council. The "advice and consent" of the council must be stated plainly and unequivocally. Kerr-McGee Nuclear Corp. v. New Mexico Envtl. Imp. Bd., 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

Board may require survey reporting to effectuate registration of X-ray equipment. - The board is authorized to adopt regulations providing for the survey of X-ray equipment used by members of the healing arts professions and also can require that the health and environment department (now department of health) be notified of sales and service of X-ray equipment in order to insure complete registration of such equipment. 1964 Op. Att'y Gen. No. 64-44.

Promulgation of rules and regulations. - The environmental improvement board is authorized to promulgate rules and regulations for radiation protection without the radiation technical advisory council approving the terms of such rules and regulations if the board promulgates regulations pursuant to the Medical Radiation Health and Safety Act (61-14E-1 NMSA 1978 et seq.); but the board may not do so without the council's approval if the regulations are promulgated pursuant to this act. 1988 Op. Att'y Gen. No. 88-39.

Law reviews. - For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

For annual survey of New Mexico law relating to administrative law, see 13 N.M.L. Rev. 235 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 274, 276.

74-3-6. Continued care fund regulations; requirements; exemptions; modification.

A. In the adoption of regulations governing continued care fund requirements, the board shall consider the desirability of prorated payments by the licensee in relation to the expected life of the licensed operation.

B. Licensees whose licensed activities consist only of uses of radioactive material which do not create a situation requiring continued care of radioactive materials after the expiration of the license, including but not limited to X-ray generating devices, laboratories, medical facilities, pharmacies, industrial radiography, well logging and gauges shall not be required to make deposits to the continued care fund.

C. Until the nuclear regulatory commission adopts regulations governing continued care activities, continued care fund deposits required from a uranium mill license holder shall be ten cents ($.10) per pound of U_3O_8 in uranium concentrate (yellow cake) produced from such mill, unless the board determines that a lesser amount is appropriate and the requirement of a mill license holder to make deposits to the continued care fund will

terminate for each mill after the cumulative continued care fund deposit for that mill reaches one million dollars ($1,000,000).

D. After the nuclear regulatory commission adopts regulations governing continued care activities:

(1) the board may alter the amount or character of a licensee's obligation by regulation if such regulations are no more stringent than the regulations of the nuclear regulatory commission governing continued care activities;

(2) the board may adopt continued care requirements more stringent than those of the nuclear regulatory commission upon the finding that such regulations are necessitated by unique or special circumstances in New Mexico; and

(3) deposits by a licensee to the continued care fund shall be considered in adopting regulations altering the amount or character of a licensee's continued care obligation.

History: 1953 Comp., § 12-9-5.1, enacted by Laws 1977, ch. 343, § 6.

74-3-7. Continued care fund created; appropriation; approval; regulation.

A. The "radiation protection continued care fund" is created in the state treasury. Cash balances in the fund shall be invested by the state treasurer as other state funds under his jurisdiction are invested.

B. Money in the continued care fund is appropriated to the agency for use in remedying and preventing situations which may be harmful to the health, safety, welfare or property of the people and which involve abandoned wastes or inoperative facilities which are or were operated by depositors to the continued care fund.

C. Emergency expenditures up to the amount of one hundred thousand dollars ($100,000) for any single emergency incident may be made from the continued care fund by the director subject to approval of the chairman of the board. Expenditures involving more than one hundred thousand dollars ($100,000) shall be made only after prior approval of the state board of finance.

D. Subject to the provisions of this section, the board shall adopt regulations governing the administration of the continued care fund.

History: 1953 Comp., § 12-9-5.2, enacted by Laws 1977, ch. 343, § 7; 1989, ch. 324, § 35.

ANNOTATIONS

Cross-references. - For definitions of "agency," "director" and "board," see 74-3-4 NMSA 1978 and notes thereto.

74-3-8. Registration of radiation equipment.

A. It is unlawful for any person to possess, use, store, dispose of, manufacture, repair, alter or inspect radiation equipment specified by regulation of the board unless he registers with the agency.

B. The agency shall issue registration certificates in accordance with procedures prescribed by regulation of the board. Registration applications shall be made on forms provided by the agency. The registration statement shall be limited to information which the board determines to be necessary for the protection of the health of the people of the state.

C. The requirement of registration shall not be interpreted to imply approval by the agency of the manner in which the activities requiring registration are carried out.

History: Laws 1959, ch. 185, 5; 1953 Comp., § 12-9-5; reenacted as 1953 Comp., § 12-9-6 by Laws 1971, ch. 284, § 6; 1977, ch. 343, § 8.

ANNOTATIONS

Cross-references. - For definitions of "board" and "agency," see 74-3-4 NMSA 1978 and notes thereto.

Repeals and reenactments. - Laws 1971, ch. 284, § 6 repealed former 12-9-6, 1953 Comp., relating to exempt persons and activities, and enacted a new 74-3-8 NMSA 1978.

74-3-9. Licensing of radioactive material.

A. It is unlawful for any person to possess, use, store, dispose of, manufacture, process, repair or alter any radioactive material unless he holds:

(1) a license issued by the nuclear regulatory commission, and notification by the licensee to the agency of license identification;

(2) a license issued by an agreement state and notification by the licensee to the agency of license identification; or

(3) a license issued by the agency.

B. The agency shall issue licenses and shall approve requests for reciprocity in accordance with procedures prescribed by regulation of the board. License applications shall be made on forms provided by the agency. The agency shall not issue a license

unless the applicant has demonstrated the capability of complying with all applicable regulations of the board.

C. The board may, by regulation, exempt from the requirements of licensure specific quantities of any radioactive material determined by the board not to constitute a health or environmental hazard.

D. The holding of a license issued by the agency, the nuclear regulatory commission or an agreement state does not relieve the licensee from the responsibility of complying with all applicable regulations of the board.

E. Any person who is or may be affected by licensing action of the agency may appeal for further relief to the district court in which the subject facilities or activities are located. All such appeals shall be upon the agency's administrative records and shall be taken within thirty days from the date the decision is final. Upon appeal, the district court shall set aside the licensing action only if found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence in the record; or

(3) otherwise not in accordance with law.

History: Laws 1959, ch. 185, § 5; 1953 Comp., § 12-9-5; reenacted as 1953 Comp., § 12-9-7 by Laws 1971, ch. 284, § 7; 1977, ch. 343, § 9; 1981, ch. 364, § 1.

ANNOTATIONS

Cross-references. - For definitions of "nuclear regulatory commission," "agency," "agreement state" and "board," see 74-3-4 NMSA 1978 and notes thereto.

Repeals and reenactments. - Laws 1971, ch. 284, § 7, repealed 12-9-7, 1953 Comp., relating to enforcement procedures and penalties, and enacted a new 74-3-9 NMSA 1978.

"Licensing action," as used in Subsection E, includes denial of an exemption under this article and orders from the environmental improvement division directing the means used for use and disposal of radioactive material. United Nuclear Corp. v. Fort, 102 N.M. 756, 700 P.2d 1005 (Ct. App. 1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 274, 276.

State regulation of nuclear power plants, 82 A.L.R.3d 751.

State or local regulation of transportation of hazardous materials as pre-empted by Hazardous Materials Transportation Act (49 U.S.C.S. § 1801 et seq.), 78 A.L.R. Fed. 289.

74-3-10. Exemptions.

A. Nothing contained in the Radiation Protection Act [74-3-1 to 74-3-16 NMSA 1978] shall be construed as authorizing the agency or the board to limit the kind and amount of radiation that may be applied to a person for diagnostic or therapeutic purposes by or under the direction of a licensed physician.

B. The Radiation Protection Act shall not apply to the transportation of any radioactive material in conformity with regulations of the department of transportation or other agency of the federal government having jurisdiction, or to any material or equipment owned by the United States and being used, stored or transported by or for the United States or any department, agency or instrumentality thereof, except to the extent required or permitted by the authority in control of such materials or equipment.

C. The Radiation Protection Act shall not apply to the mining, extraction, processing, storage or transportation of radioactive ores or uranium concentrates that are regulated by the United States bureau of mines or any other federal or state agency having authority unless the authority is ceded by such agency to the board.

History: Laws 1959, ch. 185, § 6; 1953 Comp., § 12-9-6; reenacted as 1953 Comp., § 12-9-8 by Laws 1971, ch. 284, § 8; 1977, ch. 343, § 10.

ANNOTATIONS

Cross-references. - For definitions of "agency" and "board," see 74-3-4 NMSA 1978 and notes thereto.

United States bureau of mines. - As to the United States bureau of mines, see 30 U.S.C. § 1.

74-3-11. Civil penalty; injunction.

A. If the director has good cause to believe that any person is violating a condition of a license issued by the agency, or administered by the agency pursuant to an agreement with the nuclear regulatory commission, or any regulation of the board, the person shall be given an opportunity to be heard at a hearing before the director. The director shall notify the person by certified mail of the date, time, place and subject of the hearing. If the director finds that the person is violating or threatens to violate a condition of the license or a regulation of the board, the director shall issue an order to cease and desist or revoke the license held by the person, whichever is appropriate.

B. The director may issue a cease and desist order, on an emergency basis, pending the hearing provided in Subsection A of this section, if he determines that immediate action is required to protect human health or safety. If a cease and desist order is issued on an emergency basis, the hearing before the director shall be held as soon as possible. The person who is the subject of a cease and desist order issued on an emergency basis may waive in writing the requirement of written notice of the hearing before the director in the interest of expediting that hearing.

C. The agency may seek injunctive relief against any violation or threatened violation of regulations, rules or orders adopted pursuant to the provisions of the Radiation Protection Act [74-3-1 to 74-3-16 NMSA 1978], and such relief shall be subject to the continuing jurisdiction and supervision of the district court and the court's powers of contempt. The action shall be filed in the district court for the county in which the violation occurred or will occur. The attorney general shall represent the agency.

D. In addition to the remedy provided above, the trial court may impose a civil penalty not to exceed five thousand dollars ($5,000) for each day or portion of a day during which violation occurs.

E. Any person aggrieved by a final judgment of the district court under this section may appeal to the supreme court as in other civil actions.

History: Laws 1959, ch. 185, § 7; 1953 Comp., § 12-9-7; reenacted as 1953 Comp., § 12-9-9 by Laws 1971, ch. 284, § 9; 1977, ch. 343, § 11.

ANNOTATIONS

Cross-references. - For definitions of "director," "agency," "nuclear regulatory commission" and "board," see 74-3-4 NMSA 1978 and notes thereto.

Law reviews. - For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Tort liability incident to nuclear accident or explosion, 7 A.L.R.3d 1536.

Pollution control: preliminary mandatory injunction to prevent, correct or reduce effects of polluting practices, 49 A.L.R.3d 1239.

Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency, 60 A.L.R.3d 665.

74-3-12. Criminal penalty.

Any person who willfully violates any provision of the Radiation Protection Act [74-3-1 to 74-3-16 NMSA 1978] or any rule, order or regulation promulgated thereunder is guilty of a misdemeanor.

History: 1953 Comp., § 12-9-9.1, enacted by Laws 1977, ch. 343, § 12.

ANNOTATIONS

Cross-references. - As to the definition of "misdemeanor," see 30-1-6 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 590 to 602.

74-3-13. Emergencies.

In the event of an emergency, the director may order the impounding of sources of radiation in the possession of any person who is not equipped to comply with or fails to comply with the provisions of the Radiation Protection Act [74-3-1 to 74-3-16 NMSA 1978] or any rule or regulation promulgated thereunder.

History: 1953 Comp., § 12-9-9.2, enacted by Laws 1977, ch. 343, § 13.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 493, 538, 539.

74-3-14. Fluoroscopic or X-ray machines for shoe fitting; hand-held fluoroscopes; operation or maintenance prohibited.

A. No shoe-fitting device or shoe-fitting machine which uses fluoroscopic, X-ray or radiation principles shall be operated or maintained within the state.

B. No hand-held fluoroscope shall be operated or maintained within the state.

History: 1953 Comp., § 12-9-10, enacted by Laws 1971, ch. 284, § 10; 1977, ch. 343, § 14.

74-3-15. Agreement status authorized.

The board and the agency, through the governor, may enter into an agreement with the nuclear regulatory commission, as provided in the Atomic Energy Act of 1954, as amended, providing for discontinuance of the regulatory authority of the nuclear regulatory commission and acceptance of that authority by the board and agency. For the duration of such an agreement, the board shall have authority to regulate the

radioactive materials covered by the agreement for the protection of the public health and safety and the environment from radiation hazards.

History: 1953 Comp., § 12-9-11, enacted by Laws 1971, ch. 284, § 11; 1977, ch. 343, § 15.

ANNOTATIONS

Cross-references. - As to definitions of "board," "agency" and "nuclear regulatory commission," see 74-3-4 NMSA 1978 and notes thereto.

Atomic Energy Act. - For the Atomic Energy Act of 1954, referred to in the first sentence, see 42 U.S.C. § 2011 et seq.

74-3-16. Discrimination.

No person or employer shall discharge or in any manner discriminate against any exployee [employee] except for good cause shown because the employee has filed a complaint or instituted or caused to be instituted a proceeding under or related to the Radiation Protection Act [74-3-1 to 74-3-16 NMSA 1978] or has testified or is about to testify in any such proceeding or because of the exercise by the employee on behalf of himself or others of any right afforded by that act or any rule, regulation or order adopted thereunder.

History: 1953 Comp., § 12-9-12, enacted by Laws 1977, ch. 343, § 16.

ARTICLE 4
HAZARDOUS WASTES

74-4-1. Short title.

Chapter 74, Article 4 NMSA 1978 may be cited as the "Hazardous Waste Act".

History: 1953 Comp., § 12-9B-1, enacted by Laws 1977, ch. 313, § 1; 1983, ch. 302, § 1.

ANNOTATIONS

Law reviews. - For article, "Rights of New Mexico Municipalities Regarding the Siting and Operation of Privately Owned Landfills," see 21 N.M.L. Rev. 149 (1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Standing to sue for violation of state environmental regulatory statute, 66 A.L.R.4th 685.

Validity of local regulation of hazardous waste, 67 A.L.R.4th 822.

Validity, construction, and application of state hazardous waste regulations, 86 A.L.R.4th 401.

Governmental recovery of cost of hazardous waste removal under Comprehensive Environmental Response, Compensation, and Liability Act (42 USCS § 9601 et seq.), 70 A.L.R. Fed. 329.

State or local regulation of toxic substances as pre-empted by Toxic Substances Control Act (15 USCS § 2601 et seq.), 84 A.L.R. Fed. 913.

Right to maintain action based on violation of § 7003 of Resource Conservation and Recovery Act (42 USCS § 6973) pertaining to imminent hazards from solid or hazardous waste, 105 A.L.R. Fed. 800.

Necessity of proof of scienter under statute fixing criminal penalties for hazardous waste violations (42 USCS § 6928(d)), 106 A.L.R. Fed. 836.

74-4-2. Purpose.

The purpose of the Hazardous Waste Act [this article] is to help ensure the maintenance of the quality of the state's environment; to confer optimum health, safety, comfort and economic and social well-being on its inhabitants; and to protect the proper utilization of its lands.

History: 1953 Comp., § 12-9B-2, enacted by Laws 1977, ch. 313, § 2.

74-4-3. Definitions.

As used in the Hazardous Waste Act [this article]:

A. "board" means the environmental improvement board;

B. "director" or "secretary" means the secretary of environment;

C. "disposal" means the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters;

D. "division" or "department" means the department of environment;

E. "federal agency" means any department, agency or other instrumentality of the federal government and any independent agency or establishment of that government, including any government corporation and the government printing office;

F. "generator" means any person producing hazardous waste;

G. "hazardous agricultural waste" means hazardous waste generated as part of his licensed activity by any person licensed pursuant to the Pesticide Control Act or any hazardous waste designated as hazardous agricultural waste by the board, but does not include animal excrement in connection with farm, ranch or feedlot operations;

H. "hazardous substance incident" means any emergency incident involving a chemical or chemicals, including but not limited to transportation wrecks, accidental spills or leaks, fires or explosions, which incident creates the reasonable probability of injury to human health or property;

I. "hazardous waste" means any solid waste or combination of solid wastes which because of their quantity, concentration or physical, chemical or infectious characteristics may:

(1) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or

(2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed. "Hazardous waste" does not include any of the following, until the board determines that they are subject to Subtitle C of the federal Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6901 et seq.: drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil or natural gas or geothermal energy, any fly ash waste, bottom ash waste, slag waste, flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels, solid waste from the extraction, beneficiation or processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore or cement kiln dust waste;

J. "manifest" means the form used for identifying the quantity, composition, origin, routing and destination of hazardous waste during transportation from point of generation to point of disposal, treatment or storage;

K. "person" means any individual, trust, firm, joint stock company, federal agency, corporation including a government corporation, partnership, association, state, municipality, commission, political subdivision of a state or any interstate body;

L. "regulated substance" means:

(1) any substance defined in Section 101(14) of the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980, but not including any substance regulated as a hazardous waste under Subtitle C of the federal Resource Conservation and Recovery Act of 1976, as amended; and

(2) petroleum, including crude oil or any fraction thereof that is liquid at standard conditions of temperature and pressure of sixty degrees Fahrenheit and fourteen and seven-tenths pounds per square inch absolute;

M. "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded material, including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining and agricultural operations, and from community activities, but does not include solid or dissolved materials in domestic sewage or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under Section 402 of the federal Water Pollution Control Act, as amended (86 Stat. 880), or source, special nuclear or byproduct material as defined by the federal Atomic Energy Act of 1954, as amended (68 Stat. 923);

N. "storage" means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste;

O. "tank installer" means any individual who installs or repairs an underground storage tank;

P. "transporter" means a person engaged in the movement of hazardous waste, not including movement at the site of generation, disposal, treatment or storage;

Q. "treatment" means any method, technique or process, including neutralization, designed to change the physical, chemical or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable to recovery, amenable to storage or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous; and

R. "underground storage tank" means a single tank or combination of tanks, including underground pipes connected thereto, that are used to contain an accumulation of regulated substances and the volume of which, including the volume of the underground pipes connected thereto, is ten percent or more beneath the surface of the ground. The term does not include any:

(1) farm, ranch or residential tank of one thousand one hundred gallons or less capacity used for storing motor fuel or heating oil for noncommercial purposes;

(2) septic tank;

(3) pipeline facility, including gathering lines that are regulated under the federal Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. 1671, et seq., or the federal Hazardous

Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. 2001, et seq., or that is an intrastate pipeline facility regulated under state laws comparable to either act;

(4) surface impoundment, pit, pond or lagoon;

(5) storm water or wastewater collection system;

(6) flow-through process tank;

(7) liquid trap or associated gathering lines directly related to oil or gas production and gathering operations;

(8) storage tank situated in an underground area, such as a basement, cellar, mineworking drift, shaft or tunnel, if the storage tank is situated upon or above the surface of the undesignated floor; or

(9) pipes connected to any tank that is described in Paragraphs (1) through (8) of this subsection.

History: 1953 Comp., § 12-9B-3, enacted by Laws 1977, ch. 313, § 3; 1981 (1st S.S.), ch. 8, § 2; 1987, ch. 179, § 1; 1989, ch. 322, § 1; 1991, ch. 25, § 33; 1992, ch. 43, § 1.

ANNOTATIONS

The 1991 amendment, effective March 29, 1991, rewrote Subsection B, which read "'director' means the director of the division"; substituted "department of environment" for "environmental improvement division of the health and environment department" in Subsection D; inserted "of 1976" following "Recovery Act" in the second sentence in Paragraph (2) of Subsection I and in Paragraph (1) of Subsection L; and substituted "42 U.S.C. 6901" for "42 U.S.C. 6921" in the second sentence in Paragraph (2) of Subsection I.

The 1992 amendment, effective March 6, 1992, substituted "secretary of environment" for "secretary of the department" in Subsection B, inserted "or department" in Subsection D, and made minor stylistic changes throughout the section.

Pesticide Control Act. - See 76-4-1 NMSA 1978 and notes thereto.

Resource Conservation and Recovery Act. - Subtitle C of the Resource Conservation and Recovery Act, referred to in Subsection I(2) and L(1), appears as 42 U.S.C. § 6921 et seq.

Comprehensive Environmental Response, Compensation and Liability Act. - Section 101 (14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, referred to in Subsection L (1), appears as 42 U.S.C. § 9601 (14).

Water Pollution Control Act. - Section 402 of the federal Water Pollution Control Act, referred to in Subsection M, appears as 33 U.S.C. § 1342.

Atomic Energy Act of 1954. - The Atomic Energy Act of 1954, referred to in Subsection M, appears as 42 U.S.C. § 2011 et seq.

74-4-3.1. Application of act.

Nothing in the Hazardous Waste Act [this article] shall be construed to apply to any activity or substance which is subject to the Federal Water Pollution Control Act, as amended, (33 U.S.C. 1251 et seq.), the Safe Drinking Water Act, as amended, (42 U.S.C. 300f et seq.) or the Atomic Energy Act of 1954, as amended, (42 U.S.C. 2011 et seq.) except to the extent that such application or regulation is not inconsistent with the requirements of such acts; nor shall the Hazardous Waste Act apply to the treatment, storage or disposal of wastes under a permit issued pursuant to the Surface Mining Act [69-25A-1 to 69-25A-35 NMSA 1978] or the federal Surface Mining Control and Reclamation Act of 1977, as amended, or to any farmer disposing of waste pesticides from his own use, provided he triple rinses each emptied pesticide container and disposes of the pesticide residues on his own farm in a manner consistent with the disposal instructions on the pesticide label.

History: 1978 Comp., § 74-4-3.1, enacted by Laws 1981 (1st S.S.), ch. 8, § 3.

ANNOTATIONS

Federal Water Pollution Control Act. - The Federal Water Pollution Control Act, referred to near the beginning of this section, has been superseded by the Water Pollution Control Act, which appears as 33 U.S.C. § 1251 et seq.

Surface Mining Control and Reclamation Act. - The federal Surface Mining Control and Reclamation Act of 1977, referred to in this section, appears as 30 U.S.C. § 1201 et seq.

74-4-3.2. Repealed.

ANNOTATIONS

Repeals. - Laws 1989, ch. 4, § 1 repeals 74-4-3.2 NMSA 1978, as enacted by Laws 1987, ch. 179, § 2, relating to application of Hazardous Waste Act to the waste isolation pilot plant, effective February 23, 1989. For provisions of former section, see 1987 Supplement.

74-4-3.3. Hazardous wastes of other states.

In addition to the meaning of hazardous waste as defined in Section 74-4-3 NMSA 1978, the term "hazardous waste" as used in the Hazardous Waste Act [this article] may

include any material imported into the state of New Mexico for the purpose of disposal which is defined or classified as hazardous waste in the state of origin.

History: 1978 Comp., § 74-4-3.3, enacted by Laws 1989, ch. 255, § 1.

74-4-4. Duties and powers of the board.

A. The board shall adopt regulations for the management of hazardous waste equivalent to, and no more stringent than, federal regulations adopted by the federal environmental protection agency pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended:

(1) for the identification and listing of hazardous wastes, taking into account toxicity, persistence and degradability, potential for accumulation in tissue and other related factors, including flammability, corrosiveness and other hazardous characteristics;

(2) establishing standards applicable to generators identified or listed under this subsection, including requirements for:

(a) furnishing information on the location and description of the generator's facility and on the production or energy recovery activity occurring at that facility;

(b) record-keeping practices that accurately identify the quantities of hazardous waste generated, the constituents of the waste that are significant in quantity or in potential harm to human health or the environment and the disposition of the waste;

(c) labeling practices for any containers used for the storage, transport or disposal of the hazardous waste that will identify accurately the waste;

(d) use of safe containers tested for safe storage and transportation of the hazardous waste;

(e) furnishing the information on the general chemical composition of the hazardous waste to persons transporting, treating, storing or disposing of the waste;

(f) implementation of programs to reduce the volume or quantity and toxicity of the hazardous waste generated;

(g) submission of reports to the secretary at such times as the secretary deems necessary, setting out the quantities of hazardous waste identified or listed pursuant to the Hazardous Waste Act [this article] that the generator has generated during a particular time period and the disposition of all hazardous waste reported, the efforts undertaken during a particular time period to reduce the volume and toxicity of waste generated and the changes in volume and toxicity of waste actually achieved during a particular time period in comparison with previous time periods; and

(h) the use of a manifest system and any other reasonable means necessary to assure that all hazardous waste generated is designated for treatment, storage or disposal in, and arrives at, treatment, storage or disposal facilities, other than facilities on the premises where the waste is generated, for which a permit has been issued pursuant to the Hazardous Waste Act; and that the generator of hazardous waste has a program in place to reduce the volume or quality and toxicity of waste to the degree determined by the generator to be economically practicable; and that the proposed method of treatment, storage or disposal is that practicable method currently available to the generator that minimizes the present and future threat to human health and the environment;

(3) establishing standards applicable to transporters of hazardous waste identified or listed under this subsection or of fuel produced from any such hazardous waste or of fuel from such waste and any other material, as may be necessary to protect human health and the environment, including but not limited to requirements for:

(a) record-keeping concerning the hazardous waste transported and its source and delivery points;

(b) transportation of the hazardous waste only if properly labeled;

(c) compliance with the manifest system referred to in Subparagraph (h) of Paragraph (2) of this subsection; and

(d) transportation of all the hazardous waste only to the hazardous waste treatment, storage or disposal facilities that the shipper designates on the manifest form to be a facility holding a permit issued pursuant to the Hazardous Waste Act or the federal Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6901 et seq.;

(4) establishing standards applicable to distributors or marketers of any fuel produced from hazardous waste, or any fuel that contains hazardous waste for:

(a) furnishing the information stating the location and general description of the facility; and

(b) furnishing the information describing the production or energy recovery activity carried out at the facility;

(5) establishing performance standards as may be necessary to protect human health and the environment applicable to owners and operators of facilities for the treatment, storage or disposal of hazardous waste identified or listed under this section, distinguishing, where appropriate, between new facilities and facilities in existence on the date of promulgation, including but not limited to requirements for:

(a) maintaining the records of all hazardous waste identified or listed under this subsection that is treated, stored or disposed of, as the case may be, and the manner in which such waste was treated, stored or disposed of;

(b) satisfactory reporting, monitoring, inspection and compliance with the manifest system referred to in Subparagraph (h) of Paragraph (2) of this subsection;

(c) treatment, storage or disposal of all such waste and any liquid that is not a hazardous waste, except with respect to underground injection control into deep injection wells, received by the facility pursuant to such operating methods, techniques and practices as may be satisfactory to the secretary;

(d) location, design and construction of hazardous waste treatment, disposal or storage facilities;

(e) contingency plans for effective action to minimize unanticipated damage from any treatment, storage or disposal of any hazardous waste;

(f) maintenance and operation of the facilities and requiring any additional qualifications as to ownership, continuity of operation, training for personnel and financial responsibility, including financial responsibility for corrective action, as may be necessary or desirable;

(g) compliance with the requirements of Paragraph (6) of this subsection respecting permits for treatment, storage or disposal;

(h) the taking of corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility, regardless of the time at which waste was placed in the unit; and

(i) the taking of corrective action beyond a facility's boundaries where necessary to protect human health and the environment unless the owner or operator of the facility concerned demonstrates to the satisfaction of the secretary that, despite the owner or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such action. Regulations adopted and promulgated under this subparagraph shall take effect immediately and shall apply to all facilities operating under permits issued under Paragraph (6) of this subsection and to all landfills, surface impoundments and waste pile units, including any new units, replacements of existing units or lateral expansions of existing units, that receive hazardous waste after July 26, 1982. No private entity shall be precluded by reason of criteria established under Subparagraph (f) of this paragraph from the ownership or operation of facilities providing hazardous waste treatment, storage or disposal services where the entity can provide assurance of financial responsibility and continuity of operation consistent with the degree and duration of risks associated with the treatment, storage or disposal of specified hazardous waste;

(6) requiring each person owning or operating or both an existing facility or planning to construct a new facility for the treatment, storage or disposal of hazardous waste identified or listed under this subsection to have a permit issued pursuant to requirements established by the board;

(7) establishing procedures for the issuance, suspension, revocation and modification of permits issued under Paragraph (6) of this subsection, which regulations shall provide for public notice, public comment and an opportunity for a hearing prior to the issuance, suspension, revocation or major modification of any permit unless otherwise provided in the Hazardous Waste Act;

(8) defining major and minor modifications; and

(9) establishing procedures for the inspection of facilities for the treatment, storage and disposal of hazardous waste that govern the minimum frequency and manner of the inspections, the manner in which records of the inspections shall be maintained and the manner in which reports of the inspections shall be filed; provided, however, that inspections of permitted facilities shall occur no less often than every two years.

B. The board shall adopt regulations:

(1) concerning hazardous substance incidents; and

(2) requiring notification to the department of any hazardous substance incidents.

C. The board shall adopt regulations concerning underground storage tanks that are equivalent to, and no more stringent than, federal regulations adopted by the federal environmental protection agency pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended, and that shall include:

(1) standards for the installation, operation and maintenance of underground storage tanks;

(2) requirements for financial responsibility;

(3) standards for inventory control;

(4) standards for the detection of leaks from and the integrity testing and monitoring of underground storage tanks;

(5) standards for the closure and dismantling of underground storage tanks;

(6) requirements for record-keeping; and

(7) requirements for the reporting, containment and remediation of all leaks from any underground storage tanks.

D. In the event the board wishes to adopt regulations that are identical with regulations adopted by an agency of the federal government, the board, after notice and hearing, may adopt such regulations by reference to the federal regulations without setting forth the provisions of the federal regulations.

History: 1953 Comp., § 12-9B-4, enacted by Laws 1977, ch. 313, § 4; 1981 (1st S.S.), ch. 8, § 4; 1987, ch. 179, § 3; 1989, ch. 322, § 2; 1992, ch. 43, § 2.

ANNOTATIONS

Cross-references. - For definition of "department," see 74-4-3 NMSA 1978.

The 1992 amendment, effective March 6, 1992, substituted "secretary" for "director" in Subsections A(2)(g), A(5)(c), and in the first sentence of Subsection A(5)(i); inserted "adopted and" in the second sentence of Subsection A(5)(i); substituted "owning or operating or both" for "owning and operating" in Subsection A(6); rewrote Subsection A(7); added present Subsection A(8); redesignated former Subsection A(8) as present Subsection A(9); substituted "department" for "division" in Subsection B(2); and made minor stylistic changes throughout the section.

Resource Conservation and Recovery Act. - The Resource Conservation and Recovery Act of 1976, referred to in several places in this section, appears as 42 U.S.C. § 6901 et seq.

No excuse from compliance where insufficient funds in corrective action fund. - The owner or operator of an underground storage tank which has experienced a release is not excused from compliance with corrective action requirements by reason of the insufficiency or unavailability of monies in the corrective action fund to meet the costs of corrective action. 1991 Op. Att'y Gen. No. 91-08.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 6, 134.

State or local regulation of transportation of hazardous materials as pre-empted by Hazardous Materials Transportation Act (49 U.S.C.S. § 1801 et seq.), 78 A.L.R. Fed. 289.

74-4-4.1. Hazardous agricultural waste; duties and responsibilities of the department of agriculture.

A. The department of agriculture shall be responsible for the enforcement of all board regulations adopted pursuant to the Hazardous Waste Act [this article] regarding generators of hazardous agricultural waste. The division shall enforce those board regulations pertaining to transporters, treaters, storers and disposers of hazardous agricultural waste.

B. In the exercise of the responsibility prescribed in Subsection A of this section, the department of agriculture shall have the same authority as that delegated to the division, including the director.

C. In the adoption of regulations pertaining to hazardous agricultural waste, the board shall make a reasonable effort to consult with the department of agriculture prior to the adoption of the regulations. The department of agriculture shall serve as the technical consultant to the board on matters concerning hazardous agricultural waste.

History: 1978 Comp., § 74-4-4.1, enacted by Laws 1981 (1st S.S.), ch. 8, § 5; 1989, ch. 322, § 3.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - State or local regulation of transportation of hazardous materials as pre-empted by Hazardous Materials Transportation Act (49 U.S.C.S. § 1801 et seq.), 78 A.L.R. Fed. 289.

74-4-4.2. Permits; issuance; denial; modification; suspension; revocation.

A. Each application for a permit pursuant to the Hazardous Waste Act [this article] shall contain information as may be required pursuant to Section 74-4-4.7 NMSA 1978 or pursuant to regulations promulgated by the board, including information with respect to:

(1) estimates with respect to the composition, quantity and concentration of any hazardous waste identified or listed under Subsection A of Section 74-4-4 NMSA 1978 or combinations of any hazardous waste and other solid waste proposed to be disposed of, treated, transported or stored and the time, frequency or rate at which the waste is proposed to be disposed of, treated, transported or stored; and

(2) the site where hazardous waste or the products of treatment of hazardous waste will be disposed of, treated, transported to or stored.

B. Hazardous waste permits issued after April 8, 1987 shall require corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility seeking a permit under this section.

C. The division shall provide timely review on all permit applications. Upon a determination by the secretary that the applicant has met the requirements adopted pursuant to Section 74-4-4 NMSA 1978, the secretary may issue a permit or a permit subject to any conditions necessary to protect human health and the environment for the facility.

D. The secretary may deny any permit application or modify, suspend or revoke any permit issued pursuant to the Hazardous Waste Act if the applicant or permittee has:

(1) knowingly and willfully misrepresented a material fact in the application for a permit;

(2) refused to disclose the information required under the provisions of Section 74-4-4.7 NMSA 1978;

(3) been convicted in any court, within ten years immediately preceding the date of submission of the permit application, of:

(a) a felony or other crime involving moral turpitude; or

(b) a crime defined by state or federal statutes as involving or being in restraint of trade, price-fixing, bribery or fraud;

(4) exhibited a history of willful disregard for environmental laws of any state or the United States;

(5) had any permit revoked or permanently suspended for cause under the environmental laws of any state or the United States; or

(6) violated any provision of the Hazardous Waste Act, any regulation adopted and promulgated pursuant to that act or any condition of a permit issued under that act.

E. In making a finding under Subsection D of this section, the secretary may consider aggravating and mitigating factors.

F. If an applicant or permittee whose permit is being considered for denial or revocation, respectively, on any basis provided by Subsection D of this section has submitted an action plan that has been approved in writing by the secretary, and plan approval includes a period of operation under a conditional permit that will allow the applicant or permittee a reasonable opportunity to demonstrate its rehabilitation, the secretary may issue a conditional permit for a reasonable period of time. In approving an action plan intended to demonstrate rehabilitation, the secretary may consider:

(1) implementation by the applicant or permittee of formal policies;

(2) training programs and management control to minimize and prevent the occurrence of future violations;

(3) installation by the applicant or permittee of internal environmental auditing programs;

(4) the applicant's release or the permittee's release subsequent to serving a period of incarceration or paying a fine, or both after conviction of any crime listed in Subsection D of this section; and

(5) any other factors the secretary deems relevant.

G. Notwithstanding the provisions of Subsection D of this section:

(1) a research, development and demonstration permit may be terminated upon the determination by the secretary that termination is necessary to protect human health or the environment; and

(2) a permit may be modified at the request of the permittee for just cause as demonstrated by the permittee.

H. No ruling shall be made on permit issuance, major modification, suspension or revocation without an opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing; provided, however, that the secretary may, pursuant to Section 74-4-10 NMSA 1978, order the immediate termination of a research development and demonstration permit whenever the secretary determines that termination is necessary to protect human health or the environment and may order the immediate suspension or revocation of a permit for a facility that has been ordered to take corrective action or other response measures for releases of hazardous waste into the environment.

I. The secretary shall hold a public hearing on a minor permit modification if the secretary determines that there is significant public interest in the minor modification.

J. The board shall provide a schedule of fees for businesses generating hazardous waste or seeking a permit for the management of hazardous waste, to be deposited to the credit of the hazardous waste fund, including but not limited to:

(1) a hazardous waste business fee applicable to any business engaged in a regulated hazardous waste activity, which shall be an annual flat fee based on the type of activity;

(2) a hazardous waste generation fee applicable to any business generating hazardous waste, which shall be based on the quantity of hazardous waste generated annually; however, when any material listed in Paragraph (2) of Subsection I of Section 74-4-3 NMSA 1978 is determined by the board to be subject to regulation under Subtitle C of the federal Resource Conservation and Recovery Act, the board may set a generation fee under this paragraph for that waste based on its volume, toxicity, mobility and economic impact on the regulated entity; and

(3) a hazardous waste permit application fee, not exceeding the estimated cost of investigating the application and issuing the permit, to be paid at the time the secretary notifies the applicant by certified mail that the application has been deemed administratively complete and a technical review is scheduled.

History: 1978 Comp., § 74-4-4.2, enacted by Laws 1981 (1st S.S.), ch. 8, § 6; 1987, ch. 179, § 4; 1989, ch. 322, § 4; 1992, ch. 43, § 3.

ANNOTATIONS

The 1992 amendment, effective March 6, 1992, substituted the present section catchline for "Permits; issuance and revocation; appeal"; inserted "pursuant to Section 74-4-4.7 NMSA 1978" in the introductory paragraph of Subsection A; twice substituted "secretary" for "director" in Subsection C; rewrote Subsection D; added present Subsections E, F, and G; redesignated former Subsection E as present Subsection H; inserted "major" near the beginning of Subsection H while substituting "secretary" for "division" near the middle of that subsection; added present Subsection I; redesignated former Subsection F as present Subsection J; substituted "secretary" for "director" in Subsection J(3); deleted former Subsections G and H, relating to appeal; and made minor stylistic changes throughout the section.

Federal Resource Conservation and Recovery Act. - Subtitle C of the federal Resource Conservation and Recovery Act, referred to in Subsection J(2), appears as 42 U.S.C. § 6921.

74-4-4.3. Entry; availability of records.

A. For purposes of developing or assisting in the development of any regulations, conducting any study, taking any corrective action or enforcing the provisions of the Hazardous Waste Act [this article], upon request of the director or his authorized representative:

(1) any person who generates, stores, treats, transports, disposes of or otherwise handles or has handled hazardous wastes shall furnish information relating to such hazardous wastes and permit the director or his authorized representatives:

(a) to enter at reasonable times any establishment or other place maintained by any person where hazardous wastes are or have been generated, stored, treated, disposed of or transported from or where an underground storage tank is located; and

(b) to inspect and obtain samples from any person of any hazardous wastes and samples of any containers or labeling for the wastes; and

(2) any person who owns or operates an underground storage tank, or any tank subject to study under Section 9009 of the Resource Conservation and Recovery Act that is used for storing regulated substances, shall furnish information relating to such tanks, including their associated equipment and their contents, conduct monitoring or testing, permit the director or his authorized representative at all reasonable times to have access to and to copy all records relating to such tanks and permit the director or his authorized representative to have access for corrective action. For the purposes of developing or assisting in the development of any regulation, conducting any study, taking corrective action or enforcing the provisions of the Hazardous Waste Act, the director or his authorized representative is authorized:

(a) to enter at reasonable times any establishment or other place where an underground storage tank is located;

(b) to inspect or obtain samples from any person of any regulated substance in such tank;

(c) to conduct monitoring or testing of the tanks, associated equipment, contents or surrounding soils, air, surface water or ground water; and

(d) to take corrective action.

B. Any person owning property to which access is necessary in order to investigate or clean up a facility where hazardous waste is generated, stored, treated or disposed of, or where underground storage tanks are located, shall:

(1) permit the director or his authorized representative to obtain samples of soil or ground water, or both, at reasonable times; and

(2) provide access to such property for structures or equipment necessary to monitoring or cleanup of hazardous wastes or leaking from underground storage tanks; provided that:

(a) such structures or equipment do not unreasonably interfere with the owner's use of the property; or

(b) the owner is adequately compensated for activities which unreasonably interfere with his use or enjoyment of such property.

C. Each inspection shall be commenced and completed with reasonable promptness. If the director or his representative obtains any samples, prior to leaving the premises he shall give to the owner, operator or agent in charge a receipt describing the sample obtained and, if requested, a portion of each sample equal in volume or weight to the portion retained. If any analysis is made of the samples, a copy of the results of the analysis shall be furnished promptly to the owner, operator or agent in charge.

D. Any records, reports or information obtained by the division under this section shall be available to the public, except that upon a showing satisfactory to the division that records, reports or information, or a particular part thereof, to which the director or his authorized representatives have access under this section, if made public, would divulge information entitled to protection under Section 1905 of Title 18 of the United States Code, such information or particular portion thereof shall be considered confidential, except that such record, report, document or information may be disclosed to officers, employees or authorized representatives of the United States concerned with carrying out the Resource Conservation and Recovery Act, or when relevant in any proceedings under the Hazardous Waste Act.

E. Any person not subject to the provisions of Section 1905 of Title 18 of the United States Code who knowingly and willfully divulges or discloses any information entitled to protection under this subsection shall, upon conviction, be subject to a fine of not more than five thousand dollars ($5,000) or to imprisonment not to exceed one year or both.

F. In submitting data under the Hazardous Waste Act, a person required to provide such data may:

(1) designate the data the person believes is entitled to protection under this subsection; and

(2) submit such designated data separately from other data submitted under the Hazardous Waste Act. A designation under this paragraph shall be made in writing and in such manner as the director may prescribe.

History: 1978 Comp., § 74-4-4.3, enacted by Laws 1981 (1st S.S.), ch. 8, § 7; 1987, ch. 179, § 5; 1989, ch. 322, § 5.

ANNOTATIONS

Resource Conservation and Recovery Act. - See 42 U.S.C. § 6901 et seq.

Areas subject to inspection. - Regardless of whether each specific part of the premises is subject to regulation, the statute clearly allows an inspection of all areas where the hazardous waste is being generated, whether it is in an enclosed facility or not. New Mexico Envtl. Imp. Div. v. Climax Chem. Co., 105 N.M. 439, 733 P.2d 1322 (Ct. App. 1987).

Search warrant required in absence of consent. - In the event consent to enter and inspect premises for compliance with this article is denied, an administrative search warrant is required. New Mexico Envtl. Imp. Div. v. Climax Chem. Co., 105 N.M. 439, 733 P.2d 1322 (Ct. App. 1987).

Venue in action for search warrant. - An action by which the environmental improvement division sought an administrative warrant for inspection under this article was a transitory action and venue was controlled by 38-3-1A NMSA 1978, which allows an action to be brought in a county where the plaintiff resides. New Mexico Envtl. Imp. Div. v. Climax Chem. Co., 105 N.M. 439, 733 P.2d 1322 (Ct. App. 1987).

74-4-4.4. Underground storage tanks; registration; installer certification; fees.

A. By regulation, the board shall require an owner of an underground storage tank to register the tank with the division and impose reasonable conditions for registration including the submission of plans, specifications and other relevant information relating to the tank. For purposes of this subsection only, the term "owner" means: in the case of

an underground storage tank in use on November 8, 1984 or brought into use after that date, any person who owns an underground storage tank used for storage, use, or dispensing of regulated substances; and in the case of an underground storage tank in use before November 8, 1984 but no longer in use on that date, any person who owned such tank immediately before the discontinuation of its use. The owner of a tank taken out of operation on or before January 1, 1974 shall not be required to notify under this subsection. The owner of a tank taken out of operation after January 1, 1974 and removed from the ground prior to November 8, 1984 shall not be required to notify under this subsection. Evidence of current registration pursuant to this subsection shall be available for inspection at the site of the underground storage tank.

B. By regulation, the board shall require any person who, beginning thirty days after the United States environmental protection agency administrator prescribes the form of notice pursuant to Section 9002(a)(5) of the Resource Conservation and Recovery Act and for eighteen months thereafter, deposits a regulated substance into an underground storage tank to give notice of the registration requirements of Subsection A of this section to the owner and operator of the tank.

C. By regulation, the board may require tank installers to obtain certification from the division and develop procedures for certification which will ensure that underground storage tanks are installed and repaired in a manner which will not encourage or facilitate leaking. If the board requires certification, it shall be unlawful for a person to install or repair an underground storage tank unless he is a certified tank installer. In accordance with the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978], the division may suspend or revoke the certification for a tank installer upon grounds that he:

(1) exercised fraud, misrepresentation or deception in obtaining his certification;

(2) exhibited gross incompetence in the installation or repair of an underground storage tank; or

(3) was derelict in the performance of a duty as a certified tank installer.

D. By regulation, the board shall provide a schedule of fees sufficient to defray the reasonable and necessary costs of:

(1) reviewing and acting upon applications for the registration of underground storage tanks;

(2) reviewing and acting upon applications for the certification of tank installers; and

(3) implementing and enforcing any provision of the Hazardous Waste Act [this article] applicable to underground storage tanks and tank installers including standards for the installation, operation and maintenance of underground storage tanks and for the certification of tank installers.

History: 1978 Comp., § 74-4-4.4, enacted by Laws 1987, ch. 179, § 6; 1989, ch. 322, § 6.

ANNOTATIONS

Cross-references. - For hazardous waste emergency fund, see 74-4-8 NMSA 1978.

Resource Conservation and Recovery Act. - Section 9002(a)(5) of the Resource Conservation and Recovery Act, referred to in Subsection B, appears as 42 U.S.C. § 6991a(a)(5).

74-4-4.5. Hazardous waste fund created; appropriation.

A. There is created in the state treasury the "hazardous waste fund" which shall be administered by the division. All balances in the fund are appropriated to the division for the sole purpose of meeting necessary expenses in the administration and operation of the hazardous waste program.

B. All fees collected pursuant to Subsection F of Section 74-4-4.2 NMSA 1978 shall be transmitted to the state treasurer for credit to the hazardous waste fund.

History: 1978 Comp., § 74-4-4.5, enacted by Laws 1987, ch. 179, § 7; 1989, ch. 322, § 7; 1989, ch. 324, § 36; 1990, ch. 124, § 20.

74-4-4.6. Repealed.

ANNOTATIONS

Repeals. - Laws 1989, ch. 322, § 17 repeals 74-4-4.6 NMSA 1978, as enacted by Laws 1989, ch. 322, § 8, relating to creation of the underground storage tank fund, effective July 1, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

74-4-4.7. Permit applicant disclosure.

A. Every applicant for a permit pursuant to the Hazardous Waste Act [this article] shall file a disclosure statement with the department with the information required by, and on a form developed by, the department in cooperation with the department of public safety, at the same time the applicant files the application for a permit with the secretary.

B. Upon the request of the secretary, the department of public safety shall prepare and transmit to the secretary an investigative report on the applicant based in part upon the disclosure statement. The report shall be prepared and transmitted within ninety days after the receipt of a copy of an applicant's disclosure statement from the department. Upon good cause, the ninety days may be extended for a reasonable period of time by the secretary.

C. In preparing the investigative report, the department of public safety may request and receive criminal history information on the applicant from the federal bureau of investigation or any other law enforcement agency or organization. While the investigative report is being prepared by the department of public safety, the secretary may also request information regarding any person who will be or could reasonably be expected to be involved in management activities of the hazardous waste facility or any person who has a controlling interest in any permittee. The department of public safety shall maintain confidentiality regarding the information received from a law enforcement agency as may be imposed by that agency as a condition for providing that information to the department of public safety.

D. All persons required to file a disclosure shall provide any assistance or information requested by the department of public safety or the secretary and shall cooperate in any inquiry or investigation conducted by the department of public safety or any inquiry, investigation or hearing conducted by the secretary. Nothing in this section shall be construed to waive a person's constitutional right against self-incrimination.

E. If any of the information required to be included in the disclosure statement changes, or if any information is added after filing the statement, the person required to file it shall provide that information in writing to the secretary within thirty days after the change or addition. Failure to provide the information within thirty days may constitute the basis for the revocation of, or denial of an application for, any permit issued or applied for in accordance with Section 74-4-4.2 NMSA 1978, but only if, prior to any denial or revocation, the secretary notifies the applicant or permittee of the secretary's intention to do so and gives the applicant or permittee fourteen days from the date of the notice to explain why the information was not provided within the required thirty-day period. The secretary shall consider this information when determining whether to revoke or deny the permit.

F. No person shall be required to submit the disclosure statement required by this section if the person is:

(1) the United States or any agency or instrumentality of the United States;

(2) a state or any agency or political subdivision of a state; or

(3) a corporation or an officer, director or shareholder of that corporation and that corporation:

(a) has on file and in effect with the federal securities and exchange commission a registration statement required under Section 5, Chapter 38, Title 1 of the federal Securities Act of 1933, as amended;

(b) submits to the secretary with the application for a permit evidence of the registration described in Subparagraph (a) of this paragraph and a copy of the corporation's most recent annual form 10-K or an equivalent report; and

(c) submits to the secretary on the annual anniversary of the date of the issuance of any permit it holds pursuant to the Hazardous Waste Act evidence of registration described in Subparagraph (a) of this paragraph and a copy of the corporation's most recent annual form 10-K or an equivalent report.

History: 1978 Comp., § 74-4-4.7, enacted by Laws 1992, ch. 43, § 4.

ANNOTATIONS

Emergency clauses. - Laws 1992, ch. 43, § 9 makes the act effective immediately. Approved March 6, 1992.

Securities Act of 1933. - Section 5, Chapter 38, Title 1 of the Federal Securities Act of 1933, appears as 15 U.S.C. § 77e(c).

74-4-5. Adoption of regulations; notice and hearing.

A. No regulation shall be adopted, amended or repealed until after a public hearing by the board. Hearings on regulations shall be held in Santa Fe or in an area of the state substantially affected by the regulations. In making its regulations, the board shall give the weight it deems appropriate to all relevant facts and circumstances presented at the public hearing, including but not limited to:

(1) the character and degree of injury to or interference with the environment or public health; and

(2) the technical practicability and economic reasonableness of the regulation.

B. Notice of the hearing shall be given at least thirty 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 notice shall also state where interested persons may secure copies of any proposed regulation. The notice shall be published in a newspaper of general circulation in the area affected. Reasonable effort shall be made to give notice to all persons who have made a written request to the board for advance notice of hearings.

C. At the hearing, the board shall allow all interested persons reasonable opportunity to submit data, 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.

D. The board may designate a hearing officer to take evidence in the hearing. A transcript shall be made of the entire hearing proceedings.

E. No regulation or amendment or repeal of a regulation adopted by the board shall become effective until thirty days after its filing under the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978].

History: 1953 Comp., § 12-9B-5, enacted by Laws 1977, ch. 313, § 5; 1992, ch. 43, § 5.

ANNOTATIONS

Cross-references. - As to notice by publication, see 14-11-1 NMSA 1978 et seq.

The 1992 amendment, effective March 6, 1992, deleted "appeal" at the end of the section catchline; deleted "environmental improvement" preceding "board" in the first sentence of the introductory paragraph of Subsection A; inserted "the environment or" in Subsection A(1); deleted former Subsections F, G, and H, relating to appeal; and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 6, 134.

74-4-6. Repealed.

ANNOTATIONS

Repeals. - Laws 1981 (1st S.S.), ch. 8, § 12, repeals 74-4-6 NMSA 1978, relating to disposal of out-of-state hazardous waste, effective April 14, 1981.

Compiler's note. - Laws 1992, ch. 43, § 6 enacted a section designated 74-4-6 NMSA 1978 which has been redesignated by the compiler as 74-4-14 NMSA 1978.

74-4-7. Containment and cleanup of hazardous substance incidents; division powers.

The division may:

A. take any action necessary or appropriate to protect persons from injury or other harm which might arise from hazardous substance incidents, including but not limited to providing for cleanup and disposal, coordinating the activities of other public officials and any other action the division deems necessary or appropriate;

B. notify any person who may have incurred or may incur physical injury from a hazardous substance incident that he should undergo medical examination; and

C. assess charges against persons responsible for hazardous substance incidents for costs the division incurs in cleanup of hazardous substance incidents, disposal of hazardous substances and for damage to state property. Amounts received in payment

of such assessments shall be deposited in the hazardous waste emergency fund. Any person who is assessed charges pursuant to this subsection may appeal the assessment to the district court within thirty days of receipt of notice of the assessment.

History: 1953 Comp., § 12-9B-7, enacted by Laws 1977, ch. 313, § 7; 1989, ch. 322, § 9.

ANNOTATIONS

Cross-references. - For definition of "division," see 74-4-3 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 6, 133, 134, 245, 246.

74-4-8. Emergency fund.

The "hazardous waste emergency fund" is created in the state treasury. This fund shall be used for cleanup of hazardous substance incidents, disposal of hazardous substances and necessary repairs to or replacement of state property and may be used for the state's share of any response action taken under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. Sections 9601 et seq. The administrative and technical expenses of maintaining an emergency response program within the division shall be reimbursable on a quarterly basis from this fund. Any penalties collected by the division shall be credited to this fund. Amounts in the fund shall be deposited with the state treasurer and then disbursed pursuant to vouchers signed by the director or his authorized representative upon warrants drawn by the secretary of finance and administration.

History: 1953 Comp., § 12-9B-8, enacted by Laws 1977, ch. 313, § 8; 1983, ch. 301, § 81; 1983, ch. 302, § 2; 1989, ch. 322, § 10.

ANNOTATIONS

Cross-references. - For definitions of "director" and "division," see 74-4-3 NMSA 1978.

74-4-9. Existing hazardous waste facilities; interim status.

Any person owning or operating a hazardous waste facility who has met the requirements for interim status under 42 U.S.C. 6925 shall be deemed to have interim status under the Hazardous Waste Act [this article].

History: 1978 Comp., § 74-4-9, enacted by Laws 1989, ch. 322, § 11.

ANNOTATIONS

Repeals and reenactments. - Laws 1989, ch. 322, § 11 repeals former 74-4-9 NMSA 1978, as enacted by Laws 1981 (1st S.S.), ch. 8, § 8, and enacts the above section, effective April 7, 1989. For former provisions, see 1988 Replacement Pamphlet.

74-4-10. Enforcement; compliance orders; civil penalties.

A. Whenever on the basis of any information the secretary determines that any person has violated, is violating or threatens to violate any requirement of the Hazardous Waste Act [this article], any regulation adopted and promulgated pursuant to that act or any condition of a permit issued pursuant to that act, the secretary may:

(1) issue a compliance order stating with reasonable specificity the nature of the violation or threatened violation and requiring compliance immediately or within a specified time period or assessing a civil penalty for any past or current violation, or both; or

(2) commence a civil action in district court for appropriate relief, including a temporary or permanent injunction.

B. Any order issued pursuant to Subsection A of this section may include a suspension or revocation of any permit issued by the secretary. Any penalty assessed in the order shall not exceed ten thousand dollars ($10,000) per day of noncompliance for each violation. In assessing the penalty, the secretary shall take into account the seriousness of the violation and any good-faith efforts to comply with the applicable requirements. For violations related to underground storage tanks, "per violation" means per tank.

C. If a violator fails to take corrective actions within the time specified in a compliance order, the secretary may:

(1) assess a civil penalty of not more than twenty-five thousand dollars ($25,000) for each day of continued noncompliance with the order; and

(2) suspend or revoke any permit issued to the violator pursuant to the Hazardous Waste Act.

D. Whenever on the basis of any information the secretary determines that the immediate termination of a research, development and demonstration permit is necessary to protect human health and the environment, the secretary may order an immediate termination of all research, development and demonstration operations permitted pursuant to the Hazardous Waste Act at the facility.

E. Whenever on the basis of any information the secretary determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under Section 74-4-9 NMSA 1978, the secretary may issue an order requiring corrective action, including corrective action beyond a facility's boundaries or other response measure as he deems necessary to protect human health or the

environment or may commence an action in district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.

F. Any order issued under Subsection E of this section may include a suspension or revocation of authorization to operate under Section 74-4-9 NMSA 1978 and shall state with reasonable specificity the nature of the required corrective action or other response measure and shall specify a time for compliance. If any person named in an order fails to comply with the order, the secretary may assess, and the person shall be liable to the state for a civil penalty in an amount not to exceed ten thousand dollars ($10,000) for each day of noncompliance with the order.

G. Any order issued pursuant to this section, any other enforcement proceeding initiated pursuant to this section or any claim for personal or property injury arising from any conduct for which evidence of financial responsibility must be provided may be issued to or taken against the insurer or guarantor of an owner or operator of a treatment, storage or disposal facility or underground storage tank if:

(1) the owner or operator is in bankruptcy, reorganization or arrangement pursuant to the federal Bankruptcy Code; or

(2) jurisdiction in any state or federal court cannot with reasonable diligence be obtained over an owner or operator likely to be solvent at the time of judgment.

H. Any order issued pursuant to this section shall become final unless, no later than thirty days after the order is served, the person named in the order submits a written request to the secretary for a public hearing. Upon such request the secretary shall promptly conduct a public hearing. The secretary shall appoint an independent hearing officer to preside over the public hearing. The hearing officer shall make and preserve a complete record of the proceedings and forward his recommendation based on the record to the secretary, who shall make the final decision.

I. In connection with any proceeding under this section, the secretary may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents and may promulgate rules for discovery procedures.

J. Penalties collected pursuant to an administrative order shall be deposited in the state treasury to be credited to the hazardous waste emergency fund.

History: 1953 Comp., § 12-9B-10, enacted by Laws 1977, ch. 313, § 10; reenacted by 1981 (1st S.S.), ch. 8, § 9; 1987, ch. 179, § 8; 1989, ch. 322, § 12; 1992, ch. 43, § 7.

ANNOTATIONS

The 1992 amendment, effective March 6, 1992, added "civil penalties" at the end of the section catchline, substituted "secretary" for "director" several times throughout the

section, rewrote the introductory paragraph of Subsection A, and made minor stylistic changes throughout the section.

Bankruptcy Code. - The federal Bankruptcy Code, referred to in Subsection G(1), appears as Title 11 of the United States Code.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 534 to 547.

Right to maintain action based on violation of § 7003 of Resource Conservation and Recovery Act (42 USCS § 6973) pertaining to imminent hazards from solid or hazardous waste, 105 A.L.R. Fed. 800.

74-4-10.1. Hazardous waste monitoring, analysis and testing.

A. If the director determines, upon receipt of any information, that:

(1) the presence of any hazardous waste at a facility or site at which hazardous waste is or has been stored, treated or disposed of; or

(2) the release of any such waste from such facility or site may present a substantial hazard to human health or the environment, he may issue an order requiring the owner or operator of such facility to conduct such monitoring, testing, analysis and reporting with respect to such facility or site as the director deems reasonable to ascertain the nature and extent of such hazard.

B. In the case of any facility or site not in operation at the time a determination is made under Subsection A of this section with respect to the facility or site, if the director finds that the owner of such facility or site could not reasonably be expected to have actual knowledge of the presence of hazardous waste at such facility or site and of its potential for release, the director may issue an order requiring the most recent previous owner or operator of such facility or site who could reasonably be expected to have actual knowledge to carry out the provisions referred to in Subsection A of this section.

C. Any order under Subsection A or B of this section shall require the person to whom such order is issued to submit to the director, within thirty days from the issuance of such order, a proposal for carrying out the required monitoring, testing, analysis and reporting. The director may, after providing such person with an opportunity to confer with the director respecting such proposal, require such person to carry out such monitoring, testing, analysis and reporting in accordance with such proposal and such modifications in such proposal as the director deems reasonable to ascertain the nature and extent of the hazard.

D. (1) If the director determines that no owner or operator referred to in Subsection A or B of this section is able to conduct monitoring, testing, analysis or reporting satisfactory to the director, if the director deems any such action carried out by an owner or operator

to be unsatisfactory or if the director cannot initially determine that there is an owner or operator referred to in Subsection A or B of this section who is able to conduct such monitoring, testing, analysis or reporting, the division may:

(a) conduct monitoring, testing or analysis, or any combination thereof, which he deems reasonable to ascertain the nature and extent of the hazard associated with the site concerned; or

(b) authorize a local authority or other person to carry out any such action; and

(c) in either event the director may require, by order, the owner or operator referred to in Subsection A or B of this section to reimburse the division or other authority or person for the costs of such activity. Any reimbursement to the division pursuant to this subparagraph shall be deposited to the credit of the hazardous waste fund.

(2) No order may be issued under this subsection requiring reimbursement of the costs of any action carried out by the division which confirms the results of an order issued under Subsection A or B of this section.

(3) For purposes of carrying out this subsection, the director or any authority or other person authorized under Paragraph (1) of this subsection may exercise the authorities set forth in Section 74-4-4.3 NMSA 1978.

E. The director may commence a civil action against any person who fails or refuses to comply with an order issued under this section. Such action shall be brought in the district court of the county in which the defendant is located, resides or is doing business. Such court shall have jurisdiction to require compliance with such order and to assess a civil penalty not to exceed five thousand dollars ($5,000) for each day during which such failure or refusal occurs.

History: 1978 Comp., § 74-4-10.1, enacted by Laws 1989, ch. 322, § 13.

74-4-11. Penalty; criminal.

A. No person:

(1) shall knowingly transport or cause to be transported any hazardous waste identified or listed pursuant to the Hazardous Waste Act [this article] to a facility that does not have a permit under that act or the federal Resource Conservation and Recovery Act;

(2) shall knowingly treat, store or dispose of any hazardous waste identified or listed pursuant to the Hazardous Waste Act:

(a) without having obtained a hazardous waste permit pursuant to that act or the federal Resource Conservation and Recovery Act;

(b) in knowing violation of any material condition or requirement of a hazardous waste permit; or

(c) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) shall knowingly omit material information or make any false statement or representation in any application, label, manifest, record, report, permit or other document filed, maintained or used for purposes of compliance with the Hazardous Waste Act;

(4) who knowingly generates, stores, treats, transports, disposes of, exports or otherwise handles any hazardous waste shall knowingly destroy, alter, conceal or fail to file any record, application, manifest, report or other document required to be maintained or filed for purposes of compliance with regulations adopted and promulgated pursuant to the Hazardous Waste Act;

(5) shall knowingly transport without a manifest or cause to be transported without a manifest any hazardous waste required by regulations adopted and promulgated pursuant to the Hazardous Waste Act to be accompanied by a manifest; or

(6) shall knowingly export hazardous waste identified or listed pursuant to the Hazardous Waste Act:

(a) without the consent of the receiving country; or

(b) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export and enforcement procedures for the transportation, treatment, storage and disposal of hazardous wastes, in a manner that is not in conformance with such agreement.

B. Any person who violates any of the provisions of Paragraphs (1) through (6) of Subsection A of this section is guilty of a fourth degree felony and upon conviction shall be punished by a fine of not more than ten thousand dollars ($10,000) per violation per day or by imprisonment for a definite term of not more than eighteen months or both. For a second or subsequent violation of the provisions of Paragraphs (1) through (6) of Subsection A of this section, the person is guilty of a third degree felony and shall be punished by a fine of not more than twenty-five thousand dollars ($25,000) per violation per day or by imprisonment for not more than three years or both.

C. Any person who knowingly violates any regulation adopted and promulgated pursuant to Subsection C of Section 74-4-4 or 74-4-4.4 NMSA 1978 is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five thousand dollars ($5,000) per violation per day or by imprisonment for a definite term of one year or both. For violations related to underground storage tanks, "per violation" means per tank.

D. Any person who knowingly transports, treats, stores, disposes of or exports any hazardous waste in violation of Subsection A of this section and who knows at the time of the violation that he creates a substantial danger of a substantial adverse environmental impact, is guilty of a third degree felony if the violation causes a substantial adverse environmental impact.

E. As used in this section, a "substantial adverse environmental impact" exists when an act or omission of a person causes harm or damage:

(1) to human beings; or

(2) to flora, wildlife, fish or other aquatic life or water fowl; to the habitats of wildlife, fish, other aquatic life, water fowl or livestock; to agricultural crops; to any ground water or surface water; or to the lands or waters of this state where such harm or damage amounts to more than ten thousand dollars ($10,000).

F. Any person who knowingly transports, treats, stores, disposes of or exports any hazardous waste in violation of Subsection A of this section and who knows at the time of the violation that he creates a substantial danger of death or serious bodily injury to another person is guilty of a second degree felony and shall be sentenced to a term of imprisonment not to exceed nine years or a fine not to exceed one hundred thousand dollars ($100,000), or both. Any person, other than an individual, that knowingly transports, treats, stores, disposes of or exports any hazardous waste in violation of Subsection A of this section and knows at that time that it places an individual in imminent danger of death or serious bodily injury is guilty of a second degree felony and shall be fined in an amount not to exceed two hundred fifty thousand dollars ($250,000).

History: 1953 Comp., § 12-9B-11, enacted by Laws 1977, ch. 313, § 11; 1981 (1st S.S.), ch. 8, § 10; 1987, ch. 179, § 9; 1989, ch. 322, § 14; 1992, ch. 43, § 8.

ANNOTATIONS

The 1992 amendment, effective March 6, 1992, rewrote the provisions of former Subsection A and redesignated them as present Subsections A and B; added present Subsections C to E; redesignated former Subsection B as present Subsection F; and, in Subsection F substituted "creates a substantial danger" for "thereby places another person in imminent danger" and inserted "to another person" near the middle of the first sentence while substituting "a term of imprisonment not to exceed nine years" for "nine years imprisonment" near the end of that sentence, and made minor stylistic changes throughout the subsection.

Resource Conservation and Recovery Act. - The federal Resource Conservation and Recovery Act, referred to in Subsection A, appears as 42 U.S.C. § 6901 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 590 to 602.

74-4-12. Penalty; civil.

Any person who violates any provision of the Hazardous Waste Act [this article], any regulation made pursuant to that act or any compliance order issued by the director pursuant to Section 74-4-10 NMSA 1978 may be assessed a civil penalty not to exceed ten thousand dollars ($10,000) for each day during any portion of which a violation occurs. For violations related to underground storage tanks, "per violation" means per tank.

History: 1953 Comp., § 12-9B-12, enacted by Laws 1977, ch. 313, § 12; 1981 (1st S.S.), ch. 8, § 11; 1987, ch. 179, § 10; 1989, ch. 322, § 15.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 518, 519.

74-4-13. Imminent hazards; authority of director; penalties.

A. Notwithstanding any other provision of the Hazardous Waste Act [this article], whenever the director is in receipt of evidence that the past or current handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste or the condition or maintenance of any underground storage tank may present an imminent and substantial endangerment to health or the environment, he may bring suit in the appropriate district court to immediately restrain any person, including any past or present generator, past or present transporter or past or present owner or operator of a treatment, storage or disposal facility, who has contributed or is contributing to such activity, to take such other action as may be necessary or both. A transporter shall not be deemed to have contributed or to be contributing to such handling, storage, treatment or disposal taking place after such solid waste or hazardous waste has left the possession or control of such transporter if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste. The director may also take other action, including but not limited to issuing such orders as may be necessary to protect health and the environment.

B. Any person who willfully violates or fails or refuses to comply with any order of the director under Subsection A of this section may in an action brought in the appropriate district court to enforce such order be fined not more than five thousand dollars ($5,000) for each day in which the violation occurs or the failure to comply continues.

C. Upon receipt of information that there is hazardous waste at any site which has presented an imminent and substantial endangerment to human health or the environment, the director shall provide immediate notice to the appropriate local

government agencies. In addition, the director shall require notice of such endangerment to be promptly posted at the site where the waste is located.

History: Laws 1983, ch. 302, § 3; 1987, ch. 179, § 11; 1989, ch. 322, § 16.

74-4-14. Administrative actions; judicial review.

A. Any person who is or may be affected by any final administrative action of the board or the secretary may appeal to the court of appeals for further relief within thirty days after the action. All appeals shall be upon the record before the board or the secretary.

B. For appeals of regulations, the date of the action shall be the date of filing of the regulation under the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978].

C. Upon appeal, the court of appeals shall set aside the action only if it is found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence in the record; or

(3) otherwise not in accordance with law.

D. A stay of enforcement of the action being appealed may be granted after hearing and upon good cause shown:

(1) by the board or the secretary, whichever took the action being appealed; or

(2) by the court of appeals if the board or the secretary denies a stay or fails to act upon an application for a stay within sixty days after receipt.

History: 1978 Comp., § 74-4-14, enacted by Laws 1992, ch. 43, § 6.

ANNOTATIONS

Emergency clauses. - Laws 1992, ch. 43, § 9 makes the act effective immediately. Approved March 6, 1992.

Compiler's note. - This section was enacted as 74-4-6 NMSA 1978 but was redesignated by the compiler, since a section with the same code number had previously been enacted (repealed by Laws 1981 (1st S.S.), ch. 8, § 12).

ARTICLE 4A
RADIOACTIVE MATERIALS

74-4A-1. Radioactive material transport; conditions.

A. The environmental improvement board shall have exclusive authority to promulgate regulations prescribing the conditions for transport of radioactive material on the highways. Such conditions shall include the conditions of transport that the environmental improvement board finds necessary to protect the health, safety and welfare of the citizens of the state. Except as specifically preempted by federal law, the state highway commission shall have the exclusive authority within New Mexico to designate highway routes for the transport of radioactive material. Any rule or regulation adopted by the environmental improvement board that designates highway routes for the transport of radioactive material and that was in effect prior to March 1, 1991, is deemed null and void. The state highway commission shall incorporate into the record and consider in the initial designation of routes for the transport of radioactive material, the evidentiary record from the environmental improvement board public hearings held for the purpose of receiving public comment regarding the designation of routes for the transport of radioactive material.

B. For the purposes of this section, "radioactive material" means any material or combination of materials which spontaneously emits ionizing radiation. Materials in which the estimated specific activity is not greater than 0.002 microcuries per gram of material, and in which the radioactivity is essentially uniformly distributed, are not considered to be radioactive materials. Radioactive materials includes but is not limited to:

(1) materials associated with the operation and decommissioning of nuclear reactors and the supporting fuel cycle;

(2) industrial radioisotope sources;

(3) radioactive materials used in nuclear medicine;

(4) radioactive materials used for research, education or training; and

(5) radioactive wastes;

but does not include radioactive material the regulation of which has been specifically preempted by federal law.

C. The environmental improvement division of the health and environment department [department of environment] shall have the authority to impose fines not to exceed one thousand dollars ($1,000) as set by regulation of the environmental improvement board for any violation of the board's regulations pertaining to the transport of radioactive materials.

D. Nothing in this section shall be construed to alter the obligation of the state under the April 3, 1974 agreement between the state and the atomic energy commission for the discontinuance of certain commission regulatory authority and responsibility.

History: Laws 1979, ch. 377, § 1; 1981, ch. 366, § 1; 1991, ch. 204, § 1.

ANNOTATIONS

Bracketed material. - The bracketed reference to the department of environment was inserted by the compiler, as Laws 1991, ch. 25, § 4 establishes the department of environment and provides that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment. The bracketed material was not enacted by the legislature and is not part of the law.

The 1991 amendment, effective April 4, 1991, in Subsection A, deleted "including routing criteria" at the end of the second sentence, rewrote the third sentence which read "Except as specifically preempted by federal law, the environmental improvement board shall have the exclusive authority within New Mexico to designate routes and otherwise regulate the transportation of radioactive material on the highways as it deems appropriate and necessary" and added the fourth and fifth sentences; rewrote Subsection B; and inserted "of the health and environment department" in Subsection C.

Law reviews. - For article, "Radioactive Wastes," see 24 Nat. Resources J. 967 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Atomic Energy § 45 et seq.; 8 Am. Jur. 2d Aviation § 54; 61A Am. Jur. 2d Pollution Control § 252.

Validity of local regulation of hazardous waste, 67 A.L.R.4th 822.

State or local regulation of transportation of hazardous materials as pre-empted by Hazardous Materials Transportation Act (49 U.S.C.S. § 1801 et seq.), 78 A.L.R. Fed. 289.

39A C.J.S. Health and Environment § 61.

74-4A-2. Short title.

Sections 74-4A-1 through 74-4A-14 NMSA 1978 may be cited as the "Radioactive and Hazardous Materials Act".

History: Laws 1979, ch. 380, § 1; 1981, ch. 374, § 1; 1986, ch. 61, § 1; 1991, ch. 204, § 2.

ANNOTATIONS

The 1991 amendment, effective April 4, 1991, substituted "74-4A-1" for "74-4A-2".

74-4A-3. Purpose.

A. The legislature finds that there is presently much public and state concern in the area of public health and safety over:

(1) the proposed waste isolation pilot plant for defense-related radioactive wastes;

(2) the safe treatment and disposal of hazardous wastes and the regulation of hazardous waste generators;

(3) the effective provision of regulation and information regarding hazardous chemicals in the community and in the work place;

(4) the effective control of contamination from underground storage tanks;

(5) the transportation on New Mexico highways and streets of radioactive and hazardous materials;

(6) the disposition of uranium mine and mill tailings; and

(7) the need to provide efficient and timely emergency response to accidents or natural disasters involving the disposal, storage or transportation of radioactive and hazardous materials.

B. The legislature further finds that there is a need to centralize and coordinate information on these concerns and to develop recommendations for action by the state. It is the purpose of the Radioactive and Hazardous Materials Act [74-4A-1 to 74-4A-14 NMSA 1978] to provide a vehicle for proper consideration of these legitimate state concerns without unnecessarily hampering the nuclear energy industry or compromising the nation's defense.

History: Laws 1979, ch. 380, § 2; 1981, ch. 374, § 2; 1986, ch. 61, § 2; 1991, ch. 2, § 1.

ANNOTATIONS

The 1991 amendment, effective January 30, 1991, in Subsection A, added Paragraphs (3) and (4) and designated former Paragraphs (3) to (5) as Paragraphs (5) to (7).

Law reviews. - For note, "Preemption - Atomic Energy," see 24 Nat. Resources J. 761 (1984).

For article, "Radioactive Wastes," see 24 Nat. Resources J. 967 (1984).

74-4A-4. Definitions.

As used in the Radioactive and Hazardous Materials Act [74-4A-1 to 74-4A-14 NMSA 1978]:

A. "committee" means the joint interim legislative radioactive and hazardous materials committee;

B. "disposal" means the long-term isolation of radioactive material, including long-term monitored storage which permits retrieval of the radioactive material stored and includes the temporary or permanent disposal of all hazardous wastes;

C. "environmental evaluation group" means the independent state review facility administratively attached to New Mexico institute of mining and technology and funded by the United States department of energy;

D. "hazardous waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility or other discarded material, including solid, liquid, semisolid or containing gaseous material resulting from industrial, commercial, mining or agricultural operations or from community activities which because of its quantity, concentration or physical, chemical or infectious characteristics may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed. The term "hazardous waste" does not include solid or dissolved material in domestic sewage or animal excrement in connection with farm, ranch or feedlot operations or solid or dissolved materials in irrigation return flows or industrial discharges that are point sources subject to permits under Section 402 of the federal Water Pollution Control Act, as amended, as the provisions exist on January 1, 1981, or source, special or byproduct material as defined in the Atomic Energy Act of 1954, as amended, as these definitions exist on January 1, 1981, or any of the following, until the board determines that they are subject to Subtitle C of the Resource Conservation and Recovery Act, as amended (42 U.S.C. 6921 et seq.): drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil or natural gas or geothermal energy, any fly ash waste, bottom ash waste, slag waste, flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels, solid waste from the extraction, beneficiation or processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore or cement kiln dust waste;

E. "high-level waste" means the highly radioactive wastes resulting from the reprocessing of spent nuclear fuel and includes both the liquid waste which is produced directly in reprocessing and any solid material into which such liquid waste is made;

F. "low-level waste" means material contaminated with radioactive elements emitting beta or gamma particles or with traces of transuranic elements in concentrations of less than one hundred nanocuries per gram;

G. "mixed waste" means any mixture of hazardous waste regulated under the Hazardous Waste Act and radioactive waste regulated under the federal Atomic Energy Act of 1954;

H. "radioactive materials" means any material or combination of materials which spontaneously emits ionizing radiation. Materials in which the estimated specific activity is not greater than 0.002 microcuries per gram of material, and in which the radioactivity is essentially uniformly distributed, are not considered to be radioactive materials;

I. "radioactive waste" means high-level waste, transuranic contaminated waste and low-level waste;

J. "spent fuel" means nuclear fuel that has been irradiated in and recovered from a civilian nuclear power plant;

K. "task force" means the radioactive waste consultation task force; and

L. "transuranic contaminated waste" means material contaminated with radionuclides emitting alpha radiation having an atomic number greater than ninety-two, including neptunium, plutonium, americium and curium, in concentrations of greater than one hundred nanocuries per gram.

History: Laws 1979, ch. 380, § 3; reenacted by 1981, ch. 374, § 3; 1983, ch. 22, § 1; 1986, ch. 61, § 3; 1991, ch. 2, § 2.

ANNOTATIONS

The 1991 amendment, effective January 30, 1991, added present Subsections C and G; redesignated former Subsections C to E and F to J as Subsections D to F and H to L, respectively; substituted "radionuclides emitting alpha radiation" for "elements" in subsection L; and made a minor stylistic change.

Section 402 of Federal Water Pollution Control Act. - As to Section 402 of the Federal Water Pollution Control Act, referred to in Subsection D, see 33 U.S.C. § 1342.

Atomic Energy Act of 1954, as amended. - As to the Atomic Energy Act of 1954, as amended, referred to in Subsections D and G, see 42 U.S.C. § 2011 et seq.

74-4A-5. Repealed.

ANNOTATIONS

Repeals. - Laws 1981, ch. 374, § 7, repeals 74-4A-5 NMSA 1978, relating to state approval of disposal facilities, effective April 10, 1981. For present provisions, see 74-4A-11.1 NMSA 1978.

74-4A-6. Task force.

There is created the "radioactive waste consultation task force". The task force shall consist of the secretaries of energy, minerals and natural resources, taxation and

revenue, health and environment, public safety and highway and transportation or their designees. The chairman and vice chairman, or their designees from the committee, shall be advisory members of the task force.

History: Laws 1979, ch. 380, § 5; 1986, ch. 61, § 4; 1987, ch. 234, § 80; 1991, ch. 2, § 3.

ANNOTATIONS

Cross-references. - As to secretary of energy, minerals and natural resources, see 9-5A-5 NMSA 1978.

As to secretary of health, see 9-7-5 NMSA 1978.

As to secretary of environment, see 9-7A-5 NMSA 1978.

The 1991 amendment, effective January 30, 1991, in the second sentence, deleted "department" preceding "taxation" and substituted "public safety and highway and transportation or their designees" for "and the chief highway administrator or their designees"; deleted the former third sentence which read "The task force shall terminate on December 31, 1990 unless terminated sooner"; and added the present third sentence.

Health and environment department. - Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, referred to in this section, and enacts a new 9-7-4 NMSA 1978, creating the department of health. Laws 1991, ch. 25, § 4 creates the department of environment. Under 9-7-5 NMSA 1978 the administrative head of the department of health is the secretary of health. Under 9-7A-5 NMSA 1978 the administrative head of the department of environment is the secretary of environment.

74-4A-7. Duties of the task force.

A. The task force shall negotiate for the state with the federal government in all areas relating to siting, licensing and operation of new federal disposal facilities, including research, development and demonstration, for high-level radioactive wastes, transuranic radioactive wastes and low-level radioactive waste. This subsection shall not be construed to limit the powers of any agency otherwise authorized to negotiate with the federal government, and if such negotiation should also come within the authority of the task force, the task force shall provide assistance to that agency but shall not limit the agency's exercise of authority. Any action taken pursuant to this subsection may be disapproved by joint resolution of the legislature.

B. The task force may recommend legislation to implement the state's policies with respect to new federal disposal facilities.

C. The task force shall identify impacts of new federal disposal facilities within the state and shall disseminate that information.

D. The task force shall coordinate the investigations and studies undertaken by all state agencies and shall forward an executive summary of ongoing and recently completed investigations and studies, including information from federal or other studies, to the legislature and the governor as the studies are completed or information released.

E. The task force shall meet regularly with the committee and keep the committee apprised of all actions taken by the task force.

History: Laws 1979, ch. 380, § 6; 1991, ch. 2, § 4.

ANNOTATIONS

The 1991 amendment, effective January 30, 1991, deleted "or its designee" following "The task force" near the beginning of Subsection A.

74-4A-8. Powers of the task force.

A. The task force may make procedural rules deemed necessary to carry out the provisions of Section 74-4A-7 NMSA 1978.

B. The task force may solicit and accept grants from federal or private sources for projects and undertakings that further the purposes of Section 74-4A-7 NMSA 1978.

C. The task force may make such contracts as it deems necessary to carry out the provisions of Section 74-4A-7 NMSA 1978.

D. The task force may appoint a representative on any federal or state-federal task forces or working groups.

E. The task force may perform such other acts as are necessary and proper for carrying out the provisions of Section 74-4A-7 NMSA 1978 and shall cooperate fully with the committee.

History: Laws 1979, ch. 380, § 7; 1981, ch. 374, § 4; 1986, ch. 61, § 5.

74-4A-9. Committee.

There is created a joint interim legislative committee which shall be known as the "radioactive and hazardous materials committee". The committee shall function from the date of its appointment.

History: Laws 1979, ch. 380, § 8; 1983, ch. 22, § 2; 1986, ch. 61, § 6; 1991, ch. 2, § 5.

ANNOTATIONS

Cross-references. - As to the legislative council, see 2-3-1 NMSA 1978.

The 1991 amendment, effective January 30, 1991, deleted "until December 31, 1990 unless terminated sooner by the legislative council" at the end of the second sentence.

74-4A-10. Membership; appointment; vacancies.

A. The committee shall be composed of twelve members. The legislative council shall appoint six members from the house of representatives and six members from the senate and may include members of the council, notwithstanding the provisions of Subsection D of Section 2-3-3 NMSA 1978. At the time of making the appointments, the legislative council shall designate the chairman and vice chairman of the committee. Members shall be appointed from each house so as to give the two major political parties in each house the same proportionate representation on the committee as prevails in each house; provided that in no event shall either of such parties have less than one member from each house on the committee. Vacancies on the committee shall be filled by the legislative council.

B. No action shall be taken by the committee if a majority of the total membership from either house on the committee rejects such action.

History: Laws 1979, ch. 380, § 9; 1991, ch. 2, § 6.

ANNOTATIONS

The 1991 amendment, effective January 30, 1991, in Subsection A, substituted "twelve members" for "eight members" in the first sentence, "six members" for "four members" in two places in the second sentence, and made a minor stylistic change.

74-4A-11. Committee duties.

At the beginning of each interim, the committee shall hold one organizational meeting to develop a work plan and budget for the period prior to January 1 preceding the next regular session of the legislature. The work plan and budget shall be submitted to the legislative council for approval. Upon approval of the work plan and budget by the legislative council, the committee shall examine all matters relevant to the purposes of the Radioactive and Hazardous Materials Act [74-4A-1 to 74-4A-14 NMSA 1978] and shall submit recommended legislation, together with a report on the activities and expenditures of the committee, to the legislature. In making recommendations, the committee shall review and monitor the following areas:

A. the generation, treatment, storage, transportation or disposal of radioactive or hazardous materials and wastes;

B. the control and handling of mixed waste transported to the waste isolation pilot plant site for disposal;

C. the progress and effectiveness of remediation actions at sites contaminated by radioactive or hazardous materials;

D. the compliance with the environmental protection agency, the council on environmental quality and the office of surface mining regulations and standards pursuant to federal environmental statutes;

E. the provision of activities and investigations and the dissemination of information by the environmental evaluation group however, nothing in the Radioactive and Hazardous Materials Act shall be construed to limit the independent technical review and evaluation by that group of the impact on health and safety of the waste isolation pilot plant;

F. the disposition of uranium mine and mill tailings;

G. the means through which disposition of low-level wastes may be accomplished, such as participation in a regional compact with other states;

H. the state emergency response capability;

I. the Ground Water Protection Act [Chapter 74, Article 6B NMSA 1978], in cooperation with other legislative committees, regarding the use or management of underground storage tanks and releases;

J. the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978], in cooperation with other legislative committees; and

K. such matters assigned by the legislature and consultations and negotiations with the federal government and other state governments or their representatives and agreements and revisions thereto.

History: Laws 1979, ch. 380, § 10; 1981, ch. 374, § 5; 1986, ch. 61, § 7; 1991, ch. 2, § 7.

ANNOTATIONS

Cross-references. - As to legislative council, see 2-3-1 NMSA 1978.

The 1991 amendment, effective January 30, 1991, substituted "review and monitor" for "consider" in the last sentence of the first paragraph and rewrote the balance of the section to the extent that a detailed comparison would be impracticable.

74-4A-11.1. Condition.

No person shall store or dispose of radioactive materials, radioactive waste or spent fuel in a disposal facility until the state has concurred in the creation of the disposal facility, except as specifically preempted by federal law. As used in this section, "disposal facility" means an engineered facility designed primarily for the isolation of radioactive materials, radioactive waste or spent fuel other than tailings or other waste from the extraction, beneficiation or processing of ores and minerals.

History: 1978 Comp., § 74-4A-11.1, enacted by Laws 1981, ch. 374, § 6; 1991, ch. 2, § 8.

ANNOTATIONS

The 1991 amendment, effective January 30, 1991, substituted "facility" for "subterranean cavern" in the second sentence.

74-4A-12. Subcommittees.

Subcommittees shall be created only by majority vote of all members appointed to the committee and with the approval of the legislative council. A subcommittee shall be composed of at least one member from the senate and one member from the house of representatives, and at least one member of the minority party shall be a member of the subcommittee. All meetings and expenditures of a subcommittee shall be approved by the full committee in advance of such meeting or expenditure, and the approval shall be shown in the minutes of the committee.

History: Laws 1979, ch. 380, § 11.

74-4A-13. Interrelationship with task force.

The committee shall meet regularly to review the work of, and work with, the task force. Prior to the state's acceptance of any agreement, the committee shall review and advise the task force of committee concerns and recommendations regarding all agreements negotiated by or in the name of the task force. Executive reports from the task force shall be presented annually at the first committee meeting following the close of the regular legislative session each year.

History: Laws 1979, ch. 380, § 12; 1991, ch. 2, § 9.

ANNOTATIONS

The 1991 amendment, effective January 30, 1991, added the second and third sentences.

74-4A-14. Staff.

The staff for the committee shall be provided by the legislative council service.

History: Laws 1979, ch. 380, § 14.

74-4A-15 to 74-4A-19. Repealed.

ANNOTATIONS

Repeals. - Laws 1991, ch. 2, § 10 repeals 74-4A-15 to 74-4A-19 NMSA 1978, as enacted by Laws 1981, ch. 253, §§ 1-5, relating to the Site Identification Act, effective January 30, 1991. For provisions of former sections, see 1990 Replacement Pamphlet.

ARTICLE 4B
EMERGENCY MANAGEMENT

74-4B-1. Short title.

Chapter 74, Article 4B NMSA 1978 may be cited as the "Emergency Management Act".

History: Laws 1983, ch. 80, § 1; 1984, ch. 41, § 1.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Standing to sue for violation of state environmental regulatory statute, 66 A.L.R.4th 685.

Validity, construction, and application of state hazardous waste regulations, 86 A.L.R.4th 401.

State or local regulation of toxic substances as pre-empted by Toxic Substances Control Act (15 USCS § 2601 et seq.), 84 A.L.R. Fed. 913.

Third-party defense to liability under § 107 of Comprehensive Environmental Response, Compensation, and Liability Act (42 USCS § 9607), 105 A.L.R. Fed. 21.

74-4B-2. Findings and purpose.

A. The legislature finds that the use of hazardous materials, including radioactive materials, and the transportation of such materials through or within New Mexico occurs on a daily basis, and, no matter how safety-conscious facilities, users, shippers or carriers are, accidents may occur. In the event of an accident involving hazardous materials, resource requirements may be beyond the capability of local governments, and the state must be prepared to respond quickly and effectively to protect the health and safety of its citizens and the environment.

B. The legislature further finds that at the present time there is no statewide hazardous materials emergency response or emergency management plan and that no state

agency is given explicit statutory authority for the management of an emergency involving radioactive materials.

C. It is the purpose of the Emergency Management Act [this article] to:

(1) provide that adequate hazardous materials emergency management capability exists in the state to protect the health and safety of New Mexico citizens and the environment;

(2) delineate those state agencies that are responsible for responding to a hazardous materials accident and providing for the control and management of such an accident, and to provide for the cooperation of other state agencies and local governments in emergency management; and

(3) provide for the formulation of a comprehensive hazardous materials emergency management plan which will be distributed statewide and which will be complied with by all persons who may be involved in responding to a hazardous materials accident.

History: Laws 1983, ch. 80, § 2.

74-4B-3. Definitions.

As used in the Emergency Management Act [this article]:

A. "accident" means an event involving hazardous materials that may cause injury to persons or damage to property or release hazardous materials to the environment;

B. "administrator" means the hazardous materials emergency response administrator;

C. "board" means the hazardous materials safety board;

D. "chief" means the chief of the New Mexico state police;

E. "commission" means the state emergency response commission;

F. "department" means the department of public safety;

G. "emergency management" means the ability to prepare for, respond to, mitigate, recover and restore the scene of an institutional, industrial, transportation or other accident;

H. "first responder" means the first law enforcement officer or other public service provider with a radio-equipped vehicle to arrive at the scene of an accident;

I. "hazardous materials" means hazardous substances, radioactive materials or a combination of hazardous substances and radioactive materials;

J. "hazardous substances" means flammable solids, semisolids, liquids or gases; poisons; corrosives; explosives; compressed gases; reactive or toxic chemicals; irritants or biological agents but does not include radioactive materials;

K. "orphan hazardous materials" means hazardous substances, radioactive materials or a combination of hazardous substances and radioactive materials where an owner of the substances or materials cannot be identified;

L. "plan" means the statewide hazardous materials emergency response plan;

M. "radioactive materials" means any material or combination of materials that spontaneously emits ionizing radiation. Materials in which the estimated specific activity is not greater than 0.002 microcuries per gram of material are not considered to be radioactive materials unless determined to be so by the hazardous and radioactive materials bureau of the water and waste management division of the department of environment for purposes of emergency response pursuant to the Emergency Management Act;

N. "responsible state agency" means an agency designated in Subsection D of Section 74-4B-5 NMSA 1978 with responsibility for managing a certain type of accident or performing certain functions at the scene of such accident;

O. "secretary" means the secretary of public safety; and

P. "task force" means the emergency management task force.

History: Laws 1983, ch. 80, § 3; 1984, ch. 41, § 2; 1986, ch. 62, § 1; 1989, ch. 149, § 10; 1992, ch. 5, § 1.

ANNOTATIONS

Cross-references. - As to chief of the New Mexico state police, see 29-2-3 NMSA 1978.

The 1992 amendment, effective May 20, 1992, substituted "that" for "which" in Subsection A; added present Subsection F; redesignated former Subsections F through I as present Subsections G through J; added present Subsection K; redesignated former Subsections K through N as present Subsections M through P; and, in Subsection M, substituted "that" for "which" in the first sentence, and substituted all of the present language of the second sentence beginning with "hazardous" for "radiation protection bureau of the environmental improvement division of the health and environment department for purposes of emergency response pursuant to the Emergency Management Act".

74-4B-4. State responsibility for management of accidents; immunity from liability; cooperative agreements; private property.

A. The secretary shall have final authority to administer the provisions of the Emergency Management Act [this article].

B. As between state and local governments, the state government has the primary responsibility for the management of an accident, and the local government in whose jurisdiction the accident occurs shall assist the state in its management of the accident.

C. Nothing in the Emergency Management Act shall be construed as a waiver or alteration of the immunity from liability granted under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] or as a waiver of any other immunity or privilege under law.

D. The state, through the secretary or his designee, may enter into cooperative agreements with county and municipal governments for the management of accidents based on the severity of the accident and the resources of the local government. The plan shall set forth the criteria for determining when an accident may be managed by the local government in whose jurisdiction the accident occurred.

E. The state, through the secretary or his designee, may enter into cooperative agreements with the federal government, Indian tribes and pueblos and bordering states for assistance in the management of accidents.

F. Whenever an accident appears imminent or has occurred, employees or authorized persons of responsible state agencies as defined in Section 74-4B-5 NMSA 1978 are authorized to enter upon any buildings or premises for the purpose of determining whether it is necessary for emergency management procedures to be implemented. The state on-scene coordinator or a responsible state agency may take full control and custody of such buildings and premises for the purpose of managing the accident.

History: Laws 1983, ch. 80, § 4; 1984, ch. 41, § 3; 1986, ch. 62, § 2; 1989, ch. 149, § 11.

ANNOTATIONS

Cross-references. - As to immunity from civil liabilities or penalties for "good samaritans," see 74-4B-10.1 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - State or local regulation of transportation of hazardous materials as pre-empted by Hazardous Materials Transportation Act (49 U.S.C.S. § 1801 et seq.), 78 A.L.R. Fed. 289.

74-4B-5. State police emergency response officer; procedure for notification; cooperation of other state agencies and local governments.

A. The secretary, in addition to having final authority to administer the provisions of the Emergency Management Act [this article], shall be responsible for central coordination and communication in the event of an accident.

B. The chief shall designate one or more persons to be known as "state police emergency response officers". A state police emergency response officer shall be trained in accident evaluation and emergency response and shall be available to answer an emergency response call from the first responder.

C. In the event of an accident, if the first responder is a law enforcement officer, he shall immediately notify the state police district emergency response officer in his area, who shall in turn immediately notify the state police emergency response center. If the first responder is a person with radio capability tied into the radio communications bureau of the information systems division of the general services department, he shall immediately notify Santa Fe control, who shall in turn immediately notify the state police emergency response center. The state police emergency response center shall:

(1) evaluate and determine the scope of the accident based on information provided by the first responder;

(2) instruct the first responder on how to proceed at the accident scene;

(3) immediately notify the appropriate responsible state agency and advise it of the necessary response;

(4) notify the sheriff or chief of police in whose jurisdiction the accident occurred; and

(5) coordinate field communications and summon additional resources requested by the emergency management team.

D. The responsible state agencies shall be:

(1) the New Mexico state police division of the public safety department for coordination, law enforcement and traffic and crowd control;

(2) the environmental improvement division of the health and environment department [department of environment] for assistance with accidents involving radioactive or hazardous materials or hazardous substances;

(3) the state fire marshal's office for assistance with any accident involving hazardous materials;

(4) the emergency medical services bureau of the health services division of the health and environment department [department of health] for assistance with accidents involving casualties;

(5) the emergency planning and coordination bureau of the public safety department and the military division of the department of military affairs for assistance with accidents which require the evacuation of the vicinity of the accident or the use of the national guard of New Mexico; and

(6) the state highway and transportation department for assistance with road closures, designating alternate routes and related services.

E. Other state agencies and local governments shall assist the responsible state agencies when requested to do so.

F. Any driver of a vehicle carrying hazardous materials involved in an accident which may cause injury to persons or property or any owner, shipper or carrier of hazardous materials involved in an accident who has knowledge of such accident or any owner or person in charge of any building, premises or facility where such an accident occurs shall immediately notify the New Mexico state police division of the public safety department by the quickest means of communication available.

History: Laws 1983, ch. 80, § 5; 1984, ch. 41, § 4; 1986, ch. 62, § 3; 1989, ch. 149, § 12.

ANNOTATIONS

Cross-references. - As to environmental improvement division, see 9-7-4 NMSA 1978.

As to state fire marshal's office, see 59A-52-1 NMSA 1978.

Bracketed material. - The bracketed reference to the department of environment in Subsection D(2) was inserted by the compiler, as Laws 1991, ch. 25, § 4 establishes the department of environment and provides that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment.

The bracketed reference to the department of health in Subsection D(4) was inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, and enacts a new 9-7-4 NMSA 1978, creating the department of health.

The bracketed material was not enacted by the legislature and is not part of the law.

Reporting of train accidents involving hazardous cargo. - A state corporation commission rule requiring telephonic reporting to the state police of train accidents involving hazardous cargo was not in conflict with this article, nor was it inconsistent with federal regulations promulgated under the federal Hazardous Materials Transportation Act. Southern Pac. Transp. Co. v. Corporation Comm'n, 105 N.M. 145, 730 P.2d 448 (1986).

Actions of officer upheld. - Actions of state police emergency officer and state police emergency response center were not violative of this section. Caillouette v. Hercules, Inc., 113 N.M. 492, 827 P.2d 1306 (Ct. App. 1992).

74-4B-6. Emergency management task force; created; powers and duties.

A. The "emergency management task force" is created, composed of:

(1) the chief or his designee, who shall serve as vice chairman of the task force;

(2) the state fire marshal or his designee;

(3) a staff member of the environmental improvement division who is knowledgeable about radioactive materials, to be designated by the director of the division;

(4) a staff member of the environmental improvement division who is knowledgeable about hazardous substances, to be designated by the director of the division;

(5) the director of the technical and emergency support division or his designee;

(6) the chief of the emergency medical services bureau or his designee;

(7) the secretary of highway and transportation or his designee;

(8) the chairman of the state corporation commission or his designee;

(9) a representative of the governor, to be appointed by the governor, who is not an employee of any agency represented on the task force and who shall serve as chairman of the task force;

(10) the secretary of taxation and revenue or his designee; and

(11) the director of the information systems division of the general services department or his designee.

B. The attorney general's office shall serve as attorney for the task force.

C. The task force shall, at the direction of the state emergency response commission, develop and monitor a comprehensive plan, to include:

(1) procedures for initially assessing the scope and nature of an accident;

(2) procedures for notifying and assembling the proper emergency management team from the responsible state agencies;

(3) procedures for siting and operating an on-scene command post;

(4) an inventory and assessment of manpower, equipment and training within each responsible state agency as well as other state agencies and local governments and federal and private sources;

(5) an assessment of the adequacy and availability of training materials and facilities to train and cross-train emergency response teams and other persons involved in responding to an accident and an identification of training requirements to assure that such persons are adequately trained;

(6) the development of training programs for emergency response teams and other persons involved in responding to an accident;

(7) procedures for decontamination of emergency management personnel and equipment as well as medical and other facilities which may be used in the management of the accident;

(8) identification of the medical resources in the state and the location of specialized medical facilities for use in medical emergencies;

(9) information and training programs for hospital emergency room personnel and doctors;

(10) procedures for accident assessment and record keeping;

(11) procedures for periodic emergency management preparedness exercises and testing of the plan;

(12) a designation of areas of responsibility in the emergency management plan, including but not limited to:

(a) command and control of the accident scene and overall responsibility and authority for all emergency response activity;

(b) public health and safety, including rescue operations, emergency medical services, evacuation and containment of the accident scene;

(c) sanitation and decontamination services at the accident scene;

(d) communications, including statewide and on-scene communications;

(e) public works and engineering;

(f) transportation;

(g) social services;

(h) accident assessment, investigation and record keeping;

(i) protective response, including hazardous materials exposure control;

(j) environmental monitoring, control and cleanup; and

(k) public information;

(13) criteria for determining when an accident may be handled by a local government;

(14) procedures for entering into cooperative agreements between the state and local governments and between the state and the federal government, Indian tribes and pueblos and bordering states pursuant to Section 74-4B-4 NMSA 1978; and

(15) identification of information management resources necessary for effective emergency response activity.

D. The task force shall develop liaison with the trucking industry, the railroads and other areas of the private sector in the formulation of the plan.

History: Laws 1983, ch. 80, § 6; 1984, ch. 41, § 5; 1986, ch. 62, § 4; 1987, ch. 268, § 41; 1989, ch. 149, § 13.

ANNOTATIONS

Cross-references. - As to the chairman of the state corporation commission, see N.M. Const., art. XI, § 4.

As to the environmental improvement division, see 9-7A-4 NMSA 1978.

As to the chief of the emergency medical services bureau, see 9-7-9 NMSA.

As to the information systems division of the general services department, see 9-17-3 and 15-1-2 NMSA 1978.

As to state fire marshal, see 59A-52-1 NMSA 1978.

74-4B-6.1. Hazardous materials emergency response administrator; created; duties.

A. The position of "hazardous materials emergency response administrator" is created within the technical and emergency support division of the public safety department.

B. The administrator shall, subject to the approval of the director of the technical and emergency support division of the public safety department, provide staff support to the task force and the board and shall:

(1) maintain inventories and data bases relevant to the task force and board activities;

(2) maintain current rosters of emergency response personnel and other contact persons with knowledge, resources and capabilities for emergency response functions;

(3) update the plan and accompanying documents at the direction of the task force;

(4) schedule activities required by the task force and board; and

(5) perform other duties requested by the task force and board in accordance with the provisions of the Emergency Management Act [this article] and the plan.

C. Money appropriated to the public safety department for administering the Emergency Management Act or received through grants or other sources shall be expended upon vouchers signed by the director of the technical and emergency support division of the public safety department.

History: 1978 Comp., § 74-4B-6.1, enacted by Laws 1984, ch. 41, § 6; 1986, ch. 62, § 5; 1989, ch. 149, § 14.

74-4B-7. Training officers.

Each responsible state agency shall designate one person who is knowledgeable in the area of hazardous materials accident response, as it applies to the functions of that agency, to be its training officer. It is the duty of the training officer to teach the appropriate personnel within the agency the proper methods of discharging the agency's responsibilities in responding to hazardous materials accidents. The training officer is also responsible for providing cross-training to personnel of other responsible state agencies and other persons as may be required by the hazardous materials safety board.

History: Laws 1983, ch. 80, § 7.

74-4B-8. Hazardous materials safety board; creation; duties.

A. There is created the "hazardous materials safety board", composed of the training officers of the responsible state agencies. The chairman of the board shall be elected by the members of the board.

B. The board shall, at the direction of the state emergency response commission:

(1) establish a curriculum of accident response training for the personnel of each responsible state agency designed to implement the plan adopted by the task force;

(2) certify to each responsible state agency those persons who have completed the training curriculum or parts of the curriculum;

(3) meet at least every four months to review the training needs of each responsible state agency and formulate a plan to meet those needs;

(4) conduct, under the direction and administration of the state fire marshal, an annual comprehensive training course for all appropriate personnel from responsible state agencies, other state agencies and local governments, which course shall include teaching the basic duties, responsibilities and procedures of responsible state agencies, other state agencies and local governments;

(5) in conjunction with the task force, prepare and submit to the state emergency response commission a budget for statewide training needs; and

(6) cooperate with and assist the task force as requested, including providing the task force with any requested information regarding safety and training of emergency response personnel.

History: Laws 1983, ch. 80, § 8; 1984, ch. 41, § 7; 1986, ch. 62, § 6; 1989, ch. 149, § 15.

ANNOTATIONS

Cross-references. - As to state fire marshal, see 59A-52-1 NMSA 1978.

74-4B-9. Accident review; report.

After any hazardous materials accident which required the presence of an emergency management team, including a local government team pursuant to a cooperative agreement, the board shall meet to review the performance of the team and to establish the probable cause of the accident. The board shall report its findings to the task force and the local government in whose jurisdiction the accident occurred; provided, however, the conclusions contained in the report shall not be admissible in evidence in any court proceeding to prove or disprove the negligence of any party found by the report to have contributed to the cause of the accident. The report shall be filed with the state corporation commission and the administrator.

History: Laws 1983, ch. 80, § 9; 1984, ch. 41, § 8.

74-4B-10. Clean-up.

Nothing in the Emergency Management Act [this article] shall be construed to relieve hazardous materials owners, shippers or carriers of their responsibilities and liability in the event of an accident. Such persons shall assist the state as requested in responding to an accident and are responsible for restoring the scene of the accident to the satisfaction of the state.

History: Laws 1983, ch. 80, § 10.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Third-party defense to liability under § 107 of Comprehensive Environmental Response, Compensation, and Liability Act (42 USCS § 9607), 105 A.L.R. Fed. 21.

74-4B-10.1. Good Samaritan law.

A. Notwithstanding any provision of law to the contrary, no person who provides assistance or advice in mitigating or attempting to mitigate the effects of an actual or threatened release of hazardous materials, or in preventing, cleaning up or disposing or attempting to prevent, clean up or dispose of such release, shall be subject to civil liabilities or penalties of any type.

B. The immunity provided for in Subsection A of this section does not apply to any person:

(1) whose act or omission caused, in whole or in part, the actual or threatened release of hazardous materials and who would otherwise be liable; or

(2) who receives compensation other than reimbursement for out-of-pocket expenses for his services in rendering assistance or advice.

C. Nothing in this section shall be construed to limit or otherwise affect the liability of any person for damages resulting from that person's gross negligence or reckless, wanton or intentional misconduct.

History: 1978 Comp., § 74-4B-10.1, enacted by Laws 1984, ch. 41, § 9.

ANNOTATIONS

Cross-references. - As to effect of this article on immunity law, see 74-4B-4 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57A Am. Jur. 2d Negligence §§ 98, 114, 115.

Construction and application of "Good Samaritan" statutes, 68 A.L.R.4th 294.

74-4B-11. Repealed.

ANNOTATIONS

Repeals. - Laws 1989, ch. 149, § 16 repeals 74-4B-11 NMSA 1978, as amended by Laws 1986, ch. 62, § 7, relating to report of task force to committee governor and legislature, effective July 1, 1989. For provisions of former section, see 1988 Replacement Pamphlet.

74-4B-12. Repealed.

ANNOTATIONS

Repeals. - Laws 1991, ch. 44, § 3 repeals 74-4B-12 NMSA 1978, as amended by Laws 1989, ch. 324, § 37, pertaining to the emergency response fund, effective July 1, 1991. For provisions of former section, see 1990 Replacement Pamphlet.

74-4B-13. Orphan material recovery fund established.

A. There is created in the state treasury the "orphan material recovery fund". The fund shall be invested as other state funds are invested. All money remaining in the orphan material recovery fund at the end of any fiscal year shall remain in that fund.

B. The department shall administer the orphan material recovery fund. Money in the fund is appropriated to the department for the purpose of contracting for the disposal of orphan hazardous materials:

(1) held in the possession of the department; and

(2) identified by state emergency response officers.

C. Any expenditures made from the orphan material recovery fund that are recovered from the party responsible for the orphan hazardous materials shall be credited to the fund.

D. If the cost of disposing orphan hazardous materials exceeds the balance available in the orphan material recovery fund, the secretary is authorized to seek and the state board of finance is authorized to disburse funds from the state board of finance emergency fund in an amount necessary to cover the deficit in the orphan material recovery fund.

History: Laws 1992, ch. 5, § 2.

ANNOTATIONS

Effective dates. - Laws 1992, ch. 5 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23 is effective on May 20, 1992.

74-4B-14. Cleanup of orphan hazardous materials; department recourse.

The department may assess charges against persons responsible for orphan hazardous materials for costs the department incurs in cleanup of the orphan hazardous materials and for damage to state property. Amounts received in payment of assessments for cleanup of the orphan hazardous materials shall be deposited in the orphan material recovery fund. Amounts received in payment of assessments for damage to state property shall be used to repair the damage. Any person who is assessed charges pursuant to this section may appeal the assessment to the district court within thirty days of receipt of notice of the assessment.

History: Laws 1992, ch. 5, § 3.

ANNOTATIONS

Effective dates. - Laws 1992, ch. 5 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23 is effective on May 20, 1992.

ARTICLE 4C
HAZARDOUS WASTE FEASIBILITY STUDIES

74-4C-1. Short title.

This act [74-4C-1 to 74-4C-4 NMSA 1978] may be cited as the "Hazardous Waste Feasibility Study Act".

History: Laws 1985 (1st S.S.), ch. 4, § 1.

74-4C-2. Findings.

A. The legislature recognizes that there is a growing need to identify the magnitude of hazardous waste generation in New Mexico and sites at which materials classified as hazardous wastes can be treated or disposed of. The selection of sites for such hazardous waste activities is a complex technical, environmental, logistical, legal and institutional problem because of the many interdependent factors that must be considered.

B. The legislature further finds that public understanding of the importance of safe treatment and disposal of hazardous wastes is critical in addressing New Mexico's hazardous waste problem.

C. The legislature further finds that, because of the 1984 reauthorization and amendments to the federal Resource Conservation and Recovery Act, an increased number of hazardous waste generators throughout the state will be regulated and therefore a greater economic burden will fall upon these entities.

History: Laws 1985 (1st S.S.), ch. 4, § 2.

ANNOTATIONS

Resource Conservation and Recovery Act. - The federal Resource Conservation and Recovery Act, referred to in Subsection C, appears as 42 U.S.C. § 6901 et seq.

74-4C-3. Definitions.

As used in the Hazardous Waste Feasibility Study Act [74-4C-1 to 74-4C-4 NMSA 1978]:

A. "committee" means the radioactive materials committee [radioactive and hazardous materials committee];

B. "division" means the environmental improvement division of the health and environment department [department of environment];

C. "hazardous waste" means garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility or other discarded material, including solid, liquid, semisolid or containing gaseous material resulting from industrial, commercial, mining or agricultural operations, other than waste pesticides disposed of by a farmer pursuant to Section 74-4-3.1 NMSA 1978, or from community activities which, because of its quantity, concentration or physical, chemical or infectious characteristics, may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness, or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed. The term hazardous waste does not include solid or dissolved material in domestic sewage, or animal excrement in connection with farm, ranch or feedlot operations, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under Section 402 of the Water Pollution Control Act, as amended, as the provisions exist on January 1, 1981; or source, special or byproduct material as defined in the Atomic Energy Act of 1954, as amended, as these definitions exist on January 1, 1981; or any of the following, until the environmental improvement board determines that they are subject to Subtitle C of the Resource Conservation and Recovery Act, as amended (42 U.S.C. 6921 et seq.): drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil or natural gas or geothermal energy; any fly ash waste, bottom ash waste, slag waste or flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels; solid waste from the extraction, beneficiation or processing of

ores and minerals, including phosphate rock and overburden from the mining of uranium ore; cement kiln dust waste; or pesticide waste disposed of by any farmer from his own use, provided that he triple rinses each emptied pesticide container and disposes of the pesticide residues on his own farm in a manner consistent with the disposal instructions on the pesticide label; and

D. "hazardous waste activity" means the generation, treatment, storage, transportation or disposal of hazardous waste.

History: Laws 1985 (1st S.S.), ch. 4, § 3.

ANNOTATIONS

Cross-references. - As to the environmental improvement board, see 74-1-4 NMSA 1978.

Bracketed material. - The bracketed reference to "radioactive and hazardous materials committee" in Subsection A was inserted by the compiler, as the radioactive materials committee is now the radioactive and hazardous materials committee. See 74-4A-9 NMSA 1978. The bracketed insertion was not enacted by the legislature and is not part of the law.

The bracketed reference to the department of environment was inserted by the compiler, as Laws 1991, ch. 25, § 4 establishes the department of environment and provides that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment. The bracketed material was not enacted by the legislature and is not part of the law.

Water Pollution Control Act. - Section 402 of the federal Water Pollution Control Act, referred to in Subsection C, appears as 33 U.S.C. § 1342.

Atomic Energy Act of 1954. - The federal Atomic Energy Act of 1954, referred to in Subsection C, appears as 42 U.S.C. § 2011 et seq.

74-4C-4. Hazardous waste feasibility study.

A. The committee, after consultation with the division as to the scope of the study, shall contract with public or private entities to study the magnitude of the problem of hazardous waste generation and disposal in New Mexico, including current and projected hazardous waste generation rates. If the committee determines that generation rates and transportation costs for out-of-state disposal are significant, the study shall address the need, location, conceptual design, ownership and estimated cost of a hazardous waste transfer facility to be located within the state. The facility should be capable of handling both small and large quantities of hazardous wastes. The committee shall provide for public hearing and input during the conduct of the study.

B. If the committee determines that there is a need for one or more hazardous waste transfer and waste exchange facilities, it shall make appropriate recommendations to the legislature.

History: Laws 1985 (1st S.S.), ch. 4, § 4.

ARTICLE 4D
PETROLEUM STORAGE CLEANUP

(Repealed by Laws 1990, ch. 124, § 23.)

74-4D-1 to 74-4D-8. Repealed.

ANNOTATIONS

Repeals. - Laws 1990, ch. 124, § 23 repeals 74-4D-1 to 74-4D-8, as enacted by Laws 1988, ch. 70, §§ 1 to 7 and 12, and as amended by Laws 1989, ch. 324, § 38, and Laws 1989, ch. 305, §§ 1 and 2, relating to petroleum storage cleanup, effective July 1, 1990. For provisions of former sections, see 1989 Replacement Pamphlet.

ARTICLE 4E
HAZARDOUS CHEMICALS INFORMATION ACT

74-4E-1. Short title.

Sections 1 through 9 [74-4E-1 to 74-4E-9 NMSA 1978] of this act may be cited as the "Hazardous Chemicals Information Act".

History: Laws 1989, ch. 149, § 1.

74-4E-2. Purpose of act.

The purpose of the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978] is to ensure that current information on the nature and location of hazardous chemicals is available to local emergency planning committees, emergency responders and the public as required by Title III.

History: Laws 1989, ch. 149, § 2.

ANNOTATIONS

Meaning of Title III. - See Subsection H of 74-4E-3 NMSA 1978.

74-4E-3. Definitions.

As used in the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978]:

A. "commission" means the state emergency response commission;

B. "department" means the public safety department;

C. "emergency responder" means any law enforcement officer, firefighter, medical services professional or other person trained and equipped to respond to hazardous chemical releases;

D. "hazardous chemical" means any hazardous chemical, extremely hazardous substance, toxic chemical or hazardous material as defined by Title III;

E. "facility owner or operator" means any individual, trust, firm, joint stock company, corporation, partnership, association, state agency, municipality or county having legal control or authority over buildings, equipment, structures and other stationary items which are located on a single site or on contiguous or adjacent sites. For the purposes of Section 5 [74-4E-5 NMSA 1978] of the Hazardous Chemicals Information Act, the term includes owners or operators of motor vehicles, rolling stock and aircraft;

F. "local emergency planning committee" means any local group appointed by the commission to undertake chemical release contingency planning;

G. "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment of any hazardous chemical, extremely hazardous substance or toxic chemical. "Release" includes the abandonment or discarding of barrels, containers and other closed receptacles; and

H. "Title III" means the federal Emergency Planning and Community Right-to-Know Act of 1986.

History: Laws 1989, ch. 149, § 3.

ANNOTATIONS

Emergency Planning and Community Right-to-Know Act of 1986. - The federal Emergency Planning and Community Right-to-Know Act of 1986, referred to in Subsection H, appears as 42 U.S.C. §§ 11001 to 11005, 11021 to 11023, and 11041 to 11050.

74-4E-4. Commission created; membership; terms; duties; immunity granted.

A. The "state emergency response commission" is created. The commission shall consist of seven members who shall be qualified voters of the state of New Mexico. All members shall be appointed by the governor. Among the members appointed, there shall be representatives of private industry, federal facilities, public health and public safety. Appointments shall be made for four-year terms to expire on January 1 of the appropriate year. Commission members shall serve staggered terms as determined by the governor at the time of their initial appointments. Annually, the governor shall designate, from among the members, a chairman of the commission.

B. The commission shall:

(1) exercise supervisory authority to implement Title III within New Mexico;

(2) prescribe all reporting forms required by the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978];

(3) provide direction to the emergency management task force and the hazardous materials safety board;

(4) report periodically to the radioactive and hazardous materials committee; and

(5) report annually to the governor and the legislature.

C. The commission may solicit and accept grants from federal or private sources for undertakings that further the purpose of the Hazardous Chemicals Information Act or the Emergency Management Act [Chapter 74, Article 4B NMSA 1978] and may make contracts necessary to carry out the purposes of both of those acts.

D. Commission members shall not vote by proxy. A majority of the members constitute a quorum for the conduct of business.

E. Commission members shall not be paid but shall receive per diem and mileage expenses as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

F. Immunity from tort liability for emergency response actions, including planning or preparation therefore, is granted to the state, its subdivisions and all their agencies, officers, agents and employees. Any waiver of immunity from tort liability granted under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall not be applicable to disaster or emergency response or planning.

History: Laws 1989, ch. 149, § 4.

ANNOTATIONS

Meaning of Title III. - See Subsection H of 74-4E-3 NMSA 1978.

74-4E-5. Notices and reports required; deadlines set.

A. Any facility owner or operator who is required by any section of Title III to file a written notice or report to the commission shall file that notice or report on or before the required deadline with the department. With the exception of the written follow-up emergency notice required in Section 304(c) of Title III, all notices shall be filed annually and shall confirm or amend information previously filed. Facility owners or operators shall file with the department:

(1) notice that an extremely hazardous substance, at or above a specified quantity, is present at a facility;

(2) notice that a release of any chemical substance has occurred at or above reportable quantities determined by the commission. The contents of the notice shall be determined by the commission. The notice shall be filed as soon as practicable following a release;

(3) an inventory form covering each hazardous material. This form shall be filed annually on or before March 1; and

(4) a toxic chemical release inventory form. This reporting requirement shall apply to facility owners and operators that have ten or more employees and that are in standard industrial classification codes 20 through 39, as in effect July 1, 1985. The form shall be filed annually on or before July 1.

B. The commission may simplify forms to be used for reporting, set deadlines for filing written notices or reports and adopt other regulations for the enforcement of the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978].

History: Laws 1989, ch. 149, § 5.

ANNOTATIONS

Meaning of Title III. - See Subsection H of 74-4E-3 NMSA 1978.

74-4E-6. Availability of information to the public; regulations promulgated.

A. The department shall make information, not defined as confidential, gathered under Section 5 [74-4E-5 NMSA 1978] of the Hazardous Chemicals Information Act available to any citizen of the state upon written request.

B. The department shall promulgate policies and procedures for receiving and processing requests for information under Subsection A of this section.

History: Laws 1989, ch. 149, § 6.

74-4E-7. Repealed.

ANNOTATIONS

Repeals. - Laws 1989, ch. 149, § 17 repeals 74-4E-7 NMSA 1978, as enacted by Laws 1989, ch. 149, § 7, relating to creation of the hazardous chemicals information management fund, effective July 1, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

74-4E-8. Hazardous chemicals reporting fees; schedule; distribution.

A. Any facility owner or operator required to file an inventory form covering a hazardous material as required in Paragraph (3) of Subsection A of Section 5 [74-4E-5 NMSA 1978] of the Hazardous Chemicals Information Act shall pay at the time of filing a fee of twenty-five dollars ($25.00) per inventory form. In no case shall a facility owner or operator pay more than two hundred fifty dollars ($250) in any calendar year for all forms, notices and reports required by that section.

B. Federal governmental agencies, the state and its political subdivisions and other public institutions shall be exempt from the payment of any fee imposed in this section.

C. Fees collected pursuant to this section shall be deposited in the hazardous chemicals information management fund and distributed to the department at the end of each month.

D. The provisions of this section shall be administered pursuant to the provisions of the Tax Administration Act [Chapter 7, Article 1 NMSA 1978].

History: Laws 1989, ch. 149, § 8.

74-4E-9. Failure to file or pay fees; penalty.

After July 1, 1990, any facility owner or operator who knowingly, willfully, and intentionally fails to file any notice, form or report or to pay any fee required by the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978] shall pay a civil penalty no greater than five thousand dollars ($5,000) for each violation. All civil penalties shall be deposited in the hazardous chemicals information management fund.

History: Laws 1989, ch. 149, § 9.

ARTICLE 5
AEROSOL PRODUCTS

74-5-1. Legislative findings.

The legislature finds:

A. that the deliberate inhalation of certain aerosol products has become so widespread in this state, particularly among children and young adults from low-income backgrounds, that it is now a leading drug problem in some areas; that an increasing number of individuals have died from such deliberate inhalation; that other known effects from such deliberate inhalation are permanent brain, lung, liver and kidney damage; that the best available scientific information indicates the specific components of aerosol spray products which are dangerous, and that, therefore, the deliberate inhalation of aerosol spray products presents an immediate danger to the public health, safety and welfare of the citizens, and future citizens, of this state; and

B. that available scientific information indicates a substantial possibility that fluoroalkanes, a major component of certain aerosol spray products, when discharged into the atmosphere, dissipate or impair the earth's protective layer of ozone; that the dissipation or impairment of even a small portion of the ozone layer is likely to decrease the screening of ultraviolet radiation; that any significant increase in human exposure to ultraviolet radiation is likely to increase the risk of skin cancer and other serious illness; that any significant increase in exposure of the environment to ultraviolet radiation may endanger the environment; and that therefore, the release of these aerosol spray products into the atmosphere is a significant hazard to the public health, safety and welfare of the citizens, and future citizens, of this state.

History: 1978 Comp., § 74-5-1, enacted by Laws 1977, ch. 384, § 1.

74-5-2. Repealed.

ANNOTATIONS

Repeals. - Laws 1979, ch. 82, § 3, repeals 74-5-2 NMSA 1978, relating to restrictions on the sale of certain aerosol products, effective March 16, 1979.

ARTICLE 6
WATER QUALITY

74-6-1. Short title. (Effective until July 1, 1994.)

This act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978] may be cited as the "Water Quality Act".

History: 1953 Comp., § 75-39-1, enacted by Laws 1967, ch. 190, § 1.

ANNOTATIONS

Delayed repeals. - See 74-6-14 NMSA 1978.

Cross-references. - For the Pollution Control Revenue Bond Act, see 3-59-1 NMSA 1978 et seq.

Water laws apply on Indian land. - Where non-Indians enter into long-term lease with an Indian tribe under which the non-Indians are to develop the land as a subdivision, state laws concerning subdivision control, construction licensing and water cannot be held inapplicable to the lessee because of federal preemption. Norvell v. Sangre de Cristo Dev. Co., 372 F. Supp. 348 (D.N.M. 1974), rev'd on other grounds, 519 F.2d 370 (10th Cir. 1975).

Provided Indian proprietary interest and self-government unimpaired. - The application of state antipollution laws to industries located on Indian land is valid, provided that the operation of those laws neither impairs the proprietary interest of the Indian people in their lands nor limits the right of the tribe or pueblo to govern matters of tribal relations. The regulation of industrial discharges is not a matter fundamental to tribal relations, and the state supervision of environment pollution will not limit, in any meaningful manner, the right of the several Indian peoples to govern themselves. The extension of pollution controls to industries located on Indian land will not affect the ownership or control of the land. 1970 Op. Att'y Gen. No. 70-5.

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 Nat. Resources J. 693 (1979).

For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

For article, "Information for State Groundwater Quality Policymaking," see 24 Nat. Resources J. 1015 (1984).

For article, "Transboundary Toxic Pollution and the Drainage Basin Concept," see 25 Nat. Resources J. 589 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 134 et seq.

Standing to sue for violation of state environmental regulatory statute, 66 A.L.R.4th 685.

Measure and elements of damages for pollution of well or spring, 76 A.L.R.4th 629.

Liability insurance coverage for violations of antipollution laws, 87 A.L.R.4th 444.

39A C.J.S Health and Environment § 131.

74-6-2. Definitions. (Effective until July 1, 1994.)

As used in the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978]:

A. "water contaminant" means any substance which alters the physical, chemical or biological qualities of water;

B. "water pollution" means introducing or permitting the introduction into water, either directly or indirectly, of one or more water contaminants in such quantity and of such duration as may with reasonable probability injure human health, animal or plant life or property, or to unreasonably interfere with the public welfare or the use of property;

C. "wastes" means sewage, industrial wastes or any other liquid, gaseous or solid substance which will pollute any waters of the state;

D. "sewer system" means pipelines, conduits, pumping stations, force mains or any other structures, devices, appurtenances or facilities used for collecting or conducting wastes to an ultimate point for treatment or disposal;

E. "treatment works" means any plat or other works used for the purpose of treating, stabilizing or holding wastes;

F. "sewerage system" means a system for disposing of wastes, either by surface or underground methods, and includes sewer systems, treatment works, disposal wells and other systems;

G. "water" means all water including water situated wholly or partly within or bordering upon the state, whether surface or subsurface, public or private, except private waters that do not combine with other surface or subsurface water;

H. "person" means the state or any agency, institution or political subdivision thereof, any public or private corporation, individual, partnership, association or other entity, and includes any officer, or governing or managing body of any political subdivision or public or private corporation;

I. "commission" means the water quality control commission;

J. "constituent agency" means, as the context may require, any or all of the following agencies of the state:

(1) the environmental improvement division of the health and environment department [department of environment];

(2) the state engineer and the interstate stream commission;

(3) the New Mexico department of game and fish;

(4) the oil conservation commission;

(5) the state park and recreation commission [state park and recreation division of the energy, minerals and natural resources department];

(6) the New Mexico department of agriculture;

(7) the state natural resource conservation commission [soil and water conservation division]; and

(8) the New Mexico bureau of mines [bureau of mines and mineral resources at the New Mexico institute of mining and technology]; and

K. "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance applicable to the source.

History: 1953 Comp., § 75-39-2, enacted by Laws 1967, ch. 190, § 2; 1970, ch. 64, § 1; 1971, ch. 277, § 49; 1973, ch. 326, § 1; 1977, ch. 253, § 73.

ANNOTATIONS

Delayed repeals. - See 74-6-14 NMSA 1978.

Bracketed material. - The bracketed reference to "state park and recreation division of the energy, minerals and natural resources department" in Paragraph (5) of Subsection J was inserted by the compiler, as the park and recreation commission was abolished by Laws 1977, ch. 254, § 4. Section 9-5A-3 NMSA 1978 establishes the energy, minerals and natural resources department, consisting of several divisions, including a state park and recreation division. Section 16-2-3 NMSA 1978 provides that references to the commission shall mean the state park and recreation division.

The bracketed reference in Subsection J(7) to the soil and water conservation division was inserted by the compiler, as Laws 1977, ch. 254, § 58, amends 73-20-28 NMSA 1978, changing the name of the natural resource conservation commission to the "soil and water conservation commission"; said commission is headed by a chairman. See 73-20-29 NMSA 1978.

The bracketed reference in Subsection J(8) was inserted by the compiler, as "New Mexico bureau of mines" refers to the bureau of mines and mineral resources, established by 69-1-1 NMSA 1978 as a department of the New Mexico institute of mining and technology.

The bracketed reference to the department of environment was inserted by the compiler, as Laws 1991, ch. 25, § 4 establishes the department of environment and provides that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment. The bracketed material was not enacted by the legislature and is not part of the law.

Law reviews. - For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

74-6-3. Water quality control commission created. (Effective until July 1, 1994.)

A. There is created the "water quality control commission" consisting of:

(1) the director of the environmental improvement division of the health and environment department [department of environment] or a member of his staff designated by him;

(2) the director of the department of game and fish or a member of his staff designated by him;

(3) the state engineer or a member of his staff designated by him;

(4) the chairman of the oil conservation commission or a member of his staff designated by him;

(5) the director of the state park and recreation division of the energy, minerals and natural resources department or a member of his staff designated by him;

(6) the director of the New Mexico department of agriculture or a member of his staff designated by him;

(7) the chairman of the soil and water conservation commission or a member of his staff designated by him;

(8) the director of the bureau of mines and mineral resources at the New Mexico institute of mining and technology or a member of his staff designated by him; and

(9) a representative of the public to be appointed by the governor for a term of four years and who shall be compensated from the budgeted funds of the health and environment department in accordance with the provisions of the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

B. No member of the commission shall receive or shall have received, during the previous two years, a significant portion of his income directly or indirectly from permit holders or applicants for a permit and shall, upon the acceptance of his appointment

and prior to the performance of any of his duties, file a statement of disclosure with the secretary of state disclosing any amount of money or other valuable consideration, and its source, the value of which is in excess of ten percent of his gross personal income in each of the preceding two years, that he received directly or indirectly from permit holders or applicants for permits required under the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978].

C. The commission shall elect a chairman and other necessary officers and shall keep a record of its proceedings.

D. A majority of the commission constitutes a quorum for the transaction of business, but no action of the commission is valid unless concurred in by five or more members present at a meeting.

E. The commission is the state water pollution control agency for this state for all purposes of the Federal Water Pollution Control Act, the Water Quality Act of 1965 and the Clean Waters Restoration Act of 1966, and may take all action necessary and appropriate to secure to this state, its political subdivisions or interstate agencies the benefits of these acts.

F. The commission is administratively attached, as defined in the Executive Reorganization Act [9-1-1 to 9-1-10 NMSA 1978], to the health and environment department.

History: 1953 Comp., § 75-39-3, enacted by Laws 1967, ch. 190, § 3; 1970, ch. 64, § 2; 1971, ch. 277, § 50; 1973, ch. 326, § 2; 1977, ch. 253, § 74; 1987, ch. 234, § 81.

ANNOTATIONS

Delayed repeals. - See 74-6-14 NMSA 1978.

Cross-references. - As to exemption of water quality control commission from authority of secretary of environment, see 9-7A-13 NMSA 1978.

As to director of the New Mexico department of game and fish, see 17-1-5 NMSA 1978.

As to the chairman of the oil conservation commission, see 70-2-4 NMSA 1978.

As to the state engineer, see 72-2-1 NMSA 1978.

As to the director of the New Mexico department of agriculture, see 76-1-3 NMSA 1978.

Bracketed material. - The bracketed reference to the department of environment was inserted by the compiler, as Laws 1991, ch. 25, § 4 establishes the department of environment and provides that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of

environment. The bracketed material was not enacted by the legislature and is not part of the law.

Federal acts. - The Federal Water Pollution Control Act, the Water Quality Act of 1965 and the Clean Waters Restoration Act of 1966, all referred to in Subsection E, were compiled as 33 U.S.C. § 1151 et seq., but are now omitted as superseded by 33 U.S.C. § 1251 et seq.

Health and environment department. - Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, referred to in Subsections A(9) and F, and enacts a new 9-7-4 NMSA 1978, creating the department of health. Laws 1991, ch. 25, § 4 creates the department of environment. Under 9-7-5 NMSA 1978 the administrative head of the department of health is the secretary of health. Under 9-7A-5 NMSA 1978 the administrative head of the department of environment is the secretary of environment.

Division may propose regulations to commission and act as interested party at hearings. - In light of the fact that the legislature has seen fit to have the director of the environmental improvement division sit as a member of the commission, the division may propose regulations to the commission and then act as an interested party at the hearings. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982)(decided prior to 1982 amendment of 74-6-9 NMSA 1978).

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

For annual survey of New Mexico law relating to administrative law, see 13 N.M.L. Rev. 235 (1983).

74-6-4. Duties and powers of commission. (Effective until July 1, 1994.)

The commission:

A. may accept and supervise the administration of loans and grants from the federal government and from other sources, public or private, which loans and grants shall not be expended for other than the purposes for which provided;

B. shall adopt a comprehensive water quality program and develop a continuing planning process;

C. shall adopt water quality standards as a guide to water pollution control;

D. shall adopt, promulgate and publish regulations to prevent or abate water pollution in the state or in any specific geographic area or watershed of the state or in any part thereof, or for any class of waters. Regulations shall not specify the method to be used to prevent or abate water pollution, but may specify a standard of performance for new sources which reflects the greatest degree of effluent reduction which the commission determines to be achievable through application of the best available demonstrated control technology, processes, operating methods or other alternatives, including where practicable, a standard permitting no discharge of pollutants. In making its regulations, the commission shall give weight it deems appropriate to all facts and circumstances, including but not limited to:

(1) character and degree of injury to or interference with health, welfare and property;

(2) the public interest, including social and economic value of the sources of water contaminants;

(3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved;

(4) successive uses, including but not limited to, domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses;

(5) feasibility of a user or a subsequent user treating the water before a subsequent use; and

(6) property rights and accustomed uses;

E. shall assign responsibility for administering its regulations to constituent agencies so as to assure adequate coverage and prevent duplication of effort. To this end, the commission may make such classification of waters and sources of water contaminants as will facilitate the assignment of administrative responsibilities to constituent agencies. The commission shall also hear and decide disputes between constituent agencies as to jurisdiction concerning any matters within the purpose of the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978]. In assigning responsibilities to constituent agencies, the commission shall give priority to the primary interests of the constituent agencies. The environmental improvement division of the health and environment department [department of environment] shall provide testing and other technical services;

F. may enter into or authorize constituent agencies to enter into agreements with the federal government or other state governments for purposes consistent with the Water Quality Act and receive and allocate to constituent agencies funds made available to the commission;

G. may grant an individual variance from any regulation of the commission, whenever it is found that compliance with the regulation will impose an unreasonable burden upon any lawful business, occupation or activity. The commission may grant a variance conditioned upon a person effecting a particular abatement of water pollution within a reasonable period of time. Any variance shall be granted for the period of time specified by the commission. The commission shall adopt regulations specifying the procedure under which variances may be sought, which regulations shall provide for the holding of a public hearing before any variance may be granted;

H. may adopt regulations to require the filing with it or a constituent agency, of proposed plans and specifications for the construction and operation of new sewer systems, treatment works or sewerage systems or extensions, modifications of or additions to new or existing sewer systems, treatment works or sewerage systems. Filing with or approval by the federal housing administration of plans for an extension to an existing or construction of a new sewerage system intended to serve a subdivision substantially residential in nature shall be deemed compliance with all provisions of this subsection;

I. may adopt regulations requiring notice to it or a constituent agency of intent to introduce or allow the introduction of water contaminants into waters of the state;

J. may adopt regulations establishing pretreatment standards that prohibit or control the introduction into publicly owned sewerage systems of water contaminants which are not susceptible to treatment by the treatment works or which would interfere with the operation of the treatment works;

K. shall not require a permit respecting the use of water in irrigated agriculture, except in the case of the employment of a specific practice in connection with such irrigation that documentation or actual case history has shown to be hazardous to public health; and

L. shall coordinate application procedures and funding cycles for loans and grants from the federal government and from other sources, public or private, with the local government division of the department of finance and administration pursuant to the New Mexico Community Assistance Act.

History: 1953 Comp., § 75-39-4, enacted by Laws 1967, ch. 190, § 4; 1970, ch. 64, § 3; 1971, ch. 277, § 51; 1973, ch. 326, § 3; 1981, ch. 347, § 1; 1984, ch. 5, § 13.

ANNOTATIONS

Delayed repeals. - See 74-6-14 NMSA 1978.

Cross-references. - For certification of utility operators, see 61-33-1 NMSA 1978 et seq.

Bracketed material. - The bracketed reference to the department of environment was inserted by the compiler, as Laws 1991, ch. 25, § 4 establishes the department of

environment and provides that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment. The bracketed material was not enacted by the legislature and is not part of the law.

New Mexico Community Assistance Act. - See 11-6-1 NMSA 1978 and notes thereto.

Discretion in consideration of factors. - In adopting standards for organic compounds in groundwater, Subsection D does not require the record to contain the commission's consideration of every part within the six factors for each organic compound. The commission possesses reasonable discretion in its consideration of the six factors and in the weight it gives to each factor. Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1988).

No requirement that commission consider complete environmental impact. - There is no specific requirement in the commission's mandate that it consider to the fullest extent possible the environmental consequences of its action. The commission could in all good faith adopt a regulation governing the effluent quality of sewage so restrictive that municipalities would turn to methods other than those currently used to dispose of it which would have adverse environmental consequences far more serious than some pollution of the waters of the state. City of Roswell v. New Mexico Water Quality Control Comm'n, 84 N.M. 561, 505 P.2d 1237 (Ct. App. 1972), cert. denied, 84 N.M. 560, 505 P.2d 1236 (1973) (decided under former law).

Commission may delegate authority to administer regulations. - Where the commission gives the environmental improvement division the authority to administer certain regulations, there is no unlawful delegation of authority. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982).

Numerical standards for organic compounds in rainwater. - The adoption of numerical standards for organic compounds in rainwater was not arbitrary and capricious, as they were technically achievable within the meaning of Subsection D. Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1988).

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For note, "Ground and Surface Water in New Mexico: Are They Protected Against Uranium Mining and Milling?" see 18 Nat. Resources J. 941 (1978).

For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 Nat. Resources J. 693 (1979).

For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

For article, "Information for State Groundwater Quality Policymaking," see 24 Nat. Resources J. 1015 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 133, 134.

39A C.J.S. Health and Environment §§ 133 to 136.

74-6-5. Permits; appeals; penalty. (Effective until July 1, 1994.)

A. By regulation the commission may require persons to obtain from a constituent agency designated by the commission a permit for the discharge of any water contaminant either directly or indirectly into water.

B. Prior to the issuance of a permit, the constituent agency may require the submission of plans, specifications and other relevant information which it deems necessary.

C. The commission shall by regulation set the dates upon which applications for permits shall be filed and designate the time periods within which the constituent agency shall, after the filing of an application for a permit, either grant the permit, grant the permit subject to conditions or deny the permit.

D. The constituent agency may deny any application for a permit if:

(1) it appears that the effluent would not meet applicable state or federal effluent regulations or limitations;

(2) any provision of the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978] would be violated; or

(3) it appears that the effluent would cause any state or federal stream standard to be exceeded.

E. The commission shall by regulation develop procedures which will insure that the public, affected governmental agencies and any other state whose water may be affected shall receive notice of each application for issuance or modification of a permit. No ruling shall be made on any application for a permit without opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.

F. Permits shall be issued for fixed terms not to exceed five years, except that for new discharges, the term of the permit shall commence on the date the discharge begins,

but in no event shall the term of the permit exceed seven years from the date the permit was issued.

G. By regulation the commission may impose reasonable conditions upon permits requiring permittees to:

(1) install, use and maintain effluent monitoring devices;

(2) sample effluents in accordance with methods and at locations and intervals as may be prescribed by the commission;

(3) establish and maintain records of the nature and amounts of effluents and the performance of effluent control devices;

(4) provide any other information relating to the discharge of water contaminants; and

(5) notify a constituent agency of the introduction of new water contaminants from a new source and of a substantial change in volume or character of water contaminants being introduced from sources in existence at the time of the issuance of the permit.

H. The commission shall provide by regulation a schedule of fees for permits not exceeding the estimated cost of investigation and issuance, modification and renewal of permits. Fees collected pursuant to this section shall be deposited in the water quality management fund. Effective July 1, 1992, all fees collected pursuant to this section shall be deposited in the general fund.

I. The issuance of a permit does not relieve any person from the responsibility of complying with the provisions of the Water Quality Act and any applicable regulations of the commission.

J. A permit may be terminated or modified by the constituent agency which issued it previous to its date of expiration for any of the following causes:

(1) violation of any condition of the permit;

(2) obtaining the permit by misrepresentation or failure to disclose fully all relevant facts;

(3) violation of any provisions of the Water Quality Act;

(4) violation of any applicable state or federal effluent regulations; or

(5) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

K. If the constituent agency denies, terminates or modifies a permit or grants a permit subject to condition, the constituent agency must notify the applicant or permittee by

certified mail of the action taken and the reasons. If the applicant or permittee is dissatisfied with the action taken by the constituent agency, he may file a petition for hearing before the commission. The petition shall be made in writing to the director of the constituent agency within thirty days after notice of the constituent agency's action has been received by the applicant or permittee. Unless a timely request for hearing is made, the decision of the constituent agency shall be final.

L. If a timely petition for hearing is made, the commission shall hold a hearing within thirty days after receipt of the petition. The constituent agency shall notify the petitioner by certified mail of the date, time and place of the hearing. Provided that if the commission upon receipt of the petition deems the basis for the petition for hearing by the commission is affected with substantial public interest, it shall insure that the public shall receive notice of the date, time and place of the hearing and shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. Any public member submitting data, views or arguments orally or in writing shall be subject to examination at the hearing. In the hearing, the burden of proof shall be upon the petitioner. The commission may designate a hearing officer to take evidence in the hearing. Based upon the evidence presented at the hearing, the commission shall sustain, modify or reverse the action of the constituent agency.

M. If the petitioner requests, the hearing shall be recorded at the cost of the petitioner. Unless the petitioner requests that the hearing be recorded, the decision of the commission shall be final.

N. A petitioner may appeal the decision of the commission by filing with the court of appeals a notice of appeal within thirty days after the date the decision is made. The appeal shall be on the record made at the hearing. The petitioner shall certify in his notice of appeal that arrangements have been made with the commission for preparation of a sufficient number of transcripts of the record of the hearing on which the appeal depends to support his appeal to the court, at the expense of the petitioner, including two copies which he shall furnish to the commission.

O. A person who violates any provision of this section is guilty of a misdemeanor and shall be punished by a fine of not less than three hundred dollars ($300) or more than ten thousand dollars ($10,000) per day or by imprisonment for not more than one year or both.

P. In addition to the remedy provided in Subsection O of this section, the trial court may impose a civil penalty for a violation of any provision of this section not exceeding five thousand dollars ($5,000) per day.

History: 1953 Comp., § 75-39-4.1, enacted by Laws 1973, ch. 326, § 4; 1985, ch. 157, § 1; 1989, ch. 248, § 1.

ANNOTATIONS

Delayed repeals. - See 74-6-14 NMSA 1978.

Temporary provisions. - Laws 1989, ch. 248, § 2, effective June 16, 1989, creates in the state treasury the "water quality management fund" to be administered by the environmental improvement division of the health and environment department, provides for the deposit of fees collected and for appropriation of money in the fund to the division for the purpose of paying the costs of administering any regulations promulgated pursuant to Subsection H of Section 74-6-5 NMSA 1978, and provides that on July 1, 1992, all balances in the fund shall be deposited in the general fund.

Laws 1989, ch. 248, § 3 provides that § 2 of the act, creating the water quality management fund, is repealed effective July 1, 1992.

Commission's requirement of information to prevent water pollution within statutory mandate. - Where the objective of this article is to abate and prevent water pollution, it is not "clearly incorrect" for the commission to require a discharger of toxic pollutants to provide a site and method for flow measurement and to provide any pertinent information relating to the discharge of water contaminants in order to demonstrate to the commission that the plans of the discharger will not result in a violation of the standards and regulations; these requirements are well within the statutory mandate. Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979).

In determining whether administrative interpretation is "clearly incorrect," the authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy. Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979).

Commission may delegate authority to administer regulations. - Where the commission gives the environmental improvement division the authority to administer certain regulations, there is no unlawful delegation of authority. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982).

Discharge of a toxic pollutant in violation of a discharge plan is a criminal act. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982).

Law reviews. - For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 Nat. Resources J. 693 (1979).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

For annual survey of New Mexico law relating to administrative law, see 13 N.M.L. Rev. 235 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 133 to 136.

Validity of state statutory provision permitting administrative agency to impose monetary penalties for violation of environmental pollution statute, 81 A.L.R.3d 1258.

39A C.J.S. Health and Environment §§ 134, 145, 154.

74-6-6. Adoption of regulations; notice and hearing. (Effective until July 1, 1994.)

No regulation or water quality standard or amendment or repeal thereof shall be adopted until after a public hearing within the area of the state concerned; provided that the commission may adopt water quality standards on the basis of the record of hearings held by the New Mexico department of public health [department of health] prior to the effective date of the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978] if those hearings were held in general conformance with the provisions of this section. Any person may recommend or propose regulations to the commission for promulgation. Hearings on regulations of statewide application shall be held at Santa Fe. Notice of the hearing shall be given at least thirty 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 notice shall also state where interested persons may secure copies of any proposed regulation or water quality standard. The notice shall be published in a newspaper of general circulation in the area affected. Reasonable effort shall be made to give notice to all persons who have made a written request to the commission for advance notice of its hearings. At the hearing, the commission shall allow all interested persons reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. The commission may designate a hearing officer to take evidence in the hearing. Any person heard or represented at the hearing shall be given written notice of the action of the commission. No regulation or water quality standard or amendment or repeal thereof adopted by the commission shall become effective until thirty days after its filing in accordance with the provisions of the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978]. The commission shall determine whether or not to hold a hearing within sixty days of submission of a proposed regulation.

History: 1953 Comp., § 75-39-5, enacted by Laws 1967, ch. 190, § 5; 1982, ch. 73, § 26.

ANNOTATIONS

Delayed repeals. - See 74-6-14 NMSA 1978.

Cross-references. - As to filing with the supreme court law librarian, see 14-4-9 NMSA 1978.

Bracketed material. - The bracketed reference to the department of health in the first sentence was inserted by the compiler. Laws 1937, ch. 39, § 2, creating the state department of public health, was repealed by Laws 1968, ch. 37, § 3, that department being replaced by the health and social services department. Laws 1977, ch. 253, § 5, abolished the health and social services department. Laws 1977, ch. 253, § 4 established the health and environment department. Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, and enacts a new 9-7-4 NMSA 1978, creating the department of health. The bracketed material was not enacted by the legislature and is not part of the law.

"Effective date of the Water Quality Act". - The phrase "effective date of the Water Quality Act", referred to in the first sentence, means March 29, 1967, the effective date of Laws 1967, Chapter 190.

Division may propose regulations and act as interested party at hearings. - In light of the fact that the legislature has seen fit to have the director of the environmental improvement division sit as a member of the commission, the division may propose regulations to the commission and then act as an interested party at the hearings. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982)(decided prior to 1982 amendment of 74-6-9 NMSA 1978).

Adequacy of hearing. - Given the extensive nature of the public meetings and public hearing on the matter, with an opportunity to present evidence and cross-examine witnesses and with the prehearing disclosure of six references, the allegation of the concealment of the basic data on which standards for organic compounds in ground-water were based, was without merit. Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1988).

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For annual survey of New Mexico law relating to administrative law, see 13 N.M.L. Rev. 235 (1983).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 6, 134.

39A C.J.S. Health and Environment §§ 138, 142.

74-6-7. Validity of regulation; judicial review. (Effective until July 1, 1994.)

A. Any person who is or may be affected by a regulation adopted by the commission may appeal to the court of appeal [appeals] for further relief. All such appeals shall be upon the record made at the hearing, and shall be taken to the court of appeals within

thirty days after filing of the regulation under the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978].

B. The procedure for perfecting an appeal to the court of appeals under this section consists of the timely filing of a notice of appeal with a copy attached of the regulation from which the appeal is taken. The appellant shall certify in his notice of appeal that arrangements have been made with the commission for preparation of a sufficient number of transcripts of the record of the hearing on which the appeal depends to support his appeal to the court, at the expense of the appellant, including three copies which he shall furnish to the commission.

C. Upon appeal, the court of appeals shall set aside the regulation only if found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence in the record or reasonably related to the prevention or abatement of water pollution; or

(3) otherwise not in accordance with law.

History: 1953 Comp., § 75-39-6, enacted by Laws 1967, ch. 190, § 6; 1970, ch. 64, § 4.

ANNOTATIONS

Delayed repeals. - See 74-6-14 NMSA 1978.

Standard is rule, if the proper procedure has been followed in promulgating it. Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979).

Standards adopted as rules are appealable. - Since the standards for the evaluation of waste water to determine whether it is contaminated were adopted as rules, they are appealable to the court of appeals. Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979).

Lack of numerical standards not basis for invalidating regulation. - Although there are no numerical standards in a regulation for what concentration of compounds triggers the label "toxic pollutant," this is not detrimental to a discharger where the director of the environmental improvement division will make that determination before a discharge plan is approved or disapproved, and the discharger will be notified. The lack of numerical standards is, therefore, not a basis for finding the regulation unconstitutional. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982).

Stay from operation of order or regulation. - Implicit in this section is the power to grant a stay from the operation of an administrative order or regulation, after due notice

and opportunity for hearing. Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 105 N.M. 708, 736 P.2d 986 (Ct. App. 1986).

Evidence upon review. - The "whole record" standard of judicial review to findings of fact made by administrative agencies controls where the commission acts in its rule-making capacity. Therefor, such a review must include the record of all public meetings and public hearings. Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1988).

The legal residuum rule, which requires support by some evidence that would be admissible in a jury trial, is not applicable in a judicial review of a rule-making proceeding. Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1988).

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 Nat. Resources J. 693 (1979).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 38, 113, 179 to 181, 265, 273, 292.

Validity and construction of anti-water pollution statutes and ordinances, 32 A.L.R.3d 215.

Pollution control: validity and construction of statutes, ordinances or regulations controlling discharge of industrial wastes into sewer system, 47 A.L.R.3d 1224.

39A C.J.S. Health and Environment § 146.

74-6-8. Duties of constituent agencies. (Effective until July 1, 1994.)

Each constituent agency shall administer regulations adopted pursuant to the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978], responsibility for the administration of which has been assigned to it by the commission.

History: 1953 Comp., § 75-39-7, enacted by Laws 1967, ch. 190, § 7.

ANNOTATIONS

Delayed repeals. - See 74-6-14 NMSA 1978.

Commission may delegate authority to administer regulations. - Where the commission gives the environmental improvement division the authority to administer certain regulations, there is no unlawful delegation of authority. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982).

Law reviews. - For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

74-6-9. Powers of constituent agencies. (Effective until July 1, 1994.)

Each constituent agency may:

A. receive and expend funds appropriated, donated or allocated to the constituent agency for purposes consistent with the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978];

B. develop facts and make studies and investigations and require the production of documents necessary to carry out the responsibilities assigned to the constituent agency. The result of any investigation shall be reduced to writing and a copy thereof furnished to the commission and to the owner or occupant of the premises investigated;

C. report to the commission and to other constituent agencies water pollution conditions that are believed to require action where the circumstances are such that the responsibility appears to be outside the responsibility assigned to the agency making the report;

D. make every reasonable effort to obtain voluntary cooperation in the prevention or abatement of water pollution;

E. upon presentation of proper credentials, enter at reasonable times upon or through any premises in which an effluent source is located or in which are located any records required to be maintained by regulations of the commission; provided that entry into any private residence without the permission of the owner shall be only by order of the district court for the county in which the residence is located and that, in connection with any entry provided for in this subsection, the constituent agency may:

(1) have access to any copy of the records;

(2) inspect any monitoring equipment or methods required to be installed by regulations of the commission; and

(3) sample any effluents;

F. on the same basis as any other person, recommend and propose regulations for promulgation by the commission; and

G. on the same basis as any other person, present data, views or arguments and examine witnesses and otherwise participate at all hearings conducted by the commission or any other administrative agency with responsibility in the areas of environmental management or consumer protection, but shall not be given any special status over any other party; provided, that the participation by a constituent agency in a hearing shall not require the recusal or disqualification of the commissioner representing that constituent agency.

History: 1953 Comp., § 75-39-8, enacted by Laws 1967, ch. 190, § 8; 1973, ch. 326, § 5; 1982, ch. 73, § 27.

ANNOTATIONS

Delayed repeals. - See 74-6-14 NMSA 1978.

Division may propose regulations and act as interested party at hearings. - In light of the fact that the legislature has seen fit to have the director of the environmental improvement division sit as a member of the commission, the division may propose regulations to the commission and then act as an interested party at the hearings. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982)(decided prior to 1982 amendment).

Law reviews. - For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

For annual survey of New Mexico law relating to administrative law, see 13 N.M.L. Rev. 235 (1983).

74-6-10. Abatement of water pollution. (Effective until July 1, 1994.)

A. If, as a result of investigation, a constituent agency has good cause to believe that any person is violating or threatens to violate any regulation of the commission for the enforcement of which the agency is responsible, and, if the agency is unable within a reasonable time to obtain voluntary compliance, the commission may initiate proceedings in the district court of the county in which the violation occurs. The commission may seek injunctive relief against any violation or threatened violation of regulations, and such relief shall be subject to the continuing jurisdiction and supervision of the district court and the court's powers of contempt. The attorney general shall represent the commission.

B. In addition to the remedies provided in this section, the district court may impose civil penalties not exceeding one thousand dollars ($1,000) for each violation of the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978] or any regulation of the

commission, and may charge the person convicted of such violation with the reasonable cost of treating or cleaning up waters polluted. Each day during any portion of which a violation occurs constitutes a separate violation.

C. Any party aggrieved by any final judgment of the district court under this section may appeal to the court of appeals as in other civil actions.

D. As an additional means of enforcing the Water Quality Act or any regulation of the commission, the commission may accept an assurance of discontinuance of any act or practice deemed in violation of the Water Quality Act or any regulation adopted pursuant thereto, from any person engaging in, or who has engaged in, such act or practice, signed and acknowledged by the chairman of the commission and the party affected. Any such assurance shall specify a time limit during which such discontinuance is to be accomplished.

History: 1953 Comp., § 75-39-9, enacted by Laws 1967, ch. 190, § 9; 1970, ch. 64, § 5.

ANNOTATIONS

Delayed repeals. - See 74-6-14 NMSA 1978.

Voluntary compliance no bar to assessment of civil penalties and cleanup costs. - The voluntary compliance provision of Subsection A does not apply to the remedies provided in Subsection B. The absence of voluntary compliance actions on the part of the state in a case does not prevent the state from seeking civil penalties and costs of cleanup under Subsection B. State ex rel. New Mexico Water Quality Control Comm'n v. Molybdenum Corp. of Am., 89 N.M. 552, 555 P.2d 375 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 534 to 547.

Injunction against pollution of stream by private persons or corporations, 46 A.L.R. 8

Validity and construction of statutes, ordinances or regulations controlling discharge of industrial wastes into sewer system, 47 A.L.R.3d 1224.

Preliminary mandatory injunction to prevent, correct or reduce effects of polluting practices, 49 A.L.R.3d 1239.

Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency, 60 A.L.R.3d 665.

Validity, under federal constitution, of state statute or local ordinance regulating phosphate content of detergents, 21 A.L.R. Fed. 365.

39A C.J.S. Health and Environment §§ 150 to 154.

74-6-11. Emergency procedure. (Effective until July 1, 1994.)

Notwithstanding any other provision of the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978], if any person is causing or contributing to water pollution of such characteristics and duration as to create an emergency which requires immediate action to protect human health, the director of the environmental improvement agency [department of environment] shall order the person to immediately abate the water pollution creating the emergency condition. If the effectiveness of the order is to continue beyond forty-eight hours, the director of the environmental improvement agency [department of environment] shall file an action in the district court, not later than forty-eight hours after the date of the order, to enjoin operations of any person in violation of the order.

History: 1953 Comp., § 75-39-10, enacted by Laws 1967, ch. 190, § 10; 1970, ch. 64, § 6; 1971, ch. 277, § 52.

ANNOTATIONS

Delayed repeals. - See 74-6-14 NMSA 1978.

Bracketed material. - The bracketed references to the department of environment were inserted by the compiler. The environmental improvement agency was abolished by Laws 1977, ch. 253, § 5. Former 9-7-4 NMSA 1978 created the health and environment department, consisting of several divisions, including an environmental improvement division, and Laws 1977, ch. 253, § 14 provided that all references to the agency shall mean the division. Laws 1991, ch. 25, § 4 establishes the department of environment and provides that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment. The bracketed insertions were not enacted by the legislature and are not part of the law.

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 493, 538, 539.

39A C.J.S. Health and Environment § 144.

74-6-12. Limitations. (Effective until July 1, 1994.)

A. The Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978] does not grant to the commission or to any other entity the power to take away or modify property rights in water, nor is it the intention of the Water Quality Act to take away or modify such rights.

B. Effluent data obtained by the commission or a constituent agency shall be available to the public. Other records, reports or information obtained by the commission or a constituent agency shall be available to the public, except upon a showing satisfactory to the commission or a constituent agency that the records, reports or information or a particular part thereof, if made public, would divulge methods or processes entitled to protection as trade secrets.

C. The Water Quality Act does not authorize the commission to adopt any regulation with respect to any condition or quality of water if the water pollution and its effects are confined entirely within the boundaries of property within which the water pollution occurs when the water does not combine with other waters.

D. The Water Quality Act does not grant to the commission any jurisdiction or authority affecting the relation between employers and employees with respect to or arising out of any condition of water quality.

E. The Water Quality Act does not supersede or limit the applicability of any law relating to industrial health, safety or sanitation.

F. In the adoption of regulations and water quality standards and in any action for enforcement of the Water Quality Act and regulations adopted thereunder, reasonable degradation of water quality resulting from beneficial use shall be allowed.

G. The Water Quality Act does not permit the adoption of regulations or other action by the commission or other constituent agencies which would interfere with the exclusive authority of the oil conservation commission over all persons and things necessary to prevent water pollution as a result of oil or gas operations through the exercise of the power granted to the oil conservation commission under Section 70-2-12 NMSA 1978, and other laws conferring power on the oil conservation commission.

History: 1953 Comp., § 75-39-11, enacted by Laws 1967, ch. 190, § 11; 1973, ch. 326, § 6.

ANNOTATIONS

Delayed repeals. - See 74-6-14 NMSA 1978.

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 Nat. Resources J. 693 (1979).

For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

74-6-13. Construction. (Effective until July 1, 1994.)

The Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978] provides additional and cumulative remedies to prevent, abate and control water pollution, and nothing abridges or alters rights of action or remedies in equity under the common law or statutory law, criminal or civil. No provision of the Water Quality Act or any act done by virtue thereof estops the state or any political subdivision or person as owner of water rights or otherwise, in the exercise of their rights in equity or under the common law or statutory law to suppress nuisances or to abate pollution.

History: 1953 Comp., § 75-39-12, enacted by Laws 1967, ch. 190, § 12.

ANNOTATIONS

Delayed repeals. - See 74-6-14 NMSA 1978.

Court retains jurisdiction of case seeking tort and contract damages. - The trial court correctly retains jurisdiction of a case seeking tort and contract damages against a utility for its failure to supply water meeting certain minimal standards of quality since the government agencies involved have no expertise in considering tort and contractual claims and are without power to grant the relief that the plaintiffs have asked, and this section evidences the legislative intent that common-law remedies against water pollution be preserved. O'Hare v. Valley Utils., Inc., 89 N.M. 105, 547 P.2d 1147 (Ct. App.), modified, 89 N.M. 262, 550 P.2d 274 (1976).

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

74-6-14. Termination of agency life; delayed repeal. (Effective until July 1, 1994.)

The water quality control commission is terminated on July 1, 1993 pursuant to the Sunset Act [12-9-11 to 12-9-21 NMSA 1978]. The commission shall continue to operate according to the provisions of Chapter 74, Article 6 NMSA 1978 until July 1, 1994. Effective July 1, 1994, Article 6, Chapter 74 is repealed.

History: 1978 Comp., § 74-6-13.1, enacted by Laws 1987, ch. 333, § 15.

ARTICLE 6A
WASTEWATER FACILITY CONSTRUCTION LOANS

74-6A-1. Short title.

Chapter 74, Article 6A NMSA 1978 may be cited as the "Wastewater Facility Construction Loan Act".

History: Laws 1986, ch. 72, § 1; 1991, ch. 172, § 2.

ANNOTATIONS

The 1991 amendment, effective April 4, 1991, substituted "Chapter 74, Article 6A NMSA 1978" for "This act".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 129 et seq.

39A C.J.S. Health & Environment § 106 et seq.

74-6A-2. Purpose.

The purpose of the Wastewater Facility Construction Loan Act [this article] is to provide local authorities in New Mexico with low-cost financial assistance in the construction of necessary wastewater facilities through the creation of a self-sustaining program so as to improve and protect water quality and public health.

History: Laws 1986, ch. 72, § 2; 1989, ch. 323, § 1.

74-6A-3. Definitions.

As used in the Wastewater Facility Construction Loan Act [this article]:

A. "commission" means the water quality control commission;

B. "division" means the environmental improvement division of the health and environment department [department of environment];

C. "financial assistance" means loans, the purchase or refinancing of existing local political subdivision obligations, loan guarantees, credit enhancement techniques to reduce interest on loans and bonds, bond insurance and bond guarantees or any combination of these purposes;

D. "fund" means the wastewater facility construction loan fund;

E. "local authority" means any municipality, county, incorporated county, sanitation district, water and sanitation district or any similar district, recognized Indian tribe or other issuing agency created pursuant to a joint powers agreement acting on behalf of any entity listed in this subsection;

F. "operate and maintain" means to perform all necessary activities, including replacement of equipment or appurtenances, to assure the dependable and economical function of a wastewater facility in accordance with its intended purpose;

G. "wastewater facility" means a publicly owned system for treating or disposing of sewage or wastes either by surface or underground methods, including any equipment, plant, treatment works, structure, machinery, apparatus or land, in any combination, that is acquired, used, constructed or operated for the storage, collection, reduction, recycling, reclamation, disposal, separation or treatment of water or wastes, or for the final disposal of residues resulting from the treatment of water or wastes, such as pumping and ventilating stations, facilities, plants and works, outfall sewers, interceptor sewers and collector sewers and other real or personal property and appurtenances incident to their use or operation. "Wastewater facility" also includes a nonpoint source water pollution control project as eligible under the federal Clean Water Act of 1977;

H. "account" means the wastewater suspense account;

I. "board" means the state board of finance;

J. "bonds" means wastewater bonds or other obligations authorized by the commission to be issued by the board pursuant to the Wastewater Facility Construction Loan Act;

K. "Clean Water Act" means the federal Clean Water Act of 1977 and its subsequent amendments or successor provisions;

L. "federal securities" means direct obligations of the United States, or obligations the principal and interest of which are unconditionally guaranteed by the United States, or an ownership interest in either of the foregoing;

M. "force account construction" means construction performed by the employees of a local authority rather than through a contractor;

N. "holders" means persons who are owners of bonds whether registered or not, issued pursuant to the Wastewater Facility Construction Loan Act;

O. "issuing resolution" means a formal statement adopted by the board to issue bonds pursuant to the Wastewater Facility Construction Loan Act, including any trust agreement, trust indenture or similar instrument providing terms and conditions for the bonds to be issued; and

P. "recommending resolution" means a formal statement adopted by the commission recommending to the board that bonds be issued pursuant to the Wastewater Facility Construction Loan Act, including any trust agreement, trust indenture or similar instrument providing the terms and conditions for the bonds that are issued.

History: Laws 1986, ch. 72, § 3; 1989, ch. 323, § 2; 1991, ch. 172, § 3.

ANNOTATIONS

Cross-references. - As to water quality control commission, see 74-6-3 NMSA 1978.

Bracketed material. - The bracketed reference to the department of environment was inserted by the compiler, as Laws 1991, ch. 25, § 4 establishes the department of environment and provides that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment. The bracketed material was not enacted by the legislature and is not part of the law.

The 1991 amendment, effective April 4, 1991, inserted "the purchase or refinancing of existing local political subdivision obligations" in Subsection C; in Subsection E, inserted "incorporated county", "water and sanitation district or any similar district", and "created"; inserted "to perform" near the beginning of Subsection F; inserted "sewage or" near the beginning and added "of 1977" at the end of Subsection G; added Subsections H to P; and made related and stylistic changes throughout the section.

Federal Clean Water Act. - As to the federal Clean Water Act of 1977, see 33 U.S.C. § 1251 et seq.

74-6A-4. Fund created; administration.

A. There is created in the state treasury a revolving loan fund to be known as the "wastewater facility construction loan fund", which shall be administered by the division as agent for the commission and operated as a separate account. The commission is authorized to establish procedures and adopt regulations as required to administer the fund in accordance with the Clean Water Act and state law. Any regulations relating to the issuance of bonds and the expenditure of proceeds of bond issues shall be approved by the board. The commission shall, whenever possible, coordinate application procedures and funding cycles with the New Mexico Community Assistance Act.

B. The following shall be deposited directly in the fund:

(1) grants from the federal government or its agencies allotted to the state for capitalization of the fund;

(2) funds as appropriated by the legislature to implement the provisions of the Wastewater Facility Construction Loan Act [this article] or to provide state matching funds that are required by the terms of any federal grant under the Clean Water Act;

(3) loan principal, interest and penalty payments if required by the terms of any federal grant under the Clean Water Act;

(4) money transferred from the account as needed to fulfill requirements of the Clean Water Act; and

(5) any other public or private money dedicated to the fund.

C. Money in the fund is appropriated for expenditure by the commission in a manner consistent with the terms and conditions of the federal capitalization grants and the Clean Water Act and may be used:

(1) to provide loans for the construction or rehabilitation of wastewater facilities;

(2) to purchase, refund or refinance obligations incurred by local authorities in the state for wastewater facilities where the obligations were incurred and construction commenced after March 7, 1985;

(3) to guarantee, or purchase insurance for, obligations of local authorities to improve credit market access or reduce interest rates;

(4) to provide a source of revenue or security for the payments of principal and interest on bonds recommended by the commission and issued by the board if the proceeds of the bonds are deposited in the fund to the extent provided in the terms of the federal grant;

(5) to provide loan guarantees for similar revolving funds established by local authorities;

(6) to fund the administrative expenses of the board, the commission and the division necessary to implement the provisions of the Wastewater Facility Construction Loan Act, including but not limited to costs of servicing loans and issuing bonds, fund start-up costs, financial management and legal consulting fees and reimbursement costs for support services from other state agencies; and

(7) to fund other programs for which the federal government authorizes use of wastewater grants or to provide for any other expenditure consistent with the Clean Water Act grant program and state law.

D. Pursuant to regulations adopted by the commission, the division may impose and collect a fee from each local authority that receives financial assistance from the fund which fee shall be used solely for the costs of administering the fund.

E. Money not currently needed for the operation of the fund or otherwise dedicated may be invested according to the provisions of Chapter 6, Article 10 NMSA 1978, and all interest earned on such investments shall be credited to the fund. Money remaining in the fund at the end of any fiscal year shall not revert to the general fund but shall accrue to the credit of the fund.

F. Acting as agent for the commission, the division shall maintain full authority for the operation of the fund in accordance with applicable federal and state law, including but not limited to preparing the annual intended use plan and ensuring that loan recipients are on the state priority list or otherwise satisfy Clean Water Act requirements.

G. The division shall establish fiscal controls and accounting procedures that are sufficient to assure proper accounting for fund payments, disbursements and balances and shall provide an annual report and an annual independent audit on the fund to the governor and to the United States environmental protection agency as required by the Clean Water Act.

History: 1978 Comp., § 74-6A-4, enacted by Laws 1991, ch. 172, § 4.

ANNOTATIONS

Cross-references. - As to the general fund, see 6-4-2 NMSA 1978.

Repeals and reenactments. - Laws 1991, ch. 172, § 4 repeals former 74-6A-4 NMSA 1978, as amended by Laws 1989, ch. 324, § 39, relating to creation and administration of the wastewater facility construction loan fund, and enacts the above section, effective April 4, 1991. For provisions of former section, see 1990 Replacement Pamphlet.

Federal Clean Water Act. - As to the federal Clean Water Act, see 33 U.S.C. § 1251 et seq.

New Mexico Community Assistance Act. - See 11-6-1 NMSA 1978 and notes thereto.

74-6A-5, 74-6A-6. Repealed.

ANNOTATIONS

Repeals. - Laws 1991, ch. 172, § 14 repeals 74-6A-5 and 74-6A-6 NMSA 1978, as amended by Laws 1989, ch. 323, §§ 4 and 5, relating to loan program, duties of division and commission, and financial assistance criteria, effective April 4, 1991. For provisions of former sections, see 1990 Replacement Pamphlet.

74-6A-7. Loan program; administration.

A. The division shall establish a program to provide financial assistance to local authorities, individually or jointly, for acquisition, construction or modification of wastewater facilities. The division as agent of the commission is authorized to enter into contracts and other agreements to carry out the provisions of the Wastewater Facility Loan Construction Act [this article], including but not limited to contracts and agreements with federal agencies, local authorities and other parties.

B. The commission shall adopt a system for the ranking of wastewater facility construction projects for financial assistance.

History: Laws 1991, ch. 172, § 5.

ANNOTATIONS

Emergency clauses. - Laws 1991, ch. 172, § 16 makes this section of the Wastewater Facility Construction Loan Act effective immediately. Approved April 4, 1991.

74-6A-8. Financial assistance; criteria.

A. Financial assistance shall be provided only to local authorities that:

(1) meet the requirements for financial capability set by the division to assure sufficient revenues to operate and maintain the wastewater facility for its useful life and to repay the financial assistance;

(2) agree to operate and maintain the wastewater facility so that the facility will function properly over its structural and material design life;

(3) agree to maintain separate project accounts, to maintain project accounts properly in accordance with generally accepted governmental accounting standards and to conduct an audit of the project's financial records;

(4) provide a written assurance, signed by an attorney, that the local authority has or will acquire proper title, easements and rights-of-way to the property upon or through which the wastewater facility proposed for funding is to be constructed or extended;

(5) require the contractor of the wastewater facility construction project to post a performance and payment bond in accordance with the requirements of Section 13-4-18 NMSA 1978 and its subsequent amendments and successor provisions;

(6) provide a written notice of completion and start of operation of the wastewater facility;

(7) appear on the priority list of the fund, regardless of rank on such list; and

(8) provide such information to the division as required by the commission in order to comply with the provisions of the Clean Water Act and state law.

B. Loans shall be made only to local authorities that establish one or more dedicated sources of revenue to repay the money received from the commission and to provide for operation, maintenance and equipment replacement expenses. A local authority, any existing statute to the contrary notwithstanding, may do any of the following:

(1) obligate itself to pay to the commission at periodic intervals a sum sufficient to provide all or any part of bond debt service with respect to the bonds recommended by the commission and issued by the board to fund the loan for the wastewater facility project of the local authority and pay over the debt service to the account of the wastewater facility project for deposit to the fund;

(2) fulfill any obligation to pay the commission by the issuance of bonds, notes or other obligations in accordance with the laws authorizing issuance of local authority obligations, provided however that, notwithstanding the provisions of Sections 4-54-3 or 6-15-5 NMSA 1978, or other statute or law requiring the public sale of local authority obligations, such obligations may be sold at private sale to the commission at the price and upon the terms and conditions the local authority shall determine;

(3) levy, collect and pay over to the commission and obligate itself to continue to levy, collect and pay over to the commission the proceeds of one or more of the following:

(a) sewer or waste disposal service fees or charges;

(b) licenses, permits, taxes and fees;

(c) special assessments on the property served or benefited by the wastewater facility project; and

(d) other revenue available to the local authority;

(4) undertake and obligate itself to pay its contractual obligation to the commission solely from the proceeds from any of the sources specified in Paragraph (3) of this subsection or, in accordance with the laws authorizing issuance of local authority obligations, impose upon itself a general obligation pledge to the commission additionally secured by a pledge of any of the sources specified in Paragraph (3) of this subsection; and

(5) enter into agreements, perform acts and delegate functions and duties as its governing body shall determine is necessary or desirable to enable the division as agent for the commission to fund a loan to the local authority to aid it in the construction or acquisition of a wastewater facility project.

C. Each loan made by the division as agent for the commission shall provide that repayment of the loan shall begin not later than one year after completion of construction of the wastewater facility project for which the loan was made and shall be repaid in full no later than twenty years after completion of the construction. All principal and interest on loan payments shall be deposited in the fund.

D. Financial assistance shall be made with an annual interest rate to be five percent or less as determined by the commission.

E. A zero-percent interest rate may be approved by the division when the following conditions have been met by the local authority:

(1) the local authority's average user cost is at least fifteen dollars ($15.00) per month or a higher amount as determined by the commission; and

(2) the local authority's median household income is less than three-fourths of the statewide nonmetropolitan median household income.

F. A local authority may use the proceeds from financial assistance received under the Wastewater Facility Construction Loan Act [this article] to provide a local match or any other nonfederal share of a wastewater facility construction project as allowed pursuant to the Clean Water Act.

G. Financial assistance received pursuant to the Wastewater Facility Construction Loan Act shall not be used by a local authority on any wastewater facility project constructed in fulfillment or partial fulfillment of requirements made of a subdivider under the provisions of the Land Subdivision Act [47-5-1 to 47-5-8 NMSA 1978] or the New Mexico Subdivision Act.

H. Financial assistance shall be made only to local authorities that employ or contract with a registered professional engineer to provide and be responsible for engineering services on the wastewater facility project. Such services include, but are not limited to an engineering report, construction contract documents, supervision of construction and start-up services.

I. Financial assistance shall be made only for eligible items. For financial assistance composed entirely of state funds, eligible items include but are not limited to the costs of engineering feasibility reports, contracted engineering design, inspection of construction, special engineering services, start-up services, contracted construction, materials purchased or equipment leased for force account construction, land or acquisition of existing facilities, but eligible items do not include the costs of water rights and local authority administrative costs. For financial assistance made from federal funds, eligible items are those identified pursuant to the Clean Water Act.

J. In the event of default by the local authority, the commission may enforce its rights by suit or mandamus or may utilize all other available remedies under state law.

History: Laws 1991, ch. 172, § 6.

ANNOTATIONS

Emergency clauses. - Laws 1991, ch. 172, § 16 makes this section of the Wastewater Facility Construction Loan Act effective immediately. Approved April 4, 1991.

Federal Clean Water Act. - As to the federal Clean Water Act, see 33 U.S.C. § 1251 et seq.

New Mexico Subdivision Act. - See 47-6-1 NMSA 1978 and notes thereto.

74-6A-9. Commission; powers.

A. In administering the Wastewater Facility Construction Loan Act [this article], the commission shall have the following powers which may be implemented by the division, in addition to those specified in the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978]:

(1) to provide financial assistance to local authorities to finance all or part of a wastewater facility, including all forms of assistance for which the fund may be used pursuant to the Wastewater Facility Construction Loan Act;

(2) to adopt recommending resolutions recommending that the board issue bonds or refunding bonds pursuant to the provisions of the Wastewater Facility Construction Loan Act;

(3) to execute agreements concerning state contributions to the fund made pursuant to the Clean Water Act, including obligating the commission to pay a portion of the estimated reasonable cost of a wastewater facility of a local authority as may be required to meet the water quality goals of the Clean Water Act and the state;

(4) to foreclose upon, attach or condemn any wastewater facility, property or interest in the facility pledged, mortgaged or otherwise available as security for a project financed in whole or in part pursuant to the Wastewater Facility Construction Loan Act in the event of a default by a local authority;

(5) to acquire and hold title to or leasehold interest in real and personal property and to sell, convey or lease that property for the purpose of satisfying a default or enforcing the provisions of a loan agreement;

(6) through its agent the division, to manage the fund, to grant and administer financial assistance to local authorities and to apply for and accept grants, including but not limited to capitalization grant awards made to the state in accordance with the Clean Water Act and the Wastewater Facility Construction Loan Act;

(7) to appoint and employ attorneys, financial advisors, underwriters and other experts and agents and employees as the business of the commission may require;

(8) to sue or be sued and to prosecute and defend, at law or in equity, in any court having jurisdiction over the subject matter and the parties to the matter;

(9) to collect application, origination and administrative fees from the local authority the total of which for any loan shall not exceed four percent of the value of the loan requested or authorized;

(10) to adopt regulations necessary and appropriate to implement the provisions of the Wastewater Facility Construction Loan Act; and

(11) to have and exercise all the rights and powers necessary, incidental to or implied from the specific powers enumerated in this section.

B. Specific powers enumerated in this section shall not limit any power necessary or appropriate to carry out the purposes and intent of the Wastewater Facility Construction Loan Act.

C. The commission shall use accounting, audit and fiscal procedures conforming to generally accepted government accounting standards and shall otherwise prepare audits and budgets in accordance with state law. The fiscal year of the commission shall coincide with the fiscal year of the state.

D. The commission shall deliver an annual report during the first week of each regular session of the legislature on the status of the wastewater facility construction loan program and the fund to the governor and legislature.

History: Laws 1991, ch. 172, § 7.

ANNOTATIONS

Emergency clauses. - Laws 1991, ch. 172, § 16 makes this section of the Wastewater Facility Construction Loan Act effective immediately. Approved April 4, 1991.

Federal Clean Water Act. - As to the federal Clean Water Act, see 33 U.S.C. § 1251 et seq.

74-6A-10. Board; duties and powers.

A. The board may issue bonds or refunding bonds pursuant to the Wastewater Facility Construction Loan Act [this article] when the commission issues a recommending resolution to the board stating that a bond issue is required to implement the provisions of that act.

B. The board may enter into agreements regarding the sale of bonds recommended by the commission, including arrangements for letters of credit, bond insurance or other credit enhancement devices, provided that no agreement shall obligate funds under the control of the commission other than as provided in the Wastewater Facility Construction Loan Act.

C. Prior to issuance of bonds recommended by the commission pursuant to the Wastewater Facility Construction Loan Act, the board may adopt regulations related to the issuance of bonds and the expenditure of bond proceeds pursuant to that act.

History: Laws 1991, ch. 172, § 8.

ANNOTATIONS

Emergency clauses. - Laws 1991, ch. 172, § 16 makes this section of the Wastewater Facility Construction Loan Act effective immediately. Approved April 4, 1991.

74-6A-11. Wastewater suspense account created.

A. There is created in the state treasury a fund to be known as the "wastewater suspense account". The proceeds of bonds recommended by the commission and issued and sold by the board pursuant to provisions of the Wastewater Facility Construction Loan Act [this article] shall be deposited in the account. The commission shall be the administrator of the account. All expenditures or transfers from the account shall be approved by the commission. Money in the account shall be withdrawn, expended or transferred as necessary to comply with the provisions of the recommending and issuing resolutions for the bonds, the proceeds of which have been deposited in the account, and to fund the provisions of the Wastewater Facility Construction Loan Act and the Clean Water Act.

B. Money in the account may be invested according to provisions of Chapter 6, Article 10 NMSA 1978. All interest earned on the investments shall be credited to the account.

C. Money in the account shall not revert to the general fund but accrue to the credit of the account.

History: Laws 1991, ch. 172, § 9.

ANNOTATIONS

Emergency clauses. - Laws 1991, ch. 172, § 16 makes this section of the Wastewater Facility Construction Loan Act effective immediately. Approved April 4, 1991.

Federal Clean Water Act. - As to the federal Clean Water Act, see 33 U.S.C. § 1251 et seq.

74-6A-12. Commission bonds.

A. The board, upon recommendation from the commission, may issue and sell bonds or other obligations recommended by the commission to provide funds for any purpose enumerated in the Wastewater Facility Construction Loan Act [this article] or for payment of obligations incurred or temporary loans made to accomplish any purpose of that act. As prescribed in the recommending resolution, bonds may be issued in one or more series; shall bear prescribed dates; shall be in the form provided in the Supplemental Public Securities Act [6-14-8 to 6-14-11 NMSA 1978]; shall be issued in prescribed denominations; shall have terms and maturities that do not exceed twenty-five years from the date of issue of each series; shall bear interest at prescribed rates; shall be payable and evidenced in the manner and times as set by the board; may be redeemed with or without premiums prior to maturity; may be ranked or assigned priority status; and may contain provisions not inconsistent with this subsection.

B. As security for the payment of the principal and interest on bonds recommended by the commission and issued by the board, the commission is authorized to pledge, transfer and assign after consultation with the board:

(1) any obligations of each local authority, payable to the commission;

(2) the security for the local authority obligations;

(3) any grant, subsidy or contribution from the United States or any of its agencies or instrumentalities; or

(4) any income, revenues, funds or other money of the commission from any other source appropriated or authorized for use for the purpose of implementing the provisions of the Wastewater Facility Construction Loan Act.

C. The bonds and other obligations recommended by the commission and issued by the board may be sold at any time the commission and the board agree upon. The bonds may be sold at private or public sale at prices as provided in the Public Securities Act [6-14-1 to 6-14-3 NMSA 1978] and in a manner agreed upon by the board and the commission. The commission may apply the proceeds of the sale of the bonds it recommends that have been issued by the board to:

(1) the purposes of the Wastewater Facility Construction Loan Act or the purposes for which the fund may be used;

(2) the payment of interest on bonds recommended by the commission and issued by the board for a period not to exceed three years from the date of issuance of the bonds; and

(3) the payment of all expenses, including publication and printing charges, attorneys' fees, financial advisory and underwriter fees, and premiums or commissions that the

commission or the board determine are necessary or advantageous in connection with the recommendation, advertisement, sale, creation and issuance of commission recommended obligations. The board retains the power to fix the date of sale of the bonds and to take all actions necessary to sell and deliver the bonds.

D. In anticipation of the issuance of bonds, the board or the commission may borrow such sums as may be needed for any of the purposes enumerated in Subsection C of this section, obligate itself by certificate or promissory note, bearing interest at a rate to be specified by the commission and maturing within fifteen months from the date of the certificate or promissory note. The certificates or promissory notes shall be payable solely from the proceeds of the bonds recommended by the commission and issued by the board and from the funds from which commission-recommended bonds are payable. In the event that commission funds are not available for a loan for a wastewater facility project when application is made, in order to accelerate the completion of any wastewater facility project, the local authority may, with the approval of the commission, obligate such local authority to provide local funds to pay that portion of the cost of the wastewater facility project that the commission agrees to make available by loan, and the commission may refund the amount expended on its behalf by the local authority.

E. The commission may recommend that the board issue and sell refunding bonds for the purpose of paying, defeasing or refunding the principal of, interest on and any redemption premiums on, any matured or unmatured outstanding bonds recommended by the commission and issued by the board or any matured or unmatured bonds of the state issued to finance wastewater facility projects constructed pursuant to the Clean Water Act grant program. Refunding bonds issued by the board pursuant to a recommendation by the commission shall be subject to the provisions of the Wastewater Facility Construction Loan Act in the same manner and to the same extent as other bonds issued pursuant to that act. The holders of refunding bonds shall be subrogated and entitled to all priorities, rights and pledges to which the bonds refunded thereby were entitled.

F. Except as otherwise provided in the Wastewater Facility Construction Loan Act, the proceeds of refunding bonds shall be immediately applied to the retirement of the bonds to be refunded or be placed in escrow or trust in one or more trust banks within or without the state to be applied to the payment of the refunded bonds or the refunding bonds, or both in such priority and in the manner that the commission and the board may determine.

G. The incidental costs of refunding bonds may be paid by the purchaser of the refunding bonds or be defrayed from other available revenues of the commission, from the proceeds of the refunding bonds, from the interest or other yield derived from the investment of any refunding bond proceeds or other money in escrow or trust, from any other sources legally available for that purpose or from any combination of sources as the commission may determine.

H. Any accrued interest and any premium appertaining to a sale of refunding bonds may be applied to the payment of the interest or the principal of the bonds, or to both interest and principal, may be deposited in the account or in the fund and expended solely for the purposes of this subsection, may be used to refund bonds by deposit in escrow, trust or otherwise or may be used to defray any incidental costs appertaining to the refunding or any combination thereof, as the commission may determine.

I. An escrow or trust shall be limited to proceeds of refunding bonds.

J. A trust bank accounting for federal securities and other securities issued by the federal government in escrow or trust may place those securities for safekeeping wholly or in part in one or more trust banks within or without the state. Proceeds in escrow or trust may be invested or reinvested in federal securities and, in the case of an escrow or trust for the refunding of outstanding bonds or securities, in other securities issued by the federal government if the recommending and issuing resolutions expressly permit the investment or reinvestment in securities issued by the federal government other than federal securities.

K. A trust bank shall continuously secure by a pledge of federal securities in an amount at all times at least equal to the total uninvested amount of the money, any money placed in escrow or trust in that trust bank, or by that trust bank in one or more trust banks within or without the state, and not invested or reinvested in federal securities and other securities issued by the federal government.

L. Proceeds and investments in escrow or trust, together with interest or gain to be derived from that investment, shall be in an amount at all times sufficient to pay principal, interest, prior redemption premiums due, charges of the escrow agent or trustee and other incidental expenses except to the extent otherwise provided for, as such obligations become due at their respective maturities or due at designated prior redemption dates in connection with which the commission has exercised or is obligated to exercise a prior redemption option.

M. The computations made in determining sufficiency shall be verified by a certified public accountant.

N. A purchaser of a refunding bond issued pursuant to this subsection shall not be responsible for the application of the proceeds by the commission or any of the officers, agents or employees of the commission.

O. The state treasurer may invest any idle or surplus money of the state in bonds recommended by the commission and issued by the board. The governing body of any public entity in the state may invest any idle or surplus money held in its treasury in bonds recommended by the commission and issued by the board. Bonds recommended by the commission and issued by the board shall be legal investments for executors, administrators, trustees and other fiduciaries, unless otherwise directed by the court having jurisdiction of the fiduciary relation or by the document that is the source of the

fiduciary's authority, and for savings banks and insurance companies organized under the laws of the state.

P. Bonds or other obligations recommended by the commission and issued by the board and the interest applicable thereto and the income therefrom and all projects or parts thereof and all assets of the commission shall be exempt from taxation in the state.

Q. Bonds may be issued under the provisions of the Wastewater Facility Construction Loan Act only with the approval of the commission and the board pursuant to authority provided in that act.

R. Commission members or employees, or board members or employees and any person executing bonds issued pursuant to the Wastewater Facility Construction Loan Act shall not be liable personally on such bonds or be subject to any personal liability or accountability by reason of the issuance thereof.

S. All bonds recommended by the commission and issued by the board, while registered, are hereby declared and shall be construed to be negotiable instruments.

T. All bonds, notes and certificates recommended by the commission and issued by the board shall be special obligations of the board, payable solely from the revenue, income, fees or charges that may, pursuant to the provisions of the Wastewater Facility Construction Loan Act, be pledged to the payment of such obligations, and the bonds, notes or certificates shall not create an obligation, debt or liability of the state. No breach of any pledge, obligation or agreement of the commission shall impose a pecuniary liability upon the state or a charge upon its general credit or taxing power.

U. Any recommending or issuing resolution shall provide that each bond therein recommended or authorized shall recite that it is issued by the board under recommendation of the commission. The recital shall clearly state that the bonds are in full compliance with all of the provisions of the Wastewater Facility Construction Loan Act, and all bonds issued containing such recital shall be incontestable for any cause whatsoever after their delivery for value.

History: Laws 1991, ch. 172, § 10.

ANNOTATIONS

Emergency clauses. - Laws 1991, ch. 172, § 16 makes this section of the Wastewater Facility Construction Loan Act effective immediately. Approved April 4, 1991.

Federal Clean Water Act. - As to the federal Clean Water Act, see 33 U.S.C. § 1251 et seq.

74-6A-13. Agreement of the state not to limit or alter rights of obligees.

The state hereby pledges to and agrees with the holders of any bonds or other obligations issued under the Wastewater Facility Construction Loan Act [this article] and with those parties who enter into contracts with the commission or with the division pursuant to the provisions of the Wastewater Facility Construction Loan Act, that the state shall not limit, alter, restrict or impair the rights vested in the commission to fulfill the terms of agreements made with the holders of bonds or other obligations recommended and issued pursuant to the Wastewater Facility Construction Loan Act and with the parties who may enter into contracts with the commission pursuant to the Wastewater Facility Construction Loan Act, and that the state shall not limit, alter, restrict, or impair the rights vested in a local authority or in the commission, the board or the division to fulfill the terms of contracts made with the commission or the board and with parties who enter into contracts with such local authorities or with the division acting as agent of the commission pursuant to the Wastewater Facility Construction Loan Act. The state further agrees that it shall not in any way impair the rights or remedies of the holders of such bonds or other obligations of such parties until such bonds and other obligations, together with interest thereon, with interest on any unpaid installment of interest and all costs and expenses in connection with any action or proceeding by or on behalf of such holders, are fully met and discharged and such contracts are fully performed on the part of the commission, the board, the local authorities or the division acting as agent of the commission. Nothing in this subsection precludes such limitation or alteration if and when adequate provision is made by law for the protection of the holders of bonds or other obligations recommended by the commission and issued by the board or those entering into such contracts with the commission, or the commission under any contract with a local authority, or with the division acting as agent for the commission. The commission or the board may include this pledge and undertaking for the state in such bonds or other obligations and in such contracts.

History: Laws 1991, ch. 172, § 11.

ANNOTATIONS

Emergency clauses. - Laws 1991, ch. 172, § 16 makes this section of the Wastewater Facility Construction Loan Act effective immediately. Approved April 4, 1991.

74-6A-14. Validation.

All outstanding securities of the state and of all local authorities, all loan or other agreements entered into between the state or the division and any local authority, all regulations promulgated by the commission and all acts and proceedings taken by or on behalf of the state or any local authority with respect to the financing of wastewater facilities are hereby validated, ratified, approved and confirmed. To the extent necessary to carry out its purposes, the commission shall treat any bonds, obligations

or agreements of the state or the division that were entered into prior to the effective date hereof for the purpose of effecting the provisions of the Wastewater Facility Construction Loan Act [this article] or the Clean Water Act as if such bonds, obligations or agreements were those recommended by the commission and issued by the board.

History: Laws 1991, ch. 172, § 12.

ANNOTATIONS

Emergency clauses. - Laws 1991, ch. 172, § 16 makes this section of the Wastewater Facility Construction Loan Act effective immediately. Approved April 4, 1991.

Severability clauses. - Laws 1991, ch. 172, § 15 provides for the severability of the act if any part or application thereof is held invalid.

Federal Clean Water Act. - As to the federal Clean Water Act, see 33 U.S.C. § 1251 et seq.

74-6A-15. Water quality control commission; instrumentality.

The water quality control commission shall be an instrumentality of the state.

History: Laws 1991, ch. 172, § 13.

ANNOTATIONS

Emergency clauses. - Laws 1991, ch. 172, § 16 makes the act effective immediately. Approved April 4, 1991.

ARTICLE 6B
GROUND WATER PROTECTION

74-6B-1. Short title.

Chapter 74, Article 6B NMSA 1978 may be cited as the "Ground Water Protection Act".

History: Laws 1990, ch. 124, § 1; 1992, ch. 64, § 1.

ANNOTATIONS

The 1992 amendment, effective March 9, 1992, substituted "Chapter 74, Article 6B NMSA 1978" for "Sections 1 through 11 of this act".

74-6B-2. Findings; purpose of act.

A. The legislature recognizes the threat to the public health, safety and the environment resulting from pollution of ground water resources as a result of leaking underground storage tanks. The legislature also recognizes that the owners and operators of facilities containing underground storage tanks cannot take corrective action without placing their businesses in serious financial jeopardy.

B. The legislature finds that, because New Mexico is large in area and sparsely populated in some regions, it is in the public interest to take corrective action at contaminated sites so that fuel will continue to be readily available.

C. The purpose of the Ground Water Protection Act [this article] is to provide substantive provisions and funding mechanisms that will enable the state to take corrective action at sites contaminated by leakage from underground storage tanks.

History: Laws 1990, ch. 124, § 2.

ANNOTATIONS

Emergency clauses. - Laws 1990, ch. 124, § 25 makes the act effective immediately. Approved March 7, 1990.

74-6B-3. Definitions.

As used in the Ground Water Protection Act [this article]:

A. "board" means the environmental improvement board;

B. "corrective action" means an action taken to investigate, minimize, eliminate or clean up a release to protect the public health, safety and welfare or the environment;

C. "department" means the department of environment;

D. "operator" means any person in control of or having responsibility for the daily operation of the underground storage tank;

E. "owner" means:

(1) in the case of an underground storage tank in use or brought into use on or after November 8, 1984, any person who owns an underground storage tank while it is used for the storage, use or dispensing of regulated substances; and

(2) in the case of an underground storage tank in use before November 8, 1984 but no longer in use after that date, any person who owned such a tank immediately before the discontinuation of its use;

F. "person" means an individual or any legal entity, including all governmental entities;

G. "regulated substance" means:

(1) any substance defined in Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 but not including any substance regulated as a hazardous waste under Subtitle C of the Resource Conservation and Recovery Act; and

(2) petroleum, including crude oil or any fraction thereof, that is liquid at standard conditions of temperature and pressure of sixty degrees Fahrenheit and fourteen and seven-tenths pounds per square inch absolute;

H. "release" means any spilling, leaking, emitting, discharging, escaping, leaching or disposing from an underground storage tank into ground water, surface water or subsurface soils in amounts exceeding twenty-five gallons;

I. "secretary" means the secretary of environment;

J. "site" means a place where there is or was at a previous time one or more underground storage tanks and may include areas contiguous to the actual location or previous location of the tanks; and

K. "underground storage tank" means a single tank or combination of tanks, including underground pipes connected thereto, that are used to contain an accumulation of regulated substances and the volume of which, including the volume of the underground pipes connected thereto, is ten percent or more beneath the surface of the ground. The term does not include any:

(1) farm, ranch or residential tank of one thousand one hundred gallons or less capacity used for storing motor fuel or heating oil for noncommercial purposes;

(2) septic tank;

(3) pipeline facility, including gathering lines which are regulated under the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. 1671, et seq., or the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. 2001, et seq., or which is an intrastate pipeline facility regulated under state laws comparable to either act;

(4) surface impoundment, pit, pond or lagoon;

(5) storm water or wastewater collection system;

(6) flow-through process tank;

(7) liquid trap or associated gathering lines directly related to oil or gas production and gathering operations;

(8) storage tank situated in an underground area, such as a basement, cellar, mineworking drift, shaft or tunnel, if the storage tank is situated upon or above the surface of the undesignated floor; or

(9) pipes connected to any tank that is described in Paragraphs (1) through (8) of this subsection.

History: Laws 1990, ch. 124, § 3; 1992, ch. 64, § 2.

ANNOTATIONS

The 1992 amendment, effective March 9, 1992, rewrote Subsection C which formerly read: " 'division' means the environmental improvement division of the health and environment department"; added present Subsection I; redesignated former Subsections I and J as present Subsections J and K; and made minor stylistic changes throughout the section.

Comprehensive Environmental Response, Compensation, and Liability Act of 1980. - Section 101(14) of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, referred to in Paragraph (1) of Subsection G, appears as 42 U.S.C. § 9601(14).

Resource Conservation and Recovery Act. - Subtitle C of the federal Resource Conservation and Recovery Act, referred to in Paragraph (1) of Subsection G, appears as 42 U.S.C. §§ 6921 to 6931.

74-6B-4. Underground storage tank committee; creation; terms; powers and duties.

A. An advisory committee to be known as the "underground storage tank committee" is created. It shall consist of seven members:

(1) the secretary or his designee; and

(2) six members to be appointed by and to serve at the pleasure of the governor and to be chosen from the following groups with no more than one member from each group:

(a) fire protection districts;

(b) elected local government officials;

(c) wholesalers of motor fuels;

(d) independent retailers of motor fuels;

(e) individuals knowledgeable about corrective actions in connection with leaking underground storage tanks; and

(f) private citizens or interest groups.

B. Except for the initial terms of the members, the term of the appointed members shall be three years. For the purpose of staggering subsequent appointments, the initial terms of the six appointed members shall be: two for one year; two for two years; and two for three years. Members shall serve until their successors are appointed. Vacancies occurring in the membership of an appointed member shall be filled by the governor for the remainder of the unexpired term.

C. The committee shall and is authorized to:

(1) recommend proposed regulations to the board or the secretary;

(2) establish procedures, practices and policies governing the committee's activities;

(3) review all proposed corrective action plans of the department and submit comments on the plans to the secretary; and

(4) review all proposed payments from the corrective action fund and submit its comments on the proposed payments to the secretary except payments made pursuant to Section 74-6B-13 NMSA 1978.

D. Members of the committee shall receive reimbursement for expenses incurred in the performance of their duties pursuant to the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance. Expenditures for this purpose shall be made and are authorized to be made from the underground storage tank fund.

History: Laws 1990, ch. 124, § 4; 1992, ch. 64, § 3.

ANNOTATIONS

The 1992 amendment, effective March 9, 1992, substituted "secretary" for "director of the division" in Subsection A(1); substituted "successors are" for "successor is" in the last sentence of Subsection B; substituted "board or the secretary" for "environmental improvement board" in Subsection C(1); substituted "department" for "division" and "secretary" for "director of the division" in Subsection C(3); and substituted "secretary except payments made pursuant to Section 74-6B-13 NMSA 1978" for "director of the division" in Subsection C(4).

74-6B-5. Department's right of entry and inspection.

The department has all rights of entry and inspection necessary to administer and enforce the Ground Water Protection Act [this article] as it has under Section 74-4-4.3 NMSA 1978.

History: Laws 1990, ch. 124, § 5; 1992, ch. 64, § 4.

ANNOTATIONS

The 1992 amendment, effective March 9, 1992, substituted "Department's" for "Division's" in the section catchline and "department" for "division" near the beginning of the section.

74-6B-6. Civil liability for damage to property from leaking underground storage tank.

Nothing in the Ground Water Protection Act [this article] prohibits any existing or future claim for relief a person may have as a result of damages sustained because of a release from an underground storage tank.

History: Laws 1990, ch. 124, § 6.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Tort liability for pollution from underground storage tank, 5 A.L.R.5th 1.

74-6B-7. Corrective action fund created; authorization for expenditures.

A. There is created the "corrective action fund". This fund is intended to provide for financial assurance coverage required by federal law and shall be used by the department to take corrective action in response to a release, to pay for the costs of a minimum site assessment in excess of ten thousand dollars ($10,000) and to make payments to or on behalf of owners and operators in accordance with Section 74-6B-13 NMSA 1978. The owner or operator of a site shall not use the corrective action fund as evidence of financial assurance to satisfy claims of third parties.

B. The board, after recommendations from the underground storage tank committee, shall adopt regulations for establishing priorities for corrective action at sites contaminated by underground storage tanks. The priorities shall be based on public health, safety and welfare and environmental concerns. In adopting regulations under this subsection, the board shall follow the procedures of Section 74-4-5 NMSA 1978. The provisions of that section relating to all other matters in connection with the adoption of regulations shall apply. The department shall establish priority lists of sites in accordance with the regulations adopted by the board.

C. The department shall make expenditures from the corrective action fund in accordance with regulations adopted by the board or the secretary for corrective action at sites contaminated by underground storage tanks. These expenditures shall be made by the department to perform corrective action, to pay for the costs of a minimum site assessment in excess of ten thousand dollars ($10,000), and to make payments to or on behalf of owners and operators in accordance with Section 74-6B-13 NMSA 1978. The department shall take corrective action at sites in the order of priority appearing on the priority lists, except when an emergency threat to public health, safety and welfare or to the environment exists.

D. No expenditure from the fund shall be authorized for corrective action at sites owned or operated by the United States or any agency or instrumentality thereof.

E. Nothing in this section authorizes payments for the repair or replacement of any underground storage tank or equipment.

F. Nothing in this section authorizes payments or commitments for payments in excess of the funds available.

G. Within sixty days after receipt of notification that the corrective action fund has become incapable of paying for assured corrective actions, the owner or operator shall obtain alternative financial assurance acceptable to the department.

History: Laws 1990, ch. 124, § 7; 1992, ch. 64, § 5.

ANNOTATIONS

Cross-references. - As to distribution to corrective action fund of petroleum products loading fee receipts, see 7-1-6.25 NMSA 1978.

As to imposition and rate of petroleum products loading fee, see 7-13A-3 NMSA 1978.

The 1992 amendment, effective March 9, 1992, substituted "department" for "division" several times throughout the section; added all of the present language of the first sentence of Subsection A following "release"; substituted "action" for "actions" in the first sentence of Subsections B and C; inserted "or the secretary" in the first sentence of Subsection C and added the second sentence of that subsection; and deleted "of an underground storage tank" following "operator" in Subsection G.

Appropriations. - Laws 1992, ch. 64, § 12, effective March 9, 1992, appropriates $200,000 from the corrective action fund to the department of environment for expenditure in the eighty-first fiscal year for the purpose of carrying out the provisions of the Ground Water Protection Act, provides that the appropriation is contingent upon the department of environment adopting regulations pursuant to this 1992 act during the eighty-first fiscal year, and provides that any unexpended or unencumbered balance

remaining at the end of the eighty-first fiscal year shall revert to the corrective action fund.

74-6B-8. Liability; cost recovery.

A. An owner or operator of an underground storage tank from which a release has occurred shall be strictly liable for the department's cost of taking corrective action at the site.

B. An owner or operator otherwise liable under Subsection A of this section shall not be liable for expenditures from the state corrective action fund associated with corrective action at the site if he has proved to the department that he has complied with the following:

(1) the owner or operator:

(a) is in substantial compliance with all of the requirements and provisions of regulations adopted by the board to fulfill the requirements of Paragraphs (1) through (7) of Subsection C of Section 74-4-4 NMSA 1978;

(b) has paid all underground storage tank fees required by Sections 74-4-4.4 and 74-6B-9 NMSA 1978;

(c) has conducted a minimum site assessment in accordance with regulations of the board and, if contamination is found, has taken action to prevent continuing contamination; and

(d) has cooperated in good faith with the department and has granted access to the department for investigation, cleanup and monitoring; and

(2) for sites where underground storage tanks were removed or properly abandoned prior to March 7, 1990, the owner or the operator:

(a) has paid all underground storage tank fees required by Section 74-4-4.4 NMSA 1978 and a two hundred dollar ($200) fee per site;

(b) has conducted a minimum site assessment in accordance with regulations of the board; and

(c) has cooperated in good faith with the department and has granted access to the department for investigation, cleanup and monitoring.

C. In the event that the department determines that an owner or operator has not complied with the requirements of Subsection B of this section, the department may bring an action in district court against the owner or operator to recover expenditures from the corrective action fund incurred by the department in taking corrective action at

the site. In addition, the department may bring an action in district court to recover any expenditures made of federal funds from the leaking underground storage tank trust fund in taking corrective action. These expenditures made from the corrective action fund and from federal funds include but are not limited to costs of investigating a release and undertaking corrective action, administrative costs and reasonable attorneys' fees. Expenditures recovered under this section, except for any recovered federal funds, shall be deposited into the corrective action fund.

D. The department has a right of subrogation to any insurance policies in existence at the time of the release to the extent of any rights the owner or operator of a site may have had under that policy and has a right of subrogation against any third party who caused or contributed to the release. This right of subrogation shall apply regardless of any defenses available to the owner or operator under Subsection B of this section.

History: Laws 1990, ch. 124, § 8; 1991, ch. 47, § 1; 1992, ch. 64, § 6.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, in Subsection A substituted "An owner or operator of an underground storage tank from which a release has occurred" for "All owners and operators of sites contaminated by an underground storage tank"; in Subsection B, rewrote the introductory paragraph and made minor stylistic changes; and, in Subsection C, in the first sentence, inserted "an underground storage tank if the owner or operator of the tank has failed to prove that he has complied".

The 1992 amendment, effective March 9, 1992, substituted "department's cost" for "division's costs" in Subsection A; substituted all of the present language of the introductory paragraph of Subsection B beginning with "at the site" for "taken by the division and shall be entitled to the use of the state corrective action fund for corrective action at the site if he has proven to the division that he has complied with the following"; made minor stylistic changes in Subsections B(1)(b), B(1)(c), and B(2)(b); added Subsection B(1)(d); substituted all of the present language of the introductory paragraph of Subsection B(2) following "tanks" for "have been removed or properly abandoned, the owner"; added Subsection B(2)(c); rewrote Subsection C; and substituted "department" for "division" in the first sentence of Subsection D, while adding all of the present language of that sentence following "policy".

No claim for payment from corrective action fund. - The owner or operator of an underground storage tank which has experienced a release and who has complied with the requirements of Subsections (B)(1)(a) through (c) of this section has no claim for payment from the corrective action fund for costs expended by him for corrective action, nor does he have a claim for such amounts to be expended by him in the future. 1991 Op. Att'y Gen. No. 91-08.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Tort liability for pollution from underground storage tank, 5 A.L.R.5th 1.

74-6B-9. Underground storage tank fee; deposit in underground storage tank fund.

On July 1 of each year, there is due from and shall be paid by either the owner or the operator a fee of one hundred dollars ($100) for each tank owned or operated. The fees shall be paid to the department and deposited in the underground storage tank fund created in Section 74-4-4.6 NMSA 1978.

History: Laws 1990, ch. 124, § 9; 1992, ch. 64, § 7.

ANNOTATIONS

The 1992 amendment, effective March 9, 1992, deleted "of an underground storage tank" following "operator" in the first sentence; and substituted "department" for "division" in the second sentence.

74-6B-10. Act does not create insurance company or fund.

Nothing in the Ground Water Protection Act [this article] creates an insurance company or an insurance fund. The corrective action fund is not subject to the provisions of the Insurance Code [Chapter 59A NMSA 1978].

History: Laws 1990, ch. 124, § 10.

74-6B-11. Grace period; incentives for reporting contamination incidents.

A. To encourage early detection, reporting and clean up of releases from underground storage tanks, the department shall conduct an incentive program that shall provide for a general grace period beginning on the effective date of the Ground Water Protection Act [this article] and ending two years thereafter. The department shall establish requirements for the written reporting of releases in connection with the incentive program. All sites contaminated by releases from underground storage tanks reported to the department during the period of two years after the effective date of the Ground Water Protection Act shall be exempted from any civil penalties pursuant to Section 74-4-10 NMSA 1978 for failure to report the leak, failure to pay the fee required by Section 74-4-4.4 NMSA 1978 and failure to register any underground storage tanks at the site if a written report is filed with the department in accordance with its requirements and if the owner or operator has paid an annual underground storage tank fee for each tank for the years following the effective date of this section.

B. The provisions of this section do not authorize or require payments from the corrective action fund for costs expended prior to the passage of the Ground Water Protection Act.

C. Nothing in this section relieves any person from compliance with any federal or state laws or regulations applicable to underground storage tanks.

History: Laws 1990, ch. 124, § 11; 1992, ch. 64, § 8.

ANNOTATIONS

The 1992 amendment, effective March 9, 1992, deleted "of the site" following "operator" near the end of the last sentence of Subsection A and substituted "department" for "division" several times throughout that subsection; and substituted "payments from the corrective action fund" for "reimbursement from the fund" in Subsection B.

74-6B-12. Early response team created.

A. The department shall create, within its staff or by contract, an early response team that shall respond to requests from municipalities or counties for advice and technical assistance regarding alleged releases from underground storage tanks owned or operated by the municipality or county. Within two days from the date that a request is received by the department, the team or a member of the team shall make an on-site inspection to determine the presence or absence of a release. A superficial assessment of the extent of the release, if present, shall be made by the team within five days from the date of the team's first arrival on the site and a written report shall be submitted to the owner or operator of the site.

B. The early response team shall:

(1) advise the owner or operator of procedures that will be required of him to contain and abate the release;

(2) provide the owner or operator with a list of consultants and contractors that can perform an in-depth site assessment, develop a reclamation plan and complete the reclamation according to the schedule imposed by the regulations specified in Paragraph (3) of this subsection;

(3) suggest in writing to the owner or operator acceptable alternative procedures that will satisfy the corrective action and reclamation requirements of the regulations adopted pursuant to the Ground Water Protection Act [this article] and Section 74-4-4.4 NMSA 1978 and successfully remediate the site;

(4) inform the owner or operator of the time schedule imposed by regulation that he is required to adhere to in order to remain in compliance with state requirements;

(5) within thirty days of receipt of a reclamation plan from the owner or operator, notify him whether his plan will be accepted or rejected by the department as an acceptable plan for remediating the site; and

(6) monitor and facilitate the progress of the abatement and site remediation and assure that the remediation occurs in a timely, efficient and effective manner, according to the regulations specified in Paragraph (3) of this subsection.

C. Upon request by a municipality or county, the early response team shall provide training to owners and operators in prevention of releases and early response operations that can be implemented to contain, abate and remediate releases at the sites of known underground storage tank releases.

D. Nothing in this section relieves any municipality or county from complying with any federal or state law or regulation applicable to underground storage tanks, including other sections of the Ground Water Protection Act.

History: Laws 1991, ch. 260, § 1; 1992, ch. 64, § 9.

ANNOTATIONS

The 1992 amendment, effective March 9, 1992, substituted "department" for "division" several times throughout the section; deleted "of an underground storage tank" following "operator" several times throughout the section; substituted "Paragraph (3) of this subsection" for "Paragraph (2) of this section" in Subsections B(2) and B(6); substituted "adopted" for "imposed" in Subsection B(3); substituted "thirty days" for "fifteen days" in Subsection B(5); redesignated former Subsection D as present Subsection C; deleted former Subsection E relating to liability for costs of minimum site assessments; and redesignated former Subsection F as present Subsection D.

Effective dates. - Laws 1991, ch. 260 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 14, 1991.

Compiler's note. - Subsection C, as enacted by Laws 1991, ch. 260, § 1, was not set out for this section, as that subsection, as enacted by Laws 1991, ch. 260, § 1, was vetoed by the governor.

74-6B-13. Payment program.

A. All costs in excess of ten thousand dollars ($10,000) that are necessary to perform a minimum site assessment in accordance with the regulations of the board shall be paid from the corrective action fund. In the event that an owner or operator has performed a minimum site assessment after March 7, 1990 but prior to the effective date of this section and has expended more than ten thousand dollars ($10,000), the owner or operator may apply to the department for reimbursement of the costs of the minimum site assessment in excess of ten thousand dollars ($10,000) and shall be entitled to reimbursement of those costs.

B. An owner or operator who has performed or who has made arrangements to perform corrective action after March 7, 1990 and in accordance with applicable environmental

laws and regulations may apply to the department for payment of the costs of corrective action, other than a minimum site assessment, and shall be entitled to payment of those costs from the corrective action fund, if he has proven to the department that he has complied with the requirements of Section 74-6B-8 NMSA 1978.

C. Payment of the cost of corrective action, including the cost of a minimum site assessment, shall be made by the department following application and proper documentation of the costs and in accordance with regulations adopted by the secretary establishing eligible and ineligible costs. Eligible costs for payment are those reasonable and necessary costs actually incurred after March 7, 1990 in the performance of a site assessment and for corrective action that are consistent with the department's fee schedule. Ineligible costs include attorneys' fees, repair or upgrade of tanks, loss of revenue and costs of monitoring a contractor.

D. All department determinations concerning the manner of payment, compliance and cost eligibility shall be made in accordance with department regulations.

E. If the owner or operator is in compliance with the requirements of Section 74-6B-8B NMSA 1978, payment of costs from the corrective action fund shall occur not later than ninety days after the submission of the application and proper documentation of costs by the owner or operator, except as provided in Section 74-6B-14 NMSA 1978.

F. The department shall reserve not less than twenty-five percent of the unexpended, unencumbered balance of the corrective action fund on July 1 of each year for the payment of claims made on the fund.

History: 1978 Comp., § 74-6B-13, enacted by Laws 1992, ch. 64, § 10.

ANNOTATIONS

Emergency clauses. - Laws 1992, ch. 64, § 13 makes the act effective immediately. Approved March 9, 1992.

74-6B-14. State liability; insufficient balance in the fund.

Nothing in the Ground Water Protection Act [this article] establishes or creates any liability or responsibility on the part of the department or the state to pay corrective action costs from any source other than the corrective action fund, in the manner described, nor shall the department or the state have any liability or responsibility to make any payments for corrective action costs if the balance in the fund is insufficient to cover those costs.

History: 1978 Comp., § 74-6B-14, enacted by Laws 1992, ch. 64, § 11.

ANNOTATIONS

Emergency clauses. - Laws 1992, ch. 64, § 13 makes the act effective immediately. Approved March 9, 1992.

ARTICLE 7
ENVIRONMENTAL COMPLIANCE

74-7-1. Short title.

This act [74-7-1 to 74-7-8 NMSA 1978] may be cited as the "Environmental Compliance Act".

History: Laws 1983, ch. 29, § 1.

ANNOTATIONS

Cross-references. - For general provisions on environmental improvement, see 74-1-1 NMSA 1978 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 1 et seq.

Standing to sue for violation of state environmental regulatory statute, 66 A.L.R.4th 685.

39A C.J.S. Health & Environment § 1 et seq.

74-7-2. Purpose of act.

The purpose of the Environmental Compliance Act [74-7-1 to 74-7-8 NMSA 1978] is to foster a sensitivity to the environment, to improve industry's compliance with environmental regulations that seek to maintain the delicate ecological balance while still pursuing the industrial and technological development of New Mexico, to implement a systematic procedure to review compliance with environmental regulations and to improve the environmental regulatory process by enhancing communication between industry and regulatory agencies.

History: Laws 1983, ch. 29, § 2.

74-7-3. Definitions.

As used in the Environmental Compliance Act [74-7-1 to 74-7-8 NMSA 1978]:

A. "board" means the environmental improvement board;

B. "director" means the director of the division;

C. "division" means the environmental improvement division of the health and environment department [department of environment];

D. "environmental audit" means a systematic assessment, analysis and evaluation by a regulated entity of its compliance with environmental laws and regulations administered by the board and the division, applicable to its operation; and

E. "regulated entity" means any person, partnership, corporation, firm, association, governmental or other entity organized and engaging in any business or activity in the state which deals with or has an impact on the environment of this state or which must by law comply with federal or state environmental protection regulations.

History: Laws 1983, ch. 29, § 3.

ANNOTATIONS

Bracketed material. - The bracketed reference to the department of environment was inserted by the compiler, as Laws 1991, ch. 25, § 4 establishes the department of environment and provides that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment. The bracketed material was not enacted by the legislature and is not part of the law.

74-7-4. Board; duties.

The duties of the board are to:

A. develop and maintain regulations and standards regarding environmental auditing programs; and

B. promulgate other regulations as necessary to carry out the provisions of the Environmental Compliance Act [74-7-1 to 74-7-8 NMSA 1978].

History: Laws 1983, ch. 29, § 4.

74-7-5. Adoption of regulations; notice and hearing; appeal.

A. No regulations shall be adopted pursuant to the Environmental Compliance Act [74-7-1 to 74-7-8 NMSA 1978] until after a public hearing by the board. As used in this section, "regulation" includes any amendment or repeal thereof. Hearings on regulations shall be held pertaining to that environmental area which is substantially affected by the regulation. In making a regulation, the board shall give the weight it deems appropriate to all relevant facts and circumstances presented at the hearing, including but not limited to:

(1) the protection of the health and welfare of both the general public and the individual worker and the maintenance of the delicate ecological balance;

(2) the necessity for and technical practicability and economic reasonableness of taking action with respect to environmental auditing programs;

(3) the need to protect private proprietary processes;

(4) the level of management support within the specific regulated entity for the environmental auditing program;

(5) a regulated entity's established procedures to ensure compliance and correction of any environmental standards that are violated; and

(6) compliance with the requirements of the following federal laws and their associated standards, regulations and state implementing directives:

(a) the National Environmental Policy Act of 1969;

(b) the Federal Water Pollution Control Act;

(c) the Safe Drinking Water Act;

(d) the Resource Conservation and Recovery Act of 1976;

(e) the Used Oil Recycling Act of 1980;

(f) the Clean Air Act;

(g) the Toxic Substances Control Act;

(h) the Occupational Safety and Health Act of 1970;

(i) the Noise Control Act of 1972;

(j) the Hazardous Materials Transportation Act; and

(k) the Comprehensive Environmental Response, Compensation and Liability Act of 1980.

B. Notice of the hearing shall be given at least thirty days prior to the hearing date and shall state the subject, time and place of the hearing and the manner in which interested persons may present their views. The notice shall state where interested persons may secure copies of any proposed regulation. The notice shall be published in a newspaper of general circulation in the area affected. Reasonable effort shall be made to give

notice to all persons who have made a written request to the board for advance notice of hearings.

C. At the hearing, the board shall allow all interested persons reasonable opportunity to submit data, views or arguments, orally or in writing, pertaining to the feasibility of conducting environmental audits.

D. No regulation or amendment or repeal thereof adopted by the board shall become effective until thirty days after its filing pursuant to the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978].

E. Any person who is affected by a regulation adopted by the board may appeal to the court of appeals for further relief. All appeals shall be upon the transcript made at the hearing and shall be taken to the court of appeals within thirty days after filing of the regulation pursuant to the State Rules Act.

History: Laws 1983, ch. 29, § 5.

ANNOTATIONS

Federal acts. - The National Environmental Policy Act of 1969 appears as 42 U.S.C. §§ 4321, 4331 to 4335 and 4341 to 4347.

The Federal Water Pollution Control Act is omitted from the U.S. Code as superseded by 33 U.S.C. § 1251 et seq.

The Safe Drinking Water Act appears as 21 U.S.C. § 349 and 42 U.S.C. §§ 201 and 300f et seq.

The Resource Conservation and Recovery Act of 1976 appears as 42 U.S.C. § 6901 et seq.

The Used Oil Recycling Act of 1980 appears as 42 U.S.C. §§ 6901a, 6903, 6914a, 6915, 6916, 6932, 6943 and 6948.

The Clean Air Act appears as 42 U.S.C. § 7401 et seq.

The Toxic Substances Control Act appears as 15 U.S.C. § 2601 et seq.

The Occupational Safety and Health Act of 1970 appears as 29 U.S.C. § 651 et seq. and numerous other provisions.

The Noise Control Act of 1972 appears as 42 U.S.C. § 4901 et seq. and 49 U.S.C. § 1431.

The Hazardous Materials Transportation Act appears as 49 U.S.C. § 1801 et seq.

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 appears as 42 U.S.C. § 9601 et seq., 9631 to 9633 and numerous other provisions.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Affirmative defenses in actions challenging omission or adequacy of environmental impact statement under § 102(2)(C) of National Environmental Policy Act of 1969 (42 USCS § 4332(2)(C)), 63 A.L.R. Fed. 18.

Environmental and conservation groups' standing to challenge omission or adequacy of environmental impact statement required by § 102(2)(C) of National Environmental Policy Act of 1969 (42 USCS § 4332(2)(C)), 63 A.L.R. Fed. 446.

74-7-6. Division; duties.

The division shall establish guidelines for regulated entities concerning environmental auditing programs pursuant to the rules and regulations adopted in compliance with the Environmental Compliance Act [74-7-1 to 74-7-8 NMSA 1978].

History: Laws 1983, ch. 29, § 6.

74-7-7. Regulated entities; environmental auditing programs.

Regulated entities may in cooperation with the division develop environmental auditing programs in compliance with the rules and regulations adopted pursuant to the Environmental Compliance Act [74-7-1 to 74-7-8 NMSA 1978] and may then apply to the division for certification. These environmental auditing programs shall be reviewed by the division and, upon a determination of compliance with established rules and regulations, shall be certified.

History: Laws 1983, ch. 29, § 7.

74-7-8. Board and division; incentives.

Regulated entities shall be allowed a reasonable time as determined by the division to correct any potential problem areas identified in the environmental auditing process. The board and division shall develop incentives to encourage regulated entities to participate in the Environmental Compliance Act [74-7-1 to 74-7-8 NMSA 1978].

History: Laws 1983, ch. 29, § 8.

ARTICLE 8
SOLID WASTE INCINERATION

74-8-1. Solid waste incineration prohibited.

No solid waste shall be disposed of by incineration in New Mexico until the environmental improvement board adopts regulations under the provisions of Section 74-2-5.2 NMSA 1978. As used in this section:

A. "solid waste" means solid waste as defined in the Solid Waste Act; and

B. "incineration" means the process of reducing combustible solid waste designed to achieve complete combustion by means of a device or chamber.

History: Laws 1989, ch. 279, § 1; 1990, ch. 99, § 70.

ANNOTATIONS

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

74-8-2. Disposal of incinerator ash prohibited.

No bottom, fly or combined ash from any incinerator located inside or outside New Mexico shall be disposed of at any solid waste landfill in New Mexico until such time as the environmental improvement board adopts regulations proposed by the environmental improvement division of the health and environment department [department of environment]. These regulations shall prescribe that incinerator ash be managed as solid, special or hazardous waste.

History: Laws 1989, ch. 279, § 2.

ANNOTATIONS

Bracketed material. - The bracketed reference to the department of environment was inserted by the compiler, as Laws 1991, ch. 25, § 4 establishes the department of environment and provides that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment. The bracketed material was not enacted by the legislature and is not part of the law.

74-8-3. Exemptions.

A. Medical waste incinerators incinerating less than three tons per day and medical waste incinerators that were in operation as of July 1, 1989, are exempt from the provisions of Sections 74-8-1 and 74-8-2 NMSA 1978. Utility boilers that do not use solid waste as a primary fuel are exempt.

B. The prohibitions set forth in Sections 74-8-1 and 74-8-2 NMSA 1978 shall not apply to incinerators or the disposal of ash from incinerators that have interim status pursuant to the Hazardous Waste Act [Chapter 74, Article 4 NMSA 1978] and for which a permit application has been made under Section 74-4-4.2 NMSA 1978 to the environmental

improvement division of the health and environment department [department of environment] prior to January 1, 1989.

History: Laws 1989, ch. 279, § 3; 1990, ch. 99, § 71.

ANNOTATIONS

Bracketed material. - The bracketed reference to the department of environment was inserted by the compiler, as Laws 1991, ch. 25, § 4 establishes the department of environment and provides that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment. The bracketed material was not enacted by the legislature and is not part of the law.

ARTICLE 9
SOLID WASTE ACT

74-9-1. Short title.

Sections 1 through 42 and 72 and 73 of this act may be cited as the "Solid Waste Act".

History: Laws 1990, ch. 99, § 1.

ANNOTATIONS

Solid Waste Act. - The phrase "this act", referred to in this section, means Laws 1990, ch. 99, sections 1 to 42 and 72 and 73 of which constitute the Solid Waste Act. Sections 1 to 42 appear as 74-9-1 to 74-9-42 NMSA 1978 and Sections 72 and 73 are a severability clause and a saving clause respectively, which are noted under 74-9-42 and 74-9-1 NMSA 1978 respectively.

Law reviews. - For article, "Rights of New Mexico Municipalities Regarding the Siting and Operation of Privately Owned Landfills," see 21 N.M.L. Rev. 149 (1990).

For article, "The New Mexico Solid Waste Act: A Beginning for Control of Municipal Solid Waste in the Land of Enchantment," see 21 N.M.L. Rev. 167 (1990).

For article, "Strict Liability Under the New Mexico Solid Waste Act: A Comparison with CERCLA," see 21 N.M.L. Rev. 195 (1990).

74-9-2. Purposes.

The purposes of the Solid Waste Act are to:

A. authorize and direct the establishment of a comprehensive solid waste management program;

B. provide technical, financial and program development assistance to counties and municipalities for solid waste management;

C. enhance the beauty and quality of the environment; conserve, recover and recycle resources; and protect the public health, safety and welfare;

D. plan for and regulate, in the most economically feasible, cost-effective and environmentally safe manner, the reduction, storage, collection, transportation, separation, processing, recycling and disposal of solid waste;

E. provide the opportunity and incentive for counties and municipalities to plan adequately and provide for cost-effective and environmentally safe solid waste management at the local level;

F. require issuance of permits for the construction, operation and, if applicable, closure and postclosure maintenance of solid waste facilities;

G. promote source reduction, recycling, reuse, treatment and transformation of solid waste as viable alternatives to disposal of those wastes by landfill disposal methods; and

H. require the state and its agencies, instrumentalities and political subdivisions to develop procurement policies that aid and promote the development of recycling recyclable materials.

History: Laws 1990, ch. 99, § 2.

ANNOTATIONS

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

74-9-3. Definitions.

As used in the Solid Waste Act:

A. "agricultural" means all methods of production and management of livestock, crops, vegetation and soil. This includes, but is not limited to, raising, harvesting and marketing. It also includes, but is not limited to, the activities of feeding, housing and maintaining animals such as cattle, dairy cows, sheep, goats, hogs, horses and poultry;

B. "board" means the environmental improvement board;

C. "commercial hauler" means any person transporting solid waste for hire by whatever means for the purpose of disposing of the solid waste in a solid waste facility, except that the term does not include an individual transporting solid waste generated on or from his residential premises for the purpose of disposing of it in a solid waste facility;

D. "construction and demolition debris" means materials generally considered to be not water soluble and nonhazardous in nature, including, but not limited to, steel, glass, brick, concrete, asphalt roofing materials, pipe, gypsum wallboard and lumber from the construction or destruction of a structure as part of a construction or demolition project, and includes rocks, soil, tree remains, trees and other vegetative matter that normally results from land clearing or land development operations for a construction project, but if construction and demolition debris is mixed with any other types of solid waste, whether or not originating from the construction project, it loses its classification as construction and demolition debris;

E. "densified-refuse-derived fuel" means a product resulting from the processing of mixed municipal solid waste in a manner that produces a fuel suitable for combustion in existing or new solid-fuel-fired boilers;

F. "director" means the director of the environmental improvement division of the health and environment department [department of environment];

G. "division" means the environmental improvement division of the health and environment department [department of environment];

H. "municipality" means any incorporated city, town or village, whether incorporated under general act, special act or special charter, incorporated counties and H class counties;

I. "person" means an individual or any entity, including federal, state and local governmental entities, however organized;

J. "plan" or "state plan" means the solid waste management plan required to be developed under Section 4 [74-9-4 NMSA 1978] of the Solid Waste Act;

K. "program" or "state program" means the comprehensive solid waste management program described in Section 12 [74-9-12 NMSA 1978] of the Solid Waste Act;

L. "recyclable materials" means materials that would otherwise become solid waste if not recycled and that can be collected, separated or processed and placed in use in the form of raw materials, products or densified-refuse-derived fuels;

M. "recycling" means any process by which recyclable materials are collected, separated or processed and reused or returned to use in the form of raw materials or products;

N. "solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded material, including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining and agricultural operations and from community activities. "Solid waste" does not include:

(1) drilling fluids, produced waters and other non-domestic wastes associated with the exploration, development or production, transportation, storage, treatment or refinement of crude oil, natural gas, carbon dioxide gas or geothermal energy;

(2) fly ash waste, bottom ash waste, slag waste and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels and wastes produced in conjunction with the combustion of fossil fuels that are necessarily associated with the production of energy and that traditionally have been and actually are mixed with and are disposed of or treated at the same time with fly ash, bottom ash, boiler slag or flue gas emission control wastes from coal combustion;

(3) waste from the extraction, beneficiation and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore, coal, copper, molybdenum and other ores and minerals;

(4) agricultural waste, including, but not limited to, manures and crop residues returned to the soil as fertilizer or soil conditioner;

(5) cement kiln dust waste;

(6) sand and gravel;

(7) solid or dissolved material in domestic sewage or solid or dissolved materials in irrigation return flows or industrial discharges that are point sources subject to permits under Section 402 of the Federal Water Pollution Control Act, 33 U.S.C. Section 1342 or source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954, 42 U.S.C. Section 2011 et seq.;

(8) densified-refuse-derived fuel; or

(9) any material regulated by Subtitle C of the federal Resource Conservation and Recovery Act of 1976, substances regulated by the Federal Toxic Substances Control Act or low-level radioactive waste;

O. "solid waste district" means a geographical area designated by the board as a solid waste district under Section 11 [74-9-11 NMSA 1978] of the Solid Waste Act;

P. "solid waste facility" means any public or private system, facility, location, improvements on the land, structures or other appurtenances or methods used for processing, transformation, recycling or disposal of solid waste, including landfill

disposal facilities, transfer stations, resource recovery facilities, incinerators and other similar facilities not specified, but does not include equipment specifically approved by order of the director to render medical waste noninfectious or a facility which is permitted pursuant to the provisions of the Hazardous Waste Act and does not apply to a facility fueled by a densified-refuse-derived fuel that accepts no other solid waste;

Q. "source reduction" means any action that causes a net reduction in the generation, volume or toxicity of solid waste;

R. "special waste" means solid waste that has unique handling, transportation or disposal requirements to assure protection of the environment and the public health and safety;

S. "transformation" means incineration, pyrolysis, distillation, gasification or biological conversion other than composting; and

T. "yard refuse" means vegetative matter resulting from landscaping, land maintenance and land clearing operations.

History: Laws 1990, ch. 99, § 3.

ANNOTATIONS

Bracketed material. - The bracketed reference to the department of environment was inserted by the compiler, as Laws 1991, ch. 25, § 4 establishes the department of environment and provides that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment. The bracketed material was not enacted by the legislature and is not part of the law.

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

Resource Conservation and Recovery Act of 1976. - Subtitle C of the federal Resource Conservation and Recovery Act of 1976, referred to in Paragraph (9) of Subsection N, appears as 42 U.S.C. §§ 6921 to 6931.

Toxic Substances Control Act. - The federal Toxic Substances Control Act, referred to in Paragraph (9) of Subsection N, appears as 15 U.S.C. § 2601 et seq.

74-9-4. Plan; requirement.

As a basis for developing a comprehensive solid waste management program, the director shall prepare and submit to the board for approval a solid waste management plan no later than December 31, 1992. The plan shall be comprehensive and integrated and shall include consideration of the following activities with the priorities indicated:

A. first, source reduction and recycling;

B. second, environmentally safe transformation; and

C. third, environmentally safe landfill disposal.

History: Laws 1990, ch. 99, § 4; 1991, ch. 194, § 1.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, substituted "December 31, 1992" for "December 31, 1991" at the end of the first sentence.

74-9-5. Plan; effect.

The plan approved by the board shall be effective thirty days after its approval and shall be filed under the provisions of Section 14-4-4 NMSA 1978. Consistency with the plan shall be required:

A. of any regulation adopted by the board under the provisions of the Solid Waste Act;

B. in any action taken by the director under authority contained in the Solid Waste Act; and

C. as a condition of approval of any application by a county or municipality for a grant under the provisions of the Solid Waste Act.

History: Laws 1990, ch. 99, § 5.

ANNOTATIONS

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

74-9-6. Plan; required provisions.

The plan shall include at least the following elements:

A. a waste characterization element that identifies the constituent materials, including but not limited to type, quantity and source, that compose solid waste generated or disposed of, or both, within the state;

B. a source reduction element that identifies types, quantities and toxicities of solid waste to be reduced, mechanisms to stimulate and enhance reduction, including the impacts on generation of solid waste of packaging, rate structures for collection and disposal economic incentives, and a program implementation schedule to meet the goal stated in Subsection J of this section;

C. a recycling element that identifies types and quantities of recyclable materials, evaluates and quantifies current levels of recycling efforts in New Mexico, and describes, evaluates and identifies the current and future market structure for recycling, including procurement preferences for recycled materials, and a program implementation schedule to meet the goal stated in Subsection J of this section;

D. a composting element that identifies both the types and quantities of solid waste that are and those that could be composted, procurement preferences for composted products, a description of the methods and facilities needed to implement the composting element and a program implementation schedule to meet the goal stated in Subsection J of this section;

E. a solid waste facility capacity element that identifies, for each solid waste district, current landfill disposal capacity and projects the quantity of landfill disposal space that will have to be permitted to maintain an average landfill disposal capacity that will be needed to manage the quantity of solid waste projected to be generated over the next ten years from sources both within and outside of the state, reduced by source reduction, recycling, composting and other programs;

F. an education and public information element that identifies existing public information and education programs and describes how the state will increase awareness of and cooperation of the public in environmentally safe solid waste management;

G. a funding element that includes a projected cost of implementation of the plan and recommendations for developing revenue sources for plan implementation to meet the goal stated in Subsection J of this section;

H. a special waste and household hazardous waste element that identifies types and quantities of those categories of and recommends methods for waste handling, collecting, transporting and disposing of those wastes; identifies existing and future strategies for managing those wastes; and includes an implementation schedule to meet the goal stated in Subsection J of this section;

I. a siting element that locates and provides a description of areas that could be used for development of adequate transformation or landfill disposal capacity concurrent and consistent with the development and implementation of the plan; and

J. a goal to divert twenty-five percent of all solid waste from solid waste disposal facilities by July 1, 1995, and fifty percent of all solid waste by July 1, 2000, with a base rate of disposal calculated by multiplying the population of the state by four pounds per person per day for the period used as the base period.

History: Laws 1990, ch. 99, § 6.

74-9-7. Plan; information required from counties and municipalities.

A. As a basis for developing and preparing the plan, the director shall request and shall use information from each county and municipality or combinations of counties and municipalities as further authorized under the provisions of this section.

B. The director shall prepare and distribute to each county and municipality guidelines to assist it in the preparation of the plan information submittals. These guidelines shall be distributed no later than October 1, 1990. The guidelines shall include requirements for submittal of:

(1) documentation that demonstrates that the submitting county or municipality considered combining with one or more other counties or municipalities, or both, to form a district for solid waste planning and local implementation of program elements for which the county's or municipality's participation is required under the provisions of the Solid Waste Act; and

(2) information to be furnished by counties or municipalities for their respective jurisdictions that corresponds generally to the provisions of Section 74-9-6 NMSA 1978.

C. If a county or municipality indicates in its submission that it has developed through a joint powers agreement or otherwise a plan for formation of a solid waste district with one or more other participating counties or municipalities, that proposed district shall be recommended to the board by the director for designation under Section 74-9-11 NMSA 1978.

D. In developing the information to be submitted to the director, each county and municipality shall provide:

(1) for the maximum public participation in the process that is possible within time constraints and available resources; and

(2) for obtaining information from representatives of the private sector involved in solid waste management.

E. The information submitted to the director shall include a description of methods used by the county or municipality to achieve the participation required under Subsection D of this section.

F. If a county or municipality or any combination of counties or municipalities designates in a plan information submittal proposed county, municipal or regional landfill disposal sites, and the sites comply with applicable substantive permitting requirements established by the Solid Waste Act and regulations adopted pursuant to that act, the designations shall be binding upon the director unless he applies for and receives from the board authorization to change a designation.

G. Counties and municipalities shall furnish the documentation and information described in Subsection B of this section no later than July 1, 1992.

H. Failure by a county or municipality to furnish information that is required by the director, giving due regard to the particular demographic, geographic, economic and other appropriate characteristics of the county or municipality, may render it ineligible to be a recipient of any grants authorized under the provisions of the Solid Waste Act and established by regulations adopted by the board.

History: Laws 1990, ch. 99, § 7; 1991, ch. 185, § 1; 1991, ch. 194, § 2.

ANNOTATIONS

1991 amendments. - Identical amendments to this section were enacted by Laws 1991, ch. 185, § 1 and Laws 1991, ch. 194, § 2, effective June 14, 1991, which substituted "Section 74-9-6 NMSA 1978" for "Section 6 of the Solid Waste Act" at the end of Paragraph (2) of Subsection B; substituted "Section 74-9-11 NMSA 1978" for "Section 11 of the Solid Waste Act" at the end of Subsection C; substituted "July 1, 1992" for "July 1, 1991" at the end of Subsection G; and made minor stylistic changes in Subsection F. The section is set out as amended by Laws 1991, ch. 194, § 2. See 12-1-8 NMSA 1978.

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

74-9-8. Board adoption of initial regulations.

No later than December 31, 1991, the board shall adopt regulations under the authority of this section to:

A. implement, administer and enforce a program for the cost-effective and environmentally safe siting, construction, operation, maintenance, closure and post-closure care of solid waste facilities, including financial responsibility requirements for solid waste facility owners and operators and also including requirements that assure that the relative interests of the applicant, other owners of property likely to be affected and the general public will be considered prior to the issuance of a permit for a solid waste facility;

B. define the solid wastes that are considered special wastes;

C. establish specific requirements for the detoxification and disposal of special wastes;

D. establish classifications of solid waste facilities and define what types of solid waste may be processed or disposed of in each classification;

E. establish performance standards for the construction and operation of solid waste facilities that will assure protection of ground water quality from degradation by contaminants from solid waste facilities consistent with the provisions of the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978] and the regulations and standards established under that act by the water quality control commission, provided

such regulations shall not allow permitting of any active solid waste facility larger than five hundred acres;

F. establish performance standards for transformation facilities that will assure protection of the state's environment;

G. establish requirements and procedures for the granting or denial of an application to modify a solid waste facility permit under Section 74-9-25 NMSA 1978;

H. establish requirements and procedures for commercial haulers to minimize littering and otherwise prevent degradation of the environment;

I. establish an applicant fee schedule for processing permit applications that is based on costs of application review incurred by the division and also costs incurred for investigations of applicants by state departments and agencies other than the division, which regulation shall provide for the reimbursement of these costs to the division or other department or agency from the fees charged and shall also limit the fee to be not greater than ten thousand dollars ($10,000);

J. establish requirements and procedures for a person to obtain a variance from the application of a substantive regulation to the person if the person files a written application for a variance with the director and demonstrates to the director's satisfaction that:

(l) application of the regulation would result in an arbitrary and unreasonable taking of the applicant's property or would impose an undue economic burden upon any lawful business, occupation or activity; and

(2) granting the variance will not result in any condition injurious to human health, safety or welfare or the environment;

K. assure that no variance will be granted under the provisions of Subsection J of this section until the director has considered the relative interests of the applicant, other owners of property likely to be affected and the general public and that any variance or renewal of a variance shall be granted for time periods and under conditions consistent with reasons for the various [variance] but within the following limitations:

(1) if the variance is granted on the grounds that there are no practicable means known or available for the adequate prevention of degradation of the environment or the risk to the public health, safety or welfare, it shall continue only until the necessary means for the prevention of the degradation or risk become known and available; or

(2) if the variance is granted on the grounds that it is justified to relieve or prevent hardship of a kind other than that provided for in Paragraph (1) of this subsection, it shall not be granted for more than one year;

L. establish a list of solid wastes that shall not be transferred, disposed of or transformed in a solid waste facility and prohibit the disposal or transformation of those solid wastes in solid waste facilities;

M. establish recordkeeping procedures for solid waste transfer, landfill disposal and transformation facilities that shall include requirements for recording the type, amount and origin of solid waste transferred, disposed of or transformed at the facility and that require operators of landfill disposal, solid waste transfer and transformation facilities within the state to:

(1) maintain records in a form required by the division and file them with the division indicating the type, amount, origin and location in a landfill disposal facility of solid waste accepted by the facility;

(2) maintain copies of the records required under Paragraph (1) of this subsection after closure in a manner and for the length of time prescribed by the division; and

(3) make all required records available for inspection by the division and the general public during normal business hours; and

N. require the division to establish a solid waste facility operator certification program.

History: Laws 1990, ch. 99, § 8; 1991, ch. 185, § 2; 1991, ch. 194, § 3.

ANNOTATIONS

1991 amendments. - Laws 1991, ch. 185, § 2, effective June 14, 1991, substituting "January 1, 1992" for "July 1, 1991" in the introductory phrase; substituting "Section 74-9-25 NMSA 1978" for "Section 25 of the Solid Waste Act" in Subsection G; and making a minor stylistic change in Paragraph (1) of Subsection J, was approved on April 4, 1991. However, Laws 1991, ch. 194, § 3, also effective June 14, 1991, making all of the changes made by the first amendment, except, in the introductory paragraph, substituting "December 31, 1991" for "July 1, 1991", was approved later on April 4, 1991. The section is set out as amended by Laws 1991, ch. 194, § 3. See 12-1-8 NMSA 1978.

74-9-9. Board review and modification of initial regulations after approval of plan.

After approval of the plan, the board shall review the initial solid waste regulations adopted under Section 8 [74-9-8 NMSA 1978] of the Solid Waste Act and make any modifications necessary to make the regulations consistent with the plan.

History: Laws 1990, ch. 99, § 9.

74-9-10. Board adoption of regulations for source reduction and recycling programs.

After its approval of the plan, the board shall adopt regulations to establish source reduction and recycling programs consistent with the source reduction and recycling element of the plan and designed to meet the schedule for goal achievement provided in Subsection J of Section 6 [74-9-6 NMSA 1978] of the Solid Waste Act.

History: Laws 1990, ch. 99, § 10.

74-9-11. Establishment of solid waste districts; requirements; changing boundaries.

A. After its approval of the plan, the board shall adopt regulations to establish solid waste districts. The districts shall include and be identical with any districts recommended under the provisions of Section 7 [74-9-7 NMSA 1978] of the Solid Waste Act. In establishing districts the board shall take into account all relevant factors, including:

(1) the impact of solid waste disposal on land, water and other resources;

(2) the financial impact on counties and municipalities of constructing and upgrading landfill disposal facilities;

(3) the risks to the environment and to the public health, safety and welfare associated with solid waste;

(4) the costs and risks of the transportation of solid waste;

(5) existing county and municipal boundaries in the state and commercial, industrial, transportation and population centers both within the state and those that include areas within and outside of the state; and

(6) consideration of existing landfill disposal agreements, service areas, facilities and collection systems.

B. The board shall district the whole state, and solid waste district boundaries shall be contiguous within the state. Boundaries may cross state lines. The boundaries of a district shall not be altered without board approval. Any person may petition the board for realignment of district boundaries. The board shall act on any petition for realignment of district boundaries within six months of the submission of the petition.

C. The boundaries of a solid waste district need not be county or municipal boundaries. Counties and municipalities may be divided by district boundaries with each part in a different district as long as the districts are contiguous.

History: Laws 1990, ch. 99, § 11.

74-9-12. Comprehensive state solid waste management program.

A. A comprehensive state solid waste management program consistent with the plan shall be designed by the director by December 1, 1993 and shall be fully implemented by July 1, 1994. The program shall be reexamined at least once every three years by the director for management and operational compliance and efficiency and to validate compliance with the applicable requirements of the federal statutes and regulations.

B. The program shall be designed to achieve the following objectives:

(1) reduction, recycling, collection, transportation, storage, separation, transformation and disposal of solid waste throughout the state;

(2) coordinated regional activity for solid waste management within a solid waste district;

(3) positive proposals for local action to correct deficiencies in present solid waste management processes;

(4) financial, planning and technical assistance to counties and municipalities, state agencies and other persons to achieve cost-effective reduction, recycling, transformation and disposal of solid waste and environmentally safe solid waste management practices; and

(5) the education of the general public and the education and training of individuals involved in solid waste management to assure proper solid waste management.

C. The program shall identify detailed actions that could be taken by designated persons or organizations to achieve the objectives stated in Subsection B of this section.

History: Laws 1990, ch. 99, § 12; 1991, ch. 185, § 3; 1991, ch. 194, § 4.

ANNOTATIONS

1991 amendments. - Identical amendments to this section were enacted by Laws 1991, ch. 185, § 3 and Laws 1991, ch. 194, § 4, effective June 14, 1991, which substituted "December 1, 1993" for "December 1, 1992" and "July 1, 1994" for "July 1, 1993" in the first sentence in Subsection A. The section is set out as amended by Laws 1991, ch. 194, § 4. See 12-1-8 NMSA 1978.

74-9-13. Comprehensive state solid waste management report.

The director shall prepare by July 1, 1994, and annually thereafter, a report for the legislature on the status of solid waste management efforts in the state. The report shall include, at a minimum:

A. the status of, implementation of and compliance with the Solid Waste Act;

B. a comprehensive analysis, to be updated in each report, of solid waste generation and disposal in the state projected for a twenty-year period beginning on the effective date of the Solid Waste Act;

C. the total amounts of solid waste generated, recycled and disposed of and the methods of solid waste reduction, recycling and disposal used during the calendar year prior to the year in which the report is published;

D. an evaluation of the development and implementation of local solid waste management programs;

E. an evaluation of the success in meeting the solid waste reduction goals established in Section 74-9-6 NMSA 1978;

F. recommendations concerning existing and potential programs for source reduction and recycling that would be appropriate for the state, its agencies and political subdivisions to implement to meet the requirements of the Solid Waste Act;

G. an evaluation of the markets for recycled materials and the success of state, local and private industry efforts to enhance the markets for those materials, including the results of any procurement requirements of the Solid Waste Act;

H. the results of any recycling demonstration programs; and

I. recommendations to the governor and the legislature to improve the comprehensive management of solid waste in this state.

History: Laws 1990, ch. 99, § 13; 1991, ch. 194, § 5.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, substituted "July 1, 1994" for "July 1, 1993" in the first sentence and "Section 74-9-6 NMSA 1978" for "Section 6 of the Solid Waste Act" in Subsection E.

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

"Effective date of the Solid Waste Act". - The phrase, "effective date of the Solid Waste Act", referred to in Subsection B, means March 5, 1990, the effective date of Laws 1990, ch. 99.

74-9-14. Division; powers and duties.

The division is responsible for the enforcement and implementation of the regulations adopted by the board pursuant to the Solid Waste Act. In addition to its other powers and duties under the Solid Waste Act and other laws, the division, through its director and in accordance with his delegation of authority, shall:

A. develop and implement, in consultation with local governments, the private sector and members of the public, the comprehensive solid waste management program defined in Section 74-9-12 NMSA 1978, and update the program at least every three years;

B. provide technical assistance on solid waste management matters to counties, municipalities and other persons and cooperate with appropriate federal agencies and private organizations in carrying out the provisions of the Solid Waste Act;

C. promote the planning and application of source reduction, recycling and solid waste facility siting systems that preserve and enhance the quality of the air, water and other natural resources of the state;

D. assist in and encourage, where appropriate, the development of regional solid waste management;

E. provide the economic development department with technical assistance to enable it to encourage and support the development within the state of commercial enterprises that:

(1) produce a minimum of solid waste;

(2) engage in source reduction and recycling activities; or

(3) promote market activity and develop products made of recycled materials;

F. using the state institutions of higher education, solid waste management personnel from local governments, the private sector and other organizations, conduct research, and solicit public input in the research process, on alternative, economically feasible, cost-effective and environmentally safe solid waste management methods;

G. develop information, in consultation with the economic development department, state highway and transportation department and any other appropriate state agencies, on markets and strategies for market development and expansion for recyclable materials; maintain a directory of recycling businesses operating in the state; and serve as a coordinator to match recycled materials with markets;

H. in cooperation and coordination with the general services department, develop and manage a program of grants for source reduction and recycling programs;

I. cooperate with the state highway and transportation department and private organizations engaged in beautification programs in the development of a litter control program;

J. advise the board about ground water protection devices, air quality monitoring devices and other devices or measures that may be required as a result of solid waste management operations;

K. increase public education and public awareness of solid waste issues by developing and promoting statewide programs of litter control, recycling, source reduction and proper methods of solid waste management;

L. encourage public participation in rule-making processes regarding solid waste management;

M. determine monitoring requirements for solid waste facilities;

N. contract with private sector entities or the state institutions of higher education for implementation of appropriate parts of the solid waste management program described in Section 74-9-12 NMSA 1978;

O. enter into contracts appropriate and necessary to fulfill its responsibilities under the Solid Waste Act;

P. receive funds and accept, receive and administer grants or other funds or gifts from public or private sources, including the state and federal governments, for the purpose of carrying out the provisions of the Solid Waste Act; and

Q. participate in interstate and national initiatives to adopt uniform state laws when practicable and to enter into compacts between the state and other states for the improved management, recycling and source reduction of solid waste.

History: Laws 1990, ch. 99, § 14; 1991, ch. 21, § 43.

ANNOTATIONS

The 1991 amendment, effective March 27, 1991, substituted "Section 74-9-12 NMSA 1978" for "Section 12 of the Solid Waste Act" in Subsections A and N and deleted "and tourism" following "department" near the beginning of Subsection E and in Subsection G.

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

74-9-15. Specific program; state government source reduction and recycling.

A. The division shall cooperate with the general services department in its assessment of the status of recycling efforts undertaken directly by state government for its own solid waste and its evaluation of existing programs and its development of necessary recycling programs to reduce the generation of solid waste by state government. The programs shall include recycling of office papers, cardboard, used motor oil, yard waste and other materials produced by the state for which recycling markets exist or may be developed.

B. Each state agency and the legislature shall prepare a source reduction and recycling plan addressing the requirements of Subsections C and D of this section. Each agency plan shall be submitted for approval to the general services department on or before December 31, 1991, consistent with the goals and guidelines of this section, the goals stated in Subsection J of Section 6 [74-9-6 NMSA 1978] of the Solid Waste Act and the state plan. Agency plans shall be updated biennially to increase the amount of solid waste recycled by taking advantage of any changed circumstances. Updated plans shall be submitted to the general services department for approval prior to adoption.

C. By July 1, 1992, each state agency and the legislature shall establish and implement a source separation and collection program for recyclable materials produced as a result of agency operations, including, at a minimum, high grade paper, corrugated paper and glass. The source separation and collection program shall include, at a minimum, procedures for collecting and storing recyclable materials and contractual and other arrangements with buyers. Each agency shall appoint a recycling coordinator and shall conduct educational programs about the recycling program for its employees.

D. By July 1, 1992, each state agency shall establish and implement a source reduction program for materials used in the course of agency operations. The program shall be designed and implemented to achieve the maximum feasible reduction of solid waste generated as a result of agency operations.

History: Laws 1990, ch. 99, § 15.

74-9-16. Specific program; post-secondary educational institutions source reduction and recycling.

A. Each post-secondary educational institution shall prepare a source reduction and recycling plan addressing the requirements of Subsections B and C of this section. Each institution's plan shall be submitted for approval to the secretary of general services on or before December 31, 1991, consistent with the goals and guidelines of this section, the goals stated in Subsection J of Section 6 [74-9-6 NMSA 1978] of the Solid Waste Act and the state plan. Institution plans shall be updated biennially to increase the amount of solid waste recycled by taking advantage of any changed circumstances. Updated plans shall be submitted to the secretary of general services for approval prior to adoption.

B. By July 1, 1992, each institution shall establish and implement a source separation and collection program for recyclable materials, including at a minimum, high grade paper, corrugated paper and glass. The source separation and collection program shall include procedures for collecting and storing recyclable materials and contractual and other arrangements with buyers. Each institution shall appoint for each campus a recycling coordinator and shall conduct educational programs for students and employees about the recycling program.

C. By July 1, 1992, each post-secondary educational institution shall establish and implement a source reduction program for solid waste used in the course of its operations. The program shall be designed and implemented to achieve the maximum feasible reduction of solid waste generated as a result of the institution's operations.

D. By July 1, 1992, each post-secondary educational institution shall include in its source reduction and recycling program a composting component.

History: Laws 1990, ch. 99, § 16.

74-9-17. Specific program; education to promote source reduction and recycling.

A. The division, in cooperation with the state department of public education, shall develop an educational program for the public in support of the state source reduction and recycling goals to promote source reduction and recycling efforts at the individual, local, regional and state levels.

B. The division shall develop and disseminate educational material designed to establish broad public understanding of, and compliance with, the state's source reduction and recycling goals.

History: Laws 1990, ch. 99, § 17.

74-9-18. Specific program; household hazardous waste management.

A. No later than July 1, 1990, the director shall designate a household hazardous waste coordinator within the division to advise and assist counties, municipalities and other governmental entities that have implemented programs for household hazardous waste management.

B. The division shall provide technical assistance to counties, municipalities and other governmental entities that establish household hazardous waste management programs.

C. The division shall develop and implement a public information program to provide uniform and consistent information on the proper disposal of household hazardous waste. The program may include information, consistent with product labeling, on the proper use and storage of household products that contain hazardous substances.

D. The public information program shall be designed to provide uniform responses to public inquiries about household hazardous substances and household hazardous waste.

E. The public information program shall include the development of informative materials that may be used by counties, municipalities and other governmental entities in conjunction with household hazardous waste collection. The informative materials shall be prepared with the intent of promoting consistency in how household hazardous wastes are defined, collected and disposed of in household hazardous waste management programs.

History: Laws 1990, ch. 99, § 18.

74-9-19. Specific program; procurement of recycled supplies and materials.

A. The state purchasing agent and each central purchasing office, as defined in the Procurement Code, shall establish specifications, policies and practices that assure whenever supplies and materials that are composed in whole or in part of recycled materials are available for purchase and are shown by the seller, supplier or manufacturer to be equal in quality and are offered at a price not more than five percent higher than that of the supplies and materials not composed in whole or in part of recycled materials, the state purchasing agent and each central purchasing office shall purchase those supplies and materials composed in whole or in part of recycled materials.

B. In writing the specifications required under this section, the state purchasing agent and each central purchasing office shall incorporate requirements for the purchase of products made from recycled materials if their use is technically and economically feasible. The specifications shall include requirements for the purchase of the following materials:

(1) paper and paper products;

(2) plastic and plastic products;

(3) glass and glass products;

(4) motor oil and lubricants;

(5) construction materials, including insulating materials and paving materials;

(6) furnishings, including rugs, carpets and furniture;

(7) highway equipment, including signs, signposts, reflectors, guardrails, lane dividers and barricades; and

(8) compost.

History: Laws 1990, ch. 99, § 19.

ANNOTATIONS

Procurement Code. - See 13-1-28 NMSA 1978 and notes thereto.

74-9-20. Solid waste facility permit; application; information required.

A. Except as provided in Section 73 of the Solid Waste Act, no person shall construct, operate or close a solid waste facility without first obtaining a permit from the director for the described activity.

B. An application for a permit shall be in a form and contain the information required by the director, including all information necessary for the director to make a decision on the application pursuant to Section 24 [74-9-24 NMSA 1978] of the Solid Waste Act.

C. If at any time during the existence of a permit a change in the ownership or management of a nongovernmental permittee or of a person operating a permitted facility owned by a governmental entity occurs, the permittee or operator shall submit a complete description of the change to the director within thirty days of the date the change occurs. The permittee or operator shall also comply with all requirements of this section and Section 21 [74-9-21 NMSA 1978] of the Solid Waste Act.

History: Laws 1990, ch. 99, § 20.

ANNOTATIONS

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

74-9-21. Permit applicant disclosure.

A. Every applicant for a permit shall file a disclosure statement with the information required by and on a form developed by the division in cooperation with the department of public safety at the same time he files his application for a permit with the director.

B. Upon request of the director, the department of public safety shall, within ninety days after receipt of the disclosure statement from an applicant for a permit, prepare and transmit to the director an investigative report on the applicant, based in part upon the

disclosure statement, except that this deadline may be extended for a reasonable period of time, for good cause, by the director. In preparing this report, the department of public safety may request and receive criminal history information from the federal bureau of investigation and any other law enforcement agency or organization. The director may also request information under this subsection regarding any person who will be or could reasonably be expected to be involved in management activities of the solid waste facility or any person who has a controlling interest in any permittee. The department of public safety shall provide such confidentiality regarding the information received from a law enforcement agency as may be imposed by that agency as a condition for providing that information to the department.

C. All persons required to file a disclosure statement shall provide any assistance or information requested by the director or the department of public safety and shall cooperate in any inquiry or investigation conducted by the department and any inquiry, investigation or hearing conducted by the director. If, upon issuance of a formal request to answer any inquiry or produce information, evidence or testimony, any person required to file a disclosure statement refuses to comply, the application of an applicant or the permit of a permittee may be denied or revoked by the director.

D. If any of the information required to be included in the disclosure statement changes, or if any additional information should be added after the filing of the statement, the person required to file it shall provide that information to the director in writing, within thirty days after the change or addition. The failure to provide such information within thirty days may constitute the basis for the revocation of or denial of an application for any permit issued or applied for in accordance with Section 24 [74-9-24 NMSA 1978] of the Solid Waste Act, but only if, prior to any such denial or revocation, the director notifies the applicant or permittee of the director's intention to do so and gives the applicant or permittee fourteen days from the date of the notice to explain why the information was not provided within the required thirty-day period. The director shall consider this information when determining whether to revoke or deny the permit.

E. No person shall be required to submit the disclosure statement required by this section if the person is a corporation or an officer, director or shareholder of that corporation and that corporation:

(1) has on file and in effect with the federal securities and exchange commission a registration statement required under Section 5, Chapter 38, Title 1 of the Securities Act of 1933, as amended, 15 U.S.C. Section 77e (c);

(2) submits to the director with the application for a permit evidence of the registration described in Paragraph (1) of this subsection and a copy of the corporation's most recent annual form 10-K or an equivalent report; and

(3) submits to the director on the anniversary of the date of the issuance of any permit it holds under the Solid Waste Act evidence of registration described in Paragraph (1) of

this subsection and a copy of the corporation's most recent annual form 10-K or an equivalent report.

History: Laws 1990, ch. 99, § 21.

ANNOTATIONS

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

74-9-22. Solid waste facility permit; notice of application.

Each application filed with the division for a permit under the provisions of Section 20 [74-9-20 NMSA 1978] of the Solid Waste Act shall include documentary proof that the applicant has provided notice of the filing of the application to the public and other affected individuals and entities. The board shall adopt a regulation specifying the required content of the notice. The notice shall be:

A. provided by certified mail to the owners of record, as shown by the most recent property tax schedule, of all properties:

(1) within one hundred feet of the property on which the facility is located or proposed to be located if the facility is or will be in a class A or H class county or a municipality with a population of more than two thousand five hundred persons; or

(2) within one-half mile of the property on which the facility is located or proposed to be located if the facility is or will be in a county or municipality other than those specified in Paragraph (1) of this subsection;

B. provided by certified mail to all municipalities and counties in which the facility is or will be located and to all municipalities and counties within a ten mile radius of the property on which the facility is proposed to be constructed, operated or closed;

C. published once in a newspaper of general circulation in each county in which the property on which the facility is proposed to be constructed, operated or closed is located. This notice shall appear in either the classified or legal advertisements section of the newspaper and at one other place in the newspaper calculated to give the general public the most effective notice and, when appropriate, shall be printed in both English and Spanish; and

D. posted in at least four publicly accessible and conspicuous places, including the proposed or existing facility entrance on the property on which the facility is or is proposed to be located.

History: Laws 1990, ch. 99, § 22.

74-9-23. Solid waste facility permit; when application deemed complete; notice of hearing.

A. An application for a solid waste facility permit under the provisions of Section 20 [74-9-20 NMSA 1978] of the Solid Waste Act shall be deemed complete when the director has received all information required under that section and Section 21 [74-9-21 NMSA 1978] of the Solid Waste Act. At any time during the application process that the director determines that additional information is required from an applicant or that information furnished is incomplete, he shall notify the applicant in writing within ten days of the date that determination is made.

B. Within sixty days of the director's determination that a permit application is complete, the director shall set a date, time and location for a hearing on the application and give notice of the hearing date, time and location and a brief description of the application in the same manner as required in Section 22 [74-9-22 NMSA 1978] of the Solid Waste Act and to any person who makes a written request to the director for notice regarding a specific application. Except as otherwise provided in this section, hearings shall be conducted in accordance with the provisions of Section 29 [74-9-29 NMSA 1978] of the Solid Waste Act.

History: Laws 1990, ch. 99, § 23.

74-9-24. Solid waste facility permit; issuance and denial; grounds; notification of decision; permit recording requirement.

A. The director, within one hundred eighty days after the application is deemed complete, and after a public hearing, shall issue a permit, issue a permit with terms and conditions or deny a permit application. The director may deny a permit application, on the basis of information in the application or evidence presented at the hearing, or both, if he makes a finding that granting the permit would be contradictory to or in violation of the Solid Waste Act or any regulation adopted under it. He may also deny a permit application if the applicant fails to meet the financial responsibility requirements established by the board under Subsection A of Section 8 [74-9-8 NMSA 1978] and Section 35 [74-9-35 NMSA 1978] of the Solid Waste Act.

B. The director may deny any permit application or revoke a permit if he has reasonable cause to believe that any person required to be listed on the application pursuant to Section 20 [74-9-20 NMSA 1978] of the Solid Waste Act has:

(1) knowingly misrepresented a material fact in application for a permit;

(2) refused to disclose or failed to disclose the information required under the provisions of Section 21 [74-9-21 NMSA 1978] of the Solid Waste Act;

(3) been convicted of a felony or other crime involving moral turpitude within ten years immediately preceding the date of the submission of the permit application;

(4) been convicted of a felony within ten years immediately preceding the date of the submission of the permit application, in any court for any crime defined by state or federal statutes as involving or being restraint of trade, price-fixing, bribery or fraud;

(5) exhibited a history of willful disregard for environmental laws of any state or the United States; or

(6) had any permit revoked or permanently suspended for cause under the environmental laws of any state or the United States.

C. In making a finding under Subsection B of this section, the director may consider aggravating and mitigating factors presented by any party at the hearing.

D. If an applicant whose permit is being considered for denial or revocation on any basis provided in this section has submitted an affirmative action plan that has been approved in writing by the director and plan approval includes a period of operation under a conditional permit or license and that will allow the applicant a reasonable opportunity to affirmatively demonstrate its rehabilitation, the director may issue a conditional license for a reasonable period of time of operation. In approving an affirmative action plan intended to affirmatively demonstrate rehabilitation, the director may consider the following factors: implementation by the applicant of formal policies; training programs and management control to minimize and prevent the occurrence of future violations; installation by the applicant of internal environmental auditing programs; the discharge of individuals convicted of any crimes set forth in Subsection B of this section; and such other factors as the director may deem relevant.

E. Within sixty days of the date of the closing of the hearing on a permit application, the director shall notify the applicant by certified mail of the issuance, denial or issuance with conditions of a permit and the reasons therefor. Any person who has made a written request to the director to be notified of the action taken on the application shall be given written notice of the director's action.

F. No permit for the operation of a solid waste facility shall be valid until the permit, or a notice of the permit, and a legal description of the property on which the facility is located are filed and recorded in the office of the county clerk in each county in which the facility is located.

History: Laws 1990, ch. 99, § 24.

74-9-25. Application for modification of a permit; review by director and action pursuant to regulations.

The board shall adopt regulations setting forth procedures and requirements for the director's review and action on a permittee's application to modify a permit.

History: Laws 1990, ch. 99, § 25.

74-9-26. Nonadjudicatory actions under Solid Waste Act that are subject to prior hearing requirement.

The following nonadjudicatory actions or proposed actions by the board are subject to prior hearing in accordance with the provisions of Section 27 [74-9-27 NMSA 1978] of the Solid Waste Act:

A. approval or modification of the plan;

B. designation of solid waste districts and changes in boundaries of solid waste districts;

C. adoption of any fees to be charged under the provisions of Section 39 [74-9-39 NMSA 1978] of the Solid Waste Act; and

D. adoption of substantive and procedural regulations.

History: Laws 1990, ch. 99, § 26.

74-9-27. Hearing provisions for nonadjudicatory actions.

A. The board shall adopt procedural regulations to govern the procedures to be followed in hearings on nonadjudicatory actions of the board. As a minimum, the procedural regulations shall provide:

(1) for hearings to be public and scheduled at times that allow greater public participation;

(2) requirements for prior notice of the hearing and the methods for giving that notice, which shall be designed to inform interested and affected persons of the nature of the action to be considered and the date, time and place of the hearing;

(3) for maintenance of a list of persons that desire to have notice of the hearings and provisions for giving notice to those persons;

(4) a reasonable opportunity for all persons desiring to be heard on the action under consideration to be heard without making the hearing process unreasonably lengthy or cumbersome or burdening the record with unnecessary repetition;

(5) for the board to designate a hearing officer to conduct a hearing and make a report and recommendation to the board;

(6) for the maintenance of a record of the hearing proceedings and assessment of the costs of any transcription of testimony that is required for review purposes; and

(7) for the place of the hearing to be in Santa Fe, and at other places the board may prescribe, for hearings on actions of general statewide application and for hearings on actions of limited local application to be held at a place in the area affected.

B. Actions taken by the board following a hearing on nonadjudicatory actions shall be:

(1) written and shall state the reasons for the action;

(2) made public when taken;

(3) communicated to all persons that have made a written request for notification of the action taken; and

(4) taken within not more than sixty days after the closing of the hearing or the date of submission of a report by a hearing officer.

History: Laws 1990, ch. 99, § 27.

74-9-28. Prior hearing requirement for all adjudicatory actions.

A. The following adjudicatory actions by the division are subject to prior hearing in accordance with the requirements of Section 29 [74-9-29 NMSA 1978] of the Solid Waste Act, in addition to any specific hearing requirements and procedures under other provisions of that act:

(1) issuance, refusal to issue or modify and revocation of permits for solid waste facilities;

(2) administrative enforcement actions; and

(3) actions on requests for variances and exemptions.

B. In any adjudicatory hearing, the director has and may delegate to the hearing officer the power to issue subpoenas for the attendance and testimony of witnesses and the production of relevant documentary evidence. The subpoenas may be enforced by action brought in the district court for the county in which the hearing is held.

History: Laws 1990, ch. 99, § 28.

74-9-29. Hearing provisions for adjudicatory actions.

A. The director shall adopt procedural regulations to govern the procedures to be followed in hearings on adjudicatory actions of the director. No adjudicatory actions

under the Solid Waste Act shall be taken until these regulations are adopted. As a minimum, the procedural regulations shall provide:

(1) for hearings to be public;

(2) requirements for prior notice of the variance or exemption request hearings and the methods for giving that notice, which shall be designed to inform interested and affected persons of the nature of the action to be considered and the date, time and place of the hearing;

(3) for maintenance of a list of persons that desire to have notice of variance request hearings and provisions for giving notice to those persons;

(4) a reasonable opportunity for all persons desiring to be heard on a variance or exemption request or a permit action to be heard without making the hearing process unreasonably lengthy or cumbersome or burdening the record with unnecessary repetition;

(5) procedures for discovery;

(6) assurance that procedural due process requirements are satisfied;

(7) for the director to designate a hearing officer to conduct a hearing and make a report and recommendation to the director;

(8) for the maintenance of a record of the hearing proceedings and assessment of the costs of any transcription of testimony that is required for judicial review purposes; and

(9) for the place of the hearing to be in Santa Fe, and at other places the board may prescribe, for hearings on actions of general statewide application, for hearings on actions of limited local application to be held at a place in the area affected, and for enforcement actions to be heard in Santa Fe.

B. Actions taken by the director following a hearing on adjudicatory actions shall be:

(1) written and shall state the reasons for the action;

(2) made public when taken;

(3) communicated to all persons that have made a written request for notification of the action taken; and

(4) taken within not more than thirty days after the closing of the hearing or the date of submission of a report by a hearing officer.

History: Laws 1990, ch. 99, § 29.

ANNOTATIONS

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

74-9-30. Judicial review of administrative actions.

A. Any person adversely affected by an administrative action taken by the board or the director may appeal the action to the court of appeals. The appeal shall be on the record made at the hearing. To support his appeal, the appellant shall make arrangements with the division for a sufficient number of transcripts of the record of the hearing on which the appeal is based. The appellant shall pay for the preparation of the transcripts.

B. On appeal, the court of appeals shall set aside the administrative action only if it is found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence in the record; or

(3) otherwise not in accordance with law.

History: Laws 1990, ch. 99, § 30.

74-9-31. Prohibited acts.

A. Except as provided in Section 73 of the Solid Waste Act and Subsection B of this section, no person shall:

(1) dispose of any solid waste in a place other than a solid waste facility:

(a) having a permit issued under the Solid Waste Act;

(b) having a permit for solid waste disposal issued under the Environmental Improvement Act [74-1-1 to 74-1-10 NMSA 1978]; or

(c) otherwise authorized to accept solid waste for disposal or transformation under regulations adopted by the board under the Environmental Improvement Act;

(2) dispose of any solid waste in a solid waste facility when a regulation of the board prohibits the disposal of the particular type of solid waste in that facility;

(3) construct, operate or close a solid waste facility unless the facility has a permit from the division for the described action;

(4) modify a solid waste facility unless the facility has applied for and received permission from the director for the modification pursuant to regulations adopted under Section 25 [74-9-25 NMSA 1978] of the Solid Waste Act; or

(5) dispose of any solid waste in this state in a manner that the person knows or should know harms the environment or endangers the public health or safety.

B. The provisions of Subsection A of this section do not prohibit:

(1) a person who is a homeowner, residential lessee or tenant or agricultural enterprise from disposing on the property he owns, rents or leases, solid waste generated on that property;

(2) a person occupying property from disposing of domestic solid waste generated on the property if the property is located in a place that makes it not feasible to dispose of the solid waste in a permitted solid waste facility and the disposal of the solid waste does not harm the environment or endanger the public health or safety and does not violate any provision of the Solid Waste Act or any regulation adopted under that act; or

(3) a person in possession of property from disposing on that property construction and demolition debris or yard refuse generated on the property if the disposition of the solid waste does not violate any provision of the Solid Waste Act or any regulation adopted under that act.

History: Laws 1990, ch. 99, § 31.

ANNOTATIONS

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

Section 73 of the Solid Waste Act. - Section 73 of the Solid Waste Act, referred to near the beginning of Subsection A, is an uncodified saving clause noted under 74-9-1 NMSA 1978.

74-9-32. Exemptions; requirements for granting.

Exemptions from the application of the provisions of the Solid Waste Act may be applied for and shall be issued by the board, either for a single applicant or a group of applicants having substantially identical grounds for the issuance of the exemption, if the board determines after a hearing that the applicant or group of applicants is subject to requirements or regulations under an applicable federal or state law that imposes as stringent or more stringent requirements for the applicant's or applicants' management of its solid waste than the provisions of the Solid Waste Act and regulations adopted under that act. Exemptions issued under this section shall be reviewed for renewal at time intervals determined by the board for each exemption, and the date for renewal shall be stated in the exemption.

History: Laws 1990, ch. 99, § 32.

ANNOTATIONS

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

74-9-33. Facilities; entry by division; availability of records to division and others.

A. The director or any authorized representative, employee or agent of the division:

(1) may enter any solid waste facility at any reasonable time for the purpose of making an inspection or investigation of solid waste management practices;

(2) may at any reasonable time, enter, inspect and monitor any solid waste compaction facilities that compact solid waste for disposal in a solid waste district different from the district in which the compaction facility is located;

(3) may take samples of the waste, soil, air or water and analyze samples of that waste, soil, air or water in order to detect the nature and concentration of contaminants, including those produced by leaching, natural decomposition, gas production or hazardous products in the solid waste facility. The owner or operator shall have the right to split the sample and conduct his own analysis;

(4) may, for the purposes of developing or assisting in the development of any regulation, conducting any study, taking corrective action or enforcing the provisions of the Solid Waste Act conduct monitoring or testing of the equipment, contents or surrounding soils, air, surface water or ground water at a solid waste facility; and

(5) shall make reasonable periodic inspections without prior notice at every solid waste facility in order to implement effectively and enforce the requirements of the Solid Waste Act or the solid waste facility regulations and may, in coordination with the secretary of highway and transportation, conduct at weigh stations, or any other adequate site or facility, inspections of solid waste in transit.

B. Any commercial hauler that disposes of solid waste in a solid waste facility shall allow inspection of its vehicles, transfer stations, collection facilities or any other facilities designed for the collection or transportation of solid waste under the same conditions and circumstances as outlined in Subsection A of this section.

C. Any records, reports or information obtained by the division under this section shall be available to the public, except that upon a showing satisfactory to the division that records, reports or information, or a particular part thereof, to which the director or his authorized representatives have access under this section, if made public, would divulge information entitled to protection under the provisions of 18 U.S.C. Section 1905, such information or particular portion thereof shall be considered confidential,

except that such record, report, document or information may be disclosed to officers, employees or authorized representatives of the United States concerned with carrying out the federal Resource Conservation and Recovery Act of 1976, 42 U.S.C. Section 6901 et seq., or when relevant in any proceedings under the Solid Waste Act.

D. Any person not subject to the provisions of 18 U.S.C. Section 1905 who knowingly and willfully divulges or discloses any information entitled to protection under Subsection C of this section shall, upon conviction, be subject to a fine of not more than five thousand dollars ($5,000) or to imprisonment not to exceed one year or both.

E. In submitting data under the Solid Waste Act, a person required to provide such data may:

(1) designate the data the person believes is entitled to protection under Subsection C of this section; and

(2) submit such designated data separately from other data submitted under the Solid Waste Act. A designation under Paragraph (1) of this subsection shall be made in writing and in such manner as the director may prescribe.

History: Laws 1990, ch. 99, § 33.

ANNOTATIONS

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

74-9-34. Liability; defenses; indemnification.

A. As used in this section:

(1) "generator" means the United States or a state, including New Mexico, or any agency, department, instrumentality, office, institution or political subdivision of a state in which any solid waste disposed of in a solid waste facility in New Mexico originated;

(2) "responsible party" means any person other than a generator upon whom liability is imposed under Subsection B of this section; and

(3) "costs" means the costs of removal or remedial action incurred by this state or any of its counties or municipalities because of a release or threatened release of contaminants from a solid waste facility that results in the incurring of those costs by the specified governmental entity.

B. The following persons shall be strictly liable for costs:

(1) the owner of the solid waste facility;

(2) the operator of the solid waste facility;

(3) any person:

(a) having a permit issued under the Solid Waste Act;

(b) having a permit for solid waste disposal issued under the Environmental Improvement Act [74-1-1 to 74-1-10 NMSA 1978]; or

(c) otherwise authorized to accept solid waste for disposal or transformation under regulations adopted by the board under the Environmental Improvement Act;

(4) any person who, at the time of disposal of any solid waste in the solid waste facility, owned, operated or had a permit or registration certificate to operate the solid waste facility;

(5) any person who by agreement or otherwise arranged for disposal or treatment or transportation for disposal or treatment of solid waste owned or possessed by that person and disposed of in the solid waste facility;

(6) any person who accepted any solid waste for transport to the solid waste facility; and

(7) any generator.

C. A person otherwise liable under Subsection B of this section shall not be liable if he can establish by a preponderance of the evidence that:

(1) the release of contaminants and the damages resulting therefrom were caused solely by an act of God or an act of war; or

(2) he is an owner who:

(a) at the time he acquired the property, did not know and had no reason to know that the property had been used for a solid waste facility;

(b) is a governmental entity that acquired the property by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority; or

(c) acquired the property by inheritance or devise.

D. If any responsible party that is liable for a release or threatened release fails without sufficient cause to properly provide removal or remedial action upon order of the director, that person shall be liable to the state or the appropriate political subdivision for punitive damages in an amount at least equal to, and not more than three times the amount of, any costs incurred as a result of the failure to take proper action. The

director is authorized to commence a civil action against any such person to recover the damages, which shall be in addition to any costs recovered from the person. Any amounts received by the state or the appropriate political subdivision pursuant to this subsection shall be deposited in the solid waste facility grant fund.

E. The court, in accordance with equitable principles, shall apportion an award of costs or damages, or both, among defendants found liable under this section.

F. No state agency or political subdivision shall be liable under this section for costs or damages as a result of its actions taken in response to an emergency created by the release or threatened release by or from a solid waste facility owned by another person.

G. No indemnification or similar agreement shall be effective to transfer from the owner or operator of any solid waste facility, or from any person who may be liable for a release or threatened release under this section, to any other person the liability imposed under this section. Nothing in this subsection bars any agreement to insure, hold harmless or indemnify a party to that agreement for any liability under this section.

H. Nothing in this section bars or replaces any cause of action available to any person that existed before its enactment. The causes of action of this section are supplemental to existing causes of action.

History: Laws 1990, ch. 99, § 34.

ANNOTATIONS

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

74-9-35. Financial responsibility for solid waste generators and operators of solid waste facilities.

A. The board shall adopt regulations establishing financial responsibility requirements. The regulations shall be designed to assure that there are adequate sources of funds to provide for:

(1) closure, post-closure inspection and maintenance, and environmental monitoring and control;

(2) removal and disposal of buildings, fences, roads and other improvements;

(3) reclamation of affected or contaminated lands and waters;

(4) construction of any solid waste cover or containment system required as a condition of any solid waste facility permit;

(5) stabilization, removal and off-site treatment or disposal of any contaminated material that is being stored or treated;

(6) decontamination, dismantling and removal of any solid waste storage, treatment or disposal equipment;

(7) operation of any environmental monitoring systems or pollution control systems that are required as a condition of any solid waste facility permit or by order of the director; and

(8) conducting, only for landfill disposal facilities, periodic post-closure inspections of cover systems, surface water diversion structures, monitor wells or systems, pollutant detection and control systems, and performing maintenance activities to correct deficiencies that are discovered.

B. Sources of funds provided to meet financial responsibility requirements established in this section shall be available during the operating life of the solid waste facility, and for a post-closure period to be set by the board.

C. The amount of any financial responsibility requirement shall be established by the director in accordance with procedures contained in regulations of the board, but shall not be less than an amount sufficient to satisfy the purposes specified in Subsection A of this section.

D. The methods of furnishing evidence of financial responsibility acceptable shall be specified by the board. All documents evidencing financial assurances provided pursuant to this section shall be payable to the New Mexico governmental entity or entities that own or operate the solid waste facility that is the subject of the financial assurance. If no New Mexico governmental entity or governmental entities own or operate the solid waste facility that is the subject of the financial assurance, the financial assurance shall provide for payment to the state of New Mexico.

E. The United States, the state of New Mexico and any agency, department, instrumentality, office, institution or political subdivision of those governments shall not be required to provide any financial assurances pursuant to this section. This exemption shall not apply, however, to any private person who contracts with the state of New Mexico or any agency, department, instrumentality, office, institution or political subdivision of the state of New Mexico.

History: Laws 1990, ch. 99, § 35.

74-9-36. Enforcement; compliance orders.

A. Whenever, on the basis of any information, the director determines that any person has violated, is violating or threatens to violate any requirement of the Solid Waste Act,

any regulation promulgated pursuant to that act or any condition of a permit issued under that act, the director may:

(1) issue a compliance order stating with reasonable specificity the nature of the violation or threatened violation and requiring compliance immediately or within a specified time period or assessing a civil penalty for any past or current violation, or both; or

(2) commence a civil action in district court for appropriate relief, including a temporary or permanent injunction.

B. Any order issued pursuant to Subsection A of this section may include a suspension or revocation of any permit issued by the director. Any penalty assessed in the order shall not exceed five thousand dollars ($5,000) per day of noncompliance for each violation. In assessing such penalty, the director shall take into account the seriousness of the violation, any good faith efforts to comply with the applicable requirements and other relevant factors.

C. If a violator fails to take corrective action within the time specified in a compliance order, the director may:

(1) assess a civil penalty of not more than ten thousand dollars ($10,000) for each day of continued noncompliance with the order; and

(2) suspend or revoke any permit issued to the violator under the Solid Waste Act.

D. Whenever on the basis of any information the director determines that there is or has been a release of contaminants into the environment from a solid waste facility, the director may issue an order requiring corrective action, including corrective action beyond a solid waste facility's boundaries or such other response measure as he deems necessary to protect human health or the environment, or may commence an action in district court in the district in which the solid waste facility is located for appropriate relief, including a temporary or permanent injunction.

E. Any order issued under Subsection D of this section may include a suspension or revocation of a permit to operate a solid waste facility and shall state with reasonable specificity the nature of the required corrective action or other response measure and shall specify a time for compliance. If any person named in an order fails to comply with the order, the director may assess and such person shall be liable to the state for a civil penalty in an amount not to exceed five thousand dollars ($5,000) for each day of noncompliance with the order.

F. Any order issued pursuant to this section, any other enforcement proceeding initiated under this section or any claim for personal or property injury arising from any conduct for which financial responsibility must be provided may be issued to or taken against the insuror or guarantor of an owner or operator of a solid waste facility if:

(1) the owner or operator is in bankruptcy, reorganization or arrangement pursuant to the federal Bankruptcy Code [11 U.S.C. § 101 et seq.]; or

(2) jurisdiction in any state or federal court cannot with reasonable diligence be obtained over an owner or operator likely to be solvent at the time of judgment.

G. Any order issued pursuant to this section shall become final unless, no later than thirty days after the order is served, the person or persons named therein submit a written request to the director for a public hearing. Upon such request the director shall promptly conduct a public hearing. The director shall appoint an independent hearing officer to preside over the public hearing. That hearing officer shall make and preserve a complete record of the proceedings and forward his recommendation based thereon to the director, who shall make the final decision.

H. In connection with any proceeding under this section, the director may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents and may adopt rules for discovery procedures.

I. Penalties collected pursuant to an administrative order shall be deposited in the state treasury to be credited to the solid waste facility grant fund.

History: Laws 1990, ch. 99, § 36.

ANNOTATIONS

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

74-9-37. Penalty; criminal.

A. Any person who violates any paragraph of Subsection A of Section 31 [74-9-31 NMSA 1978] of the Solid Waste Act, if the cost of cleaning up the disposed solid waste is less than ten thousand dollars ($10,000), is guilty of a misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

B. Any person who violates any paragraph of Subsection A of Section 31 of the Solid Waste Act, if the cost of cleaning up the disposed solid waste is ten thousand dollars ($10,000) or greater, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

C. Any person who willfully fails to disclose or makes an intentional false disclosure of information required under the provisions of Section 20 [74-9-20 NMSA 1978] or 21 [74-9-21 NMSA 1978] of the Solid Waste Act is guilty of a fourth degree felony and shall be sentenced in accordance with the provisions of Section 31-18-15 NMSA 1978.

History: Laws 1990, ch. 99, § 37.

74-9-38. Penalty; civil.

Any person who violates any provision of Section 31 [74-9-31 NMSA 1978] of the Solid Waste Act or any regulation adopted pursuant to that act may be assessed a civil penalty not to exceed five thousand dollars ($5,000) for each day during any portion of which a violation occurs. All civil penalties assessed and collected shall be deposited in the solid waste facility grant fund.

History: Laws 1990, ch. 99, § 38.

74-9-39. Solid waste assessment fee.

A. A solid waste assessment fee shall be imposed upon the disposal of solid waste by a commercial hauler at any solid waste facility if the solid waste was generated outside the solid waste district in which the solid waste facility is located. A commercial hauler disposing solid waste from twin-plant industries having domestic operations within a solid waste district shall be exempt from payment of the solid waste assessment fee on the disposed solid waste if the industries involved are required under Mexican law to have the solid waste returned to the United States.

B. The board shall establish the solid waste assessment fee. The fee established by the board shall remain in effect until July 1, 1993. The division shall prepare a recommended permanent fee structure and present it to the first regular session of the forty-first legislature for its consideration. In establishing the fee, the board shall take into account all factors relevant to the cost of disposal of the solid waste, including the following:

(1) the impact of solid waste disposal on air, water, land and other resources;

(2) the effect of solid waste disposal on the value of public and private property;

(3) the costs of protection of the public health, safety, welfare and the environment associated with the disposal of solid waste in the solid waste district;

(4) the costs of out-of-district inspection and monitoring;

(5) the costs and risks of solid waste transportation; and

(6) the administrative costs incurred by the collecting governmental entity.

C. The fee imposed by this section shall be in addition to all other fees and taxes levied by law and shall be added to and constitute part of any other fee charged by the operator or owner of the solid waste disposal facility.

D. The fee imposed by this section shall be paid by the commercial hauler disposing of solid waste at a solid waste facility and shall be collected by the operator of the solid

waste facility, held in trust in a separate account for the benefit of the state and remitted to the taxation and revenue department. Operators collecting fees under this section may retain ten percent of the fee collected for administrative purposes. The fee accrues at the time the solid waste is disposed of in a solid waste facility. The fee imposed by this section shall be administered as if it was a tax, in accordance with the provisions of the Tax Administration Act [Chapter 7, Article 1 NMSA 1978], and shall be remitted within thirty days from the end of the month in which the fee is collected.

E. A commercial hauler shall not be required to pay the solid waste assessment fee for disposal in a solid waste facility of solid waste generated outside the district in which the solid waste facility is located if:

(1) the solid waste was generated in a commercial, industrial, transportation and population center in which the commercial hauler provided solid waste disposal service during the 1989 calendar year; and

(2) the solid waste is disposed of in a solid waste district in which the commercial hauler disposed of solid waste generated in that commercial, industrial, transportation and population center during the 1989 calendar year.

F. A distribution under the Tax Administration Act of the net proceeds of the fees collected pursuant to this section shall be made to the solid waste facility grant fund.

History: Laws 1990, ch. 99, § 39; 1991, ch. 194, § 6.

ANNOTATIONS

The 1991 amendment, effective June 14, 1991, in Subsection B, substituted "July 1, 1993" for "July 1, 1992" in the first sentence and "first regular session of the forty-first legislature" for "second regular session of the fortieth legislature" in the second sentence.

74-9-40. Grants program; duties of division.

The division shall:

A. establish a program to make grants to counties and municipalities, individually or jointly, for the establishment or modification of solid waste facilities or for contracting for solid waste services in accordance with the Solid Waste Act and regulations of the board pursuant to that act; and

B. prepare an annual report to the governor and the legislature on the grants program; and

C. award grants only to counties and municipalities that meet the criteria established by the division.

History: Laws 1990, ch. 99, § 40.

ANNOTATIONS

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

74-9-41. Solid waste facility grant fund created; administration.

A. There is created in the state treasury a fund to be known as the "solid waste facility grant fund". The division shall administer the fund and make grants from the fund in accordance with the Solid Waste Act. Earnings on balances in the fund shall be credited to the fund. Money remaining in the fund at the end of any fiscal year shall not revert to the general fund but shall accrue to the credit of the solid waste facility grant fund.

B. The division shall deposit in the solid waste facility grant fund all federal funds allocated to the state for the purpose of making grants to counties, municipalities and post-secondary educational institutions for solid waste facilities.

C. State money appropriated to the division to carry out the provisions of this section may be used to match any eligible federal funds allocated to the state for the purpose of making grants to counties or municipalities to implement the provisions of the Solid Waste Act.

History: Laws 1990, ch. 99, § 41.

ANNOTATIONS

Cross-references. - As to transfers to municipalities of net receipts attributable to the municipal gross receipts tax, see 7-1-6.12 NMSA 1978.

As to distribution of the net receipts attributable to the solid waste assessment fee, see 7-1-6.30 NMSA 1978.

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.

74-9-42. No preemption of local authority.

Nothing in the Solid Waste Act limits or is intended to limit the authority of any county or municipality to adopt and enforce solid waste management requirements more stringent than those in the Solid Waste Act. Nothing in the Solid Waste Act modifies or limits, or is intended to modify or limit, the authority of any county or municipality to exercise planning and zoning authority.

History: Laws 1990, ch. 99, § 42.

ANNOTATIONS

Severability clauses. - Laws 1990, ch. 99, § 72, provides for the severability of the Solid Waste Act if any part or application thereof is held invalid.

Solid Waste Act. - See 74-9-1 NMSA 1978 and notes thereto.