CHAPTER 74
Environmental Improvement

ARTICLE 1
General Provisions

74-1-1. Short title.

Chapter 74, Article 1 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; 1997, ch. 139, § 1.

ANNOTATIONS

Cross references. — For environmental compliance, *see* 74-7-1 NMSA 1978 et seq.

The 1997 amendment, effective June 20, 1997, substituted "Chapter 74, Article 1 NMSA 1978" for "Sections 12-12-1 through 12-12-14 NMSA 1953".

Enforcement authority under the federal Clean Air Act. — The language in § 7412(d) of the Clean Air Act, 42 U.S.C. § 7401 et seq., delegates to the states with approved state implementation plans (SIP) the primary responsibility to enforce the standards as manifested in that SIP. The delegation of federal authority is limited to state enforcement of the federally-approved SIP through the state administrative and judicial process, or possibly through citizens' suits. The administrator retains authority to enforce the SIP in federal court, acting as a supervisor to insure that the federal standards are met. *Espinosa v. Roswell Tower, Inc.*, 32 F.3d 491 (10th Cir. 1994).

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.

Supreme Court's views as to validity, construction and application of Comprehensive Environmental Response, Compensation, and Liability Act ((CERCLA) (42 U.S.C.A. §§ 9601 et seq.)), 157 A.L.R. Fed. 291.

Requirement that there be continuing violation to maintain citizen suit under federal environmental protection statutes - post-Gwaltney cases, 158 A.L.R. Fed. 519.

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 is to create a department that 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; 1997, ch. 139, § 2.

ANNOTATIONS

The 1997 amendment, effective June 20, 1997, substituted "a department that" for "an agency which" and "ensure" for "insure".

Common-law remedy for nuisance survives the enactment of the Environmental Improvement Act. *Gonzalez v. Whitaker*, 1982-NMCA-050, 97 N.M. 710, 643 P.2d 274, cert. denied, 98 N.M. 336, 648 P.2d 794.

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. *N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd.*, 1975-NMCA-083, 88 N.M. 201, 539 P.2d 221, cert. denied, 88 N.M. 318, 540 P.2d 248.

Denial of landfill permit based on public opposition. — The Environmental Improvement Act and the Solid Waste Act do not require the secretary to deny a landfill

permit based on public opposition. *Colonias Dev. Council v. Rhino Envtl. Svcs., Inc.* 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939.

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:

A. "board" means the environmental improvement board;

B. "carbon intensity" means the quantity of fuel lifecycle greenhouse gas emissions per unit of fuel energy, expressed in grams of carbon dioxide equivalent per megajoule;

C. "department" or "environmental improvement department" means the department of environment;

D. "fuel lifecycle" means an assessment of the aggregate greenhouse gas emissions based on science-based models or protocols, including direct emissions and significant indirect emissions from indirect land use change, all stages of fuel and feedstock production and distribution, feedstock generation or extraction through the distribution, delivery and use of the finished fuel by the consumer, including consideration of storage, transportation and combustion;

E. "on-site liquid waste system" means a liquid waste system, or part thereof, serving a dwelling, establishment or group, and using a liquid waste treatment unit designed to receive liquid waste followed by either a soil treatment or other type of disposal system. "On-site liquid waste system" includes holding tanks and privies but does not include systems or facilities designed to receive or treat mine or mill tailings or wastes;

F. "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;

G. "residential on-site liquid waste system" means an on-site liquid waste system serving up to four dwelling units;

H. "secretary" means the secretary of environment; and

I. "transportation fuel" means electricity or a liquid, gaseous or blended fuel, including gasoline, diesel, liquefied petroleum gas, natural gas and hydrogen, sold, supplied, used or offered for sale to power vehicles or equipment for the purposes of transportation.

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; 1997, ch. 139, § 3; 2024, ch. 54, § 1.

ANNOTATIONS

The 2024 amendment, effective May 15, 2024, added definitions for "carbon intensity", "fuel lifecycle" and "transportation fuel" to the Environmental Improvement Act; added a new Subsection B and redesignated former Subsection B as Subsection C; added a new Subsection D and redesignated former Subsections C through F as Subsections E through H, respectively; and added a new Subsection I.

The 1997 amendment, effective June 20, 1997, rewrote this section to such an extent that a detailed comparison would be impracticable.

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. There is created the "environmental improvement board". The board shall consist of seven 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 four 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 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. Four members shall constitute a quorum.

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; 1997, ch. 139, § 4; 2001, ch. 145, § 1.

ANNOTATIONS

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

For the federal Clean Air Act, *see* 42 U.S.C. § 7401 et seq.

The 2001 amendment, effective June 15, 2001, in Subsection A, increased the membership of the board from five to seven members; and increased the number of members that may be appointed from any political party from three to four; and in Subsection C, inserted the last sentence.

The 1997 amendment, effective June 20, 1997, in Subsection A, added the first sentence and deleted "42 U.S.C. Sections 7401 et seq." following "federal Clean Air Act" in the next-to-last sentence.

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 department.

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; 1997, ch. 139, § 5.

ANNOTATIONS

Cross references. — For definition of "department", *see* 74-1-3 NMSA 1978.

The 1997 amendment, effective June 20, 1997, substituted "department" for "agency".

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. N.M. Envtl. Improvement Bd.*, 1981-NMCA-044, 97 N.M. 88, 637 P.2d 38, cert. quashed, 97 N.M. 242, 637 P.2d 1087.

Power to regulate environment. — The Environmental Improvement Act grants the department and its environmental improvement board the power to regulate the

environment on behalf of the citizens of New Mexico. *Colonias Dev. Council v. Rhino Envtl. Svcs., Inc.*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pollution Control § 4.

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 department;

D. enter into investigation and remediation agreements with persons potentially responsible for sites within New Mexico subject to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, and such agreements shall not duplicate or take any authority from the oil conservation commission;

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

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

G. collect civil penalties pursuant to law, including reduction or elimination of penalties for violations from persons that:

(1) within sixty days of the discovery of a potential violation, voluntarily report to the department potential violations of law enforced by the department;

(2) initiate corrective action for the potential violation;

(3) have not previously violated the same provision of law; and

(4) do not present an imminent and substantial endangerment to health or the environment by the potential violation.

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

I. 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

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

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; 1994, ch. 124, § 1; 1997, ch. 139, § 6; 2009, ch. 42, § 1.

ANNOTATIONS

Cross references. — For definition of "department" and "board", *see* Section 74-1-3 NMSA 1978.

For creation of environmental improvement division, *see* Section 9-7-4 NMSA 1978.

For federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, *see* 42 U.S.C. § 9601 et seq.

The 2009 amendment, effective June 19, 2009, added Subsection G.

The 1997 amendment, effective June 20, 1997, substituted "department" for "agency" in the section heading and throughout the section.

The 1994 amendment, effective March 8, 1994, substituted "Agency" for "Department" in the section heading, substituted "agency" for "department" in the introductory paragraph, added Subsection D, and redesignated former Subsections D through H as Subsections E through I.

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.

Jurisdiction over pollution control. — 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. Ariz. Pub. Serv. Co.*, 1973-NMSC-051, 85 N.M. 165, 510 P.2d 98.

Agency (now department) is not given all-encompassing power to abate nuisances. *Gonzalez v. Whitaker*, 1982-NMCA-050, 97 N.M. 710, 643 P.2d 274, cert. denied, 98 N.M. 336, 648 P.2d 794.

Abating nuisance 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*, 1982-NMCA-050, 97 N.M. 710, 643 P.2d 274, cert. denied, 98 N.M. 336, 648 P.2d 794.

Article does not prohibit or limit environmental improvement division [now department] from obtaining injunctive relief. *Envtl. Improvement Div. v. Aguayo*, 1983-NMSC-027, 99 N.M. 497, 660 P.2d 587.

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

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

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 § 4.

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

74-1-7. Department; duties.

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

(1) food protection;

(2) water supply, including implementing a capacity development program to assist water systems in acquiring and maintaining technical, managerial and financial capacity in accordance with Section 1420 of the federal Safe Drinking Water Act of 1974 and establishing administrative penalties for enforcement;

(3) liquid waste, including exclusive authority to collect on-site liquid waste system fees that are no more than the average charged by the contiguous states to New Mexico for similar permits and services and to implement and administer an inspection and permitting program for on-site liquid waste systems;

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

(5) radiation control and collection of license, registration and other related fees as provided in the Radiation Protection Act [Chapter 74, Article 3 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 Imaging and Radiation Therapy Health and Safety Act [Chapter 61, Article 14E NMSA 1978];

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

(14) solid waste as provided in the Solid Waste Act [74-9-1 to 74-9-42 NMSA 1978]; and

(15) carbon intensity of transportation fuels as provided in Section 4 [74-1-18 NMSA 1978] of this 2024 act, including registration and related fees.

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; 1997, ch. 139, § 7; 1999, ch. 203, § 1; 2000, ch. 86, § 1; 2000, ch. 96, § 1; 2024, ch. 54, § 2.

ANNOTATIONS

Cross references. — For definition of "department," *see* 74-1-3 NMSA 1978.

For the Solid Waste Act, *see* 74-9-1 NMSA 1978 and notes thereto.

For the federal Safe Drinking Water Act, *see* 21 U.S.C. § 349 and 42 U.S.C. § 300f et seq.

The 2024 amendment, effective May 15, 2024, added the area of carbon intensity of transportation fuels as provided in Section 4 of this 2024 act to the list of duties for which the department of environment is required to maintain, develop and enforce rules and standards, and made certain technical amendments; and in Subsection A, Paragraph A(2), after "federal Safe Drinking Water Act", added "of 1974", and added Paragraph A(15).

2000 Multiple Amendments. — Laws 2000, ch. 86, § 1, effective May 17, 2000, in Subsection A(5), substituted "rules" for "regulations" throughout the section, and inserted "and establishment of license, registration and other related fees".

Laws 2000, ch. 96, § 1, effective May 17, 2000, in Subsection A, in the preliminary language, substituted "rules" for "regulations"; and in Subsection A(3), inserted "to collect on-site liquid waste system fees that are no more than the average charged by the contiguous states to New Mexico for similar permits and services and".

The 1999 amendment, effective April 6, 1999, rewrote the section heading, which formerly read "Environment", and substituted the language beginning "implementing a capacity development program" for "regulations establishing a reasonable system of fees for the provision of services by the department to public water supply systems, and water pollution as provided in the Water Quality Act" in Subsection A(2).

The 1997 amendment, effective June 20, 1997, substituted "environment department" for "environmental improvement agency" in the section heading; substituted "department" for "agency" throughout the section; and added "including exclusive authority to implement and administer an inspection and permitting program for on-site liquid waste systems;" in Paragraph A(3).

Conflict between municipal ordinance and state statute. — As a matter of statutory interpretation, the specific grant to the NMED in the Environmental Improvement Act trumps the city's claim to general authority under the Sewage Facilities Act. *Interstate Nuclear Servs. Corp. v. Santa Fe*, 179 F Supp.2d 1253 (D.N.M. 2000).

The secretary has jurisdiction over questions relating to the proper category of permit for a mixed waste landfill. Citizen Action v. Sandia Corp., 2008-NMCA-031, 143 N.M. 620, 179 P.3d 1228, cert. denied, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 674.

Agency is not given all-encompassing power to abate nuisances. *Gonzalez v. Whitaker*, 97 N.M. 710, 643 P.2d 274 (Ct. App.), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982).

Abating nuisance 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.), cert. denied, 98 N.M. 336, 648 P.2d 794 (1982).

No authority to deputize local officials. — The environmental improvement division (now department) (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.

74-1-7.1. Green zia program; business sensitive information confidential.

A. The department may develop and administer a pollution prevention program to be known as the "green zia program". The department may enter into contracts with the federal government, promulgate rules and take other actions appropriate and necessary to produce an efficient and effective program.

B. Information provided to the department in accordance with the green zia program may be subject to confidentiality if the person furnishing the information demonstrates to the department that the information would divulge confidential methods or processes entitled to protection as trade secrets. If the department determines that the information is subject to confidentiality, the secretary shall promulgate a determination of confidentiality with an order of confidentiality. Confidential information may be disclosed to employees or authorized representatives of the department, but they shall not disclose the information to any other person.

C. A person who violates an order of confidentiality by disclosing confidential information pursuant to this section is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than one thousand dollars ($1,000) per violation or by imprisonment for a definite term of one year or both.

History: Laws 2001, ch. 93, § 1.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 93 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2001, 90 days after adjournment of the legislature.

74-1-8. Board; duties.

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

(1) food protection;

(2) water supply, including a capacity development program to assist water systems in acquiring and maintaining technical, managerial and financial capacity in accordance with Section 1420 of the federal Safe Drinking Water Act of 1974 and rules authorizing imposition of administrative penalties for enforcement;

(3) liquid waste, including exclusive authority to establish on-site liquid waste system fees that are no more than the average charged by the contiguous states to New Mexico for similar permits and services and to implement and administer an inspection and permitting program for on-site liquid waste systems;

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

(5) radiation control and establishment of license and registration and other related fees not to exceed fees charged by the United States nuclear regulatory commission for similar licenses as provided in the Radiation Protection Act [Chapter 74, Article 3 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 Imaging and Radiation Therapy Health and Safety Act [Chapter 61, Article 14E NMSA 1978];

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

(14) solid waste as provided in the Solid Waste Act [74-9-1 NMSA 1978]; and

(15) carbon intensity of transportation fuels as provided in Section 4 [74-1-18 NMSA 1978] of this 2024 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. Administrative penalties collected pursuant to Paragraph (2) of Subsection A of this section shall be deposited in the water conservation fund.

D. On-site liquid waste system fees shall be deposited in the environmental health fund.

E. Radiation license and registration and other related fees shall be deposited in the radiation protection 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; 1993, ch. 100, § 2; 1997, ch. 139, § 8; 1999, ch. 203, § 2; 2000, ch. 86, § 2; 2000, ch. 96, § 2; 2020, ch. 32, § 3; 2024, ch. 54, § 3.

ANNOTATIONS

Cross references. — For the Solid Waste Act, *see* 74-9-1 NMSA 1978 and notes thereto.

For the federal Safe Drinking Water Act, *see* 21 U.S.C. § 349 and 42 U.S.C. § 300f et seq.

The 2024 amendment, effective May 15, 2024, added the area of carbon intensity of transportation fuels as provided in Section 4 of this 2024 act to the list of areas for which the environmental improvement board is required to promulgate rules and standards; and added Paragraph A(15).

The 2020 amendment, effective May 20, 2020, provided that on-site liquid waste system fees shall be deposited in the environmental health fund, and made certain technical amendments; and in Subsection D, after "deposited in the", deleted "liquid waste" and added "environmental health".

The 2000 amendment, effective May 17, 2000, in the preliminary language of Subsection A and in Subsection A(2), substituted "rules" for "regulations"; in Subsection A(3), inserted "to establish on-site liquid waste system fees that are no more than the average charged by the contiguous states to New Mexico for similar permits and services"; and added Subsection D.

The 1999 amendment, effective April 6, 1999, rewrote the section heading which formerly read "Environmental improvement", rewrote Subsection A(2) which formerly read "water supply, including regulations establishing a reasonable system of fees for the provision of services by the department to public water supply systems", and in Subsection C, substituted "Administrative penalties collected" for "Fees collected" and "conservation fund" for "supply fund".

The 1997 amendment, effective June 20, 1997, substituted "department" for "agency" in Paragraph A(2) and added "including exclusive authority to implement and administer an inspection and permitting program for on-site liquid waste systems" in Paragraph A(3).

The 1993 amendment, effective March 31, 1993, rewrote Subsection C which read "Effective July 1, 1992, all fees collected pursuant to Subsection A of this section shall be deposited in the general fund."

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. *N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd.*, 1975-NMCA-083, 88 N.M. 201, 539 P.2d 221, cert. denied, 88 N.M. 318, 540 P.2d 248.

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. *N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd.*, 1975-NMCA-083, 88 N.M. 201, 539 P.2d 221, cert. denied, 88 N.M. 318, 540 P.2d 248 (decided under prior law).

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. *N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd.*, 1975-NMCA-083, 88 N.M. 201, 539 P.2d 221, cert. denied, 88 N.M. 318, 540 P.2d 248.

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. N.M. Envtl. Improvement Bd.*, 1981-NMCA-044, 97 N.M. 88, 637 P.2d 38, cert. quashed, 97 N.M. 242, 637 P.2d 1087.

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. N.M. Envtl. Improvement Bd.*, 1981-NMCA-044, 97 N.M. 88, 637 P.2d 38 (Ct. App.), cert. quashed, 97 N.M. 242, 637 P.2d 1087.

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. N.M. Envtl. Improvement Bd.*, 1981-NMCA-044, 97 N.M. 88, 637 P.2d 38, cert. quashed, 97 N.M. 242, 637 P.2d 1087.

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. N.M. Envtl. Improvement Bd.*, 1987-NMCA-065, 106 N.M. 14, 738 P.2d 132.

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. *N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd.*, 1975-NMCA-083, 88 N.M. 201, 539 P.2d 221, cert. denied, 88 N.M. 318, 540 P.2d 248.

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. *N.M. Mun. League, Inc. v.*

N.M. Envtl. Improvement Bd., 1975-NMCA-083, 88 N.M. 201, 539 P.2d 221, cert. denied, 88 N.M. 318, 540 P.2d 248.

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. *N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd.*, 1975-NMCA-083, 88 N.M. 201, 539 P.2d 221, cert. denied, 88 N.M. 318, 540 P.2d 248.

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. *N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd.*, 1975-NMCA-083, 88 N.M. 201, 539 P.2d 221, cert. denied, 88 N.M. 318, 540 P.2d 248.

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*, 1982-NMCA-050, 97 N.M. 710, 643 P.2d 274.

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.

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 department 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; 1997, ch. 139, § 9.

ANNOTATIONS

The 1997 amendment, effective June 20, 1997, substituted "department" for "agency" in Subsection B.

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. Recompiled.

ANNOTATIONS

Recompilations. — Laws 1993, ch. 291, § 18 recompiled former 74-1-8.2 NMSA 1978, as enacted by Laws 1982, ch. 73, § 28, as 74-6-3.1 NMSA 1978, effective June 18, 1993.

74-1-8.3. Repealed.

ANNOTATIONS

Repeals. — Laws 1999, ch. 203, § 6 repealed 74-1-8.3 NMSA 1978, as enacted by Laws 1993, ch. 100, § 6, relating to the water supply fund, effective April 6, 1999. For provisions of former section, *see* the 1998 NMSA 1978 on *NMOneSource.com*. For present comparable provisions, *see* 16-1-2 NMSA 1978.

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 [Chapter 14, Article 4 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 material was inserted by the compiler and is not part of the law. The bracketed reference to "Subsection B" in Subsection C was inserted as that appears to be the intended reference.

Administrative rule-making proceedings. — Where plaintiffs filed a complaint for a declaratory judgment to enjoin the environmental improvement board from holding fact-finding hearings on a proposal to regulate greenhouse emissions on the grounds that the board lacked statutory authority to consider the proposal, the question of whether the board's rule-making actions exceeded its legislative authority was not ripe for judicial review, because no final rule-making action had occurred and there was not an actual controversy. *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, 149 N.M. 42, 243 P.3d 746.

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. N.M. Envtl. Improvement Bd.*, 1981-NMCA-044, 97 N.M. 88, 637 P.2d 38, cert. quashed, 97 N.M. 242, 637 P.2d 1087.

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. N.M. Envtl. Improvement Bd.*, 1976-NMCA-039, 89 N.M. 223, 549 P.2d 638.

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. N.M. Envtl. Improvement Bd.*, 1976-NMCA-039, 89 N.M. 223, 549 P.2d 638.

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. N.M. Envtl. Improvement Bd.*, 1976-NMCA-039, 89 N.M. 223, 549 P.2d 638.

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. N.M. Envtl. Improvement Bd.*, 1976-NMCA-039, 89 N.M. 223, 549 P.2d 638.

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. *N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd.*, 1975-NMCA-083, 88 N.M. 201, 539 P.2d 221, cert. denied, 88 N.M. 318, 540 P.2d 248.

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. N.M. Envtl. Improvement Bd.*, 1976-NMCA-039, 89 N.M. 223, 549 P.2d 638.

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. N.M. Envtl. Improvement Bd.*, 1976-NMCA-039, 89 N.M. 223, 549 P.2d 638.

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. *N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd.*, 1975-NMCA-083, 88 N.M. 201, 539 P.2d 221, cert. denied, 88 N.M. 318, 540 P.2d 248.

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. N.M. Envtl. Improvement Bd.*, 1981-NMCA-044, 97 N.M. 88, 637 P.2d 38, cert. quashed, 97 N.M. 242, 637 P.2d 1087.

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. N.M. Envtl. Improvement Bd.*, 1981-NMCA-044, 97 N.M. 88, 637 P.2d 38, cert. quashed, 97 N.M. 242, 637 P.2d 1087.

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. N.M. Envtl. Improvement Bd.*, 1981-NMCA-044, 97 N.M. 88, 637 P.2d 38, cert. quashed, 97 N.M. 242, 637 P.2d 1087.

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. N.M. Envtl. Improvement Bd.*, 1987-NMCA-065, 106 N.M. 14, 738 P.2d 132.

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.

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 [now Medical Imaging and Radiation Therapy Health and Safety Act, Chapter 61, Article 14E NMSA 1978]; but the board may not do so without the council's approval if the regulations are promulgated pursuant to the Radiation Protection Act (Chapter 74, Article 3 NMSA 1978). 1988 Op. Att'y Gen. No. 88-39.

Religious groups are excluded from the definition of "food service establishments". — The environmental improvement board (board) is charged with executing the provisions of the Food Service Sanitation Act (act), 25-1-1 to 25-1-15 NMSA 1978, the purpose of which is to protect the public health by establishing standards and provisions for the regulation of food service establishments and by appropriate delegations of authority to the board and the New Mexico environment department to adopt and enforce regulations covering the environmental health aspects of food service establishments to assure that consumers are not exposed to adverse environmental health conditions arising out of the operations of food service establishments; in accordance with the act, the board adopted and incorporated, with certain limited modifications, the Food Code, a model code and reference document for state, city, county and tribal agencies that regulates food service operations and establishes practical, science-based guidance for mitigating risk factors that are known to cause or contribute to foodborne illness outbreaks associated with retail and foodservice establishments. Among the modifications to the Food Code, the board excluded from the definition of "food service establishment", religious groups and other charitable organizations, and therefore the environment department does not have jurisdiction to enforce the Food Code against churches conducting temporary events such as a rummage sale or a bake sale, provided the goods do not require time or temperature control for safety and are prepared in a private home kitchen for sale or service at a fundraising function. *Application of the 2013 Food Code to Church Bake Sales* (1/17/18), Att'y Gen. Adv. Ltr. 2018-02.

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. N.M. 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 § 4.

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

74-1-10. Penalty.

A. 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.

B. Whenever, on the basis of any information, the secretary determines that a person has violated, is violating or threatens to violate any provision of Paragraph (2) or (3) of Subsection A of Section 74-1-8 NMSA 1978 or any rule, regulation or permit condition adopted and promulgated thereunder, the secretary may:

(1) issue a compliance order stating with reasonable specificity the nature of the violation or threatened violation, requiring compliance immediately or within a specified time period and 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.

C. An order issued pursuant to Subsection B of this section may include suspension or revocation of any permit issued by the department. Any penalty assessed in the order, except for residential on-site liquid waste systems, shall not exceed one thousand dollars ($1,000) for each violation. Any penalty assessed in the order for a residential on-site liquid waste system shall not exceed one hundred dollars ($100) for each violation. A penalty imposed for violation of drinking water regulations 20 NMAC 7.1 or permit conditions shall not exceed one thousand dollars ($1,000) per violation per day. 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.

D. If a violator fails to take corrective actions within the time specified in the compliance order, the secretary shall:

(1) assess civil penalties of not more than one thousand dollars ($1,000) for each noncompliance with the order; and

(2) suspend or revoke any permit issued to the violator pursuant to Paragraph (3) of Subsection A of Section 74-1-8 NMSA 1978.

E. An 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 hearing. Upon such a request, the secretary shall conduct a hearing. The secretary shall appoint an independent hearing officer to preside over the 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.

F. In connection with any proceeding pursuant to 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 adopt and promulgate rules for discovery procedures.

G. Penalties collected pursuant to violations of rules, regulations or permit conditions adopted pursuant to Paragraph (3) of Subsection A of Section 74-1-8 NMSA 1978 shall be deposited in the state treasury to be credited to the general fund.

H. Penalties collected pursuant to violations of drinking water regulations 20 NMAC 7.1 or permit conditions pursuant to Paragraph (2) of Subsection A of Section 74-1-8 NMSA 1978 shall be deposited in the state treasury to the credit of the water conservation fund.

History: 1953 Comp., § 12-12-14, enacted by Laws 1973, ch. 340, § 8; 1997, ch. 139, § 10; 1999, ch. 203, § 3.

ANNOTATIONS

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

The 1999 amendment, effective April 6, 1999, added the next-to-last sentence in Subsection C, and added Subsection H.

The 1997 amendment, effective June 20, 1997, designated existing provisions as Subsection A and added Subsections B through G.

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. *N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd.*, 1975-NMCA-083, 88 N.M. 201, 539 P.2d 221, cert. denied, 88 N.M. 318, 540 P.2d 248.

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. *N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd.*, 1975-NMCA-083, 88 N.M. 201, 539 P.2d 221, cert. denied, 88 N.M. 318, 540 P.2d 248.

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. *N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd.*, 1975-NMCA-083, 88 N.M. 201, 539 P.2d 221, cert. denied, 88 N.M. 318, 540 P.2d 248.

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. *N.M. Mun. League, Inc. v. N.M. Envtl. Improvement Bd.*, 1975-NMCA-083, 88 N.M. 201, 539 P.2d 221, cert. denied, 88 N.M. 318, 540 P.2d 248.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pollution Control § 80 et seq.

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.

74-1-10.1. False statements to the department; penalties.

A. It is unlawful for an owner or operator of a public water system subject to the Environmental Improvement Act and applicable rules or an owner's or operator's agent to:

(1) knowingly make a false statement, representation, certification or omission of fact material to the protection of public health as related to a public water system in an application, record, report, plan or other document filed with or submitted to the department, or required by rule to be maintained by an owner or operator of a public water system;

(2) knowingly falsify, tamper with or render inaccurate any device, method or record to be relied upon by the department to monitor or track information related to a public water system;

(3) knowingly falsify or conceal a fact material to the protection of public health as related to a public water system; or

(4) make or use a document with the knowledge that the document contains false statements or representations material to the protection of public health as related to a public water system.

B. A person who violates or knowingly causes or allows another person to violate Subsection A of this section is guilty of a misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

History: Laws 2018, ch. 24, § 1.

ANNOTATIONS

Effective dates. — Laws 2018, ch. 24 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 16, 2018, 90 days after the adjournment of the legislature.

74-1-11. Repealed.

ANNOTATIONS

Repeals. — Laws 1989, ch. 223, § 4 repealed 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.

74-1-12. Compliance with the federal Safe Drinking Water Act; purpose.

The purpose of this section and Section 74-1-13 NMSA 1978 is to provide:

A. an incentive for conservation of water, the state's most precious resource; and

B. funding for certain locations in the state to comply with the federal Safe Drinking Water Act in which the United States congress mandated that the United States environmental protection agency establish drinking water standards for contaminants, require filtration and disinfection for all public water supply systems, increase enforcement authority, establish public notification requirements, implement a lead ban and implement a capacity development program for existing and newly created water systems.

History: Laws 1993, ch. 317, § 1; 1999, ch. 203, § 4.

ANNOTATIONS

Cross references. — For the Drinking Water State Revolving Loan Fund Act, *see* Chapter 6, Article 21A NMSA 1978.

For the federal Safe Drinking Water Act, *see* 21 U.S.C. § 349 and 42 U.S.C. § 300f et seq.

The 1999 amendment, effective April 6, 1999, substituted "this section and Section 74-1-13 NMSA" for "this act" in the introductory language, and in Subsection B, deleted "eighty-three" preceding "contaminants" and substituted "implement a capacity development program for existing and newly created water systems" for "add drinking water standards for twenty-five contaminants every three years".

74-1-13. Water conservation fee; imposition; definitions.

A. There is imposed on every person who operates a public water supply system a water conservation fee in an amount equal to three cents ($.03) per thousand gallons of water produced on which the fee imposed by this subsection has not been paid.

B. The "water conservation fund" is created in the state treasury and shall be administered by the department. The fund shall consist of water conservation fees collected pursuant to this section. Balances 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. Earnings on the fund shall be credited to the fund.

C. Money in the water conservation fund is appropriated to the department for administration of a public water supply program to:

(1) test public water supplies for the contaminants required to be tested pursuant to the provisions of the federal Safe Drinking Water Act, as amended, and collect chemical compliance samples as required by those provisions of the federal act;

(2) perform vulnerability assessments that will be used to assess a public water supply's susceptibility to those contaminants; and

(3) implement new requirements of the Utility Operators Certification Act [Chapter 61, Article 33 NMSA 1978] and provide training for all public water supply operators.

D. The taxation and revenue department shall provide by regulation for the manner and form of collection of the water conservation fee. All water conservation fees collected by the taxation and revenue department, less the administrative fee withheld pursuant to Section 7-1-6.41 NMSA 1978, shall be deposited in the water conservation fund.

E. The fee imposed by this section shall be administered in accordance with the provisions of the Tax Administration Act [Chapter 7, Article 1 NMSA 1978] and shall be paid to the taxation and revenue department by each person who operates a public water supply system in the manner required by the department on or before the twenty-fifth day of the month following the month in which the water is produced.

F. Each operator of a public water supply system shall register and comply with the provisions of Section 7-1-12 NMSA 1978 and furnish such information as may be required by the taxation and revenue department.

G. The department shall compile a list of the contaminants that require testing pursuant to Paragraph (1) of Subsection C of this section. The list shall be compiled no less than once every twelve months and include the contaminants that will be tested in the subsequent twelve months. The department shall establish by rule procedures to compile the list and to determine which contaminants that require testing will be tested in the subsequent twelve months. The determination of which contaminants will be tested shall include consideration of the availability of funds in the water conservation fund, the needs of the public water supplies being tested for additional contaminants and public health and safety.

H. As used in this section:

(1) "person" means any individual or legal entity and also means, to the extent permitted by law, any federal, state or other governmental unit or subdivision or an agency, department or instrumentality thereof; and

(2) "public water supply system" means a system that provides piped water to the public for human consumption and that has at least fifteen service connections or regularly services an average of at least twenty-five individuals at least sixty days per year.

History: Laws 1993, ch. 317, § 2; 1997, ch. 125, § 11; 2013, ch. 128, § 1.

ANNOTATIONS

Cross references. — For the federal Safe Drinking Water Act, *see* 21 U.S.C. § 349 and 42 U.S.C. § 300f et seq.

The 2013 amendment, effective June 14, 2013, required the department of environment to compile a list of contaminants that will be tested in the succeeding twelve months; in Paragraph (1) of Subsection C, after "pursuant to the provisions of", deleted "Section 1412 of" and after "Drinking Water Act, as", deleted "finalized through July 1, 1992" and added "amended"; in Subsection D, in the second sentence, after "Section", deleted "1 of this 1997 act" and added "7-1-6.41 NMSA 1978"; and added Subsection G.

The 1997 amendment, effective July 1, 1997, substituted "as" for "and" in Paragraph (1) of Subsection C and inserted "less the administrative fee withheld pursuant to Section 1 of this 1997 act" in Subsection D.

Temporary provisions. — Laws 1999, ch. 203, § 5, effective April 6, 1999, provides that the balance in the water supply fund is transferred to the water conservation fund on April 6, 1999.

74-1-13.1. Nontransient noncommunity public water systems; definition; testing and notice requirements.

A. The department of environment shall test nontransient noncommunity water systems for arsenic, fluoride and radionuclides and adopt rules for reporting and public notification for those contaminants comparable to reporting and notification requirements for community water systems. Money in the water conservation fund may be used to fulfill the requirements of this subsection.

B. As used in this section:

(1) "community water system" means a public water system that serves at least fifteen service connections used by year-round residents or regularly serves at least twenty-five year-round residents; and

(2) "nontransient noncommunity water system" means a public water system that is not a community water system and that regularly serves at least twenty-five of the same persons over six months per year including but not limited to schools and factories.

History: Laws 2001, ch. 148, § 1.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 148 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2001, 90 days after adjournment of the legislature.

74-1-14. County or municipal authority regarding on-site liquid waste system.

Nothing in Chapter 74, Article 1 NMSA 1978 limits or is intended to limit the authority of any county or municipality to adopt and enforce requirements related to on-site liquid waste systems that are at least as stringent as those in that article; provided, however, that the county or municipality has, on staff or under contract, either a registered professional engineer with education or experience in sanitary engineering or a class II wastewater operator certified by the state of New Mexico.

History: Laws 1997, ch. 139, § 11.

74-1-14.1. Regulation of refrigerants. (Repealed effective June 16, 2033.)

The governing body of a municipality, county or other governmental entity shall allow:

A. the use of a refrigerant that is designated as an acceptable alternative or substitute for a class 1 or class 2 substance by the United States environmental protection agency; or

B. the installation or listing of equipment that contains a refrigerant designated as acceptable pursuant to Subsection A of this section and meets nationally recognized standards for the safe design, construction, installation and operation of refrigeration systems and the appropriate listing standard.

History: Laws 2023, ch. 189, § 1.

ANNOTATIONS

Compiler's notes. — Laws 2023, ch. 189, § 1 was not enacted as part of the Environmental Improvement Act, but was compiled there for the convenience of the user.

Delayed repeals. — Laws 2023, ch. 189, § 2 repeals 74-1-14.1 NMSA 1978, effective June 16, 2033.

Effective dates. — Laws 2023, ch. 189 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 16, 2023, 90 days after adjournment of the legislature.

74-1-15. Repealed.

History: Laws 2000, ch. 96, § 3; 2009, ch. 203, § 2; repealed by Laws 2020, ch. 32, § 8.

ANNOTATIONS

Repeals. — Laws 2020, ch. 32, § 8 repealed 74-1-15 NMSA 1978, as enacted by Laws 2000, ch. 96, § 3, relating to liquid waste fund created, effective May 20, 2020. For provisions of former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

74-1-15.1. Liquid waste disposal system assistance fund; created; purpose.

A. The "liquid waste disposal system assistance fund" is created in the state treasury. The department shall administer the fund. The fund may be composed of appropriations and transfers of money earned from investment of the fund and otherwise accruing to the fund and transfers of money from the environmental health fund not to exceed two hundred thousand dollars ($200,000) from the unexpended balance in the fund. Balances remaining in the fund at the end of a fiscal year shall remain to the credit of the fund. Disbursements from the fund shall be drawn on warrant of the secretary of finance and administration pursuant to vouchers signed by the secretary of environment or the secretary's authorized representative. Money in the fund is appropriated to the department for the sole purpose of assisting indigent individuals or households that qualify for funding to accomplish one of the following purposes where there is a real or potential negative impact to public health or water quality from on-site liquid waste disposal system effluent:

(1) to pay for a liquid waste disposal system to replace a cesspool or other failed or improper on-site liquid waste disposal system;

(2) to purchase, install or maintain an advanced treatment system as required by the Environmental Improvement Act or regulations issued pursuant to that act;

(3) to pay for the decommissioning and removal of a cesspool or other failed or improper on-site liquid waste disposal system; or

(4) to pay for all or a portion of the connection fees in order to connect an individual or household to a centralized wastewater collection and treatment system.

B. Construction activities sponsored by the fund shall be performed by licensed contractors selected through competitive bid by the department and shall be managed by the department.

C. No more than five percent of the fund shall be used by the department on an annual basis to pay for the department costs associated with management and implementation of fund activities.

D. As used in this section:

(1) "advanced treatment system" means an on-site liquid wastewater treatment system that removes a greater amount of contaminants than is accomplished by a primary treatment system;

(2) "connection fee" means the fee paid directly to a public water or wastewater system or other wastewater management organization and does not include other fees, such as legal fees, related to connecting an individual or household to a centralized wastewater collection and treatment system; and

(3) "indigent individuals or households" means individuals or households whose annual incomes do not exceed the federal poverty guidelines.

History: Laws 2009, ch. 203, § 1; 2020, ch. 32, § 4.

ANNOTATIONS

The 2020 amendment, effective May 20, 2020, provided for transfers from the environmental health fund to the liquid waste disposal system assistance fund to be used for regulation of liquid waste; and in Subsection A, in the introductory paragraph, after "money from the", deleted "liquid waste" and added "environmental health".

74-1-15.2. Environmental health fund; created.

A. The "environmental health fund" is created in the state treasury. The fund consists of fees collected from the regulation of on-site liquid waste systems and water recreation facilities pursuant to the Environmental Improvement Act, food establishments pursuant to the Food Service Sanitation Act [Chapter 25, Article 1 NMSA 1978] and hemp pursuant to the Hemp Manufacturing Act [Chapter 76, Article 24 NMSA 1978]. Money in the fund is subject to appropriation by the legislature to the department for the administration of regulations pertaining to liquid waste, water recreation facilities, food service sanitation and hemp. Disbursements from the fund shall be by warrant drawn by the secretary of finance and administration pursuant to vouchers signed by the secretary of environment or the secretary of environment's designee. Any unexpended or unencumbered balance in the environmental health fund remaining at the end of any fiscal year shall not revert to the general fund.

B. Up to two hundred thousand dollars ($200,000) from unexpended and unencumbered money in the environmental health fund may be transferred to the liquid waste disposal system assistance fund on an annual basis.

History: Laws 2020, ch. 32, § 1.

ANNOTATIONS

Effective dates. — Laws 2020, ch. 32 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 20, 2020, 90 days after adjournment of the legislature.

Temporary provisions. — Laws 2020, ch. 32, § 7 provided that on May 20, 2020, unexpended and unencumbered balances in the food service sanitation fund, the liquid waste fund and the water recreation facilities fund shall be transferred to the environmental health fund.

74-1-16. Water recreation facilities; fee imposition.

The board may assess an annual fee not to exceed one hundred fifty dollars ($150) on the owner or operator of a public swimming pool, public spa or other public water recreation facility to defray the cost of administering and enforcing rules adopted in accordance with the Environmental Improvement Act pertaining to public water recreation facilities. The fee shall be based on the size of the public water recreation facility. Fees collected pursuant to this section shall be deposited in the environmental health fund.

History: Laws 2003, ch. 335, § 1; 2020, ch. 32, § 5.

ANNOTATIONS

The 2020 amendment, effective May 20, 2020, removed provisions creating the water recreation facilities fund, and provided that fees collected from public water recreation facilities pursuant to this section shall be deposited in the environmental health fund; and deleted former Subsection A and subsection designation "B."; before "board", deleted "environmental improvement", and added the last sentence.

Temporary provisions. — Laws 2020, ch. 32, § 7 provided that on May 20, 2020, unexpended and unencumbered balances in the food service sanitation fund, the liquid waste fund and the water recreation facilities fund shall be transferred to the environmental health fund.

74-1-17. Nuclear workers assistance fund created.

The "nuclear workers assistance fund" is created in the state treasury. The fund shall consist of money earned from investment of the fund and otherwise accruing to the fund and up to one-half of one percent of any award for an initial claim, including a claim for medical benefits, filed by the department on behalf of the claimants with the federal office of workers' compensation program, under the federal Energy Employees Occupational Illness Compensation Program Act of 2000, 42 USC 7384 et seq., or up to five percent of any award after the department files objections to a recommended decision denying an award, which shall be transmitted to the state treasurer for credit to the nuclear workers assistance fund. Balances remaining in the fund at the end of a fiscal year shall remain in the fund and shall not revert to the general fund. The department shall administer the fund, and money in the fund is appropriated to the department for the purpose of the administration of a program to assist nuclear workers seeking claims under the federal Energy Employees Occupational Illness Compensation Program Act of 2000, 42 USC 7384 et seq. Money from the fund may be drawn on warrants of the secretary of finance and administration pursuant to vouchers signed by the secretary of environment or the secretary of environment's designee.

History: Laws 2010, ch. 50, § 1.

ANNOTATIONS

Emergency clauses. — Laws 2010, ch. 50, § 2 contained an emergency clause and was approved March 8, 2010.

74-1-18. Clean transportation fuel standard program; rules.

A. The board shall promulgate rules to implement a clean transportation fuel standard program no later than July 1, 2026.

B. Prior to the board promulgating rules pursuant to this section, the secretary shall convene an advisory committee composed of stakeholders from in-state and out-of-state producers of transportation fuels, transportation fuel distributors, local governments, utilities, tribal governments, environmental protection groups, environmental justice groups and other individuals or entities with relevant expertise to provide input and periodically review program rules.

C. The clean transportation fuel standard program rules shall:

(1) establish a statewide technology-neutral clean transportation fuel standard based on a schedule for annually decreasing the carbon intensity of transportation fuels used in the state;

(2) apply the clean transportation fuel standard to account for the fuel lifecycle in order to reduce the carbon intensity of transportation fuels used in the state by at least twenty percent below 2018 carbon intensity levels by 2030 and at least thirty percent below 2018 carbon intensity levels by 2040;

(3) establish technology-neutral mechanisms for generating, obtaining, trading, selling and retiring credits among transportation fuel producers, fuel distributors and other individuals or entities in the transportation fuel market, including additional credit opportunities from activities and projects that support the reduction or removal of greenhouse gas emissions associated with transportation in the state;

(4) establish mechanisms, including cost- containment measures and credit holding limits, to allow credits to be banked for future compliance periods to stabilize and incentivize investment in the transportation fuel credit market, verify the validity of compliance obligations, maximize savings and limit consumer costs, ensure program compliance, trade credits and allow for market participation by persons who register in the market to facilitate credit generation;

(5) require a utility that elects to participate in the program to invest all revenues from the sale of credits, not including administrative program costs, into distribution, grid modernization, infrastructure and other projects that support transportation decarbonization, with at least fifty percent of such revenues supporting low-income and underserved communities and with investor-owned utilities receiving regulatory treatment consistent with Section 62-8-12 NMSA 1978;

(6) consider similar programs in other jurisdictions, allow for coordination with other jurisdictions to promote regional reductions or removal of greenhouse gas emissions and allow market participants to generate credits under any overlapping current and future federal transportation fuel regulations;

(7) not discriminate against fuels solely on the basis of having originated in another state or jurisdiction;

(8) establish a periodic review process that includes input from the advisory committee convened pursuant to Subsection B of this section to provide input on program rules and performance and determine potential adjustments if deemed necessary after review, including the superseding of the state program by federal legislation;

(9) allow for a deferral of the program based on emergency or forecasted conditions; and

(10) establish fees for the cost of the department's administration and enforcement of the program; provided that any fees are deposited in the state air quality permit fund.

D. As used in this section:

(1) "low-income" means annual household adjusted gross income, as defined in the Income Tax Act [Chapter 7, Article 2 NMSA 1978], of equal to or less than two hundred percent of the federal poverty level; and

(2) "underserved community" means an area in this state, including a county, municipality or neighborhood, or subset of such area where the median income of the area is low-income.

History: Laws 2024, ch. 54, § 4.

ANNOTATIONS

Effective dates. — Laws 2024, ch. 54 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective May 15, 2024, 90 days after adjournment of the legislature.

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* Chapter 74, Article 1 NMSA 1978.

For the Pollution Control Revenue Bond Act, *see* Chapter 3, Article 59 NMSA 1978.

New Mexico constitutional and statutory provisions have incorporated and implemented the common law public trust doctrine. — Section 21 of Article XX of the New Mexico Constitution recognizes that a public trust duty exists for the protection of New Mexico's natural resources, and it delegates the implementation of that specific duty to the legislature. The legislature has incorporated and implemented the common law public trust doctrine with regard to the process a person must follow in asserting his or her rights to protect the atmosphere by enacting the Air Quality Control Act, Chapter 74, Article 2 NMSA 1978, to address how protections for the atmosphere are implemented. The common law, where inconsistent with this statutory scheme, must yield to the governing statute. An individual may make a claim concerning the duty to protect the atmosphere, but such a claim must be raised within the existing constitutional and statutory framework and not alternatively through a separate cause of action, because a separate common law cause of action under the public trust doctrine would circumvent and render a nullity the process under the Air Quality Control Act that has established how competing interests are addressed and decisions are made regarding regulation of the atmosphere. *Sanders-Reed v. Martinez*, 2015-NMCA-063.

Where plaintiffs filed a civil complaint against the state of New Mexico seeking a judgment declaring that the common law public trust doctrine imposes a duty on the state to regulate greenhouse gas emissions in New Mexico, that the state's failure to devise a plan to mitigate the effects of climate change is a breach of the public trust duty, and that the state should be ordered to produce a plan for redressing and preventing the impairment to the atmosphere caused by greenhouse gases, summary judgment in favor of the state was appropriate where the legislature has enacted a statutory framework to address how protections for the atmosphere are implemented, and the common law, where inconsistent with the statutory scheme, must yield to the governing statute. *Sanders-Reed v. Martinez*, 2015-NMCA-063.

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. 70-05.

Law reviews. — For comment, "Delegation of Legislative Authority on the State Level; Environmental Protection in New Mexico: Public Service Co. of N.M. et al. v. N.M. 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 § 155 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 §§ 7401-7626), 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.

Award of costs and attorney's fees in judicial review of administrative proceedings under § 307(f) of Clean Air Act (42 USCA § 7607(f)), 146 A.L.R. Fed. 531.

Federal requirements for public participation in adoption, submission, and approval of state implementation plans and revisions pursuant to § 110 of Clean Air Act (42 USCA § 7410), 151 A.L.R. Fed. 445.

Decisions of Environmental Protection Agency (EPA) approving or disapproving state implementation plans as interfering with primary role of states to determine how national ambient air quality standards should be met under Clean Air Act (42 USCA §§ 7401 et seq.), 151 A.L.R. Fed. 495.

Conformity requirements of § 176(c) of Clean Air Act, 42 U.S.C.A. § 7506(c), 157 A.L.R. Fed. 217.

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

74-2-2. Definitions.

As used in the Air Quality Control Act:

A. "air contaminant" means a substance, including 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" or "emission standard" means 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 a 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 listed 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 a 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 a physical change in, or change in the method of operation of, a source that results in an increase in the potential emission rate of a regulated air contaminant emitted by the source or that results in the emission of a 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 a natural gas curtailment or emergency allocation or an other lack of supply of natural gas;

N. "nonattainment area" means for an 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 to emit a regulated air contaminant under its physical and operational design, provided any physical or operational limitation on the capacity of the source to emit a regulated air contaminant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored or processed, shall be treated as part of its physical and operational design only if the limitation or the effect it would have on emissions is enforceable by the department or the local agency pursuant to the Air Quality Control Act or the federal act;

Q. "regulated air contaminant" means an 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 an increase in the ambient concentrations of an 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 a structure, building, equipment, facility, installation or operation that emits or may emit an 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 a 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 an 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; 2001, ch. 133, § 1.

ANNOTATIONS

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

For the federal Clean Air Act, *see* 42 U.S.C. § 7401 et seq. For Section 107 of that act, *see* 42 U.S.C. § 7407.

The 2001 amendment, effective June 15, 2001, substituted "listed" for "classified" in Subsection H; and rewrote Subsection P, which formerly read "'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;".

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.

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. N.M. Envtl. Improvement Bd.*, 1984-NMSC-042, 101 N.M. 291, 681 P.2d 717.

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. N.M. Envtl. Improvement Bd.*, 1984-NMCA-058, 102 N.M. 8, 690 P.2d 451.

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. N.M. Envtl. Improvement Bd.*, 1984-NMCA-058, 102 N.M. 8, 690 P.2d 451.

Application of reasonable probability of injury standard not required during permitting process. — Where the city of Albuquerque environmental health department (EHD) issued an authority-to-construct permit to an oil company pursuant to the New Mexico Air Quality Control Act (AQCA), 74-2-1 to 74-2-17 NMSA 1978, and where the Albuquerque-Bernalillo county air quality control board (board) upheld the EHD's issuance of the permit, and where plaintiff appealed the board's order, claiming that EHD and the board each failed to apply a "reasonable probability of injury" standard when evaluating the permit, the board did not err in upholding EHD's issuance of the authority-to-construct permit, because 74-2-7 NMSA 1978 directs EHD and the board to determine whether local, state, and federal air pollution standards or federal regulations have been violated, but does not impose on EHD or the board a requirement to independently apply the reasonable probability of injury standard when considering whether to grant a permit. *Southwest Organizing Project v. Albuquerque-Bernalillo Cnty. Air Quality Control Bd*., 2021-NMCA-005.

Requirement to consider community testimony met during permitting process. — Where the city of Albuquerque environmental health department (EHD) issued an authority-to-construct permit to an oil company pursuant to the New Mexico Air Quality Control Act (AQCA), 74-2-1 to 74-2-17 NMSA 1978, and where the Albuquerque-Bernalillo county air quality control board (board) upheld the EHD's issuance of the permit, and where plaintiff appealed the board's order, claiming that EHD, during the application process, and the board, at the later adjudicatory hearing, were required to consider community testimony regarding the oil company's effect on local resident quality of life, the board did not err in upholding EHD's issuance of the authority-to-construct permit, because EHD, during the initial application process, met the public comment requirement by holding a public information hearing, accepting pubic testimony about concerns for quality of life, and addressing written comments submitted before and during the hearing, and the board, during the hearings following the petition of EHD's decision to grant the permit, similarly permitted public testimony. EHD and the board, however, were not required to specifically address public testimony regarding quality of life issues in resolving the permit application. *Southwest Organizing Project v. Albuquerque-Bernalillo Cnty. Air Quality Control Bd*., 2021-NMCA-005.

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, 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. — For the definition of "board," "department" and "director", *see* 74-2-2 NMSA 1978.

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

For 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. 82-07.

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 N.M.: Public Service Co. of N.M. et al. v. N.M. 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 § 150 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. 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 or maintenance area may provide for a vehicle emission inspection and maintenance program for vehicles registered at an address within the jurisdiction of the local authority and under twenty-six thousand pounds gross vehicle weight rating powered by an internal combustion engine, which program shall be at least as stringent as 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 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. A local authority having a vehicle emission inspection and maintenance program shall conduct the vehicle emission inspection and maintenance program through a decentralized privately owned and operated system unless air quality emissions result in automatic implementation of another type of program under the terms of a contingency plan required and approved by the United States environmental protection agency. The local authority shall set the emission inspection fee by ordinance.

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.

J. Before a local authority adopts an ordinance that is more stringent than the federal act or applicable federal regulations, or that applies to sources not subject to regulation pursuant to the federal act or regulations, the local authority shall make a determination, based on substantial evidence and after notice and public hearing, that the proposed ordinance will be more protective of public health and the environment.

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; 1994, ch. 131, § 1; 1995, ch. 128, § 1; 2021, ch. 133, § 1.

ANNOTATIONS

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

For the meaning of "federal act", *see* Paragraph F of 74-2-2 NMSA 1978 and notes thereto.

The 2021 amendment, effective July 1, 2021, required that a local authority's decision to adopt an ordinance regulating air pollution that is more stringent than the federal act or applicable federal regulations, or that applies to sources not subject to regulation pursuant to the federal act or regulations, be based on substantial evidence after notice and public hearing, and clarified provisions of the section; in Subsection E, after "maintenance program for vehicles", added "registered at an address within the jurisdiction of the local authority and", after "gross vehicle weight", added "rating", and after "program shall be", deleted "no more" and added "at least as"; and added Subsection J.

The 1995 amendment, effective June 16, 1995, inserted "or maintenance area" in the first sentence in Subsection E, and deleted "contiguous" preceding "municipality" in Subsection F.

The 1994 amendment, effective May 18, 1994, rewrote Subsection H, which read: "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."

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

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*, 1984-NMSC-029, 101 N.M. 59, 678 P.2d 687, cert. denied, 474 U.S. 947, 106 S. Ct. 345, 88 L. Ed. 2d 292 (1985).

State has primary responsibility for assuring compliance with the air quality within the state and where a city or county assumes authority for all air quality programs within a region, the state retains responsibility to act if the city or county cannot or does not act and the state may be sanctioned for failing to assure compliance of the air quality within the region under the Clean Air Act. *N.M. Envtl. Improvement Div. v. Thomas*, 789 F.2d 825 (10th Cir. 1986).

Adoption of environmental justice principles. — The Albuquerque-Bernalillo county air quality control board has the authority to promulgate regulations that incorporate environmental justice principles, which provide that a government agency should notify the public, and factor in public testimony regarding a company's environmental impact on the community, particularly in a minority or impoverished community, prior to issuing a permit to that company, and to adopt directives requiring that environmental justice principles be incorporated into staff work, but those directives do not have a binding effect on the parties in the permitting process. 2008 Op. Att'y Gen. No. 08-03.

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. 82-07.

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. 82-07.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pollution Control § 150 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.

Federal requirements for public participation in adoption, submission, and approval of state implementation plans and revisions pursuant to § 110 of Clean Air Act (42 USCA § 7410), 151 A.L.R. Fed. 445.

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 rules and standards consistent with the Air Quality Control Act to attain and maintain national ambient air quality standards and prevent or abate air pollution, including:

(a) rules 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

(b) standards of performance that limit carbon dioxide emissions to no more than one thousand one hundred pounds per megawatt-hour on and after January 1, 2023 for a new or existing source that is an electric generating facility with an original installed capacity exceeding three hundred megawatts and that uses coal as a fuel source; 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. If the environmental improvement board or the local board determines that emissions from sources within the environmental improvement board's jurisdiction or the local board's jurisdiction cause or contribute to ozone concentrations in excess of ninety-five percent of the primary national ambient air quality standard for ozone promulgated pursuant to the federal act, the environmental improvement board or the local board shall adopt a plan, including rules, to control emissions of oxides of nitrogen and volatile organic compounds to provide for attainment and maintenance of the standard. Rules adopted pursuant to this subsection shall be limited to sources of emissions within the area of the state where the ozone concentrations exceed ninety-five percent of the primary national ambient air quality standard.

D. Rules adopted by the environmental improvement board or the local board may:

(1) include rules 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 the rules shall be 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;

(2) prescribe standards of performance for sources and emission standards for hazardous air pollutants that shall be at least as stringent as required by federal standards of performance;

(3) include rules governing emissions from solid waste incinerators that shall be at least as stringent as any applicable federal emission limitations;

(4) include rules requiring the installation of control technology for mercury emissions that removes the greater of what is achievable with best available control technology or ninety percent of the mercury from the input fuel for all coal-fired power plants, except for coal-fired power plants constructed and generating electric power and energy before July 1, 2007;

(5) 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

(6) 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.

E. Any rule adopted pursuant to this section shall be at least as stringent as federal law, if any, relating to control of motor vehicle emissions.

F. In making its rules, the environmental improvement board or the local board shall give weight it deems appropriate to all facts and circumstances, including:

(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.

G. Before the environmental improvement board or local board adopts a rule that is more stringent than the federal act or federal regulations, or that applies to sources not subject to regulation pursuant to the federal act or regulations, the environmental improvement board or local board shall make a determination, based on substantial evidence and after notice and public hearing, that the proposed rule will be more protective of public health and the environment.

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; 2007, ch. 143, § 1; 2019, ch. 65, § 36; 2021, ch. 133, § 2.

ANNOTATIONS

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

The 2021 amendment, effective July 1, 2021, provided that if there is a determination that emissions from sources within the environmental improvement board's or local board's jurisdiction cause or contribute to ozone concentrations in excess of ninety-five percent of the primary national ambient air quality standard for ozone promulgated pursuant to the federal act, the environmental improvement board or the local board must adopt a plan to control emissions of oxides of nitrogen and volatile organic compounds to provide for attainment and maintenance of the standard, and removed provisions prohibiting the environmental improvement board and the local board from adopting certain types of state air quality regulations and standards more stringent than federal regulations and standards; added new Subsection C and redesignated former Subsections C through E as Subsection D through F, respectively; in Subsection D, Paragraph D(1), after "shall be", deleted "no more stringent than but", and deleted Subparagraph D(1)(b), Paragraph D(2), after "hazardous air pollutants that", deleted "except as provided in this subsection and in Subparagraph (b) of Paragraph (1) of Subsection B of this section", after "shall be", deleted "no more stringent than but", and deleted former Subparagraph D(2)(b), in Paragraph D(3), after "as stringent as", deleted "and may be more stringent than"; in Subsection E, after "this section shall be", deleted "consistent with" and added "at least as stringent as"; and added Subsection G.

The 2019 amendment, effective June 14, 2019, required the environmental improvement board to promulgate rules and standards of performance that limit carbon dioxide emissions to no more than 1,100 lbs. per megawatt-hour on and after January 1, 2023 for electric facilities with an original installed capacity exceeding 300 megawatts and that uses coal as a fuel source; in Subsection B, Paragraph B(1), after "repeal", deleted "regulations" and added "rules and standards", added new subparagraph designation "(a)", in Subparagraph B(1)(a), added "rules", and added Subparagraph B(1)(b); and in Subsection C, replaced "regulations" with "rules", and in Paragraph C(2), after "as provided in this subsection", added "and in Subparagraph (b) of Paragraph (1) of Subsection B of this section".

The 2007 amendment, effective June 15, 2007, added Paragraph (4) of Subsection C providing the installation of control technology for mercury emissions for coal power plants other than those generating energy before July 1, 2007.

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.

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. N.M. Envtl. Improvement Bd.*, 1976-NMCA-039, 89 N.M. 223, 549 P.2d 638.

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. N.M. Envtl. Improvement Bd.*, 1976-NMCA-039, 89 N.M. 223, 549 P.2d 638.

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. N.M. Envtl. Improvement Bd.*, 1976-NMCA-039, 89 N.M. 223, 549 P.2d 638.

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. N.M. Envtl. Improvement Bd.*, 1980-NMCA-007, 94 N.M. 610, 614 P.2d 22, cert. denied, 94 N.M. 675, 615 P.2d 992.

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. N.M. Envtl. Improvement Bd.*, 1976-NMCA-039, 89 N.M. 223, 549 P.2d 638.

Substantial evidence 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 Cnty. Air Quality Control Bd.*, 1969-NMCA-089, 80 N.M. 633, 459 P.2d 159.

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. N.M. Envtl. Improvement Bd.*, 1976-NMCA-039, 89 N.M. 223, 549 P.2d 638.

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. N.M. Envtl. Improvement Bd.*, 1976-NMCA-039, 89 N.M. 223, 549 P.2d 638.

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. N.M. Envtl. Improvement Bd.*, 1980-NMCA-007, 94 N.M. 610, 614 P.2d 22, cert. denied, 94 N.M. 675, 615 P.2d 992.

Application of reasonable probability of injury standard not required during permitting process. — Where the city of Albuquerque environmental health department (EHD) issued an authority-to-construct permit to an oil company pursuant to

the New Mexico Air Quality Control Act (AQCA), 74-2-1 to 74-2-17 NMSA 1978, and where the Albuquerque-Bernalillo county air quality control board (board) upheld the EHD's issuance of the permit, and where plaintiff appealed the board's order, claiming that EHD and the board each failed to apply a "reasonable probability of injury" standard when evaluating the permit, the board did not err in upholding EHD's issuance of the authority-to-construct permit, because 74-2-7 NMSA 1978 directs EHD and the board to determine whether local, state, and federal air pollution standards or federal regulations have been violated, but does not impose on EHD or the board a requirement to independently apply the reasonable probability of injury standard when considering whether to grant a permit. *Southwest Organizing Project v. Albuquerque-Bernalillo Cnty. Air Quality Control Bd*., 2021-NMCA-005.

Requirement to consider community testimony met during permitting process. — Where the city of Albuquerque environmental health department (EHD) issued an authority-to-construct permit to an oil company pursuant to the New Mexico Air Quality Control Act (AQCA), 74-2-1 to 74-2-17 NMSA 1978, and where the Albuquerque-Bernalillo county air quality control board (board) upheld the EHD's issuance of the permit, and where plaintiff appealed the board's order, claiming that EHD, during the application process, and the board, at the later adjudicatory hearing, were required to consider community testimony regarding the oil company's effect on local resident quality of life, the board did not err in upholding EHD's issuance of the authority-to-construct permit, because EHD, during the initial application process, met the public comment requirement by holding a public information hearing, accepting pubic testimony about concerns for quality of life, and addressing written comments submitted before and during the hearing, and the board, during the hearings following the petition of EHD's decision to grant the permit, similarly permitted public testimony. EHD and the board, however, were not required to specifically address public testimony regarding quality of life issues in resolving the permit application. *Southwest Organizing Project v. Albuquerque-Bernalillo Cnty. Air Quality Control Bd*., 2021-NMCA-005.

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.

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.

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 § 150 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, 85 A.L.R. Fed. 118.

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

Decisions of Environmental Protection Agency (EPA) approving or disapproving state implementation plans as interfering with primary role of states to determine how national ambient air quality standards should be met under Clean Air Act (42 USCA §§ 7401 et seq.), 151 A.L.R. Fed. 495.

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 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 repealed former 74-2-5.1 NMSA 1978, as enacted by Laws 1985, ch. 95, § 6, relating to joint air quality control board reports, and enacted the above section, effective March 5, 1992.

Cross references. — For Section 507 of the federal Clean Air Act, *see* 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 repealed former 74-2-5.2 NMSA 1978, as enacted by Laws 1990, ch. 99, § 67, relating to solid waste incinerator regulations, and enacted the above section, effective March 5, 1992.

74-2-5.3. Repealed.

History: Laws 2009, ch. 98, § 1; repealed by Laws 2021, ch. 133, § 4.

ANNOTATIONS

Repeals. — Laws 2021, ch. 133, § 4 repealed 74-2-5.3 NMSA 1978, as enacted by Laws 2009, ch. 98, § 1, relating to duties and powers of environmental improvement board and local board for attainment and maintenance of national ambient air quality

standards for ozone, effective July 1, 2021. For provisions of former section, *see* the 2020 NMSA 1978 on *NMOneSource.com*.

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 [Chapter 14, Article 4 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.

For 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 Cnty. Air Quality Control Bd.*, 1969-NMCA-089, 80 N.M. 633, 459 P.2d 159.

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 § 4.

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) a 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) a 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 information the department or the local agency deems necessary to determine that regulations and standards under the Air Quality Control Act or the federal act will not be violated;

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

(a) ninety days after the application is determined to be administratively complete, if the application is not subject to requirements for prevention of significant deterioration, unless the secretary or the director grants an extension not to exceed ninety days for good cause, including the need to have public hearings; or

(b) one hundred eighty days after the application is determined to be administratively complete, if the application is subject to requirements for prevention of significant deterioration, unless the secretary or the director grants an extension not to exceed ninety days for good cause, including the need to have public hearings;

(3) that if the department or local agency fails to take final action on a construction permit application within the deadlines specified in Paragraph (2) of this subsection, the department or local agency shall notify the applicant in writing that an extension of time is required to process the application and specify in detail the grounds for the extension;

(4) a description of elements required before the department or local agency shall deem an application administratively complete;

(5) specification of the public notice, comment period and public hearing, if any, required prior to the issuance of a permit; provided that 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;

(6) a schedule of construction permit fees sufficient to cover the reasonable costs of:

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

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

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

(8) a method for accelerated permit processing that may be requested at the sole discretion of the applicant at the time the applicant submits a construction permit application and that:

(a) allows the department or local agency to contract with qualified outside firms to assist the department or local agency in its accelerated review of the construction permit application; provided that the department or local agency can contract with a qualified firm that does not have a conflict of interest; and

(b) establishes a process for the department or local agency to account for the expenditure of the accelerated permit processing fees;

(9) allowance for additional permit application fees, sufficient to cover the reasonable costs of an accelerated permit application review process. Before the applicant is notified that the permit application has been determined to be complete, the department or local agency shall give the applicant a reasonable estimate of costs of an accelerated permit application review process;

(10) 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

(11) 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. Except as provided in Subsection O of this section, the department or the local agency may deny any application for:

(1) a construction permit if it appears that the construction or modification:

(a) will not meet applicable standards, rules or requirements of the Air Quality Control Act or the federal act;

(b) will cause or contribute to air contaminant levels in excess of a national or state standard or, within the boundaries of a local authority, applicable local ambient air quality standards; or

(c) will violate any other provision of the Air Quality Control Act or the federal act; and

(2) an operating permit if the source will not meet the applicable standards, rules or requirements pursuant to the Air Quality Control Act or the federal act.

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

(1) for a construction permit:

(a) a requirement that such source install and operate control technology, determined on a case-by-case basis, sufficient to meet the standards, rules and requirements of the Air Quality Control Act and the federal act;

(b) 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 permit application, whichever is more stringent;

(c) compliance with applicable federal standards of performance;

(d) reasonable restrictions and limitations not relating to emission limits or emission rates; or

(e) any combination of the conditions listed in this paragraph; and

(2) for an operating permit, terms and conditions sufficient to ensure compliance with the applicable standards, rules and requirements pursuant to the Air Quality Control Act and the federal act.

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. A 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. A 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 petition 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 sixty 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 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 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.

O. The department may not deny an application for a construction permit for a cotton gin if the applicant proposes use of the best system of emissions reduction currently in use by cotton gins in the United States, as specified by regulation of the environmental improvement board, and the cotton gin has a potential emission rate, considering the use of the proposed emissions reduction system and the proposed hours of operation, of not more than fifty tons per year of any regulated air contaminant for which there is a national ambient air quality standard. The construction permit shall require that the applicant use the proposed emission reduction system and limit the hours of operation to the hours specified in the application. For purposes of this subsection, "best system of emissions reduction" for cotton gins means a system that will result in emissions reduction equal to or greater than that obtained by the use of condenser screens, seventy-mesh screen or equivalent on low-pressure exhausts and high-efficiency cyclone dust collectors on high-pressure exhausts.

P. The department or local agency may deny any permit application or revoke any permit issued pursuant to the Air Quality Control Act if, within ten years immediately preceding the date of submission of the permit application, the applicant or permittee has:

(1) knowingly misrepresented a material fact in an application for a permit;

(2) refused to disclose the information required by the provisions of the Air Quality Control Act;

(3) been convicted in any court of any state or the United States of:

(a) a felony related to environmental crime; or

(b) a crime defined by state or federal statute as involving or being in restraint of trade, price fixing, bribery or fraud;

(4) constructed or operated a facility for which a permit is sought without a permit required by the Air Quality Control Act, except when such an unpermitted facility is discovered after acquisition in the course of a timely environmental audit authorized by department or local board policy and except if:

(a) the operator of the facility using good engineering practices and established approved calculation methodologies estimated that the facility's emissions would not require a permit pursuant to the Air Quality Control Act; and

(b) upon discovery of the discrepancy between the calculated pre-construction maximum facility emissions and the calculated post-construction maximum facility emissions, the operator of the facility applies for the appropriate permit within thirty calendar days; or

(5) had any permit revoked or permanently suspended for cause under the environmental laws of any state or the United States.

Q. In making a finding under Subsection P of this section, the department or local agency may consider aggravating and mitigating factors.

R. If an applicant or permittee whose permit is being considered for denial or revocation on any basis provided by Subsection P of this section has submitted an action plan that has been approved in writing by the secretary or director, 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 or director may issue a conditional permit for a reasonable period of time.

S. An applicant for a permit pursuant to the Air Quality Control Act shall file a disclosure statement with the department or local agency with the information listed in Subsection P of this section, and on a form developed by the department. An existing permit holder shall provide such disclosure upon request by the department or local agency.

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; 1999, ch. 139, § 1; 2001, ch. 133, § 2; 2003, ch. 8, § 1; 2021, ch. 89, § 1.

ANNOTATIONS

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

For the federal Clean Air Act, *see* 42 U.S.C. § 7401 et seq.

For Section 502 of the federal Clean Air Act, referred to in Subparagraph B(11)(a), *see* 42 U.S.C. § 7661a.

For Section 505 the federal Clean Air Act, referred to in Subparagraph B(11)(a), *see* 42 U.S.C. § 7661d.

The 2021 amendment, effective June 18, 2021, authorized the department of environment or local agency to deny any permit application or revoke any permit issued pursuant to the Air Quality Control Act for cause, including poor compliance history, a previous felony conviction related to an environmental crime, constructing or operating an unpermitted facility, with exceptions, or based on a prior permit revocation or suspension in other states or under federal law; and added Subsections P through S.

The 2003 amendment, effective June 20, 2003, added "except as provided in Subsection O of this section" at the beginning of Subsection C and added Subsection O.

The 2001 amendment, effective June 15, 2001, substituted "local agency" for "local board" in Paragraph B(9); rewrote Subsections C and D; and deleted "new" preceding "source will or will not" in Subsection L.

The 1999 amendment, effective January 1, 2000, substituted "determine" for "ensure" in Subsection B(1); substituted "ninety days" for "one hundred eighty days" in Subsection B(2)(a); inserted "administratively", substituted "subject to" for "affected by" and added the language following "significant deterioration" in Subsections B(2)(a) and B(2)(b); substituted "one hundred eighty days" for "two hundred forty days" in Subsection B(2)(b); added Subsections B(3), B(4), B(8) and B(9), and redesignated the remaining subsections accordingly; substituted "in this paragraph" for "above" in Subsection D(2)(d); substituted "petition" for "request" in the last sentence of Subsection H; and substituted "sixty days" for "ninety days" in the first sentence of Subsection I.

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

In matters that substantially affect the public interest, notice and the public's opportunity to be heard is mandatory. — In an appeal from a decision of the Albuquerque-Bernalillo county air quality control board (board), where petitioners challenged a permit issued by the city of Albuquerque environmental health department (department) allowing respondents to construct a gas station with authorization to pump up to 7,000,000 gallons of gasoline per year, claiming that the department had failed to take into account various "quality of life" concerns and that the department's decision to

grant the permit application would cause emissions, odors, fumes, increased traffic, and other negative impacts on petitioners' property, the board's decision to grant respondent's motion for summary judgment was contrary to law, because the notice of hearing failed to inform the public that the board might resolve the appeal summarily prior to the public hearing, contrary to 74-2-7(I) NMSA 1978 which requires the board to consider the public's views or arguments when a permitting action substantially affects the public interest. *Freed v. City of Albuquerque (In re Merits Regarding Air Quality Permit No. 3135)*, 2017-NMCA-011.

Application of reasonable probability of injury standard not required during permitting process. — Where the city of Albuquerque environmental health department (EHD) issued an authority-to-construct permit to an oil company pursuant to the New Mexico Air Quality Control Act (AQCA), 74-2-1 to 74-2-17 NMSA 1978, and where the Albuquerque-Bernalillo county air quality control board (board) upheld the EHD's issuance of the permit, and where plaintiff appealed the board's order, claiming that EHD and the board each failed to apply a "reasonable probability of injury" standard when evaluating the permit, the board did not err in upholding EHD's issuance of the authority-to-construct permit, because 74-2-7 NMSA 1978 directs EHD and the board to determine whether local, state, and federal air pollution standards or federal regulations have been violated, but does not impose on EHD or the board a requirement to independently apply the reasonable probability of injury standard when considering whether to grant a permit. *Southwest Organizing Project v. Albuquerque-Bernalillo Cnty. Air Quality Control Bd*., 2021-NMCA-005.

Requirement to consider community testimony met during permitting process. — Where the City of Albuquerque environmental health department (EHD) issued an authority-to-construct permit to an oil company pursuant to the New Mexico Air Quality Control Act (AQCA), 74-2-1 to 74-2-17 NMSA 1978, and where the Albuquerque-Bernalillo county air quality control board (board) upheld the EHD's issuance of the permit, and where plaintiff appealed the board's order, claiming that EHD, during the application process, and the board, at the later adjudicatory hearing, were required to consider community testimony regarding the oil company's effect on local resident quality of life, the board did not err in upholding EHD's issuance of the authority-to-construct permit, because EHD, during the initial application process, met the public comment requirement by holding a public information hearing, accepting pubic testimony about concerns for quality of life, and addressing written comments submitted before and during the hearing, and the board, during the hearings following the petition of EHD's decision to grant the permit, similarly permitted public testimony. EHD and the board, however, were not required to specifically address public testimony regarding quality of life issues in resolving the permit application. *Southwest Organizing Project v. Albuquerque-Bernalillo Cnty. Air Quality Control Bd*., 2021-NMCA-005.

Hearing officer did not err in issuing a discovery order. — Where the city of Albuquerque environmental health department (EHD) issued an authority-to-construct permit to an oil company pursuant to the New Mexico Air Quality Control Act (AQCA), 74-2-1 to 74-2-17 NMSA 1978, and where the Albuquerque-Bernalillo county air quality

control board (board) upheld the EHD's issuance of the permit, and where plaintiff appealed the board's order, claiming that the board's hearing officer acted arbitrarily, capriciously, and not in accordance with the board's regulations in issuing a discovery order, there was no error because plaintiff has failed to demonstrate that the hearing officer permitted the discovery of irrelevant information or that the added burden of complying with the discovery order affected the outcome of the hearing. *Southwest Organizing Project v. Albuquerque-Bernalillo Cnty. Air Quality Control Bd*., 2021-NMCA-005.

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.

74-2-7.1. Local governing body authority; construction permits; electric generation facilities.

A. A local governing body may receive a construction permit for a gas-fired electric generation facility with a one hundred megawatt or less generating capacity in accordance with the Air Quality Control Act and may transfer the permit to the owner or operator of a facility that meets the specifications of the permit.

B. A facility that receives a construction permit transferred from a local governing body shall notify the department within thirty days of receiving the transferred construction permit. The permit shall be effective for that facility when the department receives notification of the transfer. The local governing body that transfers the construction permit shall notify the owner or operator of the local electric distribution company and the public regulation commission of the permitted project, including its net capacity rating and intended date of service.

C. As used in this section, "local governing body" means the council or other executive body charged with governing a municipality or county.

D. The department may cooperate with and lend assistance to any Indian nation, tribe or pueblo located in the state in developing permitting procedures that fulfill federal environmental protection agency standards and that parallel the state permitting procedures described in Subsections A and B of this section.

History: Laws 2001, ch. 318, § 1.

ANNOTATIONS

Effective dates. — Laws 2001, ch. 318 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 15, 2001, 90 days after adjournment of the legislature.

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, 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. N.M. Envtl. Improvement Bd.*, 1984-NMSC-042, 101 N.M. 291, 681 P.2d 717.

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. N.M. Envtl. Improvement Bd.*, 1984-NMCA-058, 102 N.M. 8, 690 P.2d 451.

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. N.M. Envtl. Improvement Bd.*, 1984-NMCA-058, 102 N.M. 8, 690 P.2d 451.

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. N.M. Envtl. Improvement Bd.*, 1980-NMCA-160, 95 N.M. 401, 622 P.2d 709, *rev'd on other grounds*, 1984-NMSC-042, 101 N.M. 291, 681 P.2d 717.

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. N.M. Envtl. Improvement Bd.*, 1980-NMCA-160, 95 N.M. 401, 622 P.2d 709, *rev'd on other grounds*, 1984-NMSC-042, 101 N.M. 291, 681 P.2d 717.

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. N.M. Envtl. Improvement Bd.*, 1980-NMCA-160, 95 N.M. 401, 622 P.2d 709, *rev'd on other grounds*, 1984-NMSC-042, 101 N.M. 291, 681 P.2d 717.

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.

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 [Chapter 14, Article 4 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.

Right to participate in appeal of administrative rule-making. — Persons who have participated in a legally significant manner in an administrative rule-making proceeding have the right to participate as parties to an appeal if they express such an intention. *New Energy Econ., Inc. v. Vanzi*, 2012-NMSC-005, 274 P.3d 53.

Where petitioners in an administrative rule-making proceeding initiated the proceeding; proposed or supported the adoption of a new rule, presented the kind of evidence that directly informed the environmental improvement board's decision on whether to adopt the new rule, submitted expert technical testimony and exhibits, and made legal and closing arguments in support of the new rule; under the statutes and rules governing the rule-making process of the EIB, petitioners were considered to be "parties" to the proceedings and assumed roles that imposed additional responsibilities and preparation on them that were not imposed on participants; participants in the administrative proceedings appealed the adoption of the new rule; and the court of appeals denied petitioners the right to intervene as parties in the appeal, the court of appeals did not have the discretion to deny intervention for the petitioners because the requirements imposed upon petitioners as parties in the rule-making proceeding, the contributions they made, highlighted by their technical testimony, and the possible challenge to those contributions on appeal, afforded petitioners a right to defend their positions on appeal. *New Energy Econ., Inc. v. Vanzi*, 2012-NMSC-005, 274 P.3d 53.

Declaratory judgment action to determine authority to enact regulations. — A plaintiff may file an action under the Declaratory Judgment Act to raise a purely legal challenge to the environmental improvement board's statutory authority to enact automobile emissions regulations under state law and may file the action independent of the administrative appeal process, with or without the environmental improvement board's consent. *State ex rel. Hanosh v. State ex rel. King*, 2009-NMSC-047, 147 N.M. 87, 217 P.3d 100, aff'g State ex rel. Hanosh v. N.M. Envtl. Improvement Bd., 2008-NMCA-156, 145 N.M. 270, 196 P.3d 970.

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. N.M. Envtl. Improvement Bd.*, 1984-NMSC-042, 101 N.M. 291, 681 P.2d 717.

Environmental Improvement Board did not err in granting air quality permit and general construction registrations. — Where petitioner challenged the New Mexico environmental improvement board's (board) decision to affirm the New Mexico environment department's (department) grant of an air quality permit and three general construction permit registrations for a gas plant in Eddy county, New Mexico, arguing that the plant's ozone emissions would exceed permissible levels, the board did not err in affirming the department's grant of the permits, because the use of significant impact levels, a de minimis increase of air contaminant levels that do not violate the "cause or contribute to" standard of the national ambient air quality standards (NAAQS), is allowable when determining whether a facility causes or contributes to an increase of the NAAQS, substantial evidence demonstrated that the permit and the registration's emissions would not cause or contribute to an increase in the ozone NAAQS, and the general construction permit registrations were not located in a nonattainment zone, which is a designation that may only be implemented by the federal environmental protection agency. *WildEarth Guardians v. N.M. Env't Improvement Bd*., 2024-NMCA-021.

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, 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 definitions of "secretary" and "director," *see* 74-2-2 NMSA 1978.

Repeals and reenactments. — Laws 1992, ch. 20, § 11 repealed former 74-2-10 NMSA 1978, as enacted by Laws 1967, ch. 277, § 9, and enacted a new section, effective March 5, 1992.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pollution Control §§ 2012, 2050.

74-2-11. Confidential information.

A. Any records, reports or information obtained under the Air Quality Control Act 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 repealed former 74-2-11 NMSA 1978, as enacted by Laws 1967, ch. 277, § 10, and enacted a new section, effective March 5, 1992.

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 §§ 29 et seq.; 127.

74-2-11.1. Limitations on regulations.

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

(1) issue a compliance order within one year after the violation becomes known by the department or the local agency 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 a 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. An order issued pursuant to Subsection A of this section may include a suspension or revocation of the permit or portion thereof issued by the secretary or the director that is alleged to have been violated. Any penalty assessed in the order shall not exceed fifteen thousand dollars ($15,000) per day of noncompliance for each violation.

C. An 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 the hearing officer's 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. A 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 a 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 a 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. If a person fails to comply with an administrative order, the secretary or director may initiate an action to suspend or revoke the permit, or portion thereof, alleged to have been violated or to commence a civil action in district court to enforce the order, or to suspend or revoke the permit, or both.

J. If a person fails to pay an assessment of a civil penalty, the secretary or director may commence a civil action in district court to collect the civil penalties assessed in the order.

K. Penalties collected pursuant to this section 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; 2001, ch. 133, § 3; 2006, ch. 61, § 1.

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 repealed former 74-2-12 NMSA 1978, as enacted by Laws 1967, ch. 277, § 11, and enacted a new section, effective March 5, 1992.

The 2006 amendment, effective May 17, 2006, added Subsection I to provide remedies for violation of a permit and added Subsection J to provide remedies for failure to pay an assessment of a civil penalty.

The 2001 amendment, effective June 15, 2001, inserted "within one year after the violation becomes known by the department or the local agency" in Paragraph A(1).

Opportunity to comply not required before imposition of penalties. — Statutory penalties can be imposed without the department of environment having first sought voluntary cooperation and compliance. *Espinosa v. Roswell Tower, Inc.*, 1996-NMCA-006, 121 N.M. 306, 910 P.2d 940.

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 § 4.

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, 85 A.L.R. Fed. 118.

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; limitation of actions.

A. A person who violates a provision of the Air Quality Control Act or a 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. A person who fails to comply with an administrative order issued pursuant to Section 74-2-12 NMSA 1978 may be assessed, pursuant to a court order, a civil penalty of not more than twenty-five thousand dollars ($25,000) for each day of noncompliance with the order.

C. In an action to enforce the provisions of the Air Quality Control Act or an ordinance, regulation, permit condition or 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.

D. No action for civil penalty shall be commenced more than five years from the date the violation was known by the department or the local agency.

History: 1978 Comp., § 74-2-12.1, enacted by Laws 1992, ch. 20, § 15; 2001, ch. 133, § 4; 2006, ch. 61, § 2.

ANNOTATIONS

The 2006 amendment, effective May 17, 2006, added a new Subsection B to provide a penalty for failure to comply with an administrative order.

The 2001 amendment, effective June 15, 2001, inserted Subsection C.

Disposal penalty authorized. — An award that represented three times the costs that the department of environment incurred in contracting for removal of a pile of asbestos-containing debris, including a six percent gross receipts tax, was consistent with the penalties authorized by law. *Espinosa v. Roswell Tower, Inc.*, 1996-NMCA-006, 121 N.M. 306, 910 P.2d 940.

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".

Consent to search. — In knowingly and voluntarily agreeing to the terms and conditions of an air quality permit specifically granting the environmental division a right of entry to the permittee's facility at all reasonable times to verify the terms and conditions of the permit, the permittee waived its rights under the Fourth Amendment to warrantless searches that comply with the requirements of the permit and Section 74-2-13 NMSA 1978. *Copar Pumice Co., Inc. v. Morris*, 632 F. Supp. 2d 1055 (D.N.M.).

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, 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. Except as provided in Subsection D of this section, 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. At any source required to have an operating permit pursuant to Section 502 of the federal act, any person who knowingly commits any violation of any applicable standard, regulation or requirement under the Air Quality Control Act or the federal act, any term or condition of an operating permit or any emission fee or filing requirement in any operating permit regulation of the environmental improvement board or the local board is guilty of a fourth degree felony and shall, upon conviction, be punished by a fine of not more than ten thousand dollars ($10,000) per day per violation or by imprisonment of not more than eighteen months, or both.

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

F. Any person who knowingly:

(1) 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, any permit issued pursuant to the Air Quality Control Act or any regulation adopted pursuant to that Act; or

(2) falsifies, tampers with or knowingly renders inaccurate any monitoring device or method required to be maintained under the Air Quality Control Act, any permit issued pursuant to the Air Quality Control Act or any ordinance or regulation adopted pursuant to that act is guilty of a misdemeanor and shall, upon conviction, be punished by a fine of not more than ten thousand dollars ($10,000) per day per violation or by imprisonment for not more than twelve months, or by both.

G. 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, who 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; 1995, ch. 162, § 1.

ANNOTATIONS

Cross references. — For meaning of "federal act", *see* Subsection F of 74-2-2 NMSA 1978 and notes thereto.

The 1995 amendment, effective June 16, 1995, inserted the proviso at the beginning of Subsection C, added Subsection D and redesignated the remaining subsections accordingly, subdivided Subsection F, adding the language beginning "any permit issued" in Paragraph (1) and rewriting Paragraph (2), and made minor stylistic changes throughout the section.

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 § 150 et seq.

Liability for spread of fire intentionally set for legitimate purpose, 25 A.L.R.5th 391.

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 and application of § 2Q1.2 and 2Q1.3 of United States Sentencing Guidelines (18 USCS Appx 2Q1.2 and 2Q1.3), pertaining to offenses involving hazardous or toxic substances, or other environmental pollutants, 138 A.L.R. Fed. 507.

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 repealed former 74-2-15 NMSA 1978, as enacted by Laws 1970, ch. 58, § 10, relating to additional means of enforcement, and enacted a new section, effective March 5, 1992.

74-2-15.1. Repealed.

ANNOTATIONS

Repeals. — Laws 1992, ch. 20, § 21 repealed 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* the 1991 NMSA 1978 on *NMOneSource.com*.

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 repealed former 74-2-16 NMSA 1978, as enacted by Laws 1970, ch. 58, § 11, relating to declaratory judgement on regulations, effective March 5, 1992.

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

A. The Air Quality Control Act 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 [Chapter 14, Article 4 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, repealed 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.

Chapter 74, Article 3 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; 2003, ch. 297, § 1.

ANNOTATIONS

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.

Cross references. — For the Environmental Improvement Act, *see* Chapter 74, Article 1 NMSA 1978.

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

The 2003 amendment, effective July 1, 2003, substituted "Chapter 74, Article 3 NMSA 1978" for "Sections 74-3-1 through 74-3-16 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 for nonmedical radiological harm, 73 A.L.R.4th 582.

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 [Medical Imaging and Radiation Therapy Health and Safety Act, Chapter 61, Article 14E 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

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 2009, ch. 106, § 1 changed the title of Chapter 61, Article 14E from "Medical Radiation Health and Safety Act" to "Medical Imaging and Radiation Therapy Health and Safety Act".

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 § 4.

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. N.M. Envtl. Improvement Bd.*, 1981-NMCA-044, 97 N.M. 88, 637 P.2d 38, cert. quashed, 97 N.M. 242, 637 P.2d 1087.

74-3-4. Definitions.

As used in the Radiation Protection Act:

A. "board" means the environmental improvement board;

B. "agency" or "division" means the environmental protection division of the 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, that emit radiation;

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

G. "agreement state" means any state with which the nuclear regulatory commission has entered into an agreement under Section 274(b) of the federal 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 its legal representatives, agents or assigns;

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

J. "director" means the director of the division;

K. "nuclear regulatory commission" means the United States nuclear regulatory commission; and

L. "secretary" means the secretary of environment.

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; 2003, ch. 297, § 2.

ANNOTATIONS

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.

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

For § 274(b) of the Atomic Energy Act of 1954, *see* 42 U.S.C. § 2021(b).

For the United States nuclear regulatory commission, *see* 42 U.S.C. § 5841.

The 2003 amendment, effective July 1, 2003, rewrote Subsection B; in Subsection G, deleted "or its successor" following "nuclear regulatory commission" near the middle and inserted "federal" preceding "Atomic Energy Act" near the end; substituted "division" for "environmental improvement agency and" at the end of Subsection J; in Subsection K, deleted "the United States atomic energy commission" preceding "the United States" near the middle and deleted "or its successor" near the end; and added Subsection L.

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:

(1) concerning the health and environmental aspects of the use, management, storage and disposal of radioactive material and the operation of ionizing and non-ionizing radiation emitting equipment;

(2) prescribing license, registration and other related fees, all of which shall be deposited in the radiation protection 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 rules 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, rules shall be furnished to interested parties upon request.

C. In order to carry out the purposes of the Radiation Protection Act, the director 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; 2000, ch. 86, § 3.

ANNOTATIONS

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.

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

The 2000 amendment, effective May 17, 2000, in the preliminary language of Subsection A, substituted "74-1-9 NMSA 1978" for "12-12-13 NMSA 1953" and deleted "and regulations" following "rules"; inserted "the use, management, storage and disposal of", "the operation of ionizing and non-ionizing" and "emitting" in Subsection A(1); in Subsection A(2), inserted "registration and other related" and substituted "radiation protection fund" for "general fund"; substituted "rules" for "regulations" in Subsections A(3) and B; substituted "74-3-6 NMSA 1978" for "12-9-5.1 NMSA 1953" in Subsection A(4); and deleted "of the agency" following "the director" in Subsection C.

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. N.M. Envtl. Improvement Bd.*, 1981-NMCA-044, 97 N.M. 88, 637 P.2d 38, cert. quashed, 97 N.M. 242, 637 P.2d 1087.

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 [now Medical Imaging and Radiation Therapy Health and Safety Act, Chapter 61, Article 14E NMSA 1978]; 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).

74-3-5.1. Radiation protection fund created.

The "radiation protection fund" is created in the state treasury. Radiation license, registration and other related fees shall be deposited in the fund. All earnings from investment of the fund shall be credited to the fund. Money in the fund is appropriated to the department of environment to carry out provisions of the Radiation Protection Act. Disbursements from the fund shall be by warrant drawn by the secretary of finance and administration pursuant to vouchers signed by the secretary of environment or his designee. Any unexpended or unencumbered balance in the radiation protection fund at the end of any fiscal year shall not revert to the general fund.

History: Laws 2000, ch. 86, § 6.

ANNOTATIONS

Effective dates. — Laws 2000, ch. 86 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 17, 2000, 90 days after adjournment of the legislature.

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

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.

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

74-3-9. Licensing of radioactive material; appeal.

A. It is unlawful for a 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, collect license, registration and other related fees and deposit those fees in the radiation protection fund and shall approve requests for reciprocity in accordance with procedures prescribed by rule 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 rules of the board.

C. The board may, by rule, establish radiation license, registration and other related fees and 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 rules of the board.

E. A person who is or may be affected by licensing action of the agency may appeal to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

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; 1998, ch. 55, § 91; 1999, ch. 265, § 93; 2000, ch. 86, § 4.

ANNOTATIONS

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.

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

For procedures governing administrative appeals to the district court, *see* Rule 1-074 NMRA.

Compiler's notes. — For scope of review of the district court, *see* Zamora v. Vill. of Ruidoso Downs, 120 N.M. 778, 907 P.2d 182 (1995).

The 2000 amendment, effective May 17, 2000, inserted "collect license, registration and other related fees and deposit those fees in the radiation protection fund" in Subsection B and inserted "establish radiation license, registration and other related fees and" in Subsection C.

The 1999 amendment, effective July 1, 1999, substituted "Section 39-3-1.1" for "Section 12-8A-1" in Subsection E.

The 1998 amendment, effective September 1, 1998, inserted "; appeal" in the section heading, substituted "rule" and "rules" for "regulation" and "regulations" throughout the section, and rewrote Subsection E.

"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*, 1985-NMCA-049, 102 N.M. 756, 700 P.2d 1005.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 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 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.

For the United States bureau of mines, *see* 30 U.S.C. § 1.

74-3-10.1. Fee exemption.

All medical, dental and veterinary x-ray equipment is exempt from fees imposed pursuant to the Radiation Protection Act.

History: Laws 2000, ch. 86, § 5.

ANNOTATIONS

Effective dates. — Laws 2000, ch. 86 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on May 17, 2000, 90 days after adjournment of the legislature.

74-3-11. Repealed.

ANNOTATIONS

Repeals. — Laws 2003, ch. 297, § 7 repealed 74-3-11 NMSA 1978, as enacted by Laws 1971, ch. 284, § 9, relating to civil penalty and injunction, effective July 1, 2003. For provisions of former section, *see* the 2002 NMSA 1978 on *NMOneSource.com*. For similar present provision, *see* 74-3-11.1 NMSA 1978.

74-3-11.1. Enforcement; compliance orders; civil penalties.

A. When, on the basis of any information, the secretary determines that a person has violated or is violating a requirement or prohibition set forth in the Radiation Protection Act, a regulation promulgated pursuant to that act or a condition of a license or registration issued pursuant to that act, the secretary 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 a past or current violation, or both. The secretary may commence an action in the appropriate district court to enforce an order; or

(2) commence a civil action in district court for appropriate relief, including injunctive relief.

B. An order issued pursuant to Subsection A of this section may include a suspension or revocation of a license or registration, or portion thereof, issued by the secretary. A penalty assessed in the order shall not exceed fifteen thousand dollars ($15,000) per day for each violation in the order. If a person named in an order fails to comply with the order, the secretary may assess a civil penalty in an amount not to exceed fifteen thousand dollars ($15,000) per day for each violation of the order.

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

D. An order issued pursuant to the provisions of Subsection A of 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. 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 a recommendation based on the proceedings to the secretary. The secretary shall make a final decision.

E. In connection with any proceeding pursuant to this section, the secretary may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents. The secretary may also adopt rules for discovery procedures.

F. Penalties collected pursuant to an administrative order issued pursuant to this section shall be deposited in the state general fund.

History: Laws 2003, ch. 297, § 4.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 297, § 8 made the act effective July 1, 2003.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 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.

Tort liability for nonmedical radiological harm, 73 A.L.R.4th 582.

74-3-11.2. Administrative actions; appeals.

A. A person who is adversely affected by a final administrative action of the secretary may appeal to the court of appeals for further relief within thirty days after the action. All appeals shall be on the administrative record developed by the secretary.

B. 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.

C. A stay of enforcement of the action being appealed may be granted after hearing and upon good cause shown:

(1) by the secretary; or

(2) by the court of appeals if the secretary denies a stay or fails to act upon an application for a stay within sixty days after receipt.

History: Laws 2003, ch. 297, § 5.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 297, § 8 made the act effective July 1, 2003.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pollution Control § 80 et seq.

74-3-12. Repealed.

ANNOTATIONS

Repeals. — Laws 2003, ch. 297, § 7 repealed 74-3-12 NMSA 1978, as enacted by Laws 1977, ch. 343, § 12, relating to criminal penalty, effective July 1, 2003. For provisions of former section, *see* the 2002 NMSA 1978 on *NMOneSource.com*. For similar present provision, *see* 74-3-12.1 NMSA 1978.

74-3-12.1. Criminal penalties.

A. A person who knowingly commits a violation of the Radiation Protection Act or a regulation promulgated pursuant to that act is guilty of a misdemeanor and upon conviction shall be sentenced to a term of imprisonment not to exceed three hundred sixty-four days or the payment of a fine not to exceed ten thousand dollars ($10,000), or both.

B. A person who knowingly makes a false statement, representation or certification in an application, record, report, plan or other document filed or required to be maintained pursuant to the Radiation Protection Act or any regulation promulgated pursuant to that act is guilty of a petty misdemeanor and upon conviction shall be sentenced to a term of imprisonment not to exceed six months or the payment of a fine not to exceed ten thousand dollars ($10,000), or both.

History: Laws 2003, ch. 297, § 6.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 297, § 8 made the act effective July 1, 2003.

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 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 §§ 2012, 2050.

74-3-13.1. Emergency powers of the secretary.

A. Notwithstanding any other provision of the Radiation Protection Act, if the secretary determines that a person is violating a condition of a license or registration issued by the agency, or administered by the agency pursuant to an agreement with the nuclear regulatory commission, or any regulation promulgated pursuant to the Radiation Protection Act, and determines that the violation may present an imminent and substantial endangerment to human health or safety, the secretary may bring suit to immediately restrain the person from the violation or take such other action as may be necessary or both. The secretary may also take other action, including issuing orders as may be necessary to protect human health and safety. The order shall be effective immediately; however, the person named in the order may request an administrative hearing before the secretary within ten days after the order is served. If a timely request for a hearing is made, the secretary shall hold the hearing within thirty days. The secretary may commence an action in the appropriate district court to enforce an order.

B. A person who willfully violates an order of the secretary pursuant to Subsection A of this section may be fined not more than fifteen thousand dollars ($15,000) per day for each violation of the order.

History: Laws 2003, ch. 297, § 3.

ANNOTATIONS

Effective dates. — Laws 2003, ch. 297, § 8 made the act effective July 1, 2003.

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

For the Atomic Energy Act of 1954, *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 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.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

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

Cross references. — For Voluntary Remediation Act, *see* Chapter 74, Article 4G NMSA 1978.

An implied private right of action does not exist under this section and a negligence per se claim may not be predicated on a violation of this section. *Schwartzman, Inc. v. Atchison, T. & S.F. Ry.*, 857 F. Supp. 838 (D.N.M. 1994).

Administrative warrant was lawful where the New Mexico Hazardous Waste Act authorizes the acts specified in the warrant to be carried out by the New Mexico environment department's officers and agents. *Eden v. Voss*, 105 Fed. Appx. 234 (10th Cir. 2004).

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.

Common-law strict liability in tort of prior landowner or lessee to subsequent owner for contamination of land with hazardous waste resulting from prior owner's or lessee's abnormally dangerous or ultrahazardous activity, 13 A.L.R.5th 600.

Recovery of punitive damages for injuries resulting from transport, handling, and storage of toxic or hazardous substances, 39 A.L.R.5th 763.

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.

Transporter liability under § 107(a)(4) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USC § 9606(a)(4)), 112 A.L.R. Fed. 49.

What are "necessary costs of response" within meaning of § 107(a)(4)(B) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USC § 9607(a)(4)(B)), 113 A.L.R. Fed. 1

Propriety of negotiated settlements in government cleanup actions under federal hazardous waste statutes, 114 A.L.R. Fed. 1

Liability of parent or successor corporation, or corporate shareholders, in action pursuant to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USCS §§ 9601-9675), 121 A.L.R. Fed. 173.

Liability of local government under § 107(a) of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 USCS § 9607(a)), 133 A.L.R. Fed. 293.

What constitutes "hazardous waste" subject to regulation under Resource Conservation and Recovery Act (42 USCS §§ 6901 et seq.), 135 A.L.R. Fed. 197.

Indemnification or release agreement as covering liability under § 107 (A) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USCS § 9607 (a)), 139 A.L.R. Fed. 123.

Application of Statute of Limitations (42 USCS § 9613 (g)(2)) in action under § 107 of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USCS § 9607) for recovery of costs for removal or remedial action, 142 A.L.R. Fed. 115.

Application of Statutes of Limitations (42 USCS § 9613 (g)) in action under § 113(f) of Comprehensive Environmental Response Compensation, and Liability Act (CERCLA) (42 USCS § 9613(f)) for contribution for response costs or damages, 143 A.L.R. Fed. 591.

Construction and application of Statute of Limitations (42 USCS § 9613(g)(1)) for action under § 107 of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USCS § 9607) for Natural Resource Damages, 144 A.L.R. Fed. 285.

Equitable considerations in allocating response costs to owner or occupant of previously contaminated facility in action pursuant to § 113(f) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USCA § 9613(f)), 148 A.L.R. Fed. 203.

Supreme Court's views as to validity, construction and application of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. § 9601 et seq.), 157 A.L.R. Fed. 291.

Amount and characteristics of wastes as equitable factors in allocation of response costs pursuant to § 113(f)(1) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9613(f)(1): multiple waste streams, 162 A.L.R. Fed. 371.

74-4-2. Purpose.

The purpose of the Hazardous Waste Act 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:

A. "above ground storage tank" means a single tank or combination of tanks, including underground pipes connected thereto, that are used to contain 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, and the volume of which is more than ninety percent above the surface of the ground. "Above ground storage tank" does not include any:

(1) farm, ranch or residential tank used for storing motor fuel for noncommercial purposes;

(2) pipeline facility, including gathering lines, that is regulated under Chapter 601 of Title 49 of the United States Code or that is an intrastate pipeline facility regulated under state laws as provided in Chapter 601 of Title 49 of the United States Code and that is determined by the United States secretary of transportation to be connected to a pipeline, or to be operated or intended to be capable of operating at pipeline pressure or as an integral part of a pipeline;

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

(4) storm water or wastewater collection system;

(5) flow-through process tank;

(6) liquid trap, tank or associated gathering lines or other storage methods or devices related to oil, gas or mining exploration, production, transportation, refining, processing or storage, or to oil field service industry operations;

(7) tank used for storing heating oil for consumptive use on the premises where stored;

(8) pipes connected to any tank that is described in Paragraphs (1) through (7) of this subsection; or

(9) tanks or related pipelines and facilities owned or used by a refinery, natural gas processing plant or pipeline company in the regular course of its refining, processing or pipeline business;

B. "board" means the environmental improvement board;

C. "corrective action" means an action taken in accordance with rules of the board to investigate, minimize, eliminate or clean up a release to protect the public health, safety and welfare or the environment;

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

E. "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 the 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;

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

G. "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 publishing office;

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

I. "hazardous agricultural waste" means hazardous waste generated as part of the licensed activity by any person licensed pursuant to the Pesticide Control Act [76-6-1 to 76-6-9 NMSA 1978] or hazardous waste designated as hazardous agricultural waste by the board, but does not include animal excrement in connection with farm, ranch or feedlot operations;

J. "hazardous substance incident" means any emergency incident involving a chemical or chemicals, including transportation wrecks, accidental spills or leaks, fires or explosions, which incident creates the reasonable probability of injury to human health or property;

K. "hazardous waste" means any solid waste or combination of solid wastes that 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.:

(a) drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil or natural gas or geothermal energy;

(b) fly ash waste;

(c) bottom ash waste;

(d) slag waste;

(e) flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels;

(f) solid waste from the extraction, beneficiation or processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore; or

(g) cement kiln dust waste;

L. "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;

M. "person" means an 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;

N. "regulated substance" means:

(1) a substance defined in Section 101(14) of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, but not including a 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;

O. "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 that 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;

P. "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;

Q. "storage tank" means an above ground storage tank or an underground storage tank;

R. "tank installer" means any individual who installs or repairs a storage tank;

S. "tank tester" means any individual who tests storage tanks;

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

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

V. "underground storage tank" means a single tank or a combination of tanks, including underground pipes connected thereto, that is 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. "Underground storage tank" does not include any:

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

(2) septic tank;

(3) pipeline facility, including gathering lines, that is regulated under Chapter 601 of Title 49 of the United States Code or that is an intrastate pipeline facility regulated under state laws as provided in Chapter 601 of Title 49 of the United States Code and that is determined by the United States secretary of transportation to be connected to a pipeline, or to be operated or intended to be capable of operating at pipeline pressure or as an integral part of a pipeline;

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

(5) storm water or wastewater collection system;

(6) flow-through process tank;

(7) liquid trap, tank 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;

(9) tank used for storing heating oil for consumptive use on the premises where stored;

(10) tank exempted by rule of the board after finding that the type of tank is adequately regulated under another federal or state law; or

(11) pipes connected to any tank that is described in Paragraphs (1) through (10) of this subsection; and

W. "used oil" means any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities.

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; 2001, ch. 323, § 1; 2001, ch. 325, § 2; 2002, ch. 47, § 1; 2010, ch. 27, § 1; 2018, ch. 11, § 1.

ANNOTATIONS

Repeals. — Laws 2002, ch. 47, § 3 repealed Laws 2001, ch. 323, § 1, effective May 15, 2002.

Cross references. — For Section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, *see* 42 U.S.C. § 9601 (14).

For Section 402 of the federal Water Pollution Control Act, *see* 33 U.S.C. § 1342.

For the Atomic Energy Act of 1954, *see* 42 U.S.C. § 2011 et seq.

The 2018 amendment, effective May 16, 2018, amended the Hazardous Waste Act to conform the definitions of "above ground storage tank", "underground storage tank" and "tank tester" to comply with federal law; in Paragraph A(2), after "lines", added "that is", after "regulated under", deleted "the federal Natural Gas Pipeline Safety Act of 1968 or the federal Hazardous Liquid Pipeline Safety Act of 1979" and added "Chapter 601 of Title 49 of the United States Code", and after "state laws", deleted "comparable to either act" and added the remainder of the paragraph; in Subsection G, after "the government", deleted "printing" and added "publishing"; added new Subsection S and redesignated former Subsections S through V as Subsections T through W, respectively; and in Subsection V(3), after "regulated under", deleted "the federal Natural Gas Pipeline Safety Act of 1968 or the federal Hazardous Liquid Pipeline Safety Act of 1979" and added "Chapter 601 of Title 49 of the United States Code", and after "under state laws", deleted "comparable to either act" and added the remainder of the paragraph.

The 2010 amendment, effective May 19, 2010, in Subsection A(1), after "storing motor fuel" deleted "or heating oil"; in Subsection A(7), after "tank", deleted "associated with an emergency generator system" and added the remainder of the sentence; in Subsection K(2), added paragraph designations (a) through (g); in Subsection U(1), after "storing motor fuel" deleted "or heating oil"; and in Subsection U(9), after "tank", deleted "associated with an emergency generator system" and added the remainder of the sentence.

The 2002 amendment, effective May 15, 2002, added Subsection V.

The 2001 amendment, effective July 1, 2001, added Subsection A; redesignated former Subsection A as B; added Subsection C; redesignated former Subsections B to N and D to P; added Subsection Q; redesignated former Subsections O to R as R to U; deleted "an underground" preceding "storage tank" in current Subsection R; substituted "Treatment" for "Such term" in last sentence of current Subsection T; substituted "'Underground storage tank'" for "The term" preceding "does not include any" in current Subsection U; deleted the citations to the two acts listed in Paragraph U(3); deleted "tank" following "liquid trap" in Paragraph U(7); added Paragraphs U(9) and (10); redesignated former Paragraph U(9) as (11) and updated the internal references.

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.

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.S. 6901" for "42 U.S.C.S. 6921" in the second sentence in Paragraph (2) of Subsection I.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Determination whether substance is "hazardous substance" within meaning of § 101(14) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USCS § 9601(14)), 118 A.L.R. Fed. 293.

Establishing "release or threatened release" of hazardous substance from facility for purposes of liability pursuant to § 107 of Comprehensive Environmental Response, Compensation, and Liability Act (42 USCS § 9607), 120 A.L.R. Fed. 1

What constitutes "hazardous waste" subject to regulation under Resource Conservation and Recovery Act (42 USCS §§ 6901 et seq.), 135 A.L.R. Fed. 197.

What constitutes "disposal" for purposes of owner or operator liability under § 107(a)(2) of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) (42 USCS § 9607(a)(2)), 136 A.L.R. Fed. 117.

What constitutes "facility" within meaning of § 101(9) of the Comprehensive, Environmental Response, Compensation, and Liability Act (CERCLA) (42 USCA § 9601(9)), 147 A.L.R. Fed. 469.

74-4-3.1. Application of act.

Nothing in the Hazardous Waste Act 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 [Chapter 69, Article 25A 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

Compiler's notes. — 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.

Cross references. — For the federal Surface Mining Control and Reclamation Act of 1977, *see* 30 U.S.C. § 1201 et seq.

74-4-3.2. Repealed.

ANNOTATIONS

Repeals. — Laws 1989, ch. 4, § 1 repealed 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.

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 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 rules for the management of hazardous waste, as may be necessary to protect public health and the environment, that are equivalent to and at least as stringent as 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; provided that, except as authorized by Sections 74-4-3.3 and 74-8-2 NMSA 1978, the board shall not identify or list any solid waste or combination of solid wastes as a hazardous waste that has not been listed and designated as a hazardous waste by the federal environmental protection agency pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended;

(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) recordkeeping 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 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 ensure 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; 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 requirements for:

(a) recordkeeping 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 facility 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;

(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 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 the 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 a 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 that facility demonstrates to the satisfaction of the secretary that, despite the owner's or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such action. Rules 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 rules 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 rules:

(1) concerning hazardous substance incidents; and

(2) requiring notification to the department of any hazardous substance incidents.

C. The board shall adopt rules concerning storage tanks as may be necessary to protect public health and the environment and that, in the case of underground storage tanks, are equivalent to and at least as stringent as federal regulations adopted by the federal environmental protection agency pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended.

D. The board shall adopt rules concerning storage tanks that implement the federal Energy Policy Act of 2005, Pub. L. 109-58, as amended, and that are equivalent to and at least as stringent as the Energy Policy Act and its grant guidelines and regulations.

E. Rules adopted pursuant to this section shall include:

(1) standards for the installation, operation, maintenance, repair and replacement of 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 storage tanks;

(5) standards for the closure and dismantling of storage tanks;

(6) requirements for recordkeeping;

(7) requirements for the reporting, containment and remediation of all leaks from any storage tanks; and

(8) criteria and procedures for classifying a storage tank facility as ineligible, and reclassifying a storage tank facility as eligible, for the delivery, deposit, acceptance or sale of petroleum products.

F. The criteria and procedures adopted by the board pursuant to this section shall require the department to classify a storage tank facility as ineligible for delivery, deposit, acceptance or sale of petroleum products if the storage tank facility has not

installed required equipment for spill prevention, overfill protection, leak detection or corrosion protection, including required corrosion protection equipment for a buried metal flexible connector.

G. The criteria and procedures adopted by the board pursuant to this section may allow the department to classify a storage tank facility as ineligible for delivery, deposit, acceptance or sale of petroleum products when the owner or operator has failed to comply with a written warning within a reasonable period of time and the warning concerns:

(1) improper operation or maintenance of required equipment for spill prevention, overfill protection, leak detection or corrosion protection;

(2) failure to maintain required financial responsibility for corrective action; or

(3) operation of the storage tank facility in a manner that creates an imminent threat to the public health and the environment.

H. Rules adopted by the board pursuant to this section shall defer classifying a storage tank facility as ineligible for delivery, deposit, acceptance or sale of petroleum products if the ineligible classification would jeopardize the availability of, or access to, motor fuel in any rural and remote areas.

I. Rules adopted by the board pursuant to this section shall allow the department to authorize delivery or deposit of petroleum products to:

(1) an emergency generator tank that is otherwise ineligible for delivery or deposit if a commercial power failure or other declared state of emergency exists and the emergency generator tank provides power supply, stores petroleum and is used solely in connection with an emergency system, legally required standby system or optional standby system; or

(2) a storage tank facility that is otherwise ineligible for delivery or deposit if the delivery or deposit is necessary to test or calibrate a tank.

J. The board shall adopt rules concerning the management of used oil that are equivalent to and at least as stringent as federal regulations adopted by the federal environmental protection agency pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended.

K. In the event the board wishes to adopt rules that are identical with regulations adopted by an agency of the federal government, the board, after notice and hearing, may adopt such rules by reference to the federal regulations without setting forth the provisions of the federal regulations.

L. Before the board adopts a rule for the management of hazardous waste, concerning storage tanks or concerning used oil, that is more stringent than the federal regulations, the board shall make a determination, based on substantial evidence and after notice and public hearing, that the proposed rule will be more protective of public health and the environment.

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; 1993, ch. 127, § 1; 2001, ch. 323, § 2; 2001, ch. 325, § 3; 2002, ch. 47, § 2; 2010, ch. 27, § 2; 2021, ch. 133, § 3.

ANNOTATIONS

Cross references. — For definition of "department", *see* 74-4-3 NMSA 1978.

For the Resource Conservation and Recovery Act of 1976, *see* 42 U.S.C. § 6901 et seq.

The 2021 amendment, effective July 1, 2021, required that the rules adopted by the environmental improvement board, concerning the management of hazardous waste and concerning storage tanks, that protect public health and that implement the federal Energy Policy Act of 2005 be at least as stringent as federal regulations adopted by the federal environmental protection agency, and required that a board's decision to adopt a rule, concerning the management of hazardous waste, storage tanks or used oil, that is more stringent than the federal regulations be based on substantial evidence after notice and public hearing; after each occurrence of "equivalent to and", deleted "no more" and added "at least as", and after "stringent", deleted "than" and added "as"; deleted former Subsection J and redesignated former Subsections K and L as Subsection J and K, respectively; and added Subsection L.

The 2010 amendment, effective May 19, 2010, added Subsection D; in Subsection E, in the introductory sentence, after "pursuant to this", changed "subsection" to "section"; in Subsection E(1), after "operation", deleted "and", and after "maintenance", added "repair and replacement"; added Paragraph (8) of Subsection E; and added Subsections F, G, H and I.

The 2002 amendment, effective May 15, 2002, added Subsection E, and redesignated former Subsection E as Subsection F.

The 2001 amendment, effective July 1, 2001, deleted the citation to the act noted in Subparagraph A(3)(d); in the preliminary language of Subsection C, deleted "underground" preceding "storage tanks", inserted "in the case of underground storage tanks" preceding "are equivalent to"; deleted "underground" preceding "storage tanks" in Paragraphs C(1), (4), (5) and (7); and making stylistic.

The 1993 amendment, effective June 18, 1993, inserted "as may be necessary to protect public health and the environment, that are" in the introductory language in Subsection A; inserted "as may be necessary to protect public health and the environment" in the introductory language in Subsection C; added present Subsection D and redesignated former Subsection D as present Subsection E.

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.

Federal sovereign immunity waived. — Resource Conservation and Recovery Act (42 U.S.C. § 6961) waived federal sovereign immunity from certain state imposed permit conditions addressing the presence of radionuclides in the disposal of hazardous waste at the Los Alamos National Laboratory where the conditions imposed by the permit to incinerate hazardous waste at the laboratory implemented objective, preexisting state standard that was capable of uniform application and was considered a "requirement" under Resource Conservation and Recovery Act. *U.S. v. N.M.*, 32 F.3d 494 (10th Cir. 1994).

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 § 4.

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.

What constitutes "hazardous waste" subject to regulation under Resource Conservation and Recovery Act (42 USCS §§ 6901 et seq.), 135 A.L.R. Fed. 197.

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 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. — Common-law strict liability in tort of prior landowner or lessee to subsequent owner for contamination of land with hazardous waste resulting from prior owner's or lessee's abnormally dangerous or ultrahazardous activity, 13 A.L.R.5th 600.

Recovery of punitive damages for injuries resulting from transport, handling, and storage of toxic or hazardous substances, 39 A.L.R.5th 763.

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. An application for a permit pursuant to the Hazardous Waste Act shall contain information required pursuant to Section 74-4-4.7 NMSA 1978 or to regulations promulgated by the board and shall include:

(1) estimates of 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) an identification and description of, and other pertinent information about, 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 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 department 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, conducting permitted hazardous waste management activities or seeking a permit for the management of hazardous waste, 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 K 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 of 1976, 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;

(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; and

(4) an annual hazardous waste permit management fee based on and not exceeding the estimated cost of conducting regulatory oversight of permitted activities.

K. The department and a business generating hazardous waste, conducting permitted hazardous waste management activities or seeking a permit for the management of hazardous waste may enter into a voluntary fee agreement in addition to and that includes all of the fees required by Subsection J of this section.

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; 2003, ch. 41, § 1; 2006, ch. 100, § 1.

ANNOTATIONS

Cross references. — For Subtitle C of the federal Resource Conservation and Recovery Act, *see* 42 U.S.C. § 6921.

The 2006 amendment, effective July 1, 2006, added Subsection K to provide for voluntary fee agreements.

The 2003 amendment, effective June 20, 2003, in Subsection A substituted "An" for "Each" at the beginning, deleted "as may be" following "shall contain information" near the beginning, deleted "pursuant" following "NMSA 1978 or" near the middle and substituted "and shall include" for "including information with respect to" near the end; substituted "of" for "with respect to" following "estimates" at the beginning of Paragraph A(1); inserted "an identification and description of, and other pertinent information about," at the beginning of Paragraph A(2); deleted "issued after April 8, 1987" following "Hazardous waste permits" near the beginning of Subsection B; substituted "department" for "division" near the beginning of Subsection C; inserted "conducting permitted hazardous waste management activities" following "generating hazardous waste" near the middle of Subsection J; inserted "of 1976" following "Recovery Act" near the middle of Paragraph J(2); and added Paragraph J(4).

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.

Response to public comments. — The fact that the secretary issued a written response to public comments after issuing a final order does not establish the fact that the secretary did not consider public input when drafting the order. *Citizen Action v. Sandia Corp.*, 2008-NMCA-031, 143 N.M. 620, 179 P.3d 1228, cert. denied, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 674.

Federal sovereign immunity waived. — Resource Conservation and Recovery Act (42 U.S.C. § 6961) waived federal sovereign immunity from certain state imposed permit conditions addressing the presence of radionuclides in the disposal of hazardous waste at the Los Alamos National Laboratory where the conditions imposed by the permit to incinerate hazardous waste at the laboratory implemented objective, preexisting state standard that was capable of uniform application and was considered a "requirement" under Resource Conservation and Recovery Act. *U.S. v. N.M.*, 32 F.3d 494 (10th Cir. 1994).

Permit modifications. — When the secretary of the New Mexico environment department modified a permit to operate a hazardous waste disposal site to clarify the type of waste that could be disposed of there, consistent with the permit's previous language, the modification was minor, under Subsection I of this section, so the secretary only had to hold a public hearing on the modification if there was significant public interest in the modification. *Sw. Research & Info. Ctr. v. State*, 2003-NMCA-012, 133 N.M. 179, 62 P.3d 270, cert. granted, 132 N.M. 551, 52 P.3d 411 (2002).

When the secretary of the New Mexico environment department determined that a modification to a permit to operate a hazardous waste disposal site was minor, his decision about whether to hold a public hearing on that modification, due to significant public interest in the modification, was reviewable only for abuse of discretion. *Sw. Research & Info. Ctr. v. State*, 2003-NMCA-012, 133 N.M. 179, 62 P.3d 270, cert. granted, 132 N.M. 551, 52 P.3d 411 (2002).

Permit modification did not require a public hearing. — Where the permittee of a hazardous waste disposal site was permitted to store low radiation contact-handled waste on the floor of the underground disposal rooms and high radiation remote-handled waste in boreholes in the walls of the disposal rooms; the permittee filed a request to modify the permit to authorize it to place a portion of the remote-handled waste in specially designed shielded containers on the floor of the disposal rooms rather that in boreholes; plaintiff claimed that when the remote-handled waste was loaded into shielded containers, it could be managed as contact-handled waste and stored on the floor of disposal rooms; in its permit modification request, the permittee stated that the

permit modifications were needed to accommodate waste generators' use of shielded containers, increase the efficiency of shipment of remote-handled waste, and increase the efficiency with which remote-handled waste was managed, processed, and handled at the permittee's waste disposal site; the department held public meetings and received and responded to written comments from the public; the department determined that the permit modification request involved changes needed to maintain the waste disposal facility's capability to manage waste safely which did not require an adversarial public hearing before a hearing officer and approved the permit modification; plaintiff claimed that the modification request involved major changes in the permit that altered the facility or its operations which required a public adversarial hearing before a hearing officer; and plaintiff failed to show by argument or evidence in the record that the department violated federal regulations in approving the permit modification request, the department did not abuse its discretion by approving the permit modification without an adversarial public hearing before a hearing officer. *Southwest Research & Info. Ctr. v. N.M. Env't Dep't*, 2014-NMCA-098.

Order approving permit modification was proper. — Where the U.S. department of energy (DOE) and appellees, as co-operators of the waste isolation pilot plant (WIPP), an underground federal repository for radioactive waste material in New Mexico, held a permit to dispose of mixed waste, a mixture of radioactive waste and hazardous waste, at WIPP but sought approval from the New Mexico environment department (NMED) to modify their permit because the original permit anticipated the emplacement of 6.2 million cubic feet of mixed waste based on an incorrect assumption that the waste containers would be full of mixed waste, but because the permit incorrectly assumed the containers would be full, this created a "de facto" limit that could result in underutilizing the WIPP facility, and where the secretary of NMED approved the permit modification request that modified the method by which appellees and DOE tracked waste volumes disposed of at WIPP, and where appellants claimed that NMED's order was not in accordance with law and arbitrary and capricious or an abuse of discretion, NMED's order was proper, because the Hazardous Waste Act (HWA), §§ 74-4-1 through 74-4-14 NMSA 1978, authorizes NMED to administer the state's hazardous waste management program consistent with federal law, the HWA provides that permittees may submit permit modification requests to NMED, and that NMED is charged with issuing a decision, the NMED's authority necessarily includes the responsibility to collect data regarding the amount of hazardous waste the HWA charges NMED with regulating, and the permit modification request enables the NMED to collect more, not less, data by tracking the volume of inner waste containers as well as outer waste containers, and neither federal law nor state law specify a particular method for calculating waste capacity, and therefore, contrary to appellants' argument, the NMED did not erroneously interpret federal law. *Nuclear Waste P'ship, LLC v. Nuclear Watch N.M.*, 2022-NMCA-014.

74-4-4.3. Entry; availability of records.

A. For purposes of developing or assisting in the development of any rules, conducting any study, taking any corrective action or enforcing the provisions of the Hazardous Waste Act, upon request of the secretary 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 secretary 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 a 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 a storage tank, or any tank subject to study under Section 9009 of the [federal] Resource Conservation and Recovery Act of 1976 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 secretary or his authorized representative at all reasonable times to have access to and to copy all records relating to such tanks and permit the secretary or his authorized representative to have access for corrective action. For the purposes of developing or assisting in the development of any rule, conducting any study, taking corrective action or enforcing the provisions of the Hazardous Waste Act, the secretary or his authorized representative is authorized to:

(a) enter at reasonable times any establishment or other place where a storage tank is located;

(b) inspect or obtain samples from any person of any regulated substance in such tank;

(c) conduct monitoring or testing of the tanks, associated equipment, contents or surrounding soils, air, surface water or ground water; and

(d) 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 storage tanks are located, shall:

(1) permit the secretary 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 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 that unreasonably interfere with his use or enjoyment of such property.

C. Each inspection shall be commenced and completed with reasonable promptness. If the secretary 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 department under this section shall be available to the public, except that upon a showing satisfactory to the department that records, reports or information, or a particular part thereof, to which the secretary 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 of 1976, 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 secretary 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; 2001, ch. 325, § 4.

ANNOTATIONS

Bracketed material. — The bracketed word "federal" was inserted by the compiler and it is not part of the law.

Cross references. — For the Resource Conservation and Recovery Act, *see* 42 U.S.C.S. § 6901 et seq. For Section 9009 of that act, *see* 42 U.S.C. § 6991h.

For Section 1905 of Title 18 of the United States Code, *see* the Trade Secrets Act.

The 2001 amendment, effective July 1, 2001, substituted "secretary" for "director" throughout the section; deleted "underground" preceding "storage tank" and "storage tanks" throughout the section; substituted "department" for "division" in Subsection D; and made stylistic changes.

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. *N.M. Envtl. Improvement Div. v. Climax Chem. Co.*, 1986-NMCA-137, 105 N.M. 439, 733 P.2d 1322, cert. denied, 105 N.M. 421, 733 P.2d 869.

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. *N.M. Envtl. Improvement Div. v. Climax Chem. Co.*, 1986-NMCA-137, 105 N.M. 439, 733 P.2d 1322, cert. denied, 105 N.M. 421, 733 P.2d 869.

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. *N.M. Envtl. Improvement Div. v. Climax Chem. Co.*, 1986-NMCA-137, 105 N.M. 439, 733 P.2d 1322, cert. denied, 105 N.M. 421, 733 P.2d 869.

No conversion or trespass by private contractor. — Where private contractor acted pursuant to a valid administrative search and seizure warrant, the affidavits supporting the application for the warrant set forth probable cause for issuance of the warrant, and the New Mexico Hazardous Waste Act permitted seizure of hazardous waste, there was no conversion or trespass by the private contractor. *Eden v. Voss*, 105 Fed. Appx. 234 (10th Cir. 2004).

74-4-4.4. Storage tanks; registration; installer certification; tester certification; fees.

A. By rule, the board shall require an owner of a storage tank to register the tank with the department 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 a storage tank in use on November 8, 1984 or brought into use after that date, any person who

owns the storage tank; and in the case of a storage tank in use before November 8, 1984 but no longer in use on that date, any person who owned the 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 storage tank.

B. By rule, 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 federal Resource Conservation and Recovery Act of 1976 and for eighteen months thereafter, deposits a regulated substance into a 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 rule, the board may require tank installers and tank testers to obtain certification from the department and develop procedures for certification that will ensure that storage tanks are installed, repaired and tested in a manner that will not encourage or facilitate leaking. If the board requires certification, it is unlawful for a person to install, repair or test a storage tank unless the person is a certified tank installer or certified tank tester. In accordance with the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978], the department may suspend or revoke the certification for a tank installer or tank tester upon grounds that the person:

(1) exercised fraud, misrepresentation or deception in obtaining certification;

(2) exhibited gross incompetence in the installation, repair or testing of a storage tank; or

(3) was derelict in the performance of a duty as a certified tank installer or certified tank tester.

D. By rule, 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 storage tanks;

(2) reviewing and acting upon applications for the certification of tank installers and certification of tank testers; and

(3) implementing and enforcing any provision of the Hazardous Waste Act applicable to storage tanks, tank installers and tank testers, including standards for the installation, operation and maintenance of storage tanks and for the certification of tank installers and tank testers.

History: 1978 Comp., § 74-4-4.4, enacted by Laws 1987, ch. 179, § 6; 1989, ch. 322, § 6; 2001, ch. 325, § 5; 2018, ch. 11, § 2.

ANNOTATIONS

Cross references. — For hazardous waste emergency fund, *see* 74-4-8 NMSA 1978.

For Section 9002(a)(5) of the Resource Conservation and Recovery Act, *see* 42 U.S.C. § 6991a(a)(5).

The 2018 amendment, effective May 16, 2018, authorized the environmental improvement board to require tank testers to obtain certification from the department of environment and develop procedures for certification that will ensure that storage tanks are tested in a manner that will not encourage or facilitate leaking, and, if such certification is required, made it unlawful to test a storage tank unless the tester is a certified tank tester, established grounds upon which a certified tank tester could lose his or her certification, and authorized the environmental improvement board to set fees sufficient to defray the costs of reviewing and acting upon applications for the certification of tank testers and the costs of implementing and enforcing provisions of the Hazardous Waste Act applicable to tank testers; in the catchline, added "tester certification"; in Subsection B, after "Section 9002(a)(5) of the", added "federal"; in Subsection C, in the introductory paragraph, after "tank installers", added "and tank testers", after "repaired", added "and tested", after "install", deleted "or", after "repair", added "or test", after "certified tank installer", added "or certified tank tester", and after "certification for a tank installer", added "or tank tester", in Paragraph C(2), after "installation", deleted "or", and after "repair", added "or testing", and in Paragraph C(3), after "installer", added "or certified tank tester"; in Subsection D, Paragraph D(2), after "tank installers", added "and certification of tank testers", and in Paragraph D(3), after "to storage tanks", deleted "and", after each occurrence of "tank installers", added "and tank testers".

The 2001 amendment, effective July 1, 2001, deleted "underground" preceding "storage tank" and "storage tanks" throughout the section; substituted "department" for "division" throughout the section; deleted "used for storage, use, or dispensing of regulated substances" preceding "and in the case of" in the second sentence of Subsection A; and made stylistic changes.

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 department. All balances in the fund are appropriated to the department for the sole purpose of meeting necessary expenses in the administration and operation of the hazardous waste program.

B. All fees collected pursuant to 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; 2006, ch. 100, § 2.

ANNOTATIONS

The 2006 amendment, effective July 1, 2006, changed "division" to "department" in Subsection A and deleted the Subsection F reference in Subsection B.

The 1990 amendment, effective July 1, 1990, substituted "hazardous waste fund" for "hazardous waste and underground storage tank fund" in the catchline and in two places in the text; in Subsection A, substituted references to the division for references to the agency in two places and "the hazardous waste program" for "the hazardous waste and underground storage tank programs"; and, in Subsection B, deleted "and Subsection D of Section 74-4-4.4 NMSA 1978".

The 1989 amendment, effective from April 7, 1989 until July 1, 1992, substituted "hazardous waste fund" for "hazardous waste and underground storage tank fund" in the catchline and in the first sentence of Subsection A and, in Subsection B; in Subsection A, substituted "the division" for "the environmental improvement division of the health and environment department" in the first sentence, and "hazardous waste program" for "hazardous waste and underground storage tank programs" in the second sentence, and deleted the former third sentence which read "All interest earned on money in the fund shall be credited to the fund"; and, in Subsection B, substituted "pursuant to Paragraph (1) of Subsection F or Section 74-4-4.2 NMSA 1978" for "pursuant to Sections 74-4-4.2F and 74-4-4.4D NMSA 1978", and added the last sentence.

74-4-4.6. Repealed.

ANNOTATIONS

Repeals. — Laws 1989, ch. 322, § 17 repealed 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.

74-4-4.7. Permit applicant disclosure.

A. Every applicant for a permit pursuant to the Hazardous Waste Act 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

Cross references. — For Section 5, Chapter 38, Title 1 of the Federal Securities Act of 1933, *see* 15 U.S.C. § 77e(c).

74-4-4.8. Storage tank fund created; appropriation.

A. There is created in the state treasury the "storage tank fund", which shall be administered by the department. All balances in the fund are appropriated to the department for the sole purpose of meeting necessary expenses in the administration and operation of the storage tank program.

B. All fees collected pursuant to Subsection D of Section 74-4-4.4 NMSA 1978 shall be transmitted to the state treasurer for credit to the storage tank fund.

C. Balances remaining in the storage tank fund at the end of a fiscal year shall not revert to the general fund.

History: Laws 1993, ch. 298, § 2; 2001, ch. 325, § 6.

ANNOTATIONS

Compiler's notes. — Laws 1993, ch. 100, § 7 enacted a 74-4-4.8 NMSA 1978, creating an underground storage tank fund, effective March 31, 1993, and was approved March 31, 1993. However, because of the enactment of 74-4-4.8 NMSA 1978 by Laws 1993, ch. 298, § 2, approved April 7, 1993, the section as enacted by Laws 1993, ch. 100 has not been set out. *See* 12-1-8 NMSA 1978.

The 2001 amendment, effective July 1, 2001, deleted "underground" preceding "storage tank" throughout the section.

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 [Chapter 14, Article 4 NMSA 1978].

History: 1953 Comp., § 12-9B-5, enacted by Laws 1977, ch. 313, § 5; 1992, ch. 43, § 5.

ANNOTATIONS

Cross references. — For 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 § 4.

74-4-6. Repealed.

ANNOTATIONS

Repeals. — Laws 1981 (1st S.S.), ch. 8, § 12, repealed 74-4-6 NMSA 1978, relating to disposal of out-of-state hazardous waste, effective April 14, 1981.

Compiler's notes. — 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.

For procedures governing administrative appeals to the district court, *see* Rule 1-074 NMRA.

Compiler's notes. — For scope of review of the district court, *see* Zamora v. Vill. of Ruidoso Downs, 120 N.M. 778, 907 P.2d 182 (1995).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pollution Control §§ 4, 719, 1136 et seq.

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.

History: 1978 Comp., § 74-4-9, enacted by Laws 1989, ch. 322, § 11.

ANNOTATIONS

Repeals and reenactments. — Laws 1989, ch. 322, § 11 repealed former 74-4-9 NMSA 1978, as enacted by Laws 1981 (1st S.S.), ch. 8, § 8, and enacted a new section, effective April 7, 1989.

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, any rule 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 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 or 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 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; 2001, ch. 325, § 7.

ANNOTATIONS

Cross references. — For the federal Bankruptcy Code, *see* Title 11 of the United States Code.

The 2001 amendment, effective July 1, 2001, deleted "underground" preceding "storage tank" and "storage tanks" throughout the section; and substituted "or" for "and" preceding "the environment" in Subsection D.

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.

A compliance order is not a limitation on the jurisdiction of the secretary. *Citizen Action v. Sandia Corp.*, 2008-NMCA-031, 143 N.M. 620, 179 P.3d 1228, cert. denied, 2008-NMCERT-002, 143 N.M. 665, 180 P.3d 674.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pollution Control § 2046 et seq.

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 to a facility that does not have a permit under that act or the federal Resource Conservation and Recovery Act of 1976;

(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 of 1976;

(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 rules 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 or used oil 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 rules 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 rules adopted and promulgated pursuant to the Hazardous Waste Act to be accompanied by a manifest;

(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; or

(7) shall knowingly store, treat, dispose of, transport, cause to be transported, market or otherwise handle any used oil in knowing violation of any material condition or requirement of any applicable rule adopted and promulgated pursuant to the Hazardous Waste Act.

B. Any person who violates any of the provisions of Paragraphs (1) through (7) 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 (7) 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 rule 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 storage tanks, "per violation" means per tank.

D. Any person who knowingly transports, treats, stores, disposes of or exports any hazardous waste or used oil in violation of Subsection A of this section and who knows at the time of the violation that the person 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 or used oil in violation of Subsection A of this section and who knows at the time of the violation that the person 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 or used oil 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; 2001, ch. 325, § 8; 2007, ch. 267, § 1.

ANNOTATIONS

Cross references. — For the federal Resource Conservation and Recovery Act, *see* 42 U.S.C.. § 6901 et seq.

The 2007 amendment, effective July 1, 2007, added Paragraph (7) of Subsection A to provide criminal penalties for certain transportation, treatment, storage and disposal of used oil.

The 2001 amendment, effective July 1, 2001, deleted "underground" preceding "storage tank" in Subsection C; and made stylistic changes.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pollution Control § 80 et seq.

74-4-12. Penalty; civil.

Any person who violates any provision of the Hazardous Waste Act, any rule 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 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; 2001, ch. 325, § 9.

ANNOTATIONS

The 2001 amendment, effective July 1, 2001, deleted "underground" preceding "storage tanks" and made a stylistic change.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pollution Control § 2032 et seq.

74-4-13. Imminent hazards; authority of director; penalties.

A. Notwithstanding any other provision of the Hazardous Waste Act, whenever the secretary is in receipt of evidence that the past or current handling, storage, treatment, transportation or disposal of solid waste or hazardous waste or the condition or maintenance of a 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 secretary 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 secretary 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 secretary 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; 2001, ch. 325, § 10.

ANNOTATIONS

The 2001 amendment, effective July 1, 2001, substituted "secretary" for "director" throughout the section; deleted "any" preceding "solid waste" and "any underground" preceding "storage tank" in Subsection A.

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 [Chapter 14, Article 4 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

Compiler's notes. — 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).

Untimely appeal of administrative action. — Where the New Mexico environment department (department) issued a determination in 2011 regarding the time-line of a five-year report on the feasibility of excavation of a mixed waste landfill and any likelihood of contaminants reaching groundwater, plaintiff's 2014 appeal of the department's 2011 decision regarding the time-line for the first five-year report was untimely. *Citizen Action N.M. v. N.M. Env't Dep't*, 2015-NMCA-058, cert. denied, 2015-NMCERT-005.

Order approving permit modification was proper. — Where the U.S. department of energy (DOE) and appellees, as co-operators of the waste isolation pilot plant (WIPP), an underground federal repository for radioactive waste material in New Mexico, held a permit to dispose of mixed waste, a mixture of radioactive waste and hazardous waste, at WIPP but sought approval from the New Mexico environment department (NMED) to modify their permit because the original permit anticipated the emplacement of 6.2 million cubic feet of mixed waste based on an incorrect assumption that the waste containers would be full of mixed waste, but because the permit incorrectly assumed the containers would be full, this created a "de facto" limit that could result in underutilizing the WIPP facility, and where the secretary of NMED approved the permit modification request that modified the method by which appellees and DOE tracked waste volumes disposed of at WIPP, and where appellants claimed that NMED's order was not in accordance with law and arbitrary and capricious or an abuse of discretion, NMED's order was proper, because the Hazardous Waste Act (HWA), §§ 74-4-1 through 74-4-14 NMSA 1978, authorizes NMED to administer the state's hazardous waste management program consistent with federal law, the HWA provides that permittees may submit permit modification requests to NMED, and that NMED is charged with issuing a decision, the NMED's authority necessarily includes the responsibility to collect data regarding the amount of hazardous waste the HWA charges NMED with regulating, and the permit modification request enables the NMED to collect more, not less, data by tracking the volume of inner waste containers as well as outer waste

containers, and neither federal law nor state law specify a particular method for calculating waste capacity, and therefore, contrary to appellants' argument, the NMED did not erroneously interpret federal law. *Nuclear Waste P'ship, LLC v. Nuclear Watch N.M.*, 2022-NMCA-014.

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 transportation 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 transportation 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 a 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, and in which the radioactivity is essentially uniformly distributed, are not considered to be radioactive materials. "Radioactive material" 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 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 a 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; 2003, ch. 142, § 95.

ANNOTATIONS

The 2003 amendment, effective July 1, 2003, substituted "state transportation commission" for "state highway commission"; and substituted "department of environment" for "environmental improvement division of the health and environment" in Subsection C.

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 § 79; 27A Am. Jur. 2d Energy & Power Sources § 73; 61A Am. Jur. 2d Pollution Control § 1156.

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 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:

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

Cross references. — For Section 402 of the Federal Water Pollution Control Act, referred to in Subsection D, *see* 33 U.S.C. § 1342.

For the Atomic Energy Act of 1954, as amended, *see* 42 U.S.C. § 2011 et seq.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes "hazardous waste" subject to regulation under Resource Conservation and Recovery Act (42 USCS §§ 6901 et seq.), 135 A.L.R. Fed. 197.

74-4A-5. Repealed.

ANNOTATIONS

Repeals. — Laws 1981, ch. 374, § 7, repealed 74-4A-5 NMSA 1978, as enacted by Laws 1979, ch. 380, § 4, relating to state approval of disposal facilities, effective April 10, 1981. For present comparable 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; health; environment; public safety; transportation; homeland security and emergency management; and Indian affairs or their designees and the commissioner of public lands or the commissioner's designee. The chair and vice chair of the committee, or their designees from the committee, shall be advisory members of the task force. The state fire marshal or the state fire marshal's designee shall serve as a nonvoting member of the task force.

History: Laws 1979, ch. 380, § 5; 1986, ch. 61, § 4; 1987, ch. 234, § 80; 1991, ch. 2, § 3; 2001, ch. 12, § 1; 2001, ch. 103, § 1; 2023, ch. 25, § 1.

ANNOTATIONS

Cross references. — For the secretary of energy, minerals and natural resources, *see* 9-5A-5 NMSA 1978.

For the secretary of health, *see* 9-7-5 NMSA 1978.

For the secretary of environment, *see* 9-7A-5 NMSA 1978.

Compiler's notes. — Pursuant to N.M. Const., art. IV, § 23, Laws 2023, ch. 25 did not pass with the required two-thirds vote of each house. Therefore, the effective date of Laws 2023, ch. 25, §§ 1 to 3 was June 16, 2023.

The 2023 amendment, effective June 16, 2023, revised the composition of the radioactive waste consultation task force; and after "public safety", deleted "and highway and", after "transportation", added "homeland security and emergency management; and Indian affairs", and after "or their designees", added "and the commissioner of public lands or the commissioner's designee".

The 2001 amendments, effective June 1, 2001, removed the taxation and revenue secretary from the radioactive waste consultation task force, deleted "and" between "health" and "environment" and inserted the last sentence, which added the state fire marshal to the task force as a non-voting member.

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.

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 and private 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 at least annually with the committee and keep the committee apprised of all actions taken by the task force.

F. The authority of the task force and its actions and those of state agencies with respect to federal or privately operated disposal or storage facilities are subject to the limitations contained in federal law and shall be consistent with federal law.

History: Laws 1979, ch. 380, § 6; 1991, ch. 2, § 4; 2023, ch. 25, § 2.

ANNOTATIONS

Compiler's notes. — Pursuant to N.M. Const., art. IV, § 23, Laws 2023, ch. 25 did not pass with the required two-thirds vote of each house. Therefore, the effective date of Laws 2023, ch. 25, §§ 1 to 3 was June 16, 2023.

The 2023 amendment, effective June 16, 2023, provided that the authority of the radioactive waste consultation task force and its actions and those of state agencies with respect to federal or privately operated disposal or storage facilities are subject to the limitations contained in federal law and shall be consistent with federal law; in Subsection C, after "federal", added "and private"; and added Subsection F.

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. — For 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

Cross references. — For the legislative council, *see* 2-3-1 NMSA 1978.

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 New Mexico 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 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 storage tanks and releases;

J. the Hazardous Chemicals Information Act [Chapter 74, Article 4E 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; 2001, ch. 325, § 11.

ANNOTATIONS

Cross references. — For legislative council, *see* 2-3-1 NMSA 1978.

The 2001 amendment, effective July 1, 2001, inserted "New Mexico" preceding "legislative council" in the preliminary language; and deleted "underground" preceding "storage tanks" in Subsection I.

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.

A. A person shall not store or dispose of radioactive materials, transuranic contaminated waste or low-level waste in a disposal facility until the state has consented to or concurred in the creation of the disposal facility.

B. A person shall not store or dispose of spent fuel or high-level waste in a disposal facility until:

(1) the state has consented to or concurred in the creation of the disposal facility; and

(2) a repository, as defined in 42 U.S.C. Section 10101(18), is in operation.

C. The state, a political subdivision of the state or an entity or authority created by a joint powers agreement shall not issue, approve or certify a permit, contract, lease or license necessary for the construction or operation of a disposal facility for spent fuel or high-level waste until the conditions of Paragraphs (1) and (2) of Subsection B of this section are met.

D. As used in this section, "disposal facility" means an engineered surface, subsurface or underground facility designed primarily for the temporary, interim or permanent 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; 2023, ch. 25, § 3.

ANNOTATIONS

Compiler's notes. — Pursuant to N.M. Const., art. IV, § 23, Laws 2023, ch. 25 did not pass with the required two-thirds vote of each house. Therefore, the effective date of Laws 2023, ch. 25, §§ 1 to 3 was June 16, 2023.

The 2023 amendment, effective June 16, 2023, prohibited the storage and disposal of radioactive materials, transuranic contaminated waste or low-level waste in a disposal facility until the state has consented to the creation of the disposal facility; prohibited the issuance or certification of a permit for the construction or operation of a disposal facility for spent fuel or high-level waste unless the state has consented to the creation of the disposal facility and a permanent repository is in operation, and revised the definition of "disposal facility"; in Subsection A, deleted "No" and added "A", after "person shall", added "not", after "store or dispose of radioactive materials", deleted "radioactive waste or spent fuel" and added "transuranic contaminated waste or low-level waste", after "until the state has", added "consented to or", and after "creation of the disposal facility", deleted "except as specifically preempted by federal law"; added new Subsections B

and C; and in Subsection D, after "engineered", added "surface, subsurface or underground", and after "primarily for the", added "temporary, interim or permanent".

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 repealed 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* the 1990 NMSA 1978 on *NMOneSource.com*.

ARTICLE 4B
Emergency Management (Repealed, Recompiled.)

74-4B-1. Recompiled.

ANNOTATIONS

Recompilation. — Laws 2005, ch. 22, § 4 recompiled former 74-4B-1 NMSA 1978 as 12-12-17 NMSA 1978, effective July 1, 2005.

74-4B-2. Recompiled.

ANNOTATIONS

Recompilation. — Laws 2005, ch. 22, § 4 recompiled former 74-4B-2 NMSA 1978 as 12-12-18 NMSA 1978, effective July 1, 2005.

74-4B-3. Recompiled.

ANNOTATIONS

Recompilation. — Laws 2005, ch. 22, § 4 recompiled former 74-4B-3 NMSA 1978 as 12-12-19 NMSA 1978, effective July 1, 2005.

74-4B-4. Recompiled.

ANNOTATIONS

Recompilation. — Laws 2005, ch. 22, § 4 recompiled former 74-4B-4 NMSA 1978 as 12-12-20 NMSA 1978, effective July 1, 2005.

74-4B-5. Recompiled.

ANNOTATIONS

Recompilation. — Laws 2005, ch. 22, § 4 recompiled former 74-4B-5 NMSA 1978 as 12-12-21 NMSA 1978, effective July 1, 2005.

74-4B-6. Recompiled.

ANNOTATIONS

Recompilation. — Laws 2005, ch. 22, § 4 recompiled former 74-4B-6 NMSA 1978 as 12-12-22 NMSA 1978, effective July 1, 2005.

74-4B-6.1. Recompiled.

ANNOTATIONS

Recompilation. — Laws 2005, ch. 22, § 4 recompiled former 74-4B-6.1 NMSA 1978 as 12-12-23 NMSA 1978, effective July 1, 2005.

74-4B-7. Recompiled.

ANNOTATIONS

Recompilation. — Laws 2005, ch. 22, § 4 recompiled former 74-4B-7 NMSA 1978 as 12-12-24 NMSA 1978, effective July 1, 2005.

74-4B-8. Recompiled.

ANNOTATIONS

Recompilation. — Laws 2005, ch. 22, § 4 recompiled former 74-4B-8 NMSA 1978 as 12-12-25 NMSA 1978, effective July 1, 2005.

74-4B-9. Recompiled.

ANNOTATIONS

Recompilation. — Laws 2005, ch. 22, § 4 recompiled former 74-4B-9 NMSA 1978 as 12-12-26 NMSA 1978, effective July 1, 2005.

74-4B-10. Recompiled.

ANNOTATIONS

Recompilation. — Laws 2005, ch. 22, § 4 recompiled former 74-4B-10 NMSA 1978 as 12-12-27 NMSA 1978, effective July 1, 2005.

74-4B-10.1. Recompiled.

ANNOTATIONS

Recompilation. — Laws 2005, ch. 22, § 4 recompiled former 74-4B-10.1 NMSA 1978 as 12-12-28 NMSA 1978, effective July 1, 2005.

74-4B-11. Repealed.

ANNOTATIONS

Repeals. — Laws 1989, ch. 149, § 16 repealed 74-4B-11 NMSA 1978, as enacted by Laws 1983, ch. 80, § 11, relating to report of task force to committee governor and legislature, effective July 1, 1989.

74-4B-12. Repealed.

ANNOTATIONS

Repeals. — Laws 1991, ch. 44, § 3 repealed 74-4B-12 NMSA 1978, as enacted by Laws 1988, ch. 14, § 6, relating to the emergency response fund, effective July 1, 1991. For provisions of former section, *see* the 1990 NMSA 1978 on *NMOneSource.com*.

74-4B-13. Recompiled.

ANNOTATIONS

Recompilation. — Laws 2005, ch. 22, § 4 recompiled former 74-4B-13 NMSA 1978 as 12-12-29 NMSA 1978, effective July 1, 2005.

74-4B-14. Recompiled.

ANNOTATIONS

Recompilation. — Laws 2005, ch. 22, § 4 recompiled former 74-4B-14 NMSA 1978 as 12-12-30 NMSA 1978, effective July 1, 2005.

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

Cross references. — For the federal Resource Conservation and Recovery Act, *see* 42 U.S.C. § 6901 et seq.

74-4C-3. Definitions.

As used in the Hazardous Waste Feasibility Study Act:

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

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. The radioactive materials committee is now the radioactive and hazardous materials committee. *See* 74-4A-9 NMSA 1978.

Laws 1991, ch. 25, § 4 established the department of environment and provided that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment.

Cross references. — For the environmental improvement board, *see* 74-1-4 NMSA 1978.

For Section 402 of the federal Water Pollution Control Act, *see* 33 U.S.C. § 1342.

For the federal Atomic Energy Act of 1954, *see* 42 U.S.C. § 2011 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes "hazardous waste" subject to regulation under Resource Conservation and Recovery Act (42 USCS § 6901 et seq.), 135 A.L.R. Fed. 197.

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.)

74-4D-1 to 74-4D-8. Repealed.

ANNOTATIONS

Repeals. — Laws 1990, ch. 124, § 23 repealed 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* the 1989 NMSA 1978 on *NMOneSource.com*.

ARTICLE 4E
Hazardous Chemicals Information Act

74-4E-1. Short title.

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

History: Laws 1989, ch. 149, § 1; 2007, ch. 291, § 32.

ANNOTATIONS

The 2007 amendment, effective July 1, 2007, changed the statutory reference to the act.

74-4E-2. Purpose of act.

The purpose of the Hazardous Chemicals Information Act 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

Compiler's notes. — For the 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:

A. "commission" means the state emergency response commission;

B. "department" means the homeland security and emergency management 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 3;

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 that are located on a single site or on contiguous or adjacent sites. For the purposes of Section 74-4E-5 NMSA 1978, 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 3" means the federal Emergency Planning and Community Right-to-Know Act of 1986.

History: Laws 1989, ch. 149, § 3; 2007, ch. 291, § 33.

ANNOTATIONS

Cross references. — For the federal Emergency Planning and Community Right-to-Know Act of 1986, *see* 42 U.S.C. §§ 11001 to 11005, 11021 to 11023, and 11041 to 11050.

The 2007 amendment, effective July 1, 2007, redefined "department" to mean the homeland security and emergency management department.

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 chair of the commission.

B. The commission shall:

(1) exercise supervisory authority to implement Title 3 within New Mexico;

(2) prescribe all reporting forms required by the Hazardous Chemicals Information Act;

(3) provide direction to 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 and may make contracts necessary to carry out the purpose of that act.

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 therefor, 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; 2007, ch. 291, § 34.

ANNOTATIONS

Compiler's notes. — For the meaning of Title III, *see* Subsection H of 74-4E-3 NMSA 1978.

The 2007 amendment, effective July 1, 2007, eliminated references to the emergency management task force and the Emergency Management Act.

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.

History: Laws 1989, ch. 149, § 5.

ANNOTATIONS

Compiler's notes. — For the 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.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 37A Am. Jur. 2d Freedom of Information Acts § 41 et seq.

74-4E-7. Repealed.

ANNOTATIONS

Repeals. — Laws 1989, ch. 149, § 17 repealed 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* the 1991 NMSA 1978 on *NMOneSource.com*.

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 4F
Hazardous Materials Transportation (Repealed.)

74-4F-1. Repealed.

History: Laws 1996, ch. 37, § 1; repealed by Laws 2007, ch. 319, § 67.

ANNOTATIONS

Repeals. — Laws 2007, ch. 319, § 67 repealed 74-4F-1 NMSA 1978, as enacted by Laws 1996, ch. 37, § 1, relating to the Hazardous Materials Transportation Act, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com*.

74-4F-2. Repealed.

History: Laws 1996, ch. 37, § 2; repealed by Laws 2007, ch. 319, § 67.

ANNOTATIONS

Repeals. — Laws 2007, ch. 319, § 67 repealed 74-4F-2 NMSA 1978, as enacted by Laws 1996, ch. 37, § 2, relating to the Hazardous Materials Transportation Act, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com*.

74-4F-3. Repealed.

History: Laws 1996, ch. 37, § 3; repealed by Laws 2004, ch. 78, § 2.

ANNOTATIONS

Repeals. — Laws 2004, ch. 78, § 2 repealed Section 74-4F-3 NMSA 1978, as enacted by Laws 1996, ch. 37, § 3, relating to the Hazardous Materials Transportation Act, effective July 1, 2004. For provisions of former section, *see* the 2003 NMSA 1978 on *NMOneSource.com*.

74-4F-4. Repealed.

History: Laws 1996, ch. 37, § 4; repealed by Laws 2007, ch. 319, § 67.

ANNOTATIONS

Repeals. — Laws 2007, ch. 319, § 67 repealed 74-4F-4 NMSA 1978, as enacted by Laws 1996, ch. 37, § 4, relating to the Hazardous Materials Transportation Act, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com*.

74-4F-5. Repealed.

History: Laws 1996, ch. 37, § 5; repealed by Laws 2007, ch. 319, § 67.

ANNOTATIONS

Repeals. — Laws 2007, ch. 319, § 67 repealed 74-4F-5 NMSA 1978, as enacted by Laws 1996, ch. 37, § 5, relating to the Hazardous Materials Transportation Act, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com*.

74-4F-6. Repealed.

History: Laws 1996, ch. 37, § 6; repealed by Laws 2007, ch. 319, § 67.

ANNOTATIONS

Repeals. — Laws 2007, ch. 319, § 67 repealed 74-4F-6 NMSA 1978, as enacted by Laws 1996, ch. 37, § 6, relating to the Hazardous Materials Transportation Act, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com*.

74-4F-7. Repealed.

History: Laws 1996, ch. 37, § 7; repealed by Laws 2007, ch. 319, § 67.

ANNOTATIONS

Repeals. — Laws 2007, ch. 319, § 67 repealed 74-4F-7 NMSA 1978, as enacted by Laws 1996, ch. 37, § 7, relating to the Hazardous Materials Transportation Act, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com*.

74-4F-8. Repealed.

History: Laws 1996, ch. 37, § 8; repealed by Laws 2007, ch. 319, § 67.

ANNOTATIONS

Repeals. — Laws 2007, ch. 319, § 67 repealed 74-4F-8 NMSA 1978, as enacted by Laws 1996, ch. 37, § 8, relating to the Hazardous Materials Transportation Act, effective June 15, 2007. For provisions of former section, *see* the 2006 NMSA 1978 on *NMOneSource.com*.

ARTICLE 4G
Voluntary Remediation

74-4G-1. Short title.

Chapter 74, Article 4G NMSA 1978 may be cited as the "Voluntary Remediation Act".

History: Laws 1997, ch. 38, § 1; 2006, ch. 62, § 1.

ANNOTATIONS

Cross references. — For the Hazardous Waste Act, *see* Chapter 74, Article 4 NMSA 1978.

The 2006 amendment, effective July 1, 2006, changed the short title reference of the act to the NMSA 1978 reference.

74-4G-2. Purpose.

The purpose of the Voluntary Remediation Act is to provide incentives for the voluntary assessment and remediation of contaminated property, with state oversight, and to remove future liability of lenders and landowners.

History: Laws 1997, ch. 38, § 2.

74-4G-3. Definitions.

As used in the Voluntary Remediation Act:

A. "applicable standards" means federal, state or local standards, requirements, criteria or limitations that are legally applicable to the facility;

B. "applicant" means a person that elects to submit an application to participate and enter into an agreement under the Voluntary Remediation Act;

C. "contaminant" means the following substances within the jurisdiction of the department:

(1) solid waste;

(2) hazardous waste as defined in 20 NMAC 4.1.200;

(3) an RCRA hazardous waste constituent listed in Appendices VIII and IX in 20 NMAC 4.1.200;

(4) any substance that could alter, if discharged or spilled, the physical, chemical, biological or radiological qualities of water; or

(5) a hazardous substance, as defined by Section 101(14) of the federal Comprehensive Environmental Response, Compensation and Liability Act and 40 C.F.R. Part 302, Table 302.4;

D. "department" means the department of environment;

E. "enforcement action" means:

(1) a written notice from the department or other state agency that requires abatement of contamination under 20 NMAC 6.2;

(2) a written order from the department or other state agency that requires or involves the removal or remediation of contaminants;

(3) a judicial action by the department or other state agency seeking the abatement of contamination or the remediation of contaminants; or

(4) a notice, order or judicial action similar to those enumerated in Paragraphs (1) through (3) of this subsection, but initiated by the federal government;

F. "fraud" means the knowingly false representation, whether by words or conduct, and whether by inaccurate or misleading allegations or by concealment of that which

should have been disclosed, that is intended to deceive or circumvent the intent of this statute;

G. "participant" means an applicant that has been approved by the department as eligible for and that signs and performs an agreement pursuant to the provisions of the Voluntary Remediation Act;

H. "person" means an individual or any other entity, including partnerships, corporations, associations, responsible business or association agents or officers, the state or a political subdivision of the state, or any agency, department or instrumentality of the United States and any of its officers, agents or employees;

I. "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment, including abandonment or discarding of any contaminant;

J. "remediation" means:

(1) actions necessary to investigate, prevent, minimize or mitigate damages to the public health or to the environment that may otherwise result from a release or threat of release; and

(2) the cleanup or removal of released contaminants to conform with applicable standards;

K. "site" means a parcel of real property for which an application has been submitted pursuant to the provisions of Section 5 [74-4G-5 NMSA 1978] of the Voluntary Remediation Act; and

L. "voluntary remediation" means remediation taken under and in compliance with the Voluntary Remediation Act.

History: Laws 1997, ch. 38, § 3.

ANNOTATIONS

Cross references. — For Section 101(14) of the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), *see* 42 U.S.C. § 9601(14).

74-4G-4. Regulations.

The department shall adopt and promulgate rules and regulations necessary to implement the provisions of the Voluntary Remediation Act. The rules and regulations shall provide for, among other things, the amount of the nonrefundable application fee and a schedule for the cost of the department's oversight of the voluntary remediation.

History: Laws 1997, ch. 38, § 4.

74-4G-5. Application and fee.

A. To be eligible for a voluntary remediation agreement an applicant must:

(1) own the site;

(2) operate a facility located on the site;

(3) be a prospective owner of the site; or

(4) be a prospective operator of a facility at the site.

B. An applicant shall pay at the time of submitting the application a reasonable, nonrefundable application fee determined by the department in advance that will pay for the costs to the department of processing the application.

C. The participant shall pay all costs of the department's oversight of the voluntary remediation.

D. The department shall reject an application for a voluntary remediation agreement if the department determines:

(1) the contaminants at the site constitute, with reasonable evidence, an unreasonable threat to human health or the environment or Native American cultural or religious sites;

(2) an administrative state or federal or judicial state or federal enforcement action is pending that concerns remediation of contamination described in the application;

(3) a federal grant requires an enforcement action at the site;

(4) the application is incomplete or inaccurate and the alleged incompleteness or inaccuracy cannot be remedied by the applicant within thirty days;

(5) the site has a state or federal permit that addresses a contaminant described in the application, or a permit is pending;

(6) an agreement between the department and the environmental protection agency precludes the site from being addressed under this statute; or

(7) the applicant has, within ten years immediately preceding the date of submission of the application:

(a) knowingly misrepresented a material fact in an application for a permit or plan submitted pursuant to state environmental laws;

(b) refused or failed to disclose any material information required under this act;

(c) exhibited a history of willful disregard for environmental laws of any state or of the United States; or

(d) had an environmental permit revoked or permanently suspended for cause pursuant to provisions of any environmental laws of any state or of the United States.

E. The department shall determine, on a first-come, first-served basis and within a reasonable period defined by regulation, whether the applicant is eligible to participate in a voluntary remediation agreement pursuant to provisions of the Voluntary Remediation Act.

F. Before the department approves a proposed voluntary remediation agreement, the applicant must:

(1) make the proposed voluntary remediation agreement available for public inspection at a location in reasonable proximity to the site;

(2) notify the following and advise them of the proposed voluntary remediation agreement and the opportunity to submit comments to the department:

(a) any local, state, federal, tribal or pueblo governmental agency potentially affected by the proposed voluntary remediation agreement;

(b) those parties that have requested notification;

(c) the general public by posting at the site on a form provided by the department; and

(d) the general public by publishing in a newspaper of general circulation in the community potentially affected by the voluntary remediation agreement; and

(3) submit to the department a copy of the public notice as well as an affidavit affirming that the applicant has complied with the provisions of this subsection.

G. The department shall:

(1) provide a comment period of at least thirty days following publication of the newspaper notice. During the comment period, interested persons may submit comments to the department concerning the proposed voluntary remediation

agreement. The department shall consider public comments in deciding whether to enter into a voluntary remediation agreement;

(2) during the thirty day comment period, allow any interested person to request a public meeting. The request shall be in writing and shall set forth the reasons why the meeting should be held. A public meeting will be held if the secretary of environment determines that there is significant public interest; and

(3) provide for appropriate public participation in the voluntary remediation work plan, including a public meeting if the secretary of environment determines that there is significant public interest.

H. If an agreement is not reached between an applicant and the department on or before the thirtieth day after the department determines an applicant to be eligible pursuant to the provisions of this section, the applicant or the department may withdraw from the negotiations.

History: Laws 1997, ch. 38, § 5.

74-4G-6. Agreement.

A. After the department determines that an applicant is eligible, the secretary of environment may enter into a voluntary remediation agreement for remediation of the site that sets forth the terms and conditions of the department's evaluation and implementation of the oversight to be performed.

B. A voluntary remediation agreement shall include a provision for the department's oversight, including access to the site, on-site collection of samples and inspection and copying of site records.

C. The department shall not initiate an enforcement action, including an administrative or judicial action, against a participant for the contamination or release thereof, or for the activity that resulted in the contamination or release thereof, if the contamination is the subject of an agreement pursuant to the provisions of the Voluntary Remediation Act; however, this section shall not be a bar to enforcement if the participant does not successfully initiate or implement the agreement within a reasonable time.

D. The participant may terminate a voluntary remediation agreement on sixty days' written notice. The department may terminate a voluntary remediation agreement on a finding that the participant is not in compliance with the voluntary remediation agreement. The department's costs incurred or obligated before the date the notice of termination is received are recoverable under the agreement if the agreement is terminated.

E. In the event that any participant is unable to resolve a dispute concerning the actions required under a voluntary remediation agreement, that participant may submit a written request for a final decision to the secretary of environment. The secretary of environment shall issue a binding final decision, including a written statement of the reason for the decision.

F. Unless the participant demonstrates that a cleanup is not required in order to comply with applicable standards, after a voluntary remediation agreement becomes effective, the participant shall submit a proposed voluntary remediation work plan for the site remediation.

History: Laws 1997, ch. 38, § 6.

74-4G-7. Certificate of completion.

If the department determines that a participant has successfully complied with the voluntary remediation agreement and the site conditions meet applicable standards, the department shall issue the participant a certificate of completion.

History: Laws 1997, ch. 38, § 7.

74-4G-8. Covenant not to sue.

A. After the department issues a certificate of completion for a site, the secretary of environment shall provide a covenant not to sue to a purchaser of the site that did not contribute to the site contamination for any direct liability, including future liability for claims based upon the contamination covered by the agreement and over which the department has authority. Except as may be provided under federal law or as may be agreed to by a federal government entity, the covenant not to sue shall not release a participant from liability to the federal government for claims based on federal law. Except as may be agreed to by a third party, the covenant not to sue shall not release a person from liability to third parties.

B. The secretary of environment's covenant not to sue under this section shall be transferable with title to the site.

History: Laws 1997, ch. 38, § 8.

74-4G-9. Recision.

Nothing in this chapter shall prohibit the secretary of environment from rescinding a certificate of completion or a covenant not to sue if the department determines that:

A. contamination addressed in the agreement is, with reasonable evidence, an unreasonable threat to human health or the environment;

B. the voluntary remediation agreement was performed in a manner that fails to comply substantially with the terms and conditions of the agreement or voluntary remediation work plan;

C. the voluntary remediation agreement is a result of fraud; or

D. contamination was present at the site at the time the voluntary remediation agreement was signed but the department did not know of the type, extent or magnitude of the contaminants.

History: Laws 1997, ch. 38, § 9.

74-4G-10. Lender liability.

A person who maintains indicia of ownership primarily to protect a security interest in a site that is the subject of a voluntary remediation agreement, who does not participate in the management of the site and is not in control of or does not have responsibility for daily operation of the site shall not be considered an owner or operator of that site and shall not be liable under any contaminant control or other environmental protection law or regulation administered by the department or otherwise responsible to the department for any environmental contamination or response action costs associated with the site. This section shall apply to all indicia of ownership existing on and after July 1, 1997.

History: Laws 1997, ch. 38, § 10; 1999, ch. 33, § 1.

ANNOTATIONS

The 1999 amendment, effective June 18, 1999, substituted "A person" for "An applicant" at the beginning of the section, and substituted "July 1, 1997" for "the effective date of the Voluntary Remediation Act" at the end of the section.

74-4G-11. Voluntary remediation fund.

The "voluntary remediation fund" is created in the state treasury. The fund shall be administered by the department. All fees and oversight payments collected pursuant to the regulations adopted by the secretary of environment pursuant to the provisions of the Voluntary Remediation Act shall be deposited in the fund. The money in the fund shall be appropriated by law to the department for the purpose of administering the Voluntary Remediation Act. Disbursements from the fund shall be made upon warrants drawn by the secretary of finance and administration pursuant to vouchers signed by the secretary of environment.

History: Laws 1997, ch. 38, § 11.

74-4G-11.1. Brownfields cleanup revolving loan fund.

A. The "brownfields cleanup revolving loan fund" is created in the state treasury. The fund shall be comprised of money from a grant from the environmental protection agency, repayments of loans and interest and income accruing on the balance of the fund. The department may make secured and unsecured loans or grants from the fund to eligible participants for the purpose of financing remedial actions and other approved activities at abandoned or underused industrial, commercial or agricultural sites or on abandoned or underused residential property. Loans or grants may be made from the fund to political subdivisions, tribes, nonprofit organizations and private entities for eligible cleanup activities pursuant to requirements for eligibility set by the environmental protection agency's brownfields program. Disbursements from the fund shall be by warrant drawn by the secretary of finance and administration pursuant to vouchers signed by the secretary of environment or the secretary's designee. Any unexpended or unencumbered balance or income earned from the money in the fund remaining at the end of a fiscal year shall not revert to the general fund.

B. The department shall review and approve qualified loan applications, and cleanup activities shall be performed pursuant to the Voluntary Remediation Act.

C. Loan repayments shall be deposited into the brownfields cleanup revolving loan fund. Interest and earnings on the balance in the fund shall be credited to the brownfields cleanup revolving loan fund.

History: Laws 2006, ch. 62, § 2.

ANNOTATIONS

Effective dates. — Laws 2006, ch. 62, § 3 made the provisions of this section effective July 1, 2006.

74-4G-12. Severability.

If any part or application of the Voluntary Remediation Act is held invalid, the remainder or its application to other situations or persons shall not be affected.

History: Laws 1997, ch. 38, § 12.

ARTICLE 4H
San Juan Generating Station Facility and Mine Remediation and Restoration Study

74-4H-1. Short title.

This act [74-4H-1 to 74-4H-4 NMSA 1978] may be cited as the "San Juan Generating Station Facility and Mine Remediation and Restoration Study Act".

History: Laws 2023, ch. 185, § 1.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 185, § 5 made Laws 2023, ch. 185, § 1 effective July 1, 2023.

74-4H-2. Definitions.

As used in the San Juan Generating Station Facility and Mine Remediation and Restoration Study Act:

A. "generating facility" means the abandoned coal-fired San Juan generating station in New Mexico;

B. "mine" means the mine associated with the generating facility;

C. "reclamation" means the rehabilitation of the generating facility and mine to make the generating facility and mine acceptable for post-mining purposes that protect the natural resources and aesthetic value of adjoining areas;

D. "remediation" means the process of reversing or stopping environmental damage;

E. "restoration" means the process of restoring site conditions to the state they were in before generating facility and mining disturbances; and

F. "toxic metal contaminants" means the federal environmental protection agency's twenty-one identified constituents of concern in coal ash residue leachate, for which the federal environmental protection agency requires ground water monitoring. These constituents include boron, calcium, chloride, pH, sulfate, total dissolved solids, antimony, arsenic, barium, beryllium, cadmium, chromium, cobalt, fluoride, lead, lithium, mercury, molybdenum, selenium, thallium and radium 226 and 228.

History: Laws 2023, ch. 185, § 2.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 185, § 5 made Laws 2023, ch. 185, § 2 effective July 1, 2023.

74-4H-3. Study and documentation; dissemination of study; study contents; reporting requirements.

A. The energy, minerals and natural resources department and the department of environment shall coordinate efforts to:

(1) contract for a comprehensive study of the generating facility and mine to determine if there has been any environmental contamination of the lands and waters on or adjacent to the generating facility and mine, including the presence of toxic metal contaminants; and

(2) develop an independent reclamation and restoration plan that addresses protecting the environment from contamination for human and ecosystem health and ground and surface water quality and prevents the migration of toxic metal contaminants and off-site pollution.

B. The energy, minerals and natural resources department and the department of environment shall make the remediation and restoration study available to the public on an accessible internet website and shall summarize the results of any inspections and data analysis in an executive summary.

C. No later than July 1, 2025, the energy, minerals and natural resources department and the department of environment shall provide a copy of the remediation and restoration study to the legislature and present specific measurable steps, informed by input from impacted communities, to oversee and enforce full remediation and restoration plans, including, to the extent possible, the cleanup of the generating facility and mine and prioritizing for employment workers who were previously employed at the generating facility and mine and workers residing in New Mexico. A presentation of the study shall occur at a meeting of the legislative interim committee dealing with water and natural resources and shall detail how the energy, minerals and natural resources department and the department of environment shall ensure timely environmental compliance with the owners of the generating facility and mine to protect public health and welfare.

D. The energy, minerals and natural resources department and the department of environment shall provide annual updates to the legislature about the progress of remediation and restoration efforts pursuant to the San Juan Generating Station Facility and Mine Remediation and Restoration Study Act.

E. To the extent allowed by applicable laws, the energy, minerals and natural resources department and the department of environment are authorized to consider the results of this study in any permitting actions related to the generating facility or mine.

F. The independent restoration and remediation plan shall not be considered a rule or standard for purposes of the Water Quality Act [Chapter 74, Article 6 NMSA 1978] but shall be considered a planning document. Planning documents are not rules or standards under the Water Quality Act.

G. As used in this section, "planning document" means a document that is used to guide future actions and strategies to meet water quality rules or standards. Planning

documents may include remediation plans, restoration plans and total maximum daily loads.

History: Laws 2023, ch. 185, § 3.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 185, § 5 made Laws 2023, ch. 185, § 3 effective July 1, 2023.

74-4H-4. Authorization to contract with outside professionals to assist in the remediation and restoration study.

The energy, minerals and natural resources department and the department of environment are authorized to contract with environmental engineers, hydrologists, geochemists and other professionals or consultants as needed to perform a rigorous study of the generating facility and mine to:

A. investigate and determine the extent of any environmental contamination;

B. create an independent restoration and remediation plan to remediate and prevent environmental contamination and impacts to ground water with long-term, measurable cleanup and performance standards; and

C. address the probability of adverse effects to human health and community resilience, particularly resulting from ground water contamination.

History: Laws 2023, ch. 185, § 4.

ANNOTATIONS

Effective dates. — Laws 2023, ch. 185, § 5 made Laws 2023, ch. 185, § 4 effective July 1, 2023.

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, repealed 74-5-2 NMSA 1978, as enacted by Laws 1977, ch. 384, § 2, relating to restrictions on the sale of certain aerosol products, effective March 16, 1979.

ARTICLE 6
Water Quality

74-6-1. Short title.

Chapter 74, Article 6 NMSA 1978 may be cited as the "Water Quality Act".

History: 1953 Comp., § 75-39-1, enacted by Laws 1967, ch. 190, § 1; 1993, ch. 291, § 1.

ANNOTATIONS

Cross references. — For the Pollution Control Revenue Bond Act, *see* 3-59-1 NMSA 1978 et seq.

The 1993 amendment, effective June 18, 1993, substituted "Chapter 74, Article 6 NMSA 1978" for "This act".

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).

An implied private right of action does not exist under this section and a negligence per se claim may not be predicated on a violation of this section. *Schwartzman, Inc. v. Atchison, Topeca & Santa Fe Ry.*, 857 F. Supp. 838 (D.N.M. 1994).

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. 70-05.

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. — 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.

Actions brought under Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act)(33 U.S.C.A. § 1251 et seq.) - supreme court cases, 163 A.L.R. Fed. 531.

39A C.J.S Health and Environment § 131.

74-6-2. Definitions.

As used in the Water Quality Act:

A. "gray water" means untreated household wastewater that has not come in contact with toilet waste and includes wastewater from bathtubs, showers, washbasins, clothes washing machines and laundry tubs, but does not include wastewater from kitchen sinks or dishwashers or laundry water from the washing of material soiled with human excreta, such as diapers;

B. "water contaminant" means any substance that could alter, if discharged or spilled, the physical, chemical, biological or radiological qualities of water. "Water contaminant" does not mean source, special nuclear or byproduct material as defined by the federal Atomic Energy Act of 1954;

C. "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;

D. "wastes" means sewage, industrial wastes or any other liquid, gaseous or solid substance that may pollute any waters of the state;

E. "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;

F. "treatment works" means any plant or other works used for the purpose of treating, stabilizing or holding wastes;

G. "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;

H. "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;

I. "person" means an individual or any other entity, including partnerships, corporations, associations, responsible business or association agents or officers, the state or a political subdivision of the state or any agency, department or instrumentality of the United States and any of its officers, agents or employees;

J. "commission" means the water quality control commission;

K. "constituent agency" means, as the context may require, any or all of the following agencies of the state:

(1) the department of environment;

(2) the state engineer and the interstate stream commission;

(3) the department of game and fish;

(4) the oil conservation commission;

(5) the state parks division of the energy, minerals and natural resources department;

(6) the New Mexico department of agriculture;

(7) the soil and water conservation commission; and

(8) the bureau of geology and mineral resources at the New Mexico institute of mining and technology;

L. "new source" means:

(1) any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance applicable to the source; or

(2) any existing source when modified to treat substantial additional volumes or when there is a substantial change in the character of water contaminants treated;

M. "source" means a building, structure, facility or installation from which there is or may be a discharge of water contaminants directly or indirectly into water;

N. "septage" means the residual wastes and water periodically pumped from a liquid waste treatment unit or from a holding tank for maintenance or disposal purposes;

O. "sludge" means solid, semi-solid or liquid waste generated from a municipal, commercial or industrial wastewater treatment plant, water supply treatment plant or air pollution control facility that is associated with the treatment of these wastes. "Sludge" does not mean treated effluent from a wastewater treatment plant;

P. "substantial adverse environmental impact" means that an act or omission of the violator causes harm or damage:

(1) to human beings; or

(2) that amounts to more than ten thousand dollars ($10,000) damage or mitigation costs to flora, including agriculture crops; fish or other aquatic life; waterfowl or other birds; livestock or wildlife or damage to their habitats; ground water or surface water; or the lands of the state;

Q. "federal act" means the Federal Water Pollution Control Act, its subsequent amendment and successor provisions;

R. "standards of performance" means any standard, effluent limitation or effluent standard adopted pursuant to the federal act or the Water Quality Act; and

S. "produced water" means a fluid that is an incidental byproduct from drilling for or the production of oil and gas.

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; 1993, ch. 291, § 2; 2001, ch. 246, § 13; 2003, ch. 7, § 1; 2019, ch. 197, § 10.

ANNOTATIONS

Cross references. — For the federal Water Pollution Control Act, *see* 33 U.S.C.. § 1251 et seq.

For the federal Atomic Energy Act of 1954, *see* 42 U.S.C. § 2011 et seq.

The 2019 amendment, effective July 1, 2019, defined "produced water" as used in the Water Quality Act; and added Subsection S.

Applicability. — Laws 2019, ch. 197, § 12 provided that the provisions of Laws 2019, ch. 197 apply to contracts entered into on and after July 1, 2019.

The 2003 amendment, effective March 10, 2003, added present Subsection A and redesignated the subsequent subsections accordingly; and inserted "federal" preceding "Atomic Energy Act" near the end of Subsection B.

The 2001 amendment, effective June 15, 2001, in Paragraph J(5), substituted "parks" for "park and recreation"; in Paragraph J(8), substituted "geology" for "mines" and made stylistic changes.

The 1993 amendment, effective June 18, 1993, in Subsection A, substituted "that could alter if discharged or spilled" for "which alters", inserted "or radiological", added the second sentence, and made a minor stylistic change; made a minor stylistic change in Subsection C; substituted "plant" for "plat" in Subsection E; rewrote Subsection H; in Subsection J, in Paragraph (1), deleted "environmental improvement division of the

health and environment" preceding "department" and inserted "of environment" following "department", deleted "New Mexico" preceding "department" in Paragraph (3), substituted "division of the energy, minerals and natural resources department" for "commission" in Paragraph (5), substituted "soil and water" for "state natural resource" in Paragraph (7), in Paragraph (8), deleted "New Mexico" preceding "bureau" and added the language following "mines"; in Subsection K, added the Paragraph (1) designation, added Paragraph (2), and made a minor stylistic change; and added Subsections L through Q.

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. — What are "navigable waters" subject to Federal Water Pollution Control Act (33 U.S.C.A. § 1251 et seq.), 160 A.L.R. Fed. 585.

74-6-3. Water quality control commission created. (Repealed effective July 1, 2026.)

A. There is created the "water quality control commission" consisting of:

(1) the secretary of environment or a member of the secretary's staff designated by the secretary;

(2) the secretary of health or a member of the secretary's staff designated by the secretary;

(3) the director of the department of game and fish or a member of the director's staff designated by the director;

(4) the state engineer or a member of the state engineer's staff designated by the state engineer;

(5) the chair of the oil conservation commission or a member of the chair's staff designated by the chair;

(6) the director of the state parks division of the energy, minerals and natural resources department or a member of the director's staff designated by the director;

(7) the director of the New Mexico department of agriculture or a member of the director's staff designated by the director;

(8) the chair of the soil and water conservation commission or a soil and water conservation district supervisor designated by the chair;

(9) the director of the bureau of geology and mineral resources at the New Mexico institute of mining and technology or a member of the director's staff designated by the director;

(10) a municipal or county government representative; and

(11) four representatives of the public to be appointed by the governor for terms of four years and who shall be compensated from the budgeted funds of the department of environment in accordance with the provisions of the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978]. At least one member appointed by the governor shall be a member of a New Mexico Indian tribe or pueblo.

B. A member of the commission shall not receive, or shall not have received during the previous two years, a significant portion of the member's income directly or indirectly from permit holders or applicants for a permit. A member of the commission shall, upon the acceptance of the member's appointment and prior to the performance of any of the member's 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 the member's gross personal income in each of the preceding two years, that the member received directly or indirectly from permit holders or applicants for permits required under the Water Quality Act. A member of the commission shall not participate in the consideration of an appeal if the subject of the appeal is an application filed or a permit held by an entity that either employs the commission member or from which the commission member received more than ten percent of the member's gross personal income in either of the preceding two years.

C. The commission shall elect a chair 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 six 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 act and the wellhead protection and sole source aquifer programs of the federal Safe Drinking Water Act and may take all action necessary and appropriate to secure to this state, its political subdivisions or interstate agencies the benefits of that act and those programs.

F. The commission is administratively attached, as defined in the Executive Reorganization Act [9-1-1 to 9-1-10 NMSA 1978], to the department of environment.

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; 1993, ch. 291, § 3; 1997, ch. 82, § 1; 2001, ch. 246, § 14; 2001, ch. 267, § 1; 2003, ch. 165, § 2; 2007, ch. 183, § 1.

ANNOTATIONS

Delayed repeals. — For delayed repeal of this section, *see* 74-6-17 NMSA 1978.

Cross references. — For exemption of water quality control commission from authority of secretary of environment, *see* 9-7A-13 NMSA 1978.

For director of the New Mexico department of game and fish, *see* 17-1-5 NMSA 1978.

For the chairman of the oil conservation commission, *see* 70-2-4 NMSA 1978.

For the state engineer, *see* 72-2-1 NMSA 1978.

For the director of the New Mexico department of agriculture, *see* 76-1-3 NMSA 1978.

For the federal Safe Drinking Water Act, *see* 21 U.S.C. § 349 and 42 U.S.C.S. § 300f et seq.

The 2007 amendment, effective June 15, 2007, added the secretary of health as a member of the commission.

The 2003 amendment, effective July 1, 2003, substituted "geology" for "mines" preceding "and mineral resources" in Paragraph A(8); added the last sentence in Paragraph A(10); in Subsection B, substituted "A member of the commission shall not receive, or shall not" for "No member of the commission shall receive, or shall" at the beginning, substituted "A member of the commission shall not" for "No member of the commission shall" preceding "participate in the", deleted "10" preceding "percent of his", substituted "preceding" for "proceeding" near the end.

The 2001 amendment, effective June 15, 2001, substituted "parks division" for "parks and recreation division" in Paragraph A(5); added Paragraph A(9) and redesignated former Paragraph A(9) as A(10); and in Subsection B, inserted the period following "permit", "A member of the commission", and the last sentence.

The 1997 amendment, effective June 20, 1997, in Subsection A, substituted "soil and water conservation district supervisor" for "person" in Paragraph (7) and "terms" for "a term" in Paragraph (9).

The 1993 amendment, effective June 18, 1993, in Subsection A, substituted "secretary of environment" for "director of the environmental improvement division of the health and environment department" in Paragraph (1) and, in Paragraph (9), substituted "three representatives" for "a representative", deleted "health and environment" preceding "department" and inserted "of environment" following "department"; in Subsection E, substituted "federal act and the wellhead protection and sole source aquifer programs of the federal Safe Drinking Water Act" for "Federal Water Pollution Control Act, the Water Quality Act of 1965 and the Clean Waters Restoration Act of 1966", and substituted

"that act and those programs" for "these acts"; and in Subsection F, deleted "health and environment" preceding "department" and inserted "of environment" following "department".

Authority of division to propose regulations and act as interested party at hearings. — In light of the fact that the legislature had seen fit to have the director of the environmental improvement division sit as a member of the commission, the division could propose regulations to the commission and then act as an interested party at the hearings. *Kerr-McGee Nuclear Corp. v. N.M. Water Quality Control Comm'n*, 1982-NMCA-015, 98 N.M. 240, 647 P.2d 873 (decided under former law).

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).

For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

74-6-3.1. Legal advice. (Repealed effective July 1, 2026.)

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; recompiled as 1978 Comp., § 74-6-3.1 by Laws 1993, ch. 291, § 18.

ANNOTATIONS

Delayed repeals. — For delayed repeal of this section, *see* 74-6-17 NMSA 1978.

Compiler's notes. — 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 was compiled as 74-1-8.2 NMSA 1978.

Cross references. — For the definition of "commission", *see* 74-6-2 NMSA 1978.

For the general powers and duties of the commission, *see* 74-6-4 NMSA 1978.

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.

74-6-4. Duties and powers of commission. (Repealed effective July 1, 2026.)

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 management program and develop a continuing planning process;

C. shall not adopt or promulgate a standard or regulation that exceeds a grant of rulemaking authority listed in the statutory section of the Water Quality Act authorizing the standard or regulation;

D. shall adopt water quality standards for surface and ground waters of the state based on credible scientific data and other evidence appropriate under the Water Quality Act. The standards shall include narrative standards and, as appropriate, the designated uses of the waters and the water quality criteria necessary to protect such uses. The standards shall at a minimum protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act. In making standards, the commission shall give weight it deems appropriate to all facts and circumstances, including the use and value of the water for water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes;

E. shall adopt, promulgate and publish regulations to prevent or abate water pollution in the state or in any specific geographic area, aquifer or watershed of the state or in any part thereof, or for any class of waters, and to govern the disposal of septage and sludge and the use of sludge for various beneficial purposes. The

regulations governing the disposal of septage and sludge may include the use of tracking and permitting systems or other reasonable means necessary to assure that septage and sludge are designated for disposal in, and arrive at, disposal facilities, other than facilities on the premises where the septage and sludge is generated, for which a permit or other authorization has been issued pursuant to the federal act or the Water Quality Act. Regulations may specify a standard of performance for new sources that reflects the greatest reduction in the concentration of water contaminants that 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 regulations, the commission shall give weight it deems appropriate to all relevant facts and circumstances, including:

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

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

(3) the 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) the successive uses, including 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;

(6) property rights and accustomed uses; and

(7) federal water quality requirements;

F. 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. In assigning responsibilities to constituent agencies, the commission shall give priority to the primary interests of the constituent agencies. The department of environment shall provide technical services, including certification of permits pursuant to the federal act, and shall maintain a repository of the scientific data required by the Water Quality Act;

G. 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;

H. 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 only 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;

I. 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 and 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 solely residential in nature shall be deemed compliance with all provisions of this subsection;

J. 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;

K. shall specify in regulations the measures to be taken to prevent water pollution and to monitor water quality. The commission may adopt regulations for particular industries. The commission shall adopt regulations for the dairy industry and the copper industry. The commission shall consider, in addition to the factors listed in Subsection E of this section, the best available scientific information. The regulations may include variations in requirements based on site-specific factors, such as depth and distance to ground water and geological and hydrological conditions. The constituent agency shall establish an advisory committee composed of persons with knowledge and expertise particular to the industry category and other interested stakeholders to advise the constituent agency on appropriate regulations to be proposed for adoption by the commission. The regulations shall be developed and adopted in accordance with a schedule approved by the commission. The schedule shall incorporate an opportunity for public input and stakeholder negotiations;

L. may adopt regulations establishing pretreatment standards that prohibit or control the introduction into publicly owned sewerage systems of water contaminants that are not susceptible to treatment by the treatment works or that would interfere with the operation of the treatment works;

M. 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 or the environment or for the use of produced water;

N. shall not require a permit for applying less than two hundred fifty gallons per day of private residential gray water originating from a residence for the resident's household gardening, composting or landscape irrigation if:

(1) a constructed gray water distribution system provides for overflow into the sewer system or on-site wastewater treatment and disposal system;

(2) a gray water storage tank is covered to restrict access and to eliminate habitat for mosquitos or other vectors;

(3) a gray water system is sited outside of a floodway;

(4) gray water is vertically separated at least five feet above the ground water table;

(5) gray water pressure piping is clearly identified as a nonpotable water conduit;

(6) gray water is used on the site where it is generated and does not run off the property lines;

(7) gray water is applied in a manner that minimizes the potential for contact with people or domestic pets;

(8) ponding is prohibited, application of gray water is managed to minimize standing water on the surface and to ensure that the hydraulic capacity of the soil is not exceeded;

(9) gray water is not sprayed;

(10) gray water is not discharged to a watercourse; and

(11) gray water use within municipalities or counties complies with all applicable municipal or county ordinances enacted pursuant to Chapter 3, Article 53 NMSA 1978;

O. 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 [11-6-1 NMSA 1978 et seq.];

P. shall adopt regulations to be administered by the department of environment for the discharge, handling, transport, storage, recycling or treatment for the disposition of

treated produced water, including disposition in road construction maintenance, roadway ice or dust control or other construction, or in the application of treated produced water to land, for activities unrelated to the exploration, drilling, production, treatment or refinement of oil or gas; and

Q. may adopt regulations to be administered by the department of environment for surface water discharges.

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; 1993, ch. 291, § 4; 2001, ch. 240, § 1; 2001, ch. 281, § 1; 2003, ch. 7, § 2; 2009, ch. 194, § 1; 2019, ch. 197, § 11.

ANNOTATIONS

Delayed repeals. — For the delayed repeal of this section, *see* 74-6-17 NMSA 1978.

Cross references. — For certification of utility operators, *see* 61-33-1 NMSA 1978 et seq.

The 2019 amendment, effective July 1, 2019, required the water quality control commission to require a permit for the use of produced water, and required the commission to adopt regulations to be administered by the department of environment for the discharge, handling, transport, storage, recycling or treatment for the disposition of treated produced water; in Subsection M, after "health or the environment", added "or for the use of produced water"; and added Subsections P and Q.

Applicability. — Laws 2019, ch. 197, § 12 provided that the provisions of Laws 2019, ch. 197 apply to contracts entered into on and after July 1, 2019.

The 2009 amendment, effective June 19, 2009, added Subsection C; in Subsection E, in the third sentence, after "Regulations" deleted "shall not specify the method to be used to prevent or abate water pollution, but"; and added Subsection K.

The 2003 amendment, effective March 10, 2003, inserted present Subsection L and redesignated former Subsection L as Subsection M.

The 2001 amendment, effective June 15, 2001, in Subsection C, substituted "based on credible scientific data and other evidence appropriate under the Water Quality Act" for "subject to the Water Quality Act"; and at the end of Subsection E, inserted "and shall maintain a repository of the scientific data required by this act".

The 1993 amendment, effective June 18, 1993, inserted "management" in Subsection B; in Subsection C, deleted "as a guide to water pollution control" following "standards" in the first sentence and added all of the remaining language following the first occurrence of "standards"; in Subsection D, rewrote the introductory paragraph,

inserted "environment" in Paragraph (1), made minor stylistic changes in Paragraphs (2), (5), and (6), and added Paragraph (7); substituted the last sentence of Subsection E for the former last sentence which read "The environmental improvement division of the health and environment department shall provide testing and other technical services"; made minor stylistic changes in Subsections G, H, and J; and inserted "or the environment" in Subsection K.

Permit conditions. — The legislature did not want regulations to specify a particular method because it understood the inflexibility in specifying a particular method in a regulation. Section 74-6-4D NMSA 1978 illustrates the legislature's intention to avoid a required approach and, instead, to grant flexibility in determining the appropriate method to use for each site. Section 74-6-4D NMSA 1978 is consistent with the idea that each site is unique, different in scale, different in impact, and different in geology and hydrology. *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n*, 2006-NMCA-115, 140 N.M. 464, 143 P.3d 502, cert. denied, 2006-NMCERT-009, 140 N.M. 542, 144 P.3d 101.

Not vague or over-broad. — The water quality control commission's amended definition of surface waters of the state, which eliminates language referring to interstate commerce, is not unconstitutionally over-broad or vague. *N.M. Mining Assn. v. N.M. Water Quality Control Comm'n*, 2007-NMCA-084, 142 N.M. 200, 164 P.3d 81.

Relevant factors in adopting water quality standards. — The adoption of water quality standards is governed by Subsection C (now D) and the commission is not required to consider technical feasibility and economic reasonableness of the standard or to determine that there is available demonstrated control technology to abate contamination to the standard. *N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, 141 N.M. 41, 150 P.3d 991.

Adoption of the Copper Rule was a permissible exercise of the water quality control commission's authority. — Where petitioners appealed the water quality control commission's (commission) decision to adopt the Copper Rule, a rule which was designed to control and contain discharges of water contaminants specific to copper mine facilities and their operations to prevent water pollution so that ground water meets state standards, claiming that the Copper Rule is inconsistent with and violates the Water Quality Act (WQA), the commission did not abuse its discretion in adopting the Copper Rule, because the adoption of the rule is a permissible exercise of the commission's statutory authority, and the Copper Rule advances the core purposes of 74-6-5(E)(3) NMSA 1978 by protecting groundwater outside the area of open pit hydrologic containment and monitoring wells. *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2018-NMSC-025, *aff'g* 2015-NMCA-076, 355 P.3d 36.

The Water Quality Act does not prohibit a point of compliance system for protecting ground water. — Under regulations adopted by the water quality control commission, where the primary method for protecting ground water during a copper mine's operation is through discharge control at each mining unit, or place of each

mining-related activity, appellant's argument, that the regulations create a "point of compliance" system that allows a mine facility to pollute water under the entire mine facility up to a designated point or "point of compliance" at which point a monitor is used to ensure compliance with adopted standards and that such a system is prohibited under the Water Quality Act (WQA), is not supported by the language of the WQA. *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2015-NMCA-076, cert. granted, 2015-NMCERT-007, cert. granted, 2015-NMCERT-007, and cert. granted, 2015-NMCERT-007.

Sufficient evidence that regulations comply with Water Quality Act. — Under regulations adopted by the water quality control commission, where the primary method for protecting ground water during a copper mine's operation is through discharge control at each mining unit, or place of each mining-related activity, the requirement that monitor wells be placed as close as practicable around the perimeter and downgradient of each mining unit, and the placement of monitor wells and the number of monitor wells that are required at each unit is subject to approval from the New Mexico environment department, and the requirement that each mining specifically identify the method by which contaminated water is controlled, the regulations do not violate any provision of the Water Quality Act. *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2015-NMCA-076, cert. granted, 2015-NMCERT-007, cert. granted, 2015-NMCERT-007, and cert. granted, 2015-NMCERT-007.

Substantial evidence. — The commission's decision to revise the standard for uranium in groundwater was supported by substantial evidence, based on credible scientific data, where the commission relied on the testimony of experts as to the appropriate standard for uranium in groundwater for the protection of public health; a peer-reviewed study on the toxic effects of uranium on humans, and the testimony of epidemiologists about the populations in New Mexico that were especially sensitive to the toxic effect of uranium. *N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, 141 N.M. 41, 150 P.3d 991.

The water quality control commission's amended definition of surface waters of the state, which eliminates language referring to interstate commerce, was adopted consistent with the requirements of the Water Quality Act, 33 U.S.C. §1251 (1972) and due process. *N.M. Mining Assn. v. N.M. Water Quality Control Comm'n*, 2007-NMCA-084, 142 N.M. 200, 164 P.3d 81.

The water quality control commission's decision to amend the definition of surface waters of the state to eliminate language referring to interstate commerce, which was not based on scientific evidence but on uncertainty about the scope of federal regulatory jurisdiction under the Clean Water Act, was supported by substantial evidence. *N.M. Mining Assn. v. N.M. Water Quality Control Comm'n*, 2007-NMCA-084, 142 N.M. 200, 164 P.3d 81.

State can adopt its own toxic pollutant criteria, rather than having the criteria imposed by the EPA. *Regents of Univ. of Cal. v. N.M. Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788.

Statement of reasons for adopting regulations need not state why the commission adopted each individual provision of the standards or need not respond to all concerns raised in testimony as such a requirement would be unduly onerous for the commission and unnecessary for the purposes of appellate review. *Univ. of Cal. v. N.M. Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788.

Discretion in consideration of factors. — In adopting standards for organic compounds in groundwater, Subsection D (now E) does not require the record to contain the commission's consideration of every part within the six (now seven) 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. N.M. Water Quality Control Comm'n*, 1987-NMCA-153, 107 N.M. 469, 760 P.2d 161, cert. denied (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. N.M. Water Quality Control Comm'n*, 1972-NMCA-160, 84 N.M. 561, 505 P.2d 1237, 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. N.M. Water Quality Control Comm'n*, 1982-NMCA-015, 98 N.M. 240, 647 P.2d 873.

The federal environmental protection agency did not act arbitrarily or capricously in relying on a letter written by the chairman of the New Mexico water quality control commission interpreting a regulation of the water quality control commission. *Defenders of Wildlife v. U.S. Envtl. Protection Agency*, 415 F.3d 1121 (10th Cir. 2005).

Tributaries of waters with fishery uses. — Nothing in the plain language of Subsection C (now D) of this section prohibits the commission from protecting waters with fishery uses by applying the standards to tributaries of those waters. *Univ. of Cal. v. N.M. Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788.

The commission has not designated a fishery use for tributaries by applying the human health standards to them. *Univ. of Cal. v. N.M. Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788.

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 (now E). *Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, 1987-NMCA-153, 107 N.M. 469, 760 P.2d 161, cert. denied (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 § 719.

39A C.J.S. Health and Environment §§ 133 to 136.

74-6-5. Permits; certification; appeals to commission.

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 or for the disposal or reuse of septage or sludge.

B. The commission shall adopt regulations establishing procedures for certifying federal water quality permits.

C. Prior to the issuance of a permit, the constituent agency may require the submission of plans, specifications and other relevant information that it deems necessary.

D. 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 administratively complete application for a permit,

either grant the permit, grant the permit subject to conditions or deny the permit. The constituent agency has the burden of showing that each condition is reasonable and necessary to ensure compliance with the Water Quality Act and applicable regulations, considering site-specific conditions. After regulations have been adopted for a particular industry, permits for facilities in that industry shall be subject to conditions contained in the regulations. Additional conditions on a final permit may be imposed if the applicant is provided with an opportunity to review and provide comments in writing on the draft permit conditions and to receive a written explanation of the reasons for the conditions from the constituent agency.

E. The constituent agency shall deny any application for a permit or deny the certification of a federal water quality permit if:

(1) the effluent would not meet applicable state or federal effluent regulations, standards of performance or limitations;

(2) any provision of the Water Quality Act would be violated;

(3) the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard. Determination of the discharge's effect on ground water shall be measured at any place of withdrawal of water for present or reasonably foreseeable future use. Determination of the discharge's effect on surface waters shall be measured at the point of discharge; or

(4) the applicant has, within the ten years immediately preceding the date of submission of the permit application:

(a) knowingly misrepresented a material fact in an application for a permit;

(b) refused or failed to disclose any information required under the Water Quality Act;

(c) been convicted of a felony or other crime involving moral turpitude;

(d) been convicted of a felony in any court for any crime defined by state or federal law as being a restraint of trade, price-fixing, bribery or fraud;

(e) exhibited a history of willful disregard for environmental laws of any state or the United States; or

(f) had an environmental permit revoked or permanently suspended for cause under any environmental laws of any state or the United States.

F. The commission shall by regulation develop procedures that ensure that the public, affected governmental agencies and any other state whose water may be

affected shall receive notice of each application for issuance, renewal or modification of a permit. Public notice shall include:

(1) for issuance or modification of a permit:

(a) notice by mail to adjacent and nearby landowners; local, state and federal governments; land grant organizations; ditch associations; and Indian nations, tribes or pueblos;

(b) posting at a place conspicuous to the public and near the discharge or proposed discharge site; and

(c) a display advertisement in English and Spanish in a newspaper of general circulation in the location of the discharge or proposed discharge; provided, however, that the advertisement shall not be displayed in the classified or legal advertisement sections; and

(2) for issuance of renewals of permits:

(a) notice by mail to the interested public, municipalities, counties, land grant organizations, ditch associations and Indian nations, tribes or pueblos; and

(b) a display advertisement in English and Spanish in a newspaper of general circulation in the location of the discharge; provided, however, that the advertisement shall not be displayed in the classified or legal advertisement sections.

G. 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 evidence, data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. The hearing shall be recorded. Any person submitting evidence, data, views or arguments shall be subject to examination at the hearing.

H. The commission may adopt regulations for the operation and maintenance of the permitted facility, including requirements, as may be necessary or desirable, that relate to continuity of operation, personnel training and financial responsibility, including financial responsibility for corrective action.

I. 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.

J. By regulation, the commission may impose reasonable conditions upon permits requiring permittees to:

(1) install, use and maintain effluent monitoring devices;

(2) sample effluents and receiving waters for any known or suspected water contaminants 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 or direct or indirect release 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.

K. 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.

L. The issuance of a permit does not relieve any person from the responsibility of complying with the provisions of the Water Quality Act, any applicable regulations or water quality standards of the commission or any applicable federal laws, regulations or standards.

M. A permit may be terminated or modified by the constituent agency that issued the permit prior 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 or any applicable regulations, standard of performance or water quality standards;

(4) violation of any applicable state or federal effluent regulations or limitations; or

(5) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

N. If the constituent agency denies, terminates or modifies a permit or grants a permit subject to condition, the constituent agency shall notify the applicant or permittee by certified mail of the action taken and the reasons. Notice shall also be given by mail to persons who participated in the permitting action.

O. A person who participated in a permitting action before a constituent agency or a person affected by a certification of a federal permit and who is adversely affected by such permitting action or certification may file a petition for review before the commission. Unless a timely petition for review is made, the decision of the constituent agency shall be final and not subject to judicial review. The petition shall:

(1) be made in writing to the commission within thirty days from the date notice is given of the constituent agency's action;

(2) include a statement of the issues to be raised and the relief sought; and

(3) be provided to all other persons submitting evidence, data, views or arguments in the proceeding before the constituent agency.

P. If a timely petition for review is made, the commission shall consider the petition within ninety days after receipt of the petition. The commission 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 review. If the petitioner is not the applicant or permittee, the applicant or permittee shall be a party to the proceeding. The commission shall ensure that the public receives notice of the date, time and place of the review.

Q. The commission shall review the record compiled before the constituent agency, including the transcript of any public hearing held on the application or draft permit, and shall allow any party to submit arguments. The commission may designate a hearing officer to review the record and the arguments of the parties and recommend a decision to the commission. The commission shall consider and weigh only the evidence contained in the record before the constituent agency and the recommended decision of the hearing officer, if any, and shall not be bound by the factual findings or legal conclusions of the constituent agency. Based on the review of the evidence, the arguments of the parties and recommendations of the hearing officer, the commission shall sustain, modify or reverse the action of the constituent agency. The commission shall enter ultimate findings of fact and conclusions of law and keep a record of the review.

R. Prior to the date set for review, if a party shows to the satisfaction of the commission that there was no reasonable opportunity to submit comment or evidence on an issue being challenged, the commission shall order that additional comment or evidence be taken by the constituent agency. Based on the additional evidence, the constituent agency may revise the decision and shall promptly file with the commission the additional evidence received and action taken. The commission shall consider the additional evidence within ninety days after receipt of the additional evidence and shall notify the petitioner and the applicant or permittee, if other than the petitioner, of the date, time and place of the review.

S. The commission shall notify the petitioner and all other participants in the review proceeding of the action taken by the commission and the reasons for that action.

History: 1953 Comp., § 75-39-4.1, enacted by Laws 1973, ch. 326, § 4; 1985, ch. 157, § 1; 1989, ch. 248, § 1; 1993, ch. 100, § 3; 1993, ch. 291, § 5; 1999, ch. 21, § 1; 2005, ch. 195, § 1; 2009, ch. 194, § 2.

ANNOTATIONS

The 2009 amendment, effective June 19, 2009, in Subsection D, added the second, third and fourth sentences.

The 2005 amendment, effective June 17, 2005, added Subsection F(1) through (2) the public notice required for issuance or modification of a permit and for issuance of renewals of permits; provided in Subsection G that the hearing shall be recorded and that any person who submits evidence, data, views or arguments shall be subject to examination at the hearing; provided in Subsection N that notice shall also be given by mail to persons who participated in the permitting action; deletes the former provision to Subsection O that the petition shall be made in writing to the commission within thirty days from the date notice is given to the agency's action, provides that if a petition for review is not timely, the decision of the agency is not subject to judicial review; added Subsection O(1) through (3) to provide requirement relating to the petition; deleted provisions in former Subsection O, which required the commission to hold a hearing and which related to the conduct of the hearing; deleted former Subsection P, which related to the recording of the hearing before the commission; provided in Subsection P that the commission shall consider the petition and that if the petitioner is not a the applicant or permittee, the applicant or permittee shall be a party to the action; added Subsection Q, which provides for a record review by the commission or a hearing officer; added Subsection R which provides the commission may order that the agency take additional comment or evidence for review by the commission; and, added Subsection S to require the commission to give notice of the action taken by the commission and the reasons for that action.

The 1999 amendment, effective June 18, 1999, in Subsection N substituted "review" for "hearing" in two places and substituted "petition" for "request" in the last sentence, substituted "review" for "hearing" in the first sentence of Subsection O, and made minor stylistic changes.

The 1993 amendment, effective March 31, 1993, in Subsection H, deleted the last sentence which read "Effective July 1, 1992, all fees collected pursuant to this section shall be deposited in the general fund".

Permit conditions. — The failure to express a limitation on the conditions which may be imposed indicates the legislature's intent that NMED should retain sufficient discretion to carry out its mission and is not limited by the conditions listed in Section 74-6-5J NMSA 1978. In adopting Section 74-6-5J the legislature wanted to emphasize the importance of monitoring, sampling, and reporting by allowing the commission to impose these conditions through regulation. When interpreted in harmony with Sections 74-6-4D and 74-6-5D NMSA 1978, Section 74-6-5J NMSA 1978 is a grant of authority,

not a limitation. *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n*, 2006-NMCA-115, 140 N.M. 464, 143 P.3d 502, cert. denied, 2006-NMCERT-009, 140 N.M. 542, 144 P.3d 101.

Date of submission. — The date of submission of an application for a discharge permit and discharge plan to the environment department occurs when the constituent agency has received all of the information that it needs to consider the application, including all information that an applicant must include in the discharge plan. The date of submission of an application may be the date that an applicant initially files an application and discharge plan with the environment department or a later date when the applicant files supplemental information that the applicant failed to provide in the initial filing and that the constituent agency determines is necessary to consider the application. *Summers v. N.M. Water Quality Control Comm'n*, 2011-NMCA-097, 150 N.M. 694, 265 P.3d 745.

Mandatory denial of a discharge permit is required if an application for a permit contains a material misrepresentation of fact when the application is submitted. A discharge permit must be denied in cases where a misrepresentation is made in an initial application and no further information is required by the constituent agency and in cases in which the initial application does not contain any misrepresentation, but supplemental information requested by the constituent agency contains a misrepresentation. *Summers v. N.M. Water Quality Control Comm'n*, 2011-NMCA-097, 150 N.M. 694, 265 P.3d 745.

Denial of discharge permits for misrepresentations applies to current and prior applications for permits. — The requirement that the constituent agency deny a discharge permit if the applicant has, within the ten years immediately preceding the date of submission of the permit application, knowingly misrepresented a material fact in the application applies to both current and prior applications for discharge permits. *Summers v. N.M. Water Quality Control Comm'n*, 2011-NMCA-097, 150 N.M. 694, 265 P.3d 745.

Applicant knowingly misrepresented a material fact. — Where the applicant for a septic waste discharge permit initially provided geological information in the application about a well that was 1,100 feet from the discharge site; environment department regulations required applicants to provide geological information about the proposed discharge site if available; the applicant failed to provide in the application geological information about a well that the applicant had drilled that was 100 feet from the discharge site, concealed facts about the date and circumstances surrounding how the applicant had drilled the well; and submitted a fabricated well log for the applicant's well, the applicant knowingly made misrepresentations of material facts. *Summers v. N.M. Water Quality Control Comm'n*, 2011-NMCA-097, 150 N.M. 694, 265 P.3d 745.

Misrepresentation occurred within the ten years preceding submission of permit application. — Where the applicant for a septic waste discharge permit filed an application on August 19, 2004; the application contained geological information about a well that was 1,100 feet from the discharge site; environment department regulations

required applicants of provide geological information about the proposed discharge site if available; the applicant made a misrepresentation of material fact on August 19, 2004 when the applicant failed to include in the application geological information about a well that the applicant had drilled that was 100 feet from the discharge site and impliedly represented that information about the more distant well was the only relevant information available; and the application for the discharge permit was submitted on July 28, 2006 when the applicant provided additional geological information that the ground water bureau had requested to fully evaluate the application, the misrepresentation was made within ten years immediately preceding the date of submission of the permit application and required denial of the discharge permit. *Summers v. N.M. Water Quality Control Comm'n*, 2011-NMCA-097, 150 N.M. 694, 265 P.3d 745.

Regulations distinguished. — There is no reason to disassociate the commission's general regulations relating to motions from those relating to formal and informal appeal petitions and appeal hearing proceedings. *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2005-NMCA-139, 138 N.M. 625, 124 P.3d 1164, cert. denied, 2005-NMCERT-009, 138 N.M. 439, 120 P.3d 1182.

Regulation requirements for a public hearing. — The regulation promulgated to effectuate 74-6-5(G) NMSA 1978, providing for the opportunity for a public hearing, requires that a party first submit a request in writing, setting forth the reasons a hearing should be held, and a determination by the secretary of the New Mexico environment department that there is a substantial public interest in the matters that are the subject of the permit application. *Communities for Clean Water v. N.M. Water Quality Control Comm'n*, 2018-NMCA-024.

Where appellant, an organization whose mission is to ensure that community waters which receive adverse impacts from Los Alamos national labs are kept safe for drinking and other uses, appealed the water quality control commission's (WQCC) final order sustaining the decision of the New Mexico environment department (NMED) to deny appellant's request for a public hearing on a water discharge permit application, the WQCC's decision sustaining NMED's denial of appellant's request for public hearing was arbitrary, capricious and not supported by substantial evidence, because although the plain language of 74-6-5(G) NMSA 1978 indicates that the legislature intended to confer limited discretion on the secretary of NMED to determine whether a public hearing should be held on a permit application under the Water Quality Act, in this case the WQCC lacked substantial evidence to support its decision to sustain NMED's denial of appellant's request for a public hearing when the WQCC failed to include an evaluation of factors relevant to a substantial public interest. *Communities for Clean Water v. N.M. Water Quality Control Comm'n*, 2018-NMCA-024.

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 Res. Corp. v. N.M. Water Quality Control Comm'n*, 1979-NMSC-090, 93 N.M. 546, 603 P.2d 285.

Adoption of the Copper Rule was a permissible exercise of the water quality control commission's authority. — Where petitioners appealed the water quality control commission's (commission) decision to adopt the Copper Rule, a rule which was designed to control and contain discharges of water contaminants specific to copper mine facilities and their operations to prevent water pollution so that ground water meets state standards, claiming that the Copper Rule is inconsistent with and violates the Water Quality Act (WQA), the commission did not abuse its discretion in adopting the Copper Rule, because the adoption of the rule is a permissible exercise of the commission's statutory authority, and the Copper Rule advances the core purposes of 74-6-5(E)(3) NMSA 1978 by protecting groundwater outside the area of open pit hydrologic containment and monitoring wells. *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2018-NMSC-025, *aff'g* 2015-NMCA-076, 355 P.3d 36.

Determining locations of places of withdrawal left to the discretion of the water quality control commission. — Determining the locations of places of withdrawal under Subsection E(3) of this section is left to the discretion of the water quality control commission (commission), and where the commission created a set of concrete regulations via the rule-making process that specifically protect ground water underlying mine facilities so that areas within a mine facility may become places of withdrawal, the commission is in compliance with the Water Quality Act, and the commission's decision not to include, in the regulations, factors or policies to be used for determining places of withdrawal did not violate the Water Quality Act. *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2015-NMCA-076, cert. granted, 2015-NMCERT-007, cert. granted, 2015-NMCERT-007, and cert. granted, 2015-NMCERT-007.

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 Res. Corp. v. N.M. Water Quality Control Comm'n*, 1979-NMSC-090, 93 N.M. 546, 603 P.2d 285.

Commission may delegate authority to administer regulations. — Where the commission gave the environmental improvement division [now department of environment] the authority to administer certain regulations, there was no unlawful delegation of authority. *Kerr-McGee Nuclear Corp. v. N.M. Water Quality Control Comm'n*, 1982-NMCA-015, 98 N.M. 240, 647 P.2d 873.

Discharge of a toxic pollutant in violation of a discharge plan is a criminal act. *Kerr-McGee Nuclear Corp. v. N.M. Water Quality Control Comm'n*, 1982-NMCA-015, 98 N.M. 240, 647 P.2d 873.

Law reviews. — 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).

For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 Nat. Resources J. 693 (1979).

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.

74-6-5.1. Disclosure statements.

A. The commission by regulation may require every applicant for a permit to dispose or use septage or sludge, or within a source category designated by the commission, to file with the appropriate constituent agency a disclosure statement. The disclosure statement shall be submitted on a form developed by the commission and the department of public safety. The commission in cooperation with the department of public safety shall determine the information to be contained in the disclosure statement. The disclosure statement shall be submitted to the constituent agency at the same time that the applicant files an application for a permit pursuant to Section 74-6-5 NMSA 1978. The commission shall adopt regulations designating additional categories of sources subject to the disclosure requirements of this section as it deems appropriate and necessary to carry out the purposes of this section.

B. Upon a request by the constituent agency, the department of public safety shall prepare and transmit to the constituent agency an investigative report on the applicant within ninety days after the department of public safety receives an administratively complete disclosure statement prepared by the applicant for a permit. The investigative report shall be based in part upon the disclosure statement. The ninety-day deadline for preparing the investigative report may be extended by the constituent agency for a reasonable period of time for good cause. The department of public safety in preparing the investigative report may request and receive criminal history information from any other law enforcement agency or organization. The constituent agency may also request information regarding a person who will be or could reasonably be expected to be involved in management activities of the permitted facility or a person who has a controlling interest in a permitted facility. The information received from a law enforcement agency shall be kept confidential by the department of public safety to the extent that confidentiality is imposed by the law enforcement agency as a condition for providing the information to the constituent agency or the commission.

C. All persons required to file a disclosure statement shall provide any assistance or information requested by the constituent agency or the department of public safety and shall cooperate in any inquiry or investigation conducted by the department of public safety. If a person required to file a disclosure statement refuses to comply with a formal request to answer an inquiry or produce information, evidence or testimony, the application of the applicant or the permit of the permittee shall be denied or terminated by the constituent agency.

D. If the information required to be included in the disclosure statement changes or if additional information should be added after the filing of the disclosure statement, the person required to file the disclosure statement shall provide the information to the constituent agency in writing within thirty days after the change or addition. Failure to provide the information within thirty days shall constitute the basis for the termination of a permit or denial of an application for a permit. Prior to terminating a permit or denying an application for a permit, the constituent agency shall notify the permittee or applicant of the constituent agency's intent to terminate a permit or deny an application and the constituent agency shall give the permittee or applicant fourteen days from the date of notice to satisfactorily explain why the information was not provided within the thirty-day period. The constituent agency shall consider the explanation of the permittee or applicant when determining whether to terminate the permit or deny the application for a permit.

E. No person shall be required to submit the disclosure statement required by this section if:

(1) the application is for a facility owned and operated by the state, a political subdivision of the state or an agency of the federal government or for the permitted disposal or use of septage or sludge on the premises where the sludge or septage is generated;

(2) the person has submitted a disclosure statement pursuant to this section within the previous year and no changes have occurred that would require disclosure under Subsection D of this section; or

(3) the person is 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 by Section 5, Chapter 38, Title 1 of the Securities Act of 1933, as amended;

(b) submits to the constituent agency with the application for a permit evidence of the registration described in Subparagraph (a) of this subsection and a copy of the corporation's most recent annual form 10-K or an equivalent report; and

(c) submits to the constituent agency on the anniversary date of the issuance of the permit evidence of registration described in Subparagraph (a) of this subsection and a copy of the corporation's most recent annual form 10-K or an equivalent report.

F. Permit decisions made pursuant to this section shall be subject to the procedures established in Section 74-6-5 NMSA 1978, including notice and appeals.

History: Laws 1993, ch. 291, § 12.

ANNOTATIONS

Cross references. — For Section 5, Chapter 38, Title 1 of the Securities Act of 1933, *see* 15 U.S.C. § 77e.

74-6-5.2. Water quality management fund created.

There is created in the state treasury the "water quality management fund" to be administered by the department of environment. All fees collected pursuant to the regulations adopted by the commission under Subsection H [J] of Section 74-6-5 NMSA 1978 shall be deposited in the fund. Money in the fund is appropriated to the department of environment for the purpose of administering the regulations adopted by the commission pursuant to Section 74-6-5 NMSA 1978. Disbursements from the fund shall be made upon warrants drawn by the secretary of finance and administration pursuant to vouchers signed by the secretary of environment.

History: Laws 1993, ch. 100, § 4.

ANNOTATIONS

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law. Laws 1993, ch. 291, § 5 rewrote 74-6-5 NMSA 1978, moving the provisions relating to fees to Subsection J, effective June 18, 1993.

74-6-6. Adoption of regulations and standards; notice and hearing.

A. No regulation or water quality standard or amendment or repeal thereof shall be adopted until after a public hearing.

B. Any person may petition in writing to have the commission adopt, amend or repeal a regulation or water quality standard. The commission shall determine whether to hold a hearing within ninety days of submission of the petition. The denial of such a petition shall not be subject to judicial review.

C. Hearings on regulations or water quality standards of statewide application shall be held in Santa Fe. Hearings on regulations or standards that are not of statewide application may be held within the area that is substantially affected by the regulation or

standard. At least thirty days prior to the hearing date, notice of the hearing shall be published in the New Mexico register and a newspaper of general circulation in the area affected and mailed to all persons who have made a written request to the commission for advance notice of hearings and who have provided the commission with a mailing address. The notice 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.

D. 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.

E. 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 [Chapter 14, Article 4 NMSA 1978].

History: 1953 Comp., § 75-39-5, enacted by Laws 1967, ch. 190, § 5; 1982, ch. 73, § 26; 1993, ch. 291, § 6.

ANNOTATIONS

Cross references. — For filing with the supreme court law librarian, *see* 14-4-9 NMSA 1978.

The 1993 amendment, effective June 18, 1993, inserted "and standards" in the catchline; inserted the subsection designations; in Subsection A, deleted "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 prior to the effective date of the Water Quality Act if those hearings were held in general conformance with the provisions of this section" from the end; in Subsection B, substituted the language following "Any person may" for "recommend or propose regulations to the commission for promulgation"; in Subsection C, in the first sentence, inserted "or water quality standards" and made a minor stylistic change, added the second sentence, in the third sentence, added "At least thirty days prior to the hearing date" and substituted the language following "hearing shall be" for "given at least thirty days prior to the hearing date and", inserted "The notice" at the beginning of the fourth sentence and deleted the last two sentences, which read "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"; and deleted the former second sentence of Subsection E, which read "The commission shall determine whether or not to hold a hearing within sixty days of submission of a proposed regulation."

This section sets forth notice and hearing requirements, which are the same for standards or regulations. *Univ. of Cal. v. N.M. Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788.

Subsection D of this section requires commission to consider, among other things, the technical practicability and economic reasonableness of a regulation before adopting it. *Univ. of Cal. v. N.M. Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788.

Distinction of standard and regulation. — A standard defines the amount of contaminant in the ambient water and a regulation defines the conduct necessary for an entity that discharges pollutants to comply with the standard. *Univ. of Cal. v. N.M. Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788.

Statement of reasons for adopting regulations need not state why the commission adopted each individual provision of the standards or need not respond to all concerns raised in testimony as such a requirement would be unduly onerous for the commission and unnecessary for the purposes of appellate review. *Univ. of Cal. v. N.M. Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788.

Authority of division to propose regulations and act as interested party at hearings. — In light of the fact that the legislature had seen fit to have the director of the environmental improvement division sit as a member of the commission, the division could propose regulations to the commission and then act as an interested party at the hearings. *Kerr-McGee Nuclear Corp. v. N.M. Water Quality Control Comm'n*, 1982-NMCA-015, 98 N.M. 240, 647 P.2d 873 (decided under prior law).

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. N.M. Water Quality Control Comm'n*, 1987-NMCA-153, 107 N.M. 469, 760 P.2d 161.

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 § 4.

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

74-6-7. Administrative action; judicial review.

A. Except as otherwise provided in the Water Quality Act, a person who is adversely affected by a regulation adopted by the commission or by a compliance order approved by the commission or who participated in a permitting action or appeal of a certification before the commission and who is adversely affected by such action may appeal to the court of appeals for further relief. All such appeals shall be upon the record made before the commission and shall be taken to the court of appeals within thirty days after the regulation, compliance order, permitting action or certification that is being appealed occurred. If an appeal of a regulation is made, then the date of the commission's action shall be the date of the filing of the regulation under the State Rules Act [Chapter 14, Article 4 NMSA 1978].

B. Upon appeal, the court of appeals shall set aside the commission's 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.

C. After a hearing and a showing of good cause by the appellant, a stay of the action being appealed may be granted pending the outcome of the judicial review. The stay of the action may be granted by the commission or by the court of appeals if the commission denies a stay within ninety days after receipt of the application.

History: 1953 Comp., § 75-39-6, enacted by Laws 1967, ch. 190, § 6; 1970, ch. 64, § 4; 1993, ch. 291, § 7.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, substituted "Administrative action" for "Validity of Regulation" in the catchline; rewrote Subsection A; deleted former Subsection B, relating to the procedure for perfecting an appeal; redesignated former Subsection C as present Subsection B; in present Subsection B, substituted "commission's action" for "regulation", deleted "or reasonably related to the prevention or abatement of water pollution" following "the record" in Paragraph (2), and made a minor stylistic change; and added present Subsection C.

Appellant must show injury or a real risk of future injury. — Where petitioner appealed from the water quality control commission’s designation of perennial waters within forest service wilderness areas as outstanding national resource waters; petitioner did not submit any data or examples to show that the cattle industry would suffer a negative economic effect as a result of the designation, because petitioner filed to show that it or its members were adversely affected by the designation and petitioner did not have a right to appeal. *N.M. Cattle Growers’ Assn. v. N.M. Water Quality Control Comm’n*, 2013-NMCA-046, 299 P.3d 436, cert. granted, 2013-NMCERT-003.

Water quality control commission's order determining that copper mine did not pose an undue risk to property was not arbitrary, capricious, or otherwise not in accordance with the law. — In appeals arising from an order of the New Mexico water quality control commission (commission) upholding the New Mexico environment department's grant of New Mexico copper corporation's application for a discharge permit for the copper flat mine (mine) in Sierra county, New Mexico pursuant to the New Mexico Water Quality Control Act (act), §§ 74-6-1 through 74-6-17 NMSA 1978, and its implementing regulations, where appellants argued that the commission erred in determining that the mine did not present an undue risk to property because the commission failed to consider the mine's inevitable depletion of surface water, the commission's final order determining that the mine did not pose an undue risk to property was not arbitrary, capricious, or otherwise not in accordance with the law where the commission relied on findings that the migration of significant water contaminants over very long distances, or in directions contrary to typical groundwater flow, was unlikely and that the pit lake would be located entirely on private land and would not combine with other surface water or ground water, and therefore eliminating any potential that the open pit water body could contaminate any other groundwater or surface water of the state. *Elephant Butte Irrigation Dist. v. N.M. Water Quality Control Comm'n*, 2022-NMCA-045, cert. denied.

Right to participate in appeal of administrative rule-making. — Persons who have participated in a legally significant manner in an administrative rule-making proceeding have the right to participate as parties to an appeal if they express such an intention. *New Energy Econ., Inc. v. Vanzi*, 2012-NMSC-005, 274 P.3d 53.

Where petitioners in an administrative rule-making proceeding supported the adoption of new rules, presented the kind of evidence that directly informed the water quality control commission’s decision on whether to adopt the new rules, submitted expert technical testimony and exhibits, and made legal and closing arguments in support of the new rules; under the statutes and rules governing the rule-making process of the WQCC, petitioners were considered to be "parties" to the proceedings and assumed roles that imposed additional responsibilities and preparation on them that were not imposed on participants; participants in the administrative proceedings appealed the adoption of the new rules; and the court of appeals denied petitioners the right to intervene as parties in the appeal, the court of appeals did not have the discretion to deny intervention for petitioners because the requirements imposed upon the petitioners as parties in the rule-making proceeding, the contributions they made, highlighted by their technical testimony, and the possible challenge to those contributions on appeal, afforded petitioners a right to defend their positions on appeal. *New Energy Econ., Inc. v. Vanzi*, 2012-NMSC-005, 274 P.3d 53.

Written basis for decision not required. — Even though statute does not explicitly state that the commission must provide a written factual and legal basis for its decision, administrative agencies must provide written factual and legal basis for their decisions in order to permit an effectual and meaningful review. *Gila Res. Info. Project v. N.M.*

Water Quality Control Comm'n, 2005-NMCA-139, 138 N.M. 625, 124 P.3d 1164, cert. denied, 2005-NMCERT-009, 138 N.M. 439, 120 P.3d 1182.

Limited appellate review. — Where all the commission provided was an unexplained conclusion of prejudice with no evidentiary support in the record and a conclusion of lack of prejudice based on an unexplained determination, the appellate court is hardly able to effectively and meaningfully review whether the commission's ultimate decision to dismiss was erroneous under the Subsection B of this section standard of review. *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2005-NMCA-139, 138 N.M. 625, 124 P.3d 1164, cert. denied, 2005-NMCERT-009, 138 N.M. 439, 120 P.3d 1182.

Standard is rule, if the proper procedure has been followed in promulgating it. *Bokum Res. Corp. v. N.M. Water Quality Control Comm'n*, 1979-NMSC-090, 93 N.M. 546, 603 P.2d 285.

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 Res. Corp. v. N.M. Water Quality Control Comm'n*, 1979-NMSC-090, 93 N.M. 546, 603 P.2d 285.

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. N.M. Water Quality Control Comm'n*, 1982-NMCA-015, 98 N.M. 240, 647 P.2d 873.

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. N.M. Water Quality Control Comm'n*, 1986-NMCA-033, 105 N.M. 708, 736 P.2d 986 (decided under prior law).

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. N.M. Water Quality Control Comm'n*, 1987-NMCA-153, 107 N.M. 469, 760 P.2d 161.

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. N.M. Water Quality Control Comm'n*, 1987-NMCA-153, 107 N.M. 469, 760 P.2d 161.

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 §§ 117, 678 et seq., 749, 878, 881, 1249, 1578 to 1581, 1719, 1721.

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.

Each constituent agency shall administer regulations adopted pursuant to the Water Quality Act, 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

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*, 1982-NMCA-015, 98 N.M. 240, 647 P.2d 873.

Law reviews. — For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

74-6-9. Powers of constituent agencies.

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;

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 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 a water contaminant source is located or in which are located any records required to be maintained by regulations of the federal government or 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 and reproduce for their use any copy of the records;

(2) inspect any treatment works, monitoring equipment or methods required to be installed by regulations of the federal government or the commission; and

(3) sample any effluents, water contaminant or receiving waters;

F. on the same basis as any other person, recommend and propose regulations and standards 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, public health 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; 1993, ch. 291, § 8.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, made a minor stylistic change in Subsection B; in Subsection E, in the introductory paragraph, substituted "a water

contaminant" for "an effluent" and inserted "federal government or the", inserted "and reproduce for their use" in Paragraph (1), in Paragraph (2), inserted "treatment works" and "federal government or the", inserted "water contaminant or receiving waters" in Paragraph (3); inserted "and standards" in Subsection F; and inserted "public health" in Subsection G.

Authority of division to propose regulations and act as interested party at hearings. — In light of the fact that the legislature had seen fit to have the director of the environmental improvement division sit as a member of the commission, the division could propose regulations to the commission and then act as an interested party at the hearings. *Kerr-McGee Nuclear Corp. v. N.M. Water Quality Control Comm'n*, 1982-NMCA-015, 98 N.M. 240, 647 P.2d 873 (decided under prior law).

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. Penalties enforcement; compliance orders; penalties; assurance of discontinuance.

A. Whenever, on the basis of any information, a constituent agency determines that a person violated or is violating a requirement, regulation or water quality standard adopted pursuant to the Water Quality Act or a condition of a permit issued pursuant to that act, the constituent agency may:

(1) issue a compliance order requiring compliance immediately or within a specified time period or issue a compliance order assessing a civil penalty, or both; or

(2) commence a civil action in district court for appropriate relief, including injunctive relief.

B. A compliance order issued pursuant to Paragraph (1) of Subsection A of this section may include a suspension or termination of the permit allegedly violated.

C. A compliance order shall state with reasonable specificity the nature of the violation. Any penalty assessed in the compliance order shall not exceed:

(1) fifteen thousand dollars ($15,000) per day of noncompliance with the provisions in Section 74-6-5 NMSA 1978, including a regulation adopted or a permit issued pursuant to that section; or

(2) ten thousand dollars ($10,000) per day for each violation of a provision of the Water Quality Act other than the provisions in Section 74-6-5 NMSA 1978 or of a regulation or water quality standard adopted pursuant to the Water Quality Act.

D. In assessing a penalty authorized by this section, the constituent agency shall take into account the seriousness of the violation, any good faith efforts to comply with the applicable requirements and other relevant factors.

E. For purposes of this section, a single operational event that leads to simultaneous violations of more than one standard shall be treated as a single violation.

F. If a person fails to take corrective actions within the time specified in a compliance order, the constituent agency may:

(1) assess a civil penalty of not more than twenty-five thousand dollars ($25,000) for each day of continued noncompliance with the compliance order; and

(2) suspend or terminate the permit violated by the person.

G. Any compliance order issued by a constituent agency pursuant to this section shall become final unless, no later than thirty days after the compliance order is served, any person named in the compliance order submits a written request to the commission for a public hearing. The commission shall conduct a public hearing within ninety days after receipt of a request.

H. The commission may appoint an independent hearing officer to preside over any public hearing held pursuant to Subsection F of this section. The hearing officer shall:

(1) make and preserve a complete record of the proceedings; and

(2) forward to the commission a report that includes recommendations, if recommendations are requested by the commission.

I. The commission shall consider the findings of the independent hearing officer and, based on the evidence presented at the hearing, the commission shall make a final decision regarding the compliance order.

J. In connection with any proceeding under this section, the commission may:

(1) adopt rules for discovery procedures; and

(2) issue subpoenas for the attendance and testimony of witnesses and for relevant papers, books and documents.

K. Penalties collected pursuant to this section shall be deposited in the general fund.

L. As an additional means of enforcing the Water Quality Act or any regulation or standard 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 or standard adopted pursuant to that act, 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 the discontinuance is to be accomplished.

History: 1953 Comp., § 75-39-9, enacted by Laws 1967, ch. 190, § 9; 1970, ch. 64, § 5; 1993, ch. 291, § 9.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, rewrote this section to the extent that a detailed comparison would be impracticable.

Voluntary compliance no bar to assessment of civil penalties and cleanup costs. — The former voluntary compliance provision of Subsection A did not apply to the remedies provided for violations of this article. The absence of voluntary compliance actions on the part of the state in a case did not prevent the state from seeking civil penalties and costs of cleanup. *State ex rel. N.M. Water Quality Control Comm'n v. Molybdenum Corp. of Am.*, 1976-NMCA-087, 89 N.M. 552, 555 P.2d 375, cert. denied, 90 N.M. 8, 558 P.2d 620 (decided under prior 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 § 2046 et seq.

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.

74-6-10.1. Civil penalties.

A. Any person who does not comply with the provisions of Section 74-6-5 NMSA 1978, including any regulation adopted pursuant to that section, or any permit issued pursuant to that section, shall be assessed civil penalties up to the amount of fifteen thousand dollars ($15,000) per day of noncompliance for each violation.

B. Any person who violates any provision of the Water Quality Act other than Section 74-6-5 NMSA 1978 or any person who violates any regulation, water quality standard or compliance order adopted pursuant to that act shall be assessed civil penalties up to the amount of ten thousand dollars ($10,000) per day for each violation.

History: Laws 1993, ch. 291, § 14.

74-6-10.2. Criminal penalties.

A. No person shall:

(1) discharge any water contaminant without a permit for the discharge, if a permit is required, or in violation of any condition of a permit for the discharge from the federal environmental protection agency, the commission or a constituent agency designated by the commission;

(2) make any false material statement, representation, certification or omission of material fact in an application, record, report, plan or other document filed, submitted or required to be maintained under the Water Quality Act;

(3) falsify, tamper with or render inaccurate any monitoring device, method or record required to be maintained under the Water Quality Act;

(4) fail to monitor, sample or report as required by a permit issued pursuant to a state or federal law or regulation; or

(5) introduce into a sewerage system or into a publicly owned treatment works any water contaminant or hazardous substance, other than in compliance with all applicable federal, state or local requirements or permits, that the person knew or reasonably should have known could cause personal injury or property damage, which causes the treatment works to violate an effluent limitation or condition in a permit issued to the treatment works pursuant to the Water Quality Act or applicable federal water quality statutes.

B. Any person who knowingly violates or knowingly causes or allows another person to violate Subsection A of this section is guilty of a fourth degree felony and shall be sentenced in accordance with the provisions of Section 31-18-15 NMSA 1978.

C. Any person who is convicted of a second or subsequent violation of Subsection A of this section is guilty of a third degree felony and shall be sentenced in accordance with the provisions of Section 31-18-15 NMSA 1978.

D. Any person who knowingly violates Subsection A of this section or knowingly causes another person to violate Subsection A of this section and thereby causes a substantial adverse environmental impact is guilty of a third degree felony and shall be sentenced in accordance with the provisions of Section 31-18-15 NMSA 1978.

E. Any person who knowingly violates Subsection A of this section and knows at the time of the violation that he is creating a substantial danger of death or serious bodily injury to any other person is guilty of a second degree felony and shall be sentenced in accordance with the provisions of Section 31-18-15 NMSA 1978.

F. A single operational event that leads to simultaneous violations of more than one water contaminant parameter shall be treated as a single violation.

History: Laws 1993, ch. 291, § 15.

ANNOTATIONS

Jury instruction. — Following reversal of a conviction under this section for knowingly violating a permit that had expired, an appellate court may not remand for entry of judgment of conviction and re-sentencing for the lesser-included offence of the attempt to violate the Water Quality Act where the jury had not been instructed on the lesser offense at trial and defendant had not offered a defense at trial to the lesser-included offence. *State v. Villa*, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017, *rev'g* 2003-NMCA-142, 134 N.M. 679, 82 P.3d 46.

Permit violation. — Where defendant was charged with violating conditions of a permit which had "technically" expired as a matter of law before the alleged violations had occurred but which all parties believed to be in effect when the alleged violation had occurred, defendant was not guilty of violating a permit under this section. *State v. Villa*, 2003-NMCA-142, 134 N.M. 679, 82 P.3d 46, *aff'd*, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017.

Constitutionality. — Provision in Section 74-6-10.2B NMSA 1978 which prohibits a person from knowingly allowing another person to violate this section was not unconstitutionally vague as applied where the defendant, who was hired as an environmental expert, knew the conditions of the disposal permit, and knew that waste dumped at the permitted site was not included in the permit, did not take any action to comply with the permit or to remedy the violations of which he had knowledge. *State v. Villa*, 2003-NMCA-142, 134 N.M. 679, 82 P.3d 46, *rev'd on other grounds*, 2004-NMSC-031, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017.

Resentencing on attempt counts after convictions for violations of statute were overturned for insufficient evidence deprived defendant of notice and opportunity to defend, was inconsistent with New Mexico law regarding jury instructions and preservation of error, because attempt offenses were not charged and jury was not instructed on them. *State v. Villa*, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017.

Conviction of offense not presented to jury. — Where a jury acquitted a defendant of 44 out of 52 charges of violating the Water Quality Act, and defendant appealed his convictions of the remaining eight felony counts, and the appellate court found insufficient evidence to sustain the eight convictions but remanded to the district court to enter judgment and resentencing for eight counts of attempt to commit the offenses of which the defendant was convicted, even though he was not charged with attempt and the jury was not instructed regarding the crime of attempt, a conviction of an offense not presented to the jury would deprive the defendant of notice and an opportunity to defend against that charge and would be inconsistent with New Mexico law regarding jury instructions and preservation of error. *State v. Villa*, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017.

74-6-11. Emergency; powers of delegated constituent agencies; penalties.

A. If a constituent agency determines upon receipt of evidence that a pollution source or combination of sources over which it has been delegated authority by the commission poses an imminent and substantial danger to public health, it may bring suit in the district court for the county in which such a source is located to:

(1) restrain immediately any person causing or contributing to the alleged condition from further causing or contributing to the condition; or

(2) take such other action as deemed necessary and appropriate.

B. If it is not practicable to assure prompt protection of public health solely by commencement of a civil action as set forth in Subsection A of this section, the constituent agency may issue such orders as it deems necessary to protect public health. Any order issued by the constituent agency shall be effective for not more than seventy-two hours unless the constituent agency brings an action in district court within the seventy-two hour period. If the constituent agency brings an action within seventy-two hours of issuance of the order, the order shall be effective for one hundred sixty-eight hours or for a longer period of time authorized by the court.

C. Any person who willfully violates or fails or refuses to comply with an order issued by a constituent agency under Subsection B of this section shall, upon conviction, be punished by a fine of not more than five thousand dollars ($5,000) for each day during which the violation, failure or refusal occurs.

History: 1953 Comp., § 75-39-10, enacted by Laws 1967, ch. 190, § 10; 1970, ch. 64, § 6; 1971, ch. 277, § 52; 1993, ch. 291, § 10.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, rewrote the catchline, which read "Emergency Procedure"; deleted the former language of the section relating to the procedure followed by the director of the environmental improvement agency to abate water pollution, and added new Subsections A through C.

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 §§ 2012, 2050.

39A C.J.S. Health and Environment § 144.

74-6-12. Limitations.

A. The Water Quality Act does not grant to the commission or to any other entity the power to take away or modify the property rights in water, nor is it the intention of the Water Quality Act to take away or modify such rights.

B. The Water Quality Act does not apply to any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act [Chapter 74, Article 4 NMSA 1978], the Ground Water Protection Act [Chapter 74, Article 6B NMSA 1978] or the Solid Waste Act [74-9-1 to 74-9-43 NMSA 1978] except to abate water pollution or to control the disposal or use of septage and sludge.

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. Except as required by federal law, in the adoption of regulations and water quality standards and in an action for enforcement of the Water Quality Act and regulations adopted pursuant to that act, reasonable degradation of water quality resulting from beneficial use shall be allowed. Such degradation shall not result in impairment of water quality to the extent that water quality standards are exceeded.

G. The Water Quality Act does not apply to any activity or condition subject to the authority of the oil conservation commission pursuant to provisions of the Oil and Gas Act [Chapter 70, Article 2 NMSA 1978], Section 70-2-12 NMSA 1978 and other laws conferring power on the oil conservation commission to prevent or abate water pollution.

H. When changes in dissolved oxygen, temperature, dissolved solids, sediment or turbidity in a water of the state is attributable to natural causes or to the reasonable operation of irrigation and flood control facilities that are not subject to federal or state water pollution control permitting, numerical standards for temperature, dissolved solids content, dissolved oxygen, sediment or turbidity adopted under the Water Quality Act do not apply. "Reasonable operation", as used in this subsection, shall be defined by regulation of the commission.

History: 1953 Comp., § 75-39-11, enacted by Laws 1967, ch. 190, § 11; 1973, ch. 326, § 6; 1993, ch. 291, § 11; 1995, ch. 133, § 1; 1999, ch. 152, § 1.

ANNOTATIONS

Cross references. — For the Solid Waste Act, *see* 74-9-1 NMSA 1978 and notes thereto.

The 1999 amendment, effective June 18, 1999, rewrote Subsection H which read: "When dissolved oxygen, sediment or turbidity in a water of the state is attributable to natural causes or to the reasonable operation of irrigation and flood control facilities, numerical standards for dissolved oxygen, sediment or turbidity adopted under the Water Quality Act do not apply. 'Reasonable operation', as used in this subsection, shall be defined by regulation of the commission".

The 1995 amendment, effective June 16, 1995, substituted "pursuant to provisions of" for "under" in Subsection G, and added Subsection H.

The 1993 amendment, effective June 18, 1993, deleted former Subsection B relating to the availability of data obtained by the commission to the public and inserted present Subsection B; in Subsection F, inserted "Except as required by federal law", substituted "pursuant to that act" for "thereunder", and added the last sentence; and rewrote Subsection G.

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.

The Water Quality Act 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

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.*, 1976-NMCA-004, 89 N.M. 105, 547 P.2d 1147, *modified*, 1976-NMSC-024, 89 N.M. 262, 550 P.2d 274.

Law reviews. — For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

74-6-14. Recompiled.

ANNOTATIONS

Recompilations. — Former Section 74-6-14 NMSA 1978, as amended by Laws 1993, ch. 291, § 17, relating to the termination of agency life, was recompiled as 74-6-17 NMSA 1978 in 1993.

74-6-15. Confidential information; penalties.

A. Records, reports or information obtained by the commission or a constituent agency pursuant to the Water Quality Act shall be generally available to the public. All ambient water quality data and all effluent data obtained by the commission or a constituent agency shall be available to the public. Records, reports or information or

particular parts of the records, reports or information shall be held confidential, if a person can demonstrate to the commission or constituent agency that the records, reports or information or particular parts of the records, reports or information, if made public, would divulge confidential business records or methods or processes entitled to protection as trade secrets. Except that the record, report or information may be disclosed:

(1) to officers, employees or authorized representatives of the commission or a constituent agency concerned with carrying out the purposes and provisions of the Water Quality Act;

(2) to officers, employees or authorized representatives of the United States government; or

(3) when relevant in any proceeding pursuant to the Water Quality Act or the federal act.

B. The commission shall promulgate regulations to implement the provisions of this section, including regulations specifying business records entitled to protection as confidential.

C. An officer, employee or authorized representative of the commission or a constituent agency who knowingly or willfully publishes, divulges, discloses or makes known any information that is required to be considered confidential pursuant to this section shall be fined not more than one thousand dollars ($1,000) or imprisonment of not more than one year, or both.

History: Laws 1993, ch. 291, § 13.

74-6-16. Effect and enforcement of Water Quality Act during transition.

A. All rules, regulations, water quality standards and administrative determinations of the commission and any constituent agency pertaining to the Water Quality Act that existed prior to the effective date of this 1993 act shall remain in full force and effect after that date until repealed or amended, unless in conflict with, prohibited by or inconsistent with the provisions of the Water Quality Act.

B. All enforcement actions taken before the effective date of this 1993 act shall be valid if based upon a violation of the Water Quality Act, including any regulation or water quality standard that was in effect at the time of the violation.

History: Laws 1993, ch. 291, § 16.

ANNOTATIONS

Compiler's notes. — The "effective date of this 1993 act", referred to in Subsection A, means June 18, 1993, the effective date of Laws 1993, ch. 29, which enacted this section.

74-6-17. Termination of agency life; delayed repeal.

The water quality control commission is terminated on July 1, 2025 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, 2026. Effective July 1, 2026, Sections 74-6-3 through 74-6-4 NMSA 1978 are repealed.

History: 1978 Comp., § 74-6-13.1, enacted by Laws 1987, ch. 333, § 15; 1993, ch. 291, § 17; 1999, ch. 21, § 2; 2005, ch. 208, § 26; 2013, ch. 166, § 8; 2019, ch. 168, § 5.

ANNOTATIONS

The 2019 amendment, effective July 1, 2019, changed "July 1, 2019", to "July 1, 2025", and changed "July 1, 2020", to "July 1, 2026".

The 2013 amendment, effective June 14, 2013, changed the agency termination date from 2013 to 2019, the termination of the operations date from 2014 to 2020, and the repeal dated from 2014 to 2020; and in the last sentence, after "74-6-3", deleted "and" and added "through".

The 2005 amendment, effective June 17, 2005, changed the termination, operation and repeal dates.

The 1999 amendment, effective June 18, 1999, substituted "July 1, 2005" for "July 1, 1999" and "July 1, 2006" for "July 1, 2000" in two places and deleted "(being Laws 1967, Chapter 190, Sections 3 and 4, as amended)" following "74-6-4".

The 1993 amendment, effective June 18, 1993, substituted "1999" for "1993" in the first sentence, substituted "2000" for "1994" at the end of the second sentence, and rewrote the third sentence which read "Effective July 1, 1994, Article 6, Chapter 74 is repealed."

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 § 718.

39A C.J.S. Health & Environment § 106 et seq.

74-6A-2. Purpose.

The purpose of the Wastewater Facility Construction Loan Act is to provide state agencies, local authorities, interstate agencies and other qualified borrowers in New Mexico with low-cost financial assistance in the construction of necessary wastewater facilities and other eligible projects 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; 2017, ch. 114, § 1; 2018, ch. 19, § 1.

ANNOTATIONS

The 2018 amendment, effective May 16, 2018, expanded the list of entities that are eligible for funding assistance in the construction of necessary wastewater facilities and other eligible projects; and after "provide state agencies", deleted "and", after "local authorities", added "interstate agencies and other qualified borrowers", and after "necessary wastewater facilities", added "and other eligible projects".

The 2017 amendment, effective July 1, 2017, made state agencies eligible for funding for wastewater projects pursuant to the Wastewater Facility Construction Loan Act; and after "to provide", added "state agencies and".

74-6A-3. Definitions.

As used in the Wastewater Facility Construction Loan Act:

A. "account" means the wastewater suspense account;

B. "administrative fee" means a fee assessed and collected by the department from a qualified borrower on each loan and expressed as a percentage per year on the outstanding principal amount of the loan, payable by the borrower on the same date that principal and interest on the loan are due, for deposit in the clean water administrative fund;

C. "board" means the state board of finance;

D. "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;

E. "Clean Water Act" means the federal Clean Water Act of 1977 and its subsequent amendments or successor provisions;

F. "commission" means the water quality control commission;

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

H. "eligible project" means a project or activity that is eligible for funding assistance under Section 603(c) of the Clean Water Act, Section 1383 of Title 33 of the United States Code, as of January 1, 2018 including a wastewater facility project, a nonpoint source water pollution control project and a watershed project that meet the criteria of the Clean Water Act;

I. "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;

J. "financial assistance" means loans, the purchase or refinancing of existing state agency or 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;

K. "force account construction" means construction performed by the employees of a local authority rather than through a contractor;

L. "fund" means the wastewater facility construction loan fund;

M. "holders" means persons who are owners of bonds, whether registered or not, issued pursuant to the Wastewater Facility Construction Loan Act;

N. "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;

O. "local authority" means a municipality, intermunicipal agency, county, incorporated county, mutual domestic water consumers association as defined by the Sanitary Projects Act [Chapter 3, Article 29 NMSA 1978], 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;

P. "operate and maintain" means to perform all necessary activities, including replacement of equipment or appurtenances, to ensure the dependable and economical function of an eligible project in accordance with its intended purpose;

Q. "qualified borrower" means a creditworthy borrower with an identified and verifiable repayment source that is eligible to receive funding pursuant to the Clean Water Act, as of January 1, 2018 including a state agency, an interstate agency and a local authority;

R. "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;

S. "state agency" means an agency or department of the executive branch of government; and

T. "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.

History: Laws 1986, ch. 72, § 3; 1989, ch. 323, § 2; 1991, ch. 172, § 3; 2007, ch. 344, § 2; 2015, ch. 112, § 1; 2017, ch. 114, § 2; 2018, ch. 19, § 2.

ANNOTATIONS

Cross references. — For the water quality control commission, *see* 74-6-3 NMSA 1978.

For the federal Clean Water Act of 1977, *see* 33 U.S.C. § 1251 et seq.

The 2018 amendment, effective May 16, 2018, arranged definitions in alphabetical order, defined "eligible project" and "qualified borrower" as used in the Wastewater Facility Construction Loan Act, and made conforming changes; added a new Subsection A and redesignated former Subsection A as Subsection B; in Subsection B, after "department from a", deleted "state agency or local authority" and added "qualified borrower"; added new Subsections C through E and redesignated former Subsections B and C as Subsections F and G, respectively; added new Subsections H and I and redesignated former Subsection D as Subsection J; added a new Subsection K and

redesignated former Subsection E as Subsection L; added new Subsections M and N and redesignated former Subsections F and G as Subsections O and P, respectively; in Subsection O, after "means", deleted "any" and added "a", and after "municipality", added "intermunicipal agency"; in Subsection P, after "economical function of", deleted "a wastewater facility" and added "an eligible project"; added new Subsections Q through S and redesignated former Subsection H as Subsection T; in Subsection T, deleted "'Wastewater facility' also includes a nonpoint source water pollution control project as eligible under the Clean Water Act"; and deleted former Subsections I through R.

The 2017 amendment, effective July 1, 2017, defined "state agency" and included "state agencies" in definitions of terms used in the Wastewater Facility Construction Loan Act; in Subsection A, after "department from a", added "state agency or"; in Subsection D, after "existing", added "state agency"; and added Subsection R.

The 2015 amendment, effective June 19, 2015, amended the Wastewater Facility Construction Loan Act to include "mutual domestic water consumers association" in the definition of "local authority"; in Subsection F, after "incorporated county", added "mutual domestic water consumers association as defined by the Sanitary Projects Act".

The 2007 amendment, effective July 1, 2007, added Subsection A.

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.

74-6A-4. Wastewater facility construction loan 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 [11-6-1 NMSA 1978].

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 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 funding for eligible projects;

(2) to purchase, refund or refinance obligations incurred by local authorities in the state for eligible projects 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 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 an administrative fee from each qualified borrower that receives financial

assistance from the fund, which fee shall not exceed five percent of the total loan amount and which shall be deposited in the clean water administrative 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 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 ensure 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; 2007, ch. 344, § 3; 2018, ch. 19, § 3.

ANNOTATIONS

Repeals and reenactments. — Laws 1991, ch. 172, § 4 repealed 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 enacted a new section, effective April 4, 1991.

Cross references. — For the general fund, *see* 6-4-2 NMSA 1978.

For public project revolving fund, *see* 6-21-6, 6-21-6.1 NMSA 1978.

For distribution to public project revolving fund from governmental gross receipts tax, *see* 7-1-6.38 NMSA 1978.

For the federal Clean Water Act of 1977, *see* 33 U.S.C. § 1251 et seq.

For the New Mexico Community Assistance Act, *see* 11-6-1 NMSA 1978 et seq.

The 2018 amendment, effective May 16, 2018, clarified that funding assistance is available for eligible projects as provided by the federal Clean Water Act; in the catchline, added "Wastewater facility construction loan"; in Subsection C, Paragraph C(1), after "to provide", deleted "loans" and added "funding", and after "for", deleted "the construction or rehabilitation of wastewater facilities" and added "eligible projects", and

in Paragraph C(2), after "in the state for", deleted "wastewater facilities" and added "eligible projects"; and in Subsection D, after "fee from each", deleted "local authority" and added "qualified borrower".

The 2007 amendment, effective July 1, 2007, in Subsection D, provided that the administrative fee shall not exceed five percent of the total loan amount to each local authority and required that the fee be deposited in the clean water administrative fund.

74-6A-4.1. Clean water administrative fund; created; use.

A. The "clean water administrative fund" is created in the state treasury and shall be administered by the department as agent for the commission. The clean water administrative fund shall be a dedicated fund, and all money in the clean water administrative fund is appropriated to the department to be used solely to administer the wastewater facility construction loan fund, which may include water quality planning and water quality analysis and protection studies if authorized by the department and, if necessary, the United States environmental protection agency. The commission may establish procedures, adopt regulations and set fees as required to administer the clean water administrative fund in accordance with the Clean Water Act and state law. The clean water administrative fund shall consist of money deposited from:

(1) loan administration fees collected by the department after the effective date of this section on loans made from the wastewater facility construction loan fund;

(2) interest earned on investment of the clean water administrative fund;

(3) grants from the federal government allotted to the state for the clean water administrative fund;

(4) funds as appropriated by the legislature for administration to implement the provisions of the Clean Water Act; and

(5) any other public or private money dedicated to the clean water administrative fund.

B. Money in the clean water administrative fund 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 clean water administrative fund. Money remaining in the clean water administrative fund at the end of any fiscal year shall not revert to the general fund but shall accrue to the credit of the clean water administrative fund.

C. The department shall establish fiscal controls and accounting procedures that are sufficient to ensure proper accounting for clean water administrative fund payments, disbursements and balances and shall provide an annual report and an annual

independent audit on the clean water administrative fund to the governor and to the United States environmental protection agency as required by the Clean Water Act.

History: Laws 2007, ch. 344, § 1.

ANNOTATIONS

Cross references. — For the federal Clean Water Act, *see* 33 U.S.C. § 125.

Effective dates. — Laws 2007, ch. 344, § 4 made this section effective July 1, 2007.

74-6A-5, 74-6A-6. Repealed.

ANNOTATIONS

Repeals. — Laws 1991, ch. 172, § 14 repealed 74-6A-5 and 74-6A-6 NMSA 1978, as enacted by Laws 1986, ch. 72, §§ 5 and 6, relating to loan program, duties of division and commission and financial assistance criteria, effective April 4, 1991. For provisions of former sections, *see* the 1990 NMSA 1978 on *NMOneSource.com*.

74-6A-7. Loan program; administration.

A. The division shall establish a program to provide financial assistance to qualified borrowers, individually or jointly, for eligible projects. 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 Construction Loan Act, including contracts and agreements with federal agencies, local authorities and other parties.

B. The commission shall adopt a system for the ranking of eligible projects for financial assistance.

History: Laws 1991, ch. 172, § 5; 2018, ch. 19, § 4.

ANNOTATIONS

The 2018 amendment, effective May 16, 2018, clarified that funding assistance is available to qualified borrowers for eligible projects as provided by the federal Clean Water Act; in Subsection A, after "provide financial assistance to", deleted "local authorities" and added "qualified borrowers", after "jointly, for", deleted "acquisition, construction or modification of wastewater facilities" and added "eligible projects", after "Wastewater Facility", deleted "Loan", and after "Construction", added "Loan"; and in Subsection B, after "ranking of", deleted "wastewater facility construction" and added "eligible".

74-6A-8. Financial assistance; criteria.

A. Financial assistance shall be provided only to qualified borrowers that:

(1) meet the requirements for financial capability set by the division to assure sufficient revenues to operate and maintain the eligible project for its useful life, if applicable, and to repay the financial assistance;

(2) agree to operate and maintain the eligible project facility so that the project facility will function properly over its structural and material design life, if applicable;

(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 or other authorized representative, that the qualified borrower has or will acquire proper title, easements and rights of way to the property upon or through which the eligible project facility proposed for funding is to be constructed or extended;

(5) require the contractor of the eligible 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 of the eligible project;

(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 qualified borrowers 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. Notwithstanding any existing statute to the contrary, a qualified borrower 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 eligible project and pay over the debt service to the account of the eligible 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 state or local authority obligations; provided, however, that, notwithstanding the provisions of Section 4-54-3 or 6-15-5 NMSA 1978 or other statute or law requiring the public sale of

local authority obligations, the 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 eligible project; or

(d) other revenue available to the qualified borrower;

(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 qualified borrower 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; or

(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 qualified borrower to aid it with an eligible 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 the eligible project for which the loan was made and shall be repaid in full no later than thirty years after completion of the eligible project. 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 greater than one and eighty-two hundredths percent of the local authority's per capita income; and

(2) the local authority's per capita income is less than three-fourths of the statewide per capita income.

F. A local authority may use the proceeds from financial assistance received under the Wastewater Facility Construction Loan Act to provide a local match or any other nonfederal share of an eligible 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 qualified borrower on any eligible 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 [Chapter 47, Article 6 NMSA 1978].

H. Financial assistance shall be made only to qualified borrowers that employ or contract with a New Mexico licensed professional engineer to provide and be responsible for engineering services on the eligible project. Such services include 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 the costs of engineering 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 qualified borrower, 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; 2015, ch. 112, § 2; 2017, ch. 114, § 3; 2018, ch. 19, § 5.

ANNOTATIONS

Cross references. — For the federal Clean Water Act of 1977, *see* 33 U.S.C. § 1251 et seq.

For the New Mexico Subdivision Act, *see* 47-6-1 NMSA 1978 and notes thereto.

The 2018 amendment, effective May 16, 2018, clarified that funding assistance is available to qualified borrowers for eligible projects as provided by the federal Clean Water Act; replaced "state agency or local authority" with "qualified borrower" throughout the section; replaced "wastewater facility" with "eligible project" throughout the section; in Subsection A, Paragraph A(1), after "useful life,", added "if applicable", in Paragraph A(2), after "design life", added "if applicable", in Paragraph A(4), after "attorney", added "or other authorized representative", and in Paragraph A(6), after "notice of completion", deleted "and start of operation of the wastewater facility" and

added "of the eligible project"; in Subsection B, in the introductory paragraph, after "replacement expenses", deleted "A state agency or local authority" and added "Notwithstanding", and after "to the contrary,", deleted "notwithstanding" and added "a qualified borrower", in Paragraph B(1), after "eligible project", deleted "of the state agency or local authority", in Paragraph B(5), after "to aid it", deleted "in the construction or acquisition of a wastewater facility project" and added "with an eligible project"; in Subsection C, after "completion of", deleted "construction of the wastewater facility" and added "eligible", and after "completion of the", deleted "construction" and added "eligible project"; in Subsection E, Paragraph E(1), after "average user cost is", deleted "at least fifteen dollars ($15.00) per month or a higher amount as determined by the commission" and added "greater than one and eighty-two hundredths percent of the local authority's per capita income", and in Paragraph E(2), after "local authority's", deleted "median household" and added "per capita", and after "statewide", deleted "nonmetropolitan median household" and added "per capita"; in Subsection F, after "nonfederal share of", deleted "a wastewater facility construction" and added "an eligible"; in Subsection H, after "employ or contract with a", added "New Mexico licensed"; and in Subsection I, after "costs of engineering", deleted "feasibility".

The 2017 amendment, effective July 1, 2017, made state agencies eligible for financial assistance for the construction of certain wastewater facilities, and provided methods by which those state agencies can repay the money received from the water quality control commission for the construction of wastewater facilities; and added "state or", "state agency or", "state agency" and "state agencies and" throughout the section.

The 2015 amendment, effective June 19, 2015, amended the Wastewater Facility Construction Loan Act by extending the maximum loan repayment period from twenty years to thirty years after completion of the construction project; in Paragraph (2) of Subsection B, after "provisions of", deleted "Sections" and added "Section"; in Subparagraph B(3)(c), after "project", deleted "and" and added "or"; in Paragraph (4) of Subsection B, after the second occurrence of "subsection", deleted "and" and added "or"; and in Subsection C, after "no later than", deleted "twenty" and added "thirty".

74-6A-9. Commission; powers.

A. In administering the Wastewater Facility Construction Loan Act, the commission shall have the following powers, which may be implemented by the division, in addition to those specified in the Water Quality Act [Chapter 74, Article 6 NMSA 1978]:

(1) to provide financial assistance to qualified borrowers to finance all or part of an eligible project, including all forms of assistance for which the fund may be used pursuant to the Wastewater Facility Construction Loan Act;

(2) to adopt 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 an eligible project 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 eligible project facility, property or interest in the project 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 qualified borrower;

(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 qualified borrowers and to apply for and accept grants, including 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 qualified borrowers, 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; 2017, ch. 114, § 4; 2018, ch. 19, § 6.

ANNOTATIONS

Cross references. — For the federal Clean Water Act of 1977, *see* 33 U.S.C. § 1251 et seq.

The 2018 amendment, effective May 16, 2018, authorized the water quality control commission to provide financial assistance to qualified borrowers for eligible projects as provided by the federal Clean Water Act; and replaced "state agencies or local authorities" with "qualified borrowers" throughout the section, and replaced "wastewater facility" with "eligible project" throughout the section.

The 2017 amendment, effective July 1, 2017, authorized the water quality control commission to provide financial assistance to state agencies to finance all or part of a wastewater facility, to collect certain fees from state agencies that have received financial assistance for wastewater projects pursuant to the Wastewater Facility Construction Loan Act, and, in the event of a default by a state agency, to foreclose upon, attach or condemn any wastewater facility or security for a project financed in whole or in part pursuant to the Wastewater Facility Construction Loan Act; in Subsection A, Paragraph A(1), after "assistance to", added "state agencies or", in Paragraph A(2), after "to adopt", deleted "recommending", in Paragraph A(4), after "default by a", added "state agency or", and in Paragraph A(9), after "administrative fees from the", added "state agency or".

74-6A-10. Board; duties and powers.

A. The board may issue bonds or refunding bonds pursuant to the Wastewater Facility Construction Loan Act 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.

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 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

Cross references. — For the federal Clean Water Act of 1977, *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 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 qualified borrower, payable to the commission;

(2) the security for the qualified borrower 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, attorney fees, financial advisory and underwriter fees, and premiums or commissions that the commission or the board determines 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 an eligible project when application is made, in order to accelerate the completion of any eligible 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 eligible 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 eligible 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 the 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 section 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 the bonds or be subject to any personal liability or accountability by reason of the issuance of the bonds.

S. All bonds recommended by the commission and issued by the board, while registered, are 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 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; 2017, ch. 114, § 5; 2018, ch. 19, § 7.

ANNOTATIONS

Cross references. — For the federal Clean Water Act of 1977, *see* 33 U.S.C. § 1251 et seq.

The 2018 amendment, effective May 16, 2018, authorized the state board of finance to issue and sell bonds or other obligations recommended by the water quality control commission to provide funds to qualified borrowers for eligible projects, and authorized the commission to pledge, transfer and assign any obligation or security of a qualified borrower as security for the payment of the principal and interest on bonds; in Subsection B, replaced "state agency or local authority" with "qualified borrower" throughout the subsection; in Subsection D, replaced "wastewater facility" with "eligible project" throughout the subsection; and in Subsection E, after "issued to finance", deleted "wastewater facility" and added "eligible".

The 2017 amendment, effective July 1, 2017, authorized the water quality control commission to pledge, transfer and assign any obligation or security of a state agency as security for the payment of the principal and interest on the issuance and sale of bonds by the state board of finance pursuant to the Wastewater Facility Construction Loan Act; in Subsection B, Paragraph B(1), after "of each", added "state agency or", and in Paragraph B(2), after "for the", added "state agency or"; and in Subsection N, after "pursuant to this", deleted "subsection" and added "section".

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 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.

74-6A-14. Validation.

All outstanding securities of the state and of all qualified borrowers, all loan or other agreements entered into between the state or the division and any qualified borrower, all regulations promulgated by the commission and all acts and proceedings taken by or on behalf of the state or any qualified borrower with respect to the financing of eligible projects are 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 April 4, 1991 for the purpose of effecting the provisions of the Wastewater Facility Construction Loan Act 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; 2018, ch. 19, § 8.

ANNOTATIONS

Cross references. — For the federal Clean Water Act of 1977, *see* 33 U.S.C. § 1251 et seq.

The 2018 amendment, effective May 16, 2018, established that all outstanding securities, loan or other agreements, and all acts taken by or on behalf of qualified borrowers with respect to the financing of eligible projects are validated, ratified, approved and confirmed; and replaced "local authority" with "qualified borrower" throughout the section, replaced "wastewater facility" with "eligible project" throughout the section, and after "entered into prior to", deleted "the effective date hereof" and added "April 4, 1991".

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.

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 and safety and the environment resulting from pollution of ground water resources as a result of leaking storage tanks. The legislature also recognizes that some owners and operators of facilities containing 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 is to provide substantive provisions and funding mechanisms to the extent that funds are available to enable the state to take corrective action at sites contaminated by leakage from storage tanks.

History: Laws 1990, ch. 124, § 2; 1995, ch. 6, § 15; 2001, ch. 325, § 12.

ANNOTATIONS

The 2001 amendment, effective July 1, 2001, deleted "underground" preceding "storage tanks" throughout the section.

The 1995 amendment, effective June 16, 1995, substituted "some owners" for "the owners" in Subsection A, substituted "to the extent that funds are available to enable" for "that will enable" in Subsection C, and made a minor stylistic change.

74-6B-3. Definitions.

As used in the Ground Water Protection Act:

A. "above ground storage tank" means a single tank or a combination of tanks, including underground pipes connected thereto, that is used to contain 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, and the volume of which is more than ninety percent above the surface of the ground. The term does not include any:

(1) farm, ranch or residential tank used for storing motor fuel for noncommercial purposes;

(2) pipeline facility, including gathering lines, that is regulated under Chapter 601 of Title 49 of the United States Code or that is an intrastate pipeline facility regulated under state laws as provided in Chapter 601 of Title 49 of the United States Code and that is determined by the United States secretary of transportation to be connected to a pipeline, or to be operated or intended to be capable of operating at pipeline pressure or as an integral part of a pipeline;

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

(4) storm water or wastewater collection system;

(5) flow-through process tank;

(6) liquid trap, tank or associated gathering lines or other storage methods or devices related to oil, gas or mining exploration, production, transportation, refining, processing or storage, or oil field service industry operations;

(7) tank used for storing heating oil for consumptive use on the premises where stored;

(8) pipes connected to any tank that is described in Paragraphs (1) through (7) of this subsection; or

(9) tanks or related pipelines and facilities owned or used by a refinery, natural gas processing plant or pipeline company in the regular course of its refining, processing or pipeline business;

B. "board" means the environmental improvement board;

C. "corrective action" means an action taken in accordance with rules of the board to investigate, minimize, eliminate or clean up a release to protect the public health, safety and welfare or the environment;

D. "department" means the department of environment;

E. "operator" means any person in control of or having responsibility for the daily operation of a storage tank;

F. "owner":

(1) means:

(a) in the case of a storage tank in use or brought into use on or after November 8, 1984, a person who owns a storage tank used for storage, use or dispensing of regulated substances; and

(b) in the case of a storage tank in use before November 8, 1984 but no longer in use after that date, a person who owned the tank immediately before the discontinuation of its use; and

(2) excludes, for purposes of tank registration requirements only, a person who:

(a) had an underground storage tank taken out of operation on or before January 1, 1974;

(b) had an underground storage tank taken out of operation after January 1, 1974 and removed from the ground prior to November 8, 1984; or

(c) had an above ground storage tank taken out of operation on or before July 1, 2001;

G. "person" means an individual or any legal entity, including all governmental entities;

H. "regulated substance" means:

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

(2) petroleum, including crude oil or a 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;

I. "release" means a spilling, leaking, emitting, discharging, escaping, leaching or disposing from a storage tank into ground water, surface water or subsurface soils in amounts exceeding twenty-five gallons;

J. "secretary" means the secretary of environment;

K. "site" means a place where there is or was at a previous time one or more storage tanks and may include areas contiguous to the actual location or previous location of the tanks;

L. "storage tank" means an above ground storage tank or an underground storage tank; and

M. "underground storage tank" means a single tank or a combination of tanks, including underground pipes connected thereto, that is 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 for noncommercial purposes;

(2) septic tank;

(3) pipeline facility, including gathering lines, that is regulated under Chapter 601 of Title 49 of the United States Code or that is an intrastate pipeline facility regulated under state laws as provided in Chapter 601 of Title 49 of the United States Code and that is determined by the United States secretary of transportation to be connected to a pipeline, or to be operated or intended to be capable of operating at pipeline pressure or as an integral part of a pipeline;

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

(5) storm water or wastewater collection system;

(6) flow-through process tank;

(7) liquid trap, tank 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;

(9) tank used for storing heating oil for consumptive use on the premises where stored;

(10) tank exempted by rule of the board after finding that the type of tank is adequately regulated under another federal or state law; or

(11) pipes connected to any tank that is described in Paragraphs (1) through (10) of this subsection.

History: Laws 1990, ch. 124, § 3; 1992, ch. 64, § 2; 1993, ch. 298, § 3; 2001, ch. 325, § 13; 2010, ch. 27, § 3; 2018, ch. 11, § 3.

ANNOTATIONS

Cross references. — For Section 101(14) of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, *see* 42 U.S.C.§ 9601(14).

For Subtitle C of the federal Resource Conservation and Recovery Act of 1976, *see* 42 U.S.C.S. §§ 6921 to 6931.

The 2018 amendment, effective May 16, 2018, amended the Ground Water Protection Act to conform the definitions of "above ground storage tank" and "underground storage tank" to comply with federal law; in Paragraph A(2), after "regulated under", deleted "the federal Natural Gas Pipeline Safety Act of 1968 or the federal Hazardous Liquid Pipeline Safety Act of 1979" and added "Chapter 601 of Title 49 of the United States Code", after "under state laws", deleted "comparable to either act" and added the remainder of the paragraph; and in Subsection M(3), after "regulated under", deleted "the federal Natural Gas Pipeline Safety Act of 1968 or the federal Hazardous Liquid Pipeline Safety Act of 1979" and added "Chapter 601 of Title 49 of the United States Code", and after "under state laws", deleted "comparable to either act" and added the remainder of the paragraph.

The 2010 amendment, effective May 19, 2010, in Subsection A(1), after "storing motor fuel" deleted "or heating oil"; in Subsection A(7), after "tank", deleted "associated with an emergency generator system" and added the remainder of the sentence; in

Subsection A(8), after "Paragraphs (1) through", deleted "(8)" and added "(7)"; in Subsection F(1)(a), after "person who owns a storage tank", added "used for storage, use or dispensing of regulated substances"; added Paragraph (2) of Subsection F; in Subsection H(1), after "Section 101(14) of the", added "federal" and after "Subtitle C of the", added "federal"; in Subsection M(1), after "storing motor fuel" deleted "or heating oil"; and in Subsection M(9), after "tank", deleted "associated with an emergency generator system" and added the remainder of the sentence.

The 2001 amendment, effective July 1, 2001, deleted "underground" preceding "storage tank" throughout the section; added Subsection A; redesignated former Subsections A to J as B to K; inserted "in accordance with rules of the board" in current Subsection C; deleted "used for the storage, use or dispensing of regulated substances" at the end of current Paragraph F(1); added Subsection L; redesignated former Subsection K as M; deleted the citations to the acts noted in current Paragraph M(3); inserted "tank" in Paragraph M(7); added current Paragraphs M(9) and (10); redesignated former Paragraph K(9) as M(11); updated the internal designations; and made stylistic changes.

The 1993 amendment, effective April 7, 1993, deleted "while it is" after "storage tank" in Paragraph (1) of Subsection E and inserted "of 1976" in Paragraph (1) of Subsection G.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Determination whether substance is "hazardous substance" within meaning of § 101(14) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USCS § 9601(14)), 118 A.L.R. Fed. 293.

Private entity's status as owner or operator under § 107 (a)(1,2) of Comprehensive Environmental Response, and Liability Act (42 USCS § 9607 (a)(1,2)) (CERCLA), 140 A.L.R. Fed. 181.

What constitutes "facility" within meaning of § 101(9) of the Comprehensive, Environmental Response, Compensation, and Liability Act (CERCLA) (42 USCA § 9601(9)), 147 A.L.R. Fed. 469.

74-6B-4. Storage tank committee; creation; terms; powers and duties.

A. An advisory committee to be known as the "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 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 may:

(1) recommend proposed rules to the board or the secretary;

(2) establish procedures, practices and policies governing the committee's activities;

(3) review corrective actions of the department and submit comments to the secretary; and

(4) review payments from the corrective action fund and submit its comments on the 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 from the storage tank fund.

History: Laws 1990, ch. 124, § 4; 1992, ch. 64, § 3; 2001, ch. 325, § 14.

ANNOTATIONS

The 2001 amendment, effective July 1, 2001, deleted "underground" preceding "storage tank" and "storage tanks" throughout the section; in Subsection C, substituted "may" for "shall and is authorized to" following "committee", deleted "proposed" preceding "corrective actions" in Paragraph C(3) and preceding "payments" twice in Paragraph C(4); and made stylistic changes.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. — State and local government control of pollution from underground storage tanks, 11 A.L.R.5th 388.

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 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 storage tank.

Nothing in the Ground Water Protection Act prohibits any existing or future claim for relief a person may have as a result of damages sustained because of a release from a storage tank.

History: Laws 1990, ch. 124, § 6; 2001, ch. 325, § 15.

ANNOTATIONS

The 2001 amendment, effective July 1, 2001, deleted "underground" preceding "storage tank".

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.

Application of statute of limitations in private tort actions based on injury to persons or property caused by undergound flow of contaminants, 11 A.L.R.5th 438.

74-6B-7. Corrective action fund created; authorization for expenditures.

A. There is created the "corrective action fund". The fund is intended to provide for financial assurance coverage and shall be used by the department to the extent that revenues are available 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), to pay the state's share of federal leaking underground storage tank trust fund cleanup costs as required by the federal Resource Conservation and Recovery Act and to make payments to or on behalf of owners and operators for corrective action taken in accordance with Section 74-6B-13 NMSA 1978. The legislature may appropriate up to thirty percent of the annual distribution to the fund pursuant to Section 7-1-6.25 NMSA 1978 to the department to match federal funds, for underground contamination cleanup, and to address water needs. 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 storage tank committee, shall adopt rules for establishing priorities for corrective action at sites contaminated by storage tanks. The priorities for corrective action shall be based on public health, safety and welfare and environmental concerns. In adopting rules pursuant to 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 rules shall apply. The department shall establish priority lists of sites in accordance with the rules adopted by the board.

C. The department shall make expenditures from the corrective action fund in accordance with rules adopted by the board or the secretary for corrective action taken by the state, owners or operators at sites contaminated by storage tanks; provided that:

(1) payments may be made only for corrective action taken by persons qualified by the department to perform the work pursuant to rules adopted by the board;

(2) no expenditures from the fund shall be paid to or on behalf of an owner or operator for corrective action, other than a minimum site assessment or sampling, if the corrective action is conducted by a person that is a subsidiary or parent of or that is otherwise affiliated with the owner or operator;

(3) expenditures shall be made by the department to perform corrective action, to pay for the costs of minimum site assessment in excess of ten thousand

dollars ($10,000) or to make payments to or on behalf of an owner or operator in accordance with Section 74-6B-13 NMSA 1978;

(4) any corrective action taken shall be taken at sites in the order of priority appearing on the priority lists, unless an emergency threat to public health, safety and welfare or to the environment exists;

(5) when available revenues are limited and the fund can no longer be approved as a financial responsibility mechanism, priorities for expenditures from the fund shall also be based on financial need as determined by rules adopted by the board; and

(6) corrective action involving remediation shall follow a competitive bidding procedure based on technical merit and cost effectiveness.

D. No expenditure from the corrective action 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 a storage tank or equipment.

F. Nothing in this section authorizes payments or commitments for payments in excess of the funds available.

G. The board, by rule, may provide for a specific amount to be reserved in the fund for emergencies. The amount reserved may be expended by the department only for corrective action necessary when an emergency threat to public health, safety and welfare or to the environment exists.

H. 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; 1993, ch. 298, § 4; 1995, ch. 6, § 16; 2001, ch. 325, § 16; 2004, ch. 88, § 1.

ANNOTATIONS

Cross references. — For distribution to corrective action fund of petroleum products loading fee receipts, *see* 7-1-6.25 NMSA 1978.

For imposition and rate of petroleum products loading fee, *see* 7-13A-3 NMSA 1978.

For the federal Resource Conservation and Recovery Act, *see* 42 U.S.C. § 6901 et seq.

The 2004 amendment, effective May 19, 2004, amended Subsection A to add before the last sentence: "The legislature may appropriate up to thirty percent of the annual distribution to the fund pursuant to Section 7-1-6.25 NMSA 1978 to the department to match federal funds, for underground contamination cleanup, and to address water needs."

The 2001 amendment, effective July 1, 2001, in Subsection A, deleted "required by federal law" following "assurance coverage" and inserted "for corrective action taken" in the penultimate sentence; in Subsection B, deleted "underground" preceding "storage tank" twice; in Subsection C, deleted language concerning expenditures from the corrective action fund, added the language beginning "taken by the state" to the end of the preliminary language and added Paragraphs (1) to (6); inserted Subsection G; redesignated former Subsection G as H; and made stylistic changes.

The 1995 amendment, effective June 16, 1995, inserted "to the extent that revenues are available" in the first sentence in Subsection A; inserted "for corrective action" in the second sentence and substituted "pursuant to" for "under" in the third sentence in Subsection B; and, in Subsection C, added the proviso at the end of the first sentence and added the second, third and final sentences.

The 1993 amendment, effective April 7, 1993, inserted the language beginning "to pay the state's share" and ending "Resource Conservation and Recovery Act" in Subsection A and inserted "corrective action" in Subsection D.

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.

74-6B-8. Liability; cost recovery.

A. An owner or operator of a storage tank from which a release has occurred shall be strictly liable for the owner's, operator's and 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 rules 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 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 rules 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 storage tanks were removed or properly abandoned prior to March 7, 1990, the owner or the operator:

(a) has paid all 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 rules 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 attorney 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. The right of subrogation shall apply regardless of any defenses available to the owner or operator under Subsection B of this section. The right of subrogation shall apply to sites where corrective action is taken by owners or operators under Section 74-6B-13 NMSA 1978 as well as to sites where corrective action is taken by the state.

History: Laws 1990, ch. 124, § 8; 1991, ch. 47, § 1; 1992, ch. 64, § 6; 2001, ch. 325, § 17.

ANNOTATIONS

The 2001 amendment, effective July 1, 2001, deleted "underground" preceding "storage tank" and "storage tanks" throughout the section; inserted "owner's, operator's and" preceding "department's cost" in Subsection A; added the language beginning "The right of subrogation" to the end of Subsection D; and made stylistic changes.

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".

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".

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. Storage tank fee; deposit in 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 storage tank owned or operated. The fees shall be paid to the department and deposited in the storage tank fund created in Section 74-4-4.8 NMSA 1978.

History: Laws 1990, ch. 124, § 9; 1992, ch. 64, § 7; 2001, ch. 325, § 18.

ANNOTATIONS

The 2001 amendment, effective July 1, 2001, deleted "underground" preceding "storage tank" throughout the section; and substituted "Section 74-4-4.8" for Section 74-4-4.6".

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 creates an insurance company or an insurance fund. The corrective action fund is not subject to the provisions of the Insurance Code.

History: Laws 1990, ch. 124, § 10.

ANNOTATIONS

Cross references. — For the Insurance Code, *see* 59A-1-1 NMSA 1978 and notes thereto.

74-6B-11. Repealed.

ANNOTATIONS

Repeals. — Laws 1993, ch. 298, § 5 repealed 74-6B-11 NMSA 1978, as enacted by Laws 1990, ch. 124, § 11, providing an incentive program to encourage early detection, reporting and clean up of releases from underground storage tanks, effective April 7, 1993. For provisions of former section, *see* the 1992 NMSA 1978 on *NMOneSource.com*.

74-6B-12. Repealed.

ANNOTATIONS

Repeals. — Laws 2001, ch. 325, § 20 repealed 74-6B-12 NMSA 1978, as enacted by Laws 1991, ch. 260, § 1, creating an early response team, effective July 1, 2001. For provisions of former section, *see* the 2000 NMSA 1978 on *NMOneSource.com*.

74-6B-13. Payment program.

A. Unless provided otherwise in this section, all costs in excess of ten thousand dollars ($10,000) that are necessary to perform a minimum site assessment in accordance with the rules of the board shall be paid from the corrective action fund.

B. 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 rules adopted by the secretary establishing eligible and ineligible costs. Ineligible costs include attorney fees, repair or upgrade of tanks, loss of revenue and costs of monitoring a contractor.

C. The department shall adopt rules to provide for payments from the corrective action fund, to the extent that money is available in the fund, to persons who cannot afford to pay all or a portion of the initial ten thousand dollar ($10,000) cost of a minimum site assessment otherwise required in this section. The department shall develop a financial assistance means test, including a sliding scale of financial relief as the department deems appropriate, that allows some or all of the minimum site assessment costs to be paid from the corrective action fund.

D. All department determinations concerning the manner of payment, compliance and cost eligibility shall be made in accordance with department rules.

E. If the owner or operator is in compliance with the requirements of Subsection B of Section 74-6B-8 NMSA 1978, payment of costs from the corrective action fund shall occur not later than sixty 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. Before any payment is made for a corrective action pursuant to this section to or on behalf of an owner or operator, payment shall first be made to reimburse the federal leaking underground storage tank trust fund for any costs incurred for that corrective action.

G. Counties and municipalities are exempt from the requirements to pay any portion of the initial ten thousand dollars ($10,000) of a minimum site assessment.

History: 1978 Comp., § 74-6B-13, enacted by Laws 1992, ch. 64, § 10; 1993, ch. 327, § 1; 1995, ch. 6, § 17; 1997, ch. 104, § 3; 1997, ch. 222, § 3; 2001, ch. 325, § 19.

ANNOTATIONS

The 2001 amendment, effective July 1, 2001, deleted language in Subsection A, concerning reimbursement of costs; deleted all of former Subsection B, concerning reimbursement of costs; redesignated former Subsections C to F as B to E; deleted the former second sentence of former Subsection C, concerning eligible costs for payment; deleted the former last sentence in former Subsection D, concerning financial assistance; substituted "sixty days" for "thirty days" in current Subsection E; deleted

former Subsection G, concerning reserve of a portion of the fund; added Subsections F and G; and made stylistic changes.

The 1997 amendment, effective June 20, 1997, in Subsection F, substituted "thirty" for "ninety"; and in Subsection C, made a stylistic change

The 1995 amendment, effective June 16, 1995, added "to the extent that money is available" at the end of Subsection A, added "and if money is available in the fund" at the end of Subsection B, and inserted "to the extent that money is available in the fund" in the first sentence of Subsection D.

The 1993 amendment, effective June 18, 1993, in Subsection A, added "Unless provided otherwise in this section" to the beginning and substituted "March 9, 1992" for "the effective date of this section" in the second sentence; added present Subsection D, redesignating former Subsections D through F as Subsections E through G; and changed the style of the statutory reference in present Subsection F.

74-6B-13.1. Repealed.

ANNOTATIONS

Repeals. — Laws 2001, ch. 325, § 20 repealed 74-6B-13.1 NMSA 1978, as enacted by Laws 1995, ch. 6, § 19, a temporary provision concerning funding of the corrective action fund, effective July 1, 2001. For provisions of former section, *see* the 2000 NMSA 1978 on *NMOneSource.com*.

74-6B-14. State liability; insufficient balance in the fund.

Nothing in the Ground Water Protection Act 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

Am. Jur. 2d, A.L.R. and C.J.S. references. — Application of statute of limitations in private tort actions based on injury to persons or property caused by underground flow of contaminants, 11 A.L.R.5th 438.

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* Chapter 74, Article 1 NMSA 1978.

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.

What constitutes "suit" triggering insurer's duty to defend environmental claims-state cases, 48 A.L.R.5th 355.

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

74-7-2. Purpose of act.

The purpose of the Environmental Compliance Act 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:

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 it 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.

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 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 [Chapter 14, Article 4 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

Cross references. — For the National Environmental Policy Act of 1969 *see* 42 U.S.C. §§ 4321, 4331 to 4335 and 4341 to 4347.

The federal Water Pollution Control Act was omitted from the U.S. Code as superseded by 33 U.S.C. § 1251 et seq.

For the Safe Drinking Water Act, *see* 21 U.S.C. § 349 and 42 U.S.C. §§ 201 and 300f et seq.

For the Resource Conservation and Recovery Act of 1976, *see* 42 U.S.C. § 6901 et seq.

For the Used Oil Recycling Act of 1980, *see* 42 U.S.C. §§ 6901a, 6903, 6914a, 6915, 6916, 6932, 6943 and 6948.

For the Clean Air Act, *see* 42 U.S.C. § 7401 et seq.

For the Toxic Substances Control Act, *see* 15 U.S.C. § 2601 et seq.

For the Occupational Safety and Health Act of 1970, *see* 29 U.S.C. § 651 et seq. and numerous other provisions.

For the Noise Control Act of 1972, *see* 42 U.S.C. § 4901 et seq. and 49 U.S.C. § 1431.

For the Hazardous Materials Transportation Act, *see* 49 U.S.C. § 1801 et seq.

For the Comprehensive Environmental Response, Compensation and Liability Act of 1980, *see* 42 U.S.C. § 9601 et seq.

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.

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 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.

History: Laws 1983, ch. 29, § 8.

ARTICLE 7A
Environmental Database

74-7A-1. Short title.

This act [74-7A-1 to 74-7A-4 NMSA 1978] may be cited as the "Environmental Database Act".

History: Laws 2021, ch. 121, § 1.

ANNOTATIONS

Effective dates. — Laws 2021, ch. 121 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

74-7A-2. Definitions.

As used in the Environmental Database Act:

A. "environmental data" means geospatial data relating to the environmental resources in the state specified in Paragraphs (1) through (8) of Subsection D of Section 3 [74-7A-3 NMSA 1978] of the Environmental Database Act;

B. "environmental database" means the centralized, map-based, searchable website created pursuant to the Environmental Database Act that houses the state's environmental data;

C. "host" means the natural heritage New Mexico division of the museum of southwestern biology at the university of New Mexico; and

D. "state agency" means the energy, minerals and natural resources department, the department of environment, the state land office, the department of health, the department of game and fish, the public regulation commission and the historic preservation division of the cultural affairs department.

History: Laws 2021, ch. 121, § 2.

ANNOTATIONS

Effective dates. — Laws 2021, ch. 121 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

74-7A-3. Environmental database; environmental data required; host and state agency duties.

A. The host, with the cooperation of the state agencies, shall improve the state's environmental data infrastructure by creating, operating and maintaining the environmental database, which shall be user-friendly, searchable and accessible to the public and state agencies and its primary services free of charge. The environmental database shall house the state's environmental data for the purpose of governmental transparency, interagency cooperation and information sharing and to provide widespread access to the best scientific data to address the state's natural resource and environmental management needs.

B. No later than December 31, 2021, the host shall establish an information exchange process for the collection and electronic publication of the state's environmental data.

C. No later than July 1, 2022, the environmental database shall be available for public access and include the environmental data specified in Subsection D of this section, subject to the confidentiality provisions of Section 4 [74-7A-4 NMSA 1978] of the Environmental Database Act.

D. The environmental database shall provide access to the state's environmental data, including:

(1) from the energy, minerals and natural resources department:

(a) locations of active oil and gas wells;

(b) locations of state parks;

(c) locations of active mines;

(d) locations of utility-scale solar and wind projects on state land; and

(e) maps of important plant areas, maps of rare plant locations and rare plant monitoring data;

(2) from the department of environment:

(a) locations of current permits for major sources of air pollution;

(b) locations of current federal Clean Air Act non-attainment areas;

(c) a map showing surface waters of New Mexico;

(d) locations of impaired waters with federal Clean Water Act Section 303(d) status;

(e) locations of floodplains and wetlands;

(f) locations of waters with special statuses;

(g) locations of national pollutant discharge elimination system permits;

(h) ground water quality data, where available; and

(i) locations of the state's United States environmental protection agency superfund sites;

(3) from the state land office:

(a) locations of active state trust land leases; and

(b) locations of active rights of way across state trust land;

(4) from the department of health:

(a) health impact assessments;

(b) poverty levels across the state by zip code; and

(c) child asthma rates across the state by zip code;

(5) from the department of game and fish:

(a) designated critical habitat for federal threatened and endangered species;

(b) the crucial habitat layer from the crucial habitat assessment tool;

(c) likely habitat for state sensitive species;

(d) riparian corridors;

(e) identified wildlife corridors;

(f) state wildlife action plan conservation opportunity areas;

(g) New Mexico Audubon important bird areas; and

(h) fisheries management plan water bodies;

(6) from the public regulation commission, the locations of electric transmission lines;

(7) from the historic preservation division of the cultural affairs department, a link to the division's database of publicly available geographic information about archaeological and cultural sites;

(8) from each state agency, at the discretion of the state agency, links to available agency-developed data and research used in decision making that the state agency determines will assist the public in understanding the state environmental data reported;

(9) a link to each state agency's website;

(10) a link to the statutes that govern each state agency;

(11) a link to the New Mexico Administrative Code [14-4-7.2 NMSA 1978]; and

(12) additional information, as required by the host in cooperation with the state agencies, that will assist the public in understanding the state's environmental data.

E. A state agency shall provide the host with updates to the state agency's environmental data as frequently as possible, but at least annually.

F. The host shall update the environmental database as new data is received, but at least annually.

History: Laws 2021, ch. 121, § 3.

ANNOTATIONS

Effective dates. — Laws 2021, ch. 121 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

74-7A-4. Protection of confidential information.

Nothing in the Environmental Database Act shall require disclosure by a state agency of:

A. information that is confidential by state or federal law;

B. sensitive biological information that cannot be made publicly available for the protection of species;

C. information required to remain confidential for safety or security reasons;

D. archaeological or cultural survey information, unless the information is already publicly available or, if the information is of cultural significance to an Indian nation, tribe or pueblo, the disclosure is done with permission from the relevant Indian nation, tribe or pueblo; or

E. information that is not already provided to a state agency pursuant to rule or law.

History: Laws 2021, ch. 121, § 4.

ANNOTATIONS

Effective dates. — Laws 2021, ch. 121 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 2021, 90 days after adjournment of the legislature.

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 [74-9-1 to 74-9-43 NMSA 1978]; 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

Cross references. — For the 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 material was inserted by the compiler and is not part of the law. Laws 1991, ch. 25, § 4 established the department of environment and provided that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment.

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 material was inserted by the compiler and is not part of the law. Laws 1991, ch. 25, § 4 established the department of environment and provided that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment.

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

Compiler's notes. — 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

Denial of landfill permit based on public opposition. — The Environmental Improvement Act and the Solid Waste Act do not require the secretary to deny a landfill permit based on public opposition. *Colonias Dev. Council v. Rhino Envtl. Svcs., Inc.*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939.

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 [Chapter 74, Article 4 NMSA 1978] 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 material was inserted by the compiler and is not part of the law. Laws 1991, ch. 25, § 4 established the department of environment and provided that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment.

Cross references. — For Subtitle C of the federal Resource Conservation and Recovery Act of 1976, *see* 42 U.S.C. §§ 6921 to 6931.

For the federal Toxic Substances Control Act, *see* 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

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 was set out as amended by Laws 1991, ch. 194, § 2. *See* 12-1-8 NMSA 1978.

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 [Chapter 74, Article 6 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:

(1) 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

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

1991 amendments. — Laws 1991, ch. 185, § 2, effective June 14, 1991, substituted "January 1, 1992" for "July 1, 1991" in the introductory phrase; substituted "Section 74-9-25 NMSA 1978" for "Section 25 of the Solid Waste Act" in Subsection G; and made 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, made all of the

changes made by the first amendment, except, in the introductory paragraph, substituted "December 31, 1991" for "July 1, 1991", was approved later on April 4, 1991. The section was 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 was set out as amended by Laws 1991, ch. 194, § 4. *See* 12-1-8 NMSA 1978.

Terms of permits during transition. — Since the relevant 1989 regulation states: "The director shall not issue any permit for a period longer than 10 years, which may be renewed," 203.A, 1989 Regs, it is clear that nothing in the regulation mandates that permits should be granted for the maximum period of time; in fact, the regulation by its plain language authorizes permits for less than a 10-year period. Further, the secretary (now director), in her discretion, could choose to implement the comprehensive solid waste management plan by reviewing all solid waste landfills through the application process within a shorter period of time than 10 years. For these reasons, the five-year permit was proper. *Joab, Inc. v. Espinosa*, 1993-NMCA-113, 116 N.M. 554, 865 P.2d 1198.

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

Compiler's notes. — The phrase, "effective date of the Solid Waste Act", means March 5, 1990, the effective date of Laws 1990, ch. 99.

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.

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.

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 [13-1-28 to 13-1-199 NMSA 1978], 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

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

Compiler's notes. — Laws 1990, ch. 99 enacted Sections 1 to 42 and 72 and 73, which constitute the Solid Waste Act. Section 73 was a savings clause that was not compiled.

Application sufficient. — The application in this case contained the necessary information, since neither the Act nor the regulations mandate that specific information about the liner and leachate collection system be contained in the application. *Joab, Inc. v. Espinosa*, 1993-NMCA-113, 116 N.M. 554, 865 P.2d 1198.

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

74-9-22. Solid waste facility permit; notice of application.

Each application filed with the division for a permit under the provisions of Section 74-9-20 NMSA 1978 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 the governing body of any county, municipality, Indian tribe or pueblo when the boundary of the territory of the county, municipality, Indian tribe or pueblo is 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; 1993, ch. 172, § 1.

ANNOTATIONS

The 1993 amendment, effective June 18, 1993, changed the style of the statutory reference in the first sentence and substituted "the governing body of any county, municipality, Indian tribe or pueblo when the boundary of the territory of the county, municipality, Indian tribe or pueblo is" for "all municipalities and counties" in Subsection B.

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Failure to give proper notice. — Form of publication employed by the landfill did not substantially fulfill the statutory requirement of a single publication in which the notice appeared in both the legal/classified section and one other place calculated to give the general public the most effective notice; therefore, the administrative proceedings conducted subsequent to the landfill's defective notice were invalid. *Martinez v. Maggiore*, 2003-NMCA-043, 133 N.M. 472, 64 P.3d 499.

Standing. — Residents were proper persons to raise the landfill's failure to publish notice as required by Subsection C. *Martinez v. Maggiore*, 2003-NMCA-043, 133 N.M. 472, 64 P.3d 499.

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.

ANNOTATIONS

Public participation encouraged. — The secretary (now director) must use discretion in implementing the Solid Waste Act and its regulations in order to encourage public participation in the permitting process. *Colonias Dev. Council v. Rhino Envtl. Svcs., Inc.*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939.

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 the director makes a finding that granting the permit would be contradictory to or in violation of the Solid Waste Act or any regulation adopted pursuant to the provisions of that act. The director may also deny a permit application if the applicant fails to meet the financial responsibility requirements established by the board pursuant to the provisions of Subsection A of Section 74-9-8 NMSA 1978 and Section 74-9-35 NMSA 1978.

B. The director may deny any permit application or revoke an existing permit if the director has reasonable cause to believe that a person required to be listed on the application pursuant to Section 74-9-20 NMSA 1978 has:

(1) knowingly misrepresented a material fact in application for a permit;

(2) refused to disclose or failed to disclose the information required pursuant to the provisions of Section 74-9-21 NMSA 1978;

(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 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:

(1) implementation by the applicant of formal policies;

(2) training programs and management control to minimize and prevent the occurrence of future violations;

(3) installation by the applicant of internal environmental auditing programs;

(4) the discharge of individuals convicted of any crimes set forth in Subsection B of this section; and

(5) 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 for it. 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.

G. Except as otherwise provided by law:

(1) each permit issued for a publicly owned and publicly or privately operated new or repermitted existing landfill, transfer station, recycling facility or composting facility shall remain in effect throughout the active life of the landfill, transfer station, recycling facility or composting facility as described in the approved permit or for twenty years, whichever is less. Each permit issued for a publicly owned landfill, transfer station, recycling facility or composting facility that is privately operated pursuant to a contract of no more than four years duration entered into in accordance with the state or local procurement code shall remain in effect throughout the active life of the landfill, transfer station, recycling facility or composting facility as described in the approved permit or for twenty years, whichever is less. Each time the contract is renewed, the director shall review the contract to determine whether the term of the permit shall be governed by this paragraph or Paragraph (2) of this subsection. Each permit shall be reviewed by the department of environment at least once every ten years. The review shall address the operation, compliance history, financial assurance and technical requirements for the landfill, transfer station, recycling facility or composting facility. At the time of the review there shall be public notice in the manner prescribed by Section 74-9-22 NMSA 1978. If the secretary of environment determines that there is significant public interest, a nonadjudicatory hearing shall be held as part of the review. The secretary may require appropriate modifications of the permit, including modifications necessary to make the permit terms and conditions consistent with statutes, regulations or judicial decisions;

(2) each permit issued for a privately owned new or repermitted existing landfill, transfer station, recycling facility or composting facility shall remain in effect throughout the active life of the facility as described in the approved permit or for twenty years, whichever is less. Owners of privately owned facilities permitted prior to July 1, 2011 shall submit in writing to the division no later than September 1, 2011 their decision to opt into the twenty-year permit cycle and provide information that demonstrates that such period is less than the remaining active life of the facility. If a privately owned facility opts into the twenty-year permit cycle, the twenty-year permit term shall be reduced by the number of years the facility has operated under its current permit. For privately owned facilities that opt into the twenty-year permit term, the facility owners shall adjust financial assurance coverage to accommodate requirements pursuant to the solid waste management regulations. Each permit shall be reviewed at least every five years by the department of environment. Interested parties may petition the department for review, in addition to the five-year review, provided that the director has discretion to determine whether there is good cause for such an additional review. The review shall address the operation, compliance history, financial assurance and technical requirements for the landfill, transfer station, recycling facility or composting facility. At the time of the review there shall be public notice in the manner prescribed by Section 74-9-22 NMSA 1978. If the secretary of environment determines that there is significant public interest, a nonadjudicatory hearing shall be held as part of the review. The secretary may require appropriate modifications of the permit, including modifications necessary to make the permit terms and conditions consistent with statutes, regulations or judicial decisions; and

(3) the term of permits for facilities not specified by this subsection shall be governed by existing or amended regulations adopted by the board.

H. The director shall issue separate special waste permits for all solid waste facilities that transfer, process, transform, recycle or dispose of special waste pursuant to regulations adopted by the board.

History: Laws 1990, ch. 99, § 24; 1993, ch. 246, § 3; 2011, ch. 125, § 1.

ANNOTATIONS

The 2011 amendment, effective June 17, 2011, increased the maximum term of permits for private landfills from ten to twenty years and provided for the extension of existing ten year permits to twenty year permits.

The 1993 amendment, effective April 6, 1993, changed the style of the statutory references at the end of Subsection A and in the introductory language and Paragraph (2) of Subsection B; deleted "and" after "permit or license" in the first sentence of Subsection D; and added Subsections G and H.

The secretary (now director) of the environment department does not have the discretionary authority to deviate from the duration provision of Section 74-9-24

NMSA 1978 and limit the duration of a permit. *Camino Real Envtl. Ctr., Inc. v. N.M. Dep't of Env't*, 2010-NMCA-057, 148 N.M. 776, 242 P.3d 343, cert. denied, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

Secretary (now director) cannot limit the duration of a permit. — Where the owner of a privately-owned existing landfill applied for a ten-year renewal of a permit to operate the landfill and permission to use new lined cells in the landfill, and the expected active life of the landfill was fifty years, the secretary (now director) of the environment department did not have the authority to limit the term of the permit to one year. *Camino Real Envtl. Ctr., Inc. v. N.M. Dep't of Env't*, 2010-NMCA-057, 148 N.M. 776, 242 P.3d 343, cert. denied, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

Role of hearing officer. — While testimony relating to "social impact" may not require denial of a permit, the hearing officer must listen to concerns about adverse impacts on social well-being and quality of life, as well as report them accurately to the secretary (now director). *Colonias Dev. Council v. Rhino Envtl. Svcs., Inc.*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939.

Secretary (now director) abused his discretion by limiting the scope of testimony during the public hearing and interpreting the department's role as confined to technical oversight. *Colonias Dev. Council v. Rhino Envtl. Svcs., Inc.*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939.

Impact of additional landfill on community. — The secretary (now director) must evaluate whether the impact of an additional landfill on a community's quality of life creates a public nuisance or hazard to public health, welfare, of the environment. *Colonias Dev. Council v. Rhino Envtl. Svcs., Inc.*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939.

Conditions attached to permit issuance. — The Act contemplates that the secretary (now director) will exercise her discretion in imposing conditions and terms, allowing her to address concerns raised at the public hearing when the applicant submits a plan to overcome potential causes for denial of the application. Although not formally labeled an affirmative action plan, the requirement that the landfill obtain department of environment approval of the liner and leachate collection system operate as the functional equivalent of such a plan. To disallow requirements or conditions in a permit based on demonstrations of future compliance with regulations would unduly limit the secretary's (now director's) options in responding to evidence introduced during the public hearing process. *Joab, Inc. v. Espinosa*, 1993-NMCA-113, 116 N.M. 554, 865 P.2d 1198.

Consideration of past history of noncompliance. — Secretary (now director) did not abuse his discretion or act unreasonably in concluding that a municipality's past problems with the operation of its existing landfill and financial assurance compliance were not severe enough to warrant a discretionary denial of a permit for a new landfill where municipality did not provide year end financial statements for the latest fiscal

years in the operating record of its existing landfill, municipality made efforts to deal with compliance problems at its existing landfill, municipality's compliance with regard to issues other than litter was average, and municipality corrected problems when the environment department sent notices of violation. *Pickett Ranch, LLC v. Curry*, 2006-NMCA-082, 140 N.M. 49, 139 P.3d 209.

Burden of proof with regard to permit conditions. — To the extent a party argues for the inclusion of permit conditions that are not required by the relevant statutes and regulations, the party has the burden of proving that the conditions are necessary to protect the public health and the environment. *Pickett Ranch, LLC v. Curry*, 2006-NMCA-082, 140 N.M. 49, 139 P.3d 209.

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.

ANNOTATIONS

Written basis for decision not required. — Even though statute does not explicitly state that the commission must provide a written factual and legal basis for its decision, administrative agencies must provide written factual and legal basis for their decisions in order to permit an effectual and meaningful review. *Gila Res. Info. Project v. N.M.*

Water Control Comm'n, 2005-NMCA-139, 138 N.M. 625, 124 P.3d 1164, cert. denied, 2005-NMCERT-009, 138 N.M. 439, 120 P.3d 1182.

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

Goal of hearings. — An essential goal of public hearings during the permitting process is to provide community members the opportunity to ask questions, offer their own technical advice, cross-examine witnesses and make nontechnical statements. *Colonias Dev. Council v. Rhino Envtl. Svcs., Inc.*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939.

Written basis for decision not required. — Even though statute does not explicitly state that the commission must provide a written factual and legal basis for its decision, administrative agencies must provide written factual and legal basis for their decisions in order to permit an effectual and meaningful review. *Gila Res. Info. Project v. N.M. Water Control Comm'n*, 2005-NMCA-139, 138 N.M. 625, 124 P.3d 1164, cert. denied, 2005-NMCERT-009, 138 N.M. 439, 120 P.3d 1182.

Statement of reasons required. — Subsection B(1) of this section and 20 NMAC 1.4.V.504(B) required the secretary (now director) of the environment department to state reasons for departing from hearing officer's recommendations as to groundwater conditions for landfill permit. *Atlixco Coal. v. Maggiore*, 1998-NMCA-134, 125 N.M. 786, 965 P.2d 370.

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.

ANNOTATIONS

Statement of reasons required. — Section 74-9-29 B(1) NMSA 1978 and 20 NMAC 1.4.V.504(B) required the secretary (now director) of the environment department to state reasons for departing from hearing officer's recommendations as to groundwater conditions for landfill permit. *Atlixco Coal. v. Maggiore*, 1998-NMCA-134, 125 N.M. 786, 965 P.2d 370.

Agency determination given deference. — Under Subsection B, the court of appeals shall set aside the administrative action only if it is found to be within one of the specified categories. This standard of review requires the court to give the agency's decision a degree of deference. *Joab, Inc. v. Espinosa*, 1993-NMCA-113, 116 N.M. 554, 865 P.2d 1198.

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 [Chapter 74, Article 1 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 that 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 74-9-25 NMSA 1978; or

(5) dispose of any solid waste in this state in a manner that 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; 1995, ch. 132, § 1.

ANNOTATIONS

Compiler's notes. — Laws 1990, ch. 99 enacted Sections 1 to 42 and 72 and 73, which constitute the Solid Waste Act. Section 73 was a savings clause that was not compiled.

The 1995 amendment, effective April 5, 1995, in Subsection A, substituted "Section 74-9-25 NMSA 1978" for "Section 25 of the Solid Waste Act" in Paragraph (4), and deleted "the person knows or should know" preceding "harms" in Paragraph (5).

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

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

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 [Chapter 74, Article 1 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

Am. Jur. 2d, A.L.R. and C.J.S. references. — Validity, construction and application of statutes requiring that percentage of punitive damages awards be paid directly to state or court-administered fund, 16 A.L.R.5th 129.

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 acceptable methods of furnishing evidence of financial responsibility shall be specified by the board and shall include evidence of trust funds, performance bonds, insurance and irrevocable letters of credit in combination with other methods specified in this section; provided that irrevocable letters of credit shall not constitute more than fifty percent of the total financial responsibility required. Methods for evidencing financial

responsibility for local governments shall include all methods approved by the federal environmental protection agency. Local government owners of solid waste facilities may determine the method of evidencing financial responsibility required of private operators under contract or agreement with the local government. Such evidence of financial assurance shall be approved by the director. 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 or institution 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; 1993, ch. 246, § 4.

ANNOTATIONS

The 1993 amendment, effective April 6, 1993, in Subsection D, rewrote the first sentence and added the present second and third sentences; and in Subsection E, substituted "or institution" for "or political subdivision" in the first sentence.

Post-permit compliance. — The Solid Waste Act and regulations permit the environment department to require post-permit compliance, rather than pre-permit compliance, with some of the regulations governing financial assurance. Municipal applicant for a landfill permit is not required to submit a year-end financial statement before it may be issued a permit. *Pickett Ranch, LLC v. Curry*, 2006-NMCA-082, 140 N.M. 49, 139 P.3d 209.

74-9-35.1. Legislative findings.

The legislature finds:

A. the federal environmental protection agency, effective April 9, 1994, will require owners and operators of solid waste facilities to meet certain specified financial assurance criteria;

B. the only exceptions allowed will be "owners or operators who are state or federal government entities whose debts and liabilities are the debts and liabilities of a state or the United States";

C. the federal environmental protection agency does not consider political subdivisions of a state to be "state or federal government entities";

D. the Solid Waste Act currently exempts political subdivisions of the state from the requirement to show financial responsibility;

E. if New Mexico fails to require financial assurance from political subdivisions of the state, New Mexico may lose primacy over solid waste control, and political subdivisions of the state will in any event be required in 1994 to provide a showing of financial responsibility; and

F. it is in the best interest of the state to retain primacy in the field of solid waste control.

History: Laws 1993, ch. 246, § 1.

74-9-35.2. Review of contracts and leases.

All leases and contracts for the operation of landfills, transfer stations, recycling facilities and composting facilities between local government entities and private parties shall be reviewed by the attorney general, who shall provide recommendations on legal issues to the department and the local public entity at least fifteen days prior to the approval of the contract or within thirty days after his receipt of the contract, whichever is later.

History: Laws 1993, ch. 246, § 2.

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.

74-9-37. Penalty; criminal.

A. Any person who knowingly violates any paragraph of Subsection A of Section 74-9-31 NMSA 1978:

(1) if the violation involves a quantity of solid waste that is less than five thousand pounds, is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978; or

(2) if the violation involves a quantity of solid waste that is five thousand pounds or greater, is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

B. Any person who knowingly violates any paragraph of Subsection A of Section 74-9-31 NMSA 1978 and the violation involves any quantity of infectious waste 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 is convicted of a second or subsequent violation of Section 74-9-31 NMSA 1978 pursuant to the provisions of Paragraph (2) of Subsection A or Subsection B or D of this section is guilty of a third degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

D. Any person who knowingly omits any material information or knowingly makes a false material statement or representation required pursuant to the provisions of Section 74-9-20 or 74-9-21 NMSA 1978 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; 1995, ch. 132, § 2.

ANNOTATIONS

The 1995 amendment, effective April 5, 1995, added Subsection A; redesignated former Subsection A as Subsection B; in Subsection B, inserted "knowingly", substituted "and the violation involves any quantity of infectious waste" for "if the cost of cleaning up the disposed solid waste is less than ten thousand dollars ($10,000)", and substituted "fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-

18-15 NMSA 1978" for "misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978"; added Subsection C; deleted former Subsection B providing the penalty for individuals violating the Solid Waste Act where the cost of clean up is ten thousand dollars ($10,000) or greater; redesignated former Subsection C as Subsection D; in Subsection D, substituted "knowingly omits any material" for "willfully fails to disclose or makes an intentional false disclosure of", inserted "or knowingly makes a false material statement or representation", and substituted "Section 74-9-20 or 74-9-21 NMSA 1978" for "Section 20 or 21 of the Solid Waste Act"; and made minor stylistic changes throughout the section.

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.

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. — For public project revolving fund, *see* 6-21-6, 6-21-6.1 NMSA 1978.

For transfers to municipalities of net receipts attributable to the municipal gross receipts tax, *see* 7-1-6.12 NMSA 1978.

For distribution of the net receipts attributable to the solid waste assessment fee, *see* 7-1-6.30 NMSA 1978.

For distributions to the public project revolving fund from governmental gross receipts tax, *see* 7-1-6.38 NMSA 1978.

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. — Laws 1990, ch. 99, § 72, provided for the severability of the Solid Waste Act if any part or application thereof is held invalid.

74-9-43. Authority to accept nondomestic oil, gas and geothermal wastes.

A. A solid waste facility may accept for disposal nondomestic waste. For the purposes of this section, "nondomestic waste" means waste associated with the exploration, development, production, transportation, storage, treatment or refinement of crude oil, natural gas, carbon dioxide gas or geothermal energy, but does not include drilling fluids, produced waters, petroleum liquids, petroleum sludges or, except in the event of an emergency declared by the director of the oil conservation division of the energy, minerals and natural resources department, petroleum-contaminated soils associated with the exploration, development, production, transportation, storage, treatment or refinement of crude oil or natural gas.

B. The solid waste facility may accept nondomestic waste for disposal with the approval of the oil conservation division of the energy, minerals and natural resources department pursuant to its authority under the Oil and Gas Act [Chapter 70, Article 2 NMSA 1978] if the nondomestic waste otherwise meets the requirements of the Solid Waste Act applicable to the solid waste facility. Upon presentation for disposal, nondomestic waste shall be regulated in the same manner as solid waste for purposes of the Solid Waste Act.

C. A solid waste facility operator proposing to accept for disposal nondomestic waste shall comply with rules adopted pursuant to the Solid Waste Act applicable to manifesting, testing and inspection of solid waste and any rules adopted pursuant to the Solid Waste Act applicable to record keeping for solid waste.

History: Laws 2001, ch. 67, § 1.

ANNOTATIONS

Emergency clauses. — Laws 2001, ch. 67, § 2 contained an emergency clause and was approved March 16, 2001.

ARTICLE 10
Solid Waste Authority

74-10-1. Short title.

This act [74-10-1 to 74-10-100 NMSA 1978] may be cited as the "Solid Waste Authority Act".

History: Laws 1993, ch. 319, § 1.

74-10-2. Legislative declaration.

It is declared as a matter of legislative determination that:

A. the organization of the authority hereby created having the purposes, powers, duties, privileges, immunities, rights, liabilities and disabilities provided in the Solid Waste Authority Act will serve a public use and will promote the health, safety, prosperity, security and general welfare of the inhabitants thereof and of the state;

B. the acquisition, improvement, maintenance and operation of any solid waste management-related project authorized in that act is in the public interest and constitutes a part of the established and permanent policy of the state;

C. the authority hereby organized shall be a body corporate and politic, a quasi-municipal corporation and a political subdivision of the state;

D. the notice provided for in the Solid Waste Authority Act for each hearing and action to be taken is reasonably calculated to inform any person of interest in any proceedings under that act which may directly and adversely affect his legally protected interests;

E. for the accomplishment of these purposes, the provisions of that act shall be broadly construed;

F. nothing in the Solid Waste Authority Act shall be construed to supersede or affect any provision of the Solid Waste Act [74-9-1 to 74-9-43 NMSA 1978] or any regulations adopted pursuant to that act; and

G. any authority created by the Solid Waste Authority Act is specifically prohibited from exercising any regulatory or enforcement powers or any permitting or site approval as mandated by the Solid Waste Act.

History: Laws 1993, ch. 319, § 2.

ANNOTATIONS

Cross references. — For the Solid Waste Act, *see* 74-9-1 NMSA 1978 and notes thereto.

74-10-3. Decision of board or governing body final.

The action and decision of the board as to all matters passed upon by it in relation to any action, matter or thing provided in the Solid Waste Authority Act shall be final and conclusive unless arbitrary, capricious or fraudulent.

History: Laws 1993, ch. 319, § 3.

74-10-4. Definitions.

Except where the context otherwise requires, as used in the Solid Waste Authority Act:

A. "acquisition" or "acquire" means the opening, laying out, establishment, purchase, construction, securing, installation, reconstruction, lease, gift, grant from the federal government, any public body or person, endowment, bequest, devise, condemnation, transfer, assignment, option to purchase, other contract or other acquirement, or any combination thereof, of facilities, other property, any project or an interest therein authorized by the Solid Waste Authority Act;

B. "authority" means the solid waste authority;

C. "board" means the board of directors of the authority;

D. "chairman" means the chairman of the board and president of the authority;

E. "condemnation" or "condemn" means the acquisition by the exercise of the power of eminent domain of property for any facilities, other property, project or an interest therein authorized by the Solid Waste Authority Act. The authority may exercise in the state the power of eminent domain, either within or without the authority and, in the manner provided by law for the condemnation of private property for public use, may take any property necessary to carry out any of the objects or purposes of that act. In the event the construction of any facility or project authorized by that act, or any part thereof, makes necessary the removal and relocation of any public utilities, whether on private or public right of way, the authority shall reimburse the owner of the public utility facility for the expense of removal and relocation, including the cost of any necessary land or rights in land;

F. "cost" or "cost of the project" means all, or any part designated by the board, of the cost of any facilities, project or interest therein being acquired and of all or any property, rights, easements, privileges, agreements and franchises deemed by the authority to be necessary or useful and convenient therefor or in connection therewith, which cost, at the option of the board, may include all or any part of the incidental costs pertaining to the project, including without limiting the generality of the foregoing, preliminary expenses advanced by any municipality, county or other public body from funds available for use therefor in the making of surveys, preliminary plans, estimates of cost, other preliminaries, the costs of appraising, printing, employing engineers, architects, fiscal agents, attorneys at law, clerical help, other agents or employees, the costs of capitalizing interest or any discount on securities, of inspection, of any administrative, operating and other expenses of the authority prior to the levy and collection of taxes, and of reserves for working capital, operation, maintenance or replacement expenses or for payment or security of principal of or interest on any securities, the costs of making, publishing, posting, mailing and otherwise giving any notice in connection with the project, the taking of options, the issuance of securities, the filing or recordation of instruments, the levy and collection of taxes and installments thereof, the costs of reimbursements by the authority to any public body, the federal government or any person of any money theretofore expended for or in connection with any facility or project and all other expenses necessary or desirable and appertaining to any project, as estimated or otherwise ascertained by the board;

G. "director" means a member of the board;

H. "disposal" or "dispose" means the sale, destruction, razing, loan, lease, gift, grant, transfer, assignment, mortgage, option to sell, other contract or other disposition, or any combination thereof, of facilities, other property, any project or an interest therein authorized by the Solid Waste Authority Act;

I. "engineer" means any engineer in the permanent employ of the authority or any independent competent engineer or firm of such engineers employed by the authority in connection with any facility, property, project or power authorized by the Solid Waste Authority Act;

J. "equipment" or "equip" means the furnishing of all necessary or desirable, related or appurtenant, facilities, or any combination thereof, appertaining to any facilities, property, project or interest therein authorized by the Solid Waste Authority Act;

K. "facility" means any of the solid waste facilities or other property appertaining to the solid waste system of the authority;

L. "federal government" means the United States or any agency, instrumentality or corporation thereof;

M. "federal securities" means the bills, certificates of indebtedness, notes or bonds that are direct obligations of, or the principal and interest of which obligations are unconditionally guaranteed by, the United States;

N. "governing body" means the city council, city commission, board of county commissioners, board of trustees, board of directors or other legislative body of the public body proceeding under the Solid Waste Authority Act, in which body the legislative powers of the public body are vested;

O. "improvement" or "improve" means the extension, widening, lengthening, betterment, alteration, reconstruction, repair or other improvement, or any combination thereof of facilities, other property, project or any interest therein authorized by the Solid Waste Authority Act;

P. "municipality" means any incorporated city, town or village in the state, whether incorporated or governed under a general act, special legislative act or special charter of any type. "Municipal" pertains to municipality;

Q. "person" means any human being, association, partnership, firm or corporation, excluding a public body and excluding the federal government;

R. "president" means the president of the authority and the chairman of the board;

S. "project" means any structure, facility, undertaking or system that the authority is authorized to acquire, improve, equip, maintain or operate. A project may consist of all kinds of personal and real property. A project shall appertain to the solid waste system that the authority is authorized and directed to provide within and without the authority's boundaries;

T. "property" means real property and personal property;

U. "publication" or "publish" means publication in at least the one newspaper designated as the authority's official newspaper and published in the authority in the English language at least once a week and of general circulation in the authority. Except as otherwise specifically provided or necessarily implied, "publication" or "publish" also means publication for at least once a week for three consecutive weeks by three weekly insertions, the first publication being at least fifteen days prior to the designated time or event, unless otherwise so stated. It is not necessary that publication be made on the same day of the week in each of the three calendar weeks, but not less than fourteen days shall intervene between the first publication and the last publication, and publication shall be complete on the day of the last publication. Any publication required shall be verified by the affidavit of the publisher and filed with the secretary;

V. "public body" means the state or any agency, instrumentality or corporation thereof or any municipality, county, school district, other type district or any other

political subdivision of the state, excluding the authority and excluding the federal government;

W. "qualified elector" means a person qualified to vote in general elections in the state, who is a resident of the authority at the time of any election held under the provisions of the Solid Waste Authority Act or at any other time in reference to which the term "qualified elector" is used;

X. "real property" means:

(1) land, including land under water;

(2) buildings, structures, fixtures and improvements on land;

(3) any property appurtenant to or used in connection with land; and

(4) every estate, interest, privilege, easement, franchise and right in land, legal or equitable, including without limiting the generality of the foregoing, rights of way, terms for years and liens, charges or encumbrances by way of judgment, mortgage or otherwise and the indebtedness secured by such liens;

Y. "secretary" means the secretary of the authority;

Z. "secretary of state" means the secretary of the state of New Mexico;

AA. "securities" means any notes, warrants, bonds, temporary bonds or interim debentures or other obligations of the authority or any public body appertaining to any project or interest therein authorized by the Solid Waste Authority Act;

BB. "state" means the state of New Mexico or any agency, instrumentality or corporation thereof;

CC. "street" means any street, avenue, boulevard, alley, highway or other public right of way used for any vehicular traffic;

DD. "taxes" means general ad valorem taxes pertaining to any project authorized by the Solid Waste Authority Act; and

EE. "treasurer" means the treasurer of the authority.

History: Laws 1993, ch. 319, § 4.

74-10-5. Creation of a solid waste authority; board.

Any county or contiguous counties and any municipality or municipalities desiring to create a solid waste authority board for the purposes of petitioning to the county special

district commission pursuant to the Special District Procedures Act [4-53-1 to 4-53-11 NMSA 1978] for the creation of a solid waste authority may, by joint resolution, agree to the creation of a solid waste authority board. Each county or contiguous counties or any municipality or municipalities having adopted such a resolution shall make appointments to said boards as follows:

A. The county chairman, with the advice and consent of the county commissioners, shall appoint three members;

B. The mayor or chief elected executive officer of each municipality shall appoint two members each;

C. In the event that there are an even number of board members appointed, those board members having been appointed as provided above shall select one additional board member. After taking oath and filing bonds, the board shall choose one of its members as chairman of the board and president of the authority, and shall elect a secretary and a treasurer of the board and of the authority, who may or may not be members of the board. The secretary and treasurer may be one person. Such board shall adopt a seal and the secretary shall keep, in a well-bound book, a record of all its proceedings, minutes of all meetings, certificates, contracts, bonds given by employees and all corporate acts which shall be open to inspection by all owners of real property in the authority as well as to all other interested parties.

History: Laws 1993, ch. 319, § 5.

74-10-6. Oaths and bonds of board members.

Whenever a board has been appointed or elected, as hereinafter provided, the members of the board shall qualify by filing with the clerk of the court their oaths of office and corporate surety bonds at the expense of the authority in an amount not to exceed one thousand dollars ($1,000) each, the form thereof to be fixed and approved by the board, conditioned for the faithful performance of their duties as directors. The interim board as appointed pursuant to Section 5 [74-10-5 NMSA 1978] of the Solid Waste Authority Act shall serve until an election is held as provided hereinafter.

History: Laws 1993, ch. 319, § 6.

74-10-7. Petition for creation of solid waste authority.

A. The organization of a solid waste authority shall be initiated by the interim board appointed pursuant to Section 6 [74-10-6 NMSA 1978] of the Solid Waste Authority Act by filing a petition, duly adopted by the solid waste authority board and filed with the county special district commission as provided in the Special District Procedures Act [4-53-1 to 4-53-11 NMSA 1978].

B. The petition shall set forth:

(1) the name of the proposed district consisting of a chosen name preceding the words "solid waste authority";

(2) a general description of the improvements to be constructed or installed within and for the authority;

(3) an estimated overall cost of the proposed improvements to be constructed or installed within and for the authority;

(4) an estimated time table for the completion of all intended improvements;

(5) the need for the creation of the district and the construction or installation of improvements, stating the nature and extent of the anticipated use of the improvements by persons presently residing on land within the authority, and the nature and extent of the anticipated use of the improvements due to future development;

(6) a general description of the boundaries of the authority or the territory to be included within the authority, with such certainty as to enable a property owner to determine whether or not his property is within the authority;

(7) the salary, if any, that the members of the board shall receive for their services; and

(8) a request for the organization of the authority.

C. No petition duly adopted by the solid waste authority board and submitted to the county special district commission shall be declared void on account of alleged defects, but the county special district commission may at any time permit the petition to be amended to conform to the facts by correcting any errors in the description of the territory or in any other particular.

History: Laws 1993, ch. 319, § 7.

74-10-8. Hearing on petition.

A. At any time after the filing of the petition for the organization of an authority and before the day fixed for the hearing for the county special district commission on said petition, the owner of any taxable property within the proposed authority may file a petition with the county special district commission stating the reasons why the property should not be included in the authority and requesting that the property be excluded from it. The petition shall be verified and shall describe the property sought to be excluded. The county special district commission shall hear the petition and all objections to it at the time of the hearing before the county special district commission on the petition for organization of the solid waste authority and said county special district commission shall determine whether the property should be excluded or included in the authority.

B. The county special district commission may deny the petition or may order the petition to be modified if the county special district commission, after hearing on the petition, finds that:

(1) the proposed solid waste authority and improvements therein cannot conform with state regulations;

(2) the solid waste authority improvements cannot be implemented within a reasonable time taking into consideration the applications for state and federal grants;

(3) there is a lacking or actual or impending need for the solid waste improvements proposed; or

(4) the boundaries of the proposed authority contain land that has no actual or impending need for a solid waste authority or cannot be reasonably expected to utilize the solid waste authority improvements.

History: Laws 1993, ch. 319, § 8.

74-10-9. Decision of the special district commission.

The decision of the county special district commission shall be in accordance with Section 4-53-10 NMSA 1978; provided, however, that the county special district commission shall have the authority to modify the boundaries of the proposed solid waste authority and shall, in any decision approving the solid waste authority include a legal description of the boundaries of the authority.

History: Laws 1993, ch. 319, § 9.

74-10-10. Filing special district commission order.

Within thirty days after the solid waste authority has been declared created by the county special district commission, the county special district commission shall transmit to the county clerk in each county in which the authority is located, copies of the findings and the opinion of the county special district commission approving the solid waste authority. The same shall be filed in the same manner as articles of incorporation are now required to be filed under the general laws concerning corporations; and the clerk of the court in each county shall receive a fee of one dollar ($1.00) for filing preserving the same.

History: Laws 1993, ch. 319, § 10.

74-10-11. Districting the authority.

A. The interim board shall, within one hundred eighty days of the filing of the decision of the county special district commission with the county clerk, and after public

hearing, adopt by resolution a districting plan which causes the area within the authority to be divided into seven geographical districts numbered one through seven and each district shall elect one representative. Each representative representing a district shall reside in and be elected by qualified voters of that district only.

B. In establishing authority districts, the interim appointed board shall consider the following principles which, in the event of any conflict among them, shall be considered in the following order:

(1) the districts shall contain as nearly as possible substantially the same population based on the most recent federal census;

(2) communities of interest, including those based upon ethnic and economic factors, shall be preserved whenever reasonable within a single district; and

(3) the districts shall be formed of compact, contiguous territories and the total length of all district boundaries shall be as short as possible.

C. Redistricting shall occur upon any change in the authority's boundaries.

History: Laws 1993, ch. 319, § 11.

74-10-12. Board of directors.

The governing body of the authority is a board of directors consisting of seven qualified electors of the authority. All powers, rights, privileges and duties vested in or imposed upon the authority are exercised and performed by and through the board of directors; provided that the exercise of any executive, administrative and ministerial powers may be, by the board, delegated and redelegated to officers and employees of the authority. Except for the first directors appointed as provided for in Section 74-10-5 NMSA 1978, the term of each director commences on the first day of January next following a regular local election in the state and runs for six years.

History: Laws 1993, ch. 319, § 12; 2019, ch. 212, § 269.

ANNOTATIONS

The 2019 amendment, effective April 3, 2019, revised provisions related to the terms of office for directors; and deleted "5 of the Solid Waste Authority Act or elected as provided in Section 13 of the Solid Waste Authority Act and except for any director chosen to fill an unexpired term" and added "74-10-5 NMSA 1978", and deleted "Each director, subject to such exceptions, shall serve a six-year term ending on the first day of January next following a general election, and each director shall serve until his successor has been duly chosen and qualified."

74-10-13. Election of directors.

Each biennial nonpartisan election of directors shall be conducted at the time of the regular local election under the direction of the county clerk and in accordance with the election laws of New Mexico. Any other election of the authority, including an election to seek approval for the issuance of bonds, shall be conducted pursuant to the provisions of the Local Election Act [Chapter 1, Article 22 NMSA 1978].

History: Laws 1993, ch. 319, § 13; 2019, ch. 212, § 270.

ANNOTATIONS

The 2019 amendment, effective April 3, 2019, provided that each biennial nonpartisan election of directors shall be conducted at the time of the regular local election, and provided that any other election shall be conducted pursuant to the Local Election Act; after "conducted at the time of the", deleted "general" and added "regular local", and after "shall be conducted", deleted "at any time approved by the board in accordance with the election laws of New Mexico" and added "pursuant to the provisions of the Local Election Act".

74-10-14. Election resolution.

The board shall call any election by resolution as prescribed in the Local Election Act [Chapter 1, Article 22 NMSA 1978]. The resolution shall recite the objects and purposes of the election and indicate the general or regular local election on which the ballot question shall appear or specify the date a special election will be held.

History: Laws 1993, ch. 319, § 14; 2019, ch. 212, § 271.

ANNOTATIONS

The 2019 amendment, effective April 3, 2019, revised provisions related to a resolution that calls for an election; and deleted "adopted at least one hundred eighty days prior to the election" and added "as prescribed in the Local Election Act", after "purposes of the election and", and deleted "the date upon which the election shall" and added "indicate the general or regular local election on which the ballot question shall appear or specify the date a special election will".

74-10-15. Conduct of election.

An election held pursuant to the Solid Waste Authority Act shall be conducted pursuant to the provisions of the Local Election Act [Chapter 1, Article 22 NMSA 1978].

History: Laws 1993, ch. 319, § 15; 2019, ch. 212, § 272.

ANNOTATIONS

The 2019 amendment, effective April 3, 2019, provided that an election held pursuant to the Solid Waste Authority Act shall be conducted pursuant to the Local Election Act"; and deleted "in the manner provided by the laws of the state for the conduct of general elections" and added "pursuant to the provisions of the Local Election Act".

74-10-16. Repealed.

History: Laws 1993, ch. 319, § 16; repealed by Laws 2019, ch. 212, § 284.

ANNOTATIONS

Repeals. — Laws 2019, ch. 212, § 284 repealed 74-10-16 NMSA 1978, as enacted by Laws 1993, ch. 319, § 16, relating to notice of election, effective April 3, 2019. For provisions of former section, *see* the 2018 NMSA 1978 on *NMOneSource.com*.

74-10-17. Repealed.

History: Laws 1993, ch. 319, § 17; repealed by Laws 2019, ch. 212, § 284.

ANNOTATIONS

Repeals. — Laws 2019, ch. 212, § 284 repealed 74-10-17 NMSA 1978, as enacted by Laws 1993, ch. 319, § 17, relating to polling places, effective April 3, 2019. For provisions of former section, *see* the 2018 NMSA 1978 on *NMOneSource.com*.

74-10-18. Repealed.

History: Laws 1993, ch. 319, § 18; repealed by Laws 2019, ch. 212, § 284.

ANNOTATIONS

Repeals. — Laws 2019, ch. 212, § 284 repealed 74-10-18 NMSA 1978, as enacted by Laws 1993, ch. 319, § 18, relating to election supplies, effective April 3, 2019. For provisions of former section, *see* the 2018 NMSA 1978 on *NMOneSource.com*.

74-10-19. Approval of proposals at election.

Except as otherwise provided, any proposal submitted at any election held pursuant to the Solid Waste Authority Act shall not carry unless the proposal has been approved by a majority of the qualified electors of the authority voting on the proposal.

History: Laws 1993, ch. 319, § 19; 2019, ch. 212, § 273.

ANNOTATIONS

The 2019 amendment, effective April 3, 2019, revised certain election procedures for elections held pursuant to the Solid Waste Authority Act; in the section heading, added "Approval of proposals at" and deleted "returns"; and deleted "The authority shall appoint an authority precinct board at the authority's expense for each polling place. For authority elections held at the time of the general election, the authority shall be provided space in the polling places where the general election is being conducted. Paper ballots shall be used in the conduct of any authority election, and the authority precinct board shall conduct the election as provided in the Election Code where paper ballots are used. The separate authority precinct board shall certify the results of the election in that precinct to the secretary within twelve hours after the close of the polls. The secretary shall canvass the results of the authority election as certified by each of the separate authority precinct boards and shall declare the results of the election at any regular or special meeting held not less than five days following the date of the election."

74-10-20. Filling vacancies on board.

Any vacancy on the board shall be filled by appointment by the remaining members of the board, the appointee to act until the next biennial election when the vacancy shall be filled by election. Any vacancy on the appointed board shall be filled in the same manner as original appointments, the appointee to act until the next election.

History: Laws 1993, ch. 319, § 20.

74-10-21. Changing authority's boundaries.

The elected board has the authority to petition the county special district commission to change the authority's boundaries. The county special district commission's decision shall be made in accordance with Sections 8, 9 and 10 [74-10-8, 74-10-9 and 74-10-10 NMSA 1978] of the Solid Waste Authority Act.

History: Laws 1993, ch. 319, § 21.

74-10-22. Board's administrative powers.

The board may exercise the following powers:

A. fix the time and place at which its regular meetings will be held within the authority and provide for the calling and holding of special meetings;

B. adopt and amend or otherwise modify bylaws and rules for procedure;

C. select one director as chairman of the board and president of the authority, and another director as chairman pro tem of the board and president pro tem of the authority, and choose a secretary and a treasurer of the board and authority, each of

which two positions may be filled by a person who is, or is not, a director, and both of which positions may, or may not, be filled by one person;

D. prescribe by resolution a system of business administration and create all necessary offices and establish and re-establish the powers, duties and compensation of all officers and employees;

E. require and fix the amount of all official bonds necessary or desirable and convenient in the opinion of the board for the protection of the funds and property of the authority, subject to the provisions of Section 13 [74-10-13 NMSA 1978] of the Solid Waste Authority Act;

F. prescribe a method of auditing and allowing or rejecting claims and demands;

G. provide a method for the letting of contracts on a fair and competitive basis for the construction of works, any facility or any project or any interest therein or the performance or furnishing of labor, materials or supplies as required in that act;

H. designate an official newspaper published in the authority in the English language and direct additional publication in any newspaper where it deems that the public necessity may so require; and

I. make and pass resolutions and orders on behalf of the authority not repugnant to the provisions of the Solid Waste Authority Act, necessary or proper for the government and management of the affairs of the authority, for the execution of the powers vested in the authority and for carrying into effect the provisions of that act.

History: Laws 1993, ch. 319, § 22.

74-10-23. Records of board.

On all resolutions and orders, the roll shall be called, and the ayes and nays shall be recorded. All resolutions and orders, as soon as may be after their passage, shall be recorded in a book kept for that purpose and be authenticated by the signature of the presiding officer of the board and the secretary. Every legislative act of the board of a general or permanent nature shall be by resolution. The book of resolutions and orders is a public record. A record shall also be made of all other proceedings of the board, minutes of all meetings, certificates, contracts, bonds given by officers, employees and any other agents of the authority, and all corporate acts, which record is also a public record. The treasurer shall keep strict and accurate accounts of all money received by and disbursed for and on behalf of the authority in a permanent record, which is also a public record. Any permanent record of the authority shall be open for inspection by any qualified elector thereof, by any other interested person or by any representative of the federal government or any public body. All records are subject to audit as provided by law for political subdivisions.

History: Laws 1993, ch. 319, § 23.

74-10-24. Meetings of board.

All meetings of the board shall be open to the public. No business of the board shall be transacted except at a regular or special meeting at which a quorum consisting of at least three-fifths of the total membership of the board is present. Any action of the board requires the affirmative vote of a majority of the directors present and voting. A smaller number of directors than a quorum may adjourn from time to time and may compel the attendance of absent members in the manner and under such penalties as the board may provide.

History: Laws 1993, ch. 319, § 24.

74-10-25. Compensation of directors.

Directors shall receive no compensation for their services as a director. Directors may be reimbursed for expenses incurred by them on authority business with approval of the board.

History: Laws 1993, ch. 319, § 25.

74-10-26. Interest in contracts and property disqualifications.

No director or officer, employee or agent of the authority may be interested in any contract or transaction with the authority except in his official representative capacity or as provided, except for any contract of employment with the authority. Neither the holding of any office nor employment in the government of any public body or the federal government nor the owning of any property within the state, within or without the authority, may be deemed a disqualification for membership on the board or employment by the authority, or a disqualification for compensation for services as an officer, employee or agent of the authority, except as provided in Section 22 [74-10-22 NMSA 1978] of the Solid Waste Authority Act.

History: Laws 1993, ch. 319, § 26.

74-10-27. Powers of the authority.

The authority may exercise the following duties, privileges, immunities, rights, liabilities and disabilities appertaining to a public body politic and corporate and constituting a quasi-municipal corporation and political subdivision of the state established as an instrumentality exercising public and essential governmental and proprietary functions to provide for the public health, safety and general welfare:

A. perpetual existence and succession;

B. adopt, have and use a corporate seal and alter the same at pleasure;

C. sue and be sued and be a party to suits, actions and proceedings;

D. commence, maintain, intervene in, defend, compromise, terminate by settlement or otherwise and otherwise participate in and assume the cost and expense of any and all actions and proceedings now or hereafter begun and appertaining to the authority, its board, its officers, agents or employees, or any of the authority's duties, privileges, immunities, rights, liabilities and disabilities, or the authority's solid waste system, other property of the authority or any project;

E. enter into contracts and agreements, including but not limited to contracts with the federal government, the state and any other public body;

F. borrow money and issue securities evidencing any loan to or amount due by the authority, provide for and secure the payment of any securities and the rights of the holders of those securities and purchase, hold and dispose of securities, as provided in the Solid Waste Authority Act;

G. refund any loan or obligation of the authority and issue refunding securities to evidence such loan or obligation without any election;

H. purchase, trade, exchange, encumber and otherwise acquire, maintain and dispose of property and interests in that property;

I. subject to an election as provided in the Solid Waste Authority Act, levy and cause to be collected general ad valorem taxes on all property subject to property taxation within the authority; provided that the total tax levy, excluding any levy for the payment of any debt of the authority authorized pursuant to the Solid Waste Authority Act, for any fiscal year shall not exceed an aggregate total of three mills, or any lower amount required by operation of the rate limitation provisions of Section 7-37-7.1 NMSA 1978 upon this tax levy, for each one thousand dollars ($1,000) of net taxable value, as that term is defined in the Property Tax Code [Chapter 7, Articles 35 to 38 NMSA 1978], by certifying, on or before the fifteenth day of July in each year in which the board determines, after approval by the qualified electors pursuant to the Solid Waste Authority Act, to levy a tax, to the board of county commissioners within each county wherein the authority has any territory, the rate so fixed, with directions that, at the time and in the manner required by law for levying taxes for other purposes, such body having authority to levy taxes shall levy the tax upon the net taxable value of all property subject to property taxation within the authority;

J. hire and retain officers, agents, employees, engineers, attorneys and any other persons, permanent or temporary, necessary or desirable to effect the purposes of the Solid Waste Authority Act, defray any expenses incurred thereby in connection with the authority and acquire office space, equipment, services, supplies, fire and extended coverage insurance, use and occupancy insurance, workers' compensation insurance,

property damage insurance, public liability insurance for the authority and its officers, agents and employees and other types of insurance, as the board may determine; provided, however, that no provision in that act authorizing the acquisition of insurance shall be construed as waiving any immunity of the authority or any director, officer or agent thereof and otherwise existing under the laws of the state;

K. condemn property for public use;

L. acquire, improve, equip, hold, operate, maintain and dispose of a solid waste system, wholly within the authority, or partially within and partially without the authority, and wholly within, wholly without or partially within and partially without any public body all or any part of the area of which is situated within the authority;

M. pay or otherwise defray the cost of any project;

N. pay or otherwise defray and contract so to pay or defray, for any term not exceeding fifty years, without an election, except as otherwise provided in the Solid Waste Authority Act, the principal of, any interest on and any other charges appertaining to, any securities or other obligations of the federal government, any public body or person incurred in connection with any such property so acquired by the authority;

O. establish and maintain facilities within or without the authority, across or along any public street, highway, bridge, viaduct or other public right-of-way or in, upon, under or over any vacant public lands, which public lands are now or may become the property of the state, or across any stream of water or water course, without first obtaining a franchise from the municipality, county or other public body having jurisdiction over the same; provided that the authority shall cooperate with any public body having such jurisdiction, shall promptly restore any such street, highway, bridge, viaduct or other public right-of-way to its former state of usefulness as nearly as may be and shall not use the same in such manner as to impair completely or unnecessarily the usefulness thereof;

P. deposit any money of the authority, subject to the limitations in Article 8, Section 4 of the constitution of New Mexico, in any banking institution within or without the state and secured in such manner and subject to such terms and conditions as the board may determine, with or without the payment of any interest on any such deposit;

Q. invest any surplus money in the authority treasury, including such money in any sinking or reserve fund established for the purpose of retiring any securities of the authority, not required for the immediate necessities of the authority, in its own securities or in federal securities, by direct purchase of any issue of such securities, or part thereof, at the original sale of the same, or by the subsequent purchase of such securities;

R. sell any such securities thus purchased and held, from time to time;

S. reinvest the proceeds of any such sale in other securities of the authority or in federal securities, as provided in Subsection Q of this section;

T. sell in season from time to time such securities thus purchased and held, so that the proceeds may be applied to the purposes for which the money with which such securities were originally purchased was placed in the treasury of the authority;

U. accept contributions or loans from the federal government for the purpose of financing the planning, acquisition, improvement, equipment, maintenance and operation of any enterprise in which the authority is authorized to engage and enter into contracts and cooperate with and accept cooperation and participation from the federal government for these purposes;

V. enter into joint operating or service contracts and agreements, acquisition, improvement, equipment or disposal contracts or other arrangements, for any term not exceeding fifty years, with the federal government, any public body or any person concerning solid waste facilities, or any project, whether acquired by the authority or by the federal government, any public body or any person, and accept grants and contributions from the federal government, any public body or any person in connection therewith;

W. enter into and perform when determined by the board to be in the public interest and necessary for the protection of the public health, contracts and agreements, for any term not exceeding fifty years, with the federal government, any public body or any person for the provision and operation by the authority of solid waste facilities;

X. enter into and perform, without any election, contracts and agreements with the federal government, any public body or any person for or concerning the planning, construction, lease or other acquisition, improvement, equipment, operation, maintenance, disposal, and the financing of any project, including but not necessarily limited to any contract or agreement for any term not exceeding fifty years;

Y. enter upon any land, make surveys, borings, soundings and examinations for the purposes of the authority, locate the necessary works of any project and roadways and other rights-of-way appertaining to any project authorized in the Solid Waste Authority Act; and acquire all property necessary or convenient for the acquisition, improvement or equipment of such works;

Z. cooperate with and act in conjunction with the state, or any of its engineers, officers, boards, commissions or departments, or with the federal government or any of its engineers, officers, boards, commissions or departments, or with any other public body or any person in the acquisition, improvement or equipment of any project or for any works, acts or purposes provided for in the Solid Waste Authority Act, and adopt and carry out any definite plan or system of work for any such purpose;

AA. cooperate with the federal government or any public body by an agreement therewith by which the authority may:

(1) acquire and provide, without cost to the cooperating entity, the land, easements and rights-of-way necessary for the acquisition, improvement or equipment of the solid waste system or any project;

(2) hold and save harmless the cooperating entity free from any claim for damages arising from the acquisition, improvement, equipment, maintenance and operation of the solid waste system or any project; and

(3) maintain and operate any project in accordance with regulations prescribed by the cooperating entity;

BB. carry on technical and other investigations of all kinds, make measurements, collect data and make analyses, studies and inspections pertaining to solid waste facilities, and any project, both within and without the authority, and for this purpose the authority has the right of access through its authorized representative to all lands and premises within the state;

CC. have the right to provide from revenues or other available funds an adequate fund for the improvement and equipment of the authority's solid waste system or of any parts of the works and properties of the authority;

DD. make and keep records in connection with any project or otherwise concerning the authority;

EE. arbitrate any differences arising in connection with any project or otherwise concerning the authority;

FF.have the management, control and supervision of all the business and affairs appertaining to any project herein authorized, or otherwise concerning the authority, and of the acquisition, improvement, equipment, operation and maintenance of any such project;

GG. prescribe the duties of officers, agents, employees and other persons and fix their compensation;

HH. enter into contracts of indemnity and guaranty, in such form as may be approved by the board, relating to or connected with the performance of any contract or agreement which the authority is empowered to enter into under the provisions of the Solid Waste Authority Act or of any other law of the state;

II. provide, by any contract for any term not exceeding fifty years, or otherwise, without an election:

(1) for the joint use of personnel, equipment and facilities of the authority and any public body, including without limitation public buildings constructed by or under the supervision of the board of the authority or the governing body of the public body concerned, upon such terms and agreements and within such areas within the authority as may be determined, for the promotion and protection of health, comfort, safety, life, welfare and property of the inhabitants of the authority and any such public body; and

(2) for the joint employment of clerks, stenographers and other employees appertaining to any project, now existing or hereafter established in the authority, upon such terms and conditions as may be determined for the equitable apportionment of the expenses therefrom resulting;

JJ. obtain financial statements, appraisals, economic feasibility reports and valuations of any type appertaining to any project or any property pertaining thereto;

KK. adopt any resolution authorizing a project or the issuance of securities, or both, or otherwise appertaining thereto, or otherwise concerning the authority;

LL. make and execute a mortgage, deed of trust, indenture or other trust instrument appertaining to a project or to any securities authorized in the Solid Waste Authority Act, or to both, except as provided in Subsection MM of this section and in Section 48 [74-10-48 NMSA 1978] of the Solid Waste Authority Act;

MM. make all contracts, execute all instruments and do all things necessary or convenient in the exercise of the powers granted in the Solid Waste Authority Act, or in the performance of the authority's covenants or duties or in order to secure the payment of its securities; provided, no encumbrance, mortgage or other pledge of property, excluding any money, of the authority is created thereby and provided no property, excluding money, of the authority is liable to be forfeited or taken in payment of such securities;

NN. have and exercise all rights and powers necessary or incidental to or implied from the specific powers granted in the Solid Waste Authority Act, which specific powers shall not be considered as a limitation upon any power necessary or appropriate to carry out the purposes and intent of that act;

OO. exercise all or any part or combination of the powers granted in the Solid Waste Authority Act; and

PP. to fix and from time to time increase or decrease rates, tolls or charges for services or facilities furnished or made available by the authority, and to pledge that revenue for the payment of any indebtedness of the district. Until paid, all rates, tolls or charges constitute a perpetual lien on and against the property served, and any such lien may be foreclosed in the same manner as provided by the laws of New Mexico for the foreclosure of real estate mortgages.

History: Laws 1993, ch. 319, § 27.

74-10-28. Levy and collection of taxes.

To levy and collect taxes, the board shall determine in each year the amount of money necessary to be raised by taxation, taking into consideration other sources of revenue of the authority, and shall propose by resolution a rate of levy, without limitation as to rate or amount, except for the limitation in Section 27 [74-10-27 NMSA 1978] of the Solid Waste Authority Act and for any constitutional limitation, which, when levied upon the net taxable value, as that term is defined in the Property Tax Code [Chapter 7, Articles 35 to 38 NMSA 1978], of all property subject to property taxation within the authority, and together with other revenues, will raise the amount required by the authority annually to supply funds for paying expenses of organization and the costs of acquiring, improving, equipping, operating and maintaining any project or facility of the authority, and promptly to pay in full, when due, all interest on and principal of bonds and other securities of the authority, and in the event of accruing defaults or deficiencies, an additional levy may be made as provided in Section 29 [74-10-29 NMSA 1978] of the Solid Waste Authority Act.

History: Laws 1993, ch. 319, § 28.

74-10-29. Levies to cover deficiencies.

The board, in proposing ad valorem tax levies by resolution, shall take into account the maturing indebtedness for the ensuing year as provided in its contracts, maturing securities and interest on securities, and deficiencies and defaults of prior years and shall make ample provision for the payment thereof. In case the money produced from such levies, together with other revenues of the authority, is not sufficient punctually to pay the annual installments of its contracts or securities, and interest thereon, and to pay defaults and deficiencies, the board shall propose by resolution such additional levies of taxes as may be necessary for such purposes, and notwithstanding any limitations, except the limitation in Subsection I of Section 27 [74-10-27 NMSA 1978] of the Solid Waste Authority Act, and any constitutional limitation, such taxes, if approved by the qualified electors, shall be made and continue to be levied until the indebtedness of the authority is fully paid.

History: Laws 1993, ch. 319, § 29.

74-10-30. Elections for imposition of ad valorem taxes.

Whenever the board shall determine by resolution that the interest of the authority and the public interest or necessity demand the imposition of a general ad valorem tax, the board shall certify the rate of ad valorem tax needed and shall order the submission of the proposition of imposing the ad valorem tax to the qualified electors residing within the authority. Any such election may be held separate or may be consolidated or held concurrent with any other election authorized by the Solid Waste Authority Act. Such

resolution shall also fix the date upon which the election shall be held, the manner of holding the same, the method of voting for or against the imposition of the proposed ad valorem tax, shall designate the polling place or places and shall appoint for each polling place from the qualified electors of the district the officers of such election consisting of three judges, one of whom shall act as clerk.

History: Laws 1993, ch. 319, § 30.

74-10-31. Conduct of election.

Elections for imposition of ad valorem taxes shall be conducted in a manner prescribed by the laws of the state for the conduct of general elections and in accordance with the provisions and procedures outlined in the Solid Waste Authority Act for the election of directors.

History: Laws 1993, ch. 319, § 31.

74-10-32. Sinking fund.

Whenever any indebtedness has been incurred by the authority, it is lawful for the board to levy taxes and to collect revenue for the purpose of creating a reserve fund in such amount as the board may determine, which may be used to meet the obligations of the authority, for maintenance and operating charges and depreciation, and to provide improvements for the authority.

History: Laws 1993, ch. 319, § 32.

74-10-33. Manner of levying and collecting taxes.

It is the duty of the body having authority to levy taxes within each county to levy the taxes provided in Subsection I of Section 27 [74-10-27 NMSA 1978] of the Solid Waste Authority Act, and elsewhere in that act. It is the duty of all officials charged with collecting taxes to collect such taxes at the time and in the form and manner and with like interest and penalties as other general ad valorem taxes are collected, and when collected, to pay the same to the authority. The payment of such collection shall be made monthly to the treasurer of the authority and paid into the depository thereof to the credit of the authority. All general ad valorem taxes levied under that act, together with interest thereon and penalties for default in payment thereof, and all costs of collecting the same constitute until paid a perpetual lien on and against the property taxed, and such lien is on a parity with the tax lien of other general ad valorem taxes.

History: Laws 1993, ch. 319, § 33.

74-10-34. Delinquent taxes.

If the general ad valorem taxes levied are not paid, then delinquent real property shall be sold at the regular tax sale for the payment of such taxes, interest and penalties, in the manner provided by the statutes of the state for selling real property for the nonpayment of general taxes. If there are no bids at the tax sale for the property so offered, the property shall be struck off to the county, and the county shall account to the authority in the same manner as provided by law for accounting for school, town and city taxes. Delinquent personal property shall be distrained and sold as provided by law.

History: Laws 1993, ch. 319, § 34.

74-10-35. Powers of public bodies.

The governing body of any municipality, federally authorized Indian pueblo or tribe or other public body, upon its behalf and in its name, for the purpose of aiding and cooperating in the determination of any authority boundary or any project authorized in the Solid Waste Authority Act, upon the terms and with or without consideration and with or without an election, as the governing body determines, may exercise the following powers:

A. sell, lease, loan, donate, grant, convey, assign, transfer and otherwise dispose to the authority, solid waste facilities or any other property or any interest therein;

B. make available for temporary use or otherwise dispose to the authority of any machinery, equipment, facilities and other property, and any agents, employees, persons with professional training and any other persons, to effect the purposes of that act. Any such property and persons owned or in the employ of any public body while engaged in performing for the authority any service, activity or undertaking authorized in that act, pursuant to contract or otherwise, shall have and retain all of the powers, privileges, immunities, rights and duties of and shall be deemed to be engaged in the service and employment of such public body, notwithstanding such service, activity or undertaking is being performed in or for the authority;

C. enter into any agreement or joint agreement between or among the federal government, the authority and any other public body, or any combination thereof, extending over any period not exceeding fifty years, which is mutually agreed thereby, notwithstanding any law to the contrary, respecting action or proceedings appertaining to any power granted in that act, and the use or joint use of any facilities, project or other property authorized in that act;

D. sell, lease, loan, donate, grant, convey, assign, transfer or pay over to the authority any facilities or any project authorized in that act, or any part thereof, or any interest in real or personal property, or any funds available for acquisition, improvement or equipment purposes, including the proceeds of any securities previously or hereafter issued for acquisition, improvement or equipment purposes which may be used by the authority in the acquisition, improvement, equipment, maintenance or operation of any facilities or project authorized in that act;

E. transfer, grant, convey or assign and set over to the authority any contracts which may have been awarded by the public body for the acquisition, improvement or equipment of any project not begun or if begun, not completed;

F. budget and appropriate, and each municipality or other public body is hereby required and directed to budget and appropriate, from time to time, general ad valorem tax proceeds, and other revenues legally available therefor to pay all obligations arising from the exercise of any powers granted in the Solid Waste Authority Act as such obligations shall accrue and become due;

G. provide for an agency, by any agreement authorized in that act, to administer or execute that or any collateral agreement, which agency may be one of the parties to the agreement, or a commission or board constituted pursuant to the agreement;

H. provide that any such agency shall possess the common power specified in the agreement and may exercise it in the manner or according to the method provided in the agreement. Such power is subject to the restrictions upon the manner of exercising the power of any one of the contracting parties, which party shall be designated by the agreement; and

I. continue any agreement authorized in the Solid Waste Authority Act for a definite term not exceeding fifty years, or until rescinded or terminated, which agreement may provide for the method by which it may be rescinded or terminated by any party.

History: Laws 1993, ch. 319, § 35.

74-10-36. Effect of extraterritorial functions.

All of the powers, privileges, immunities and rights, exemptions from laws, ordinances and rules, all pension, relief, disability, workers' compensation and other benefits which apply to the activity of officers, agents or employees of the authority or any such public body when performing their respective functions within the territorial limits of the respective public agencies apply to them to the same degree and extent while engaged in the performance of any of their functions and duties extraterritorially under the Solid Waste Authority Act.

History: Laws 1993, ch. 319, § 36.

74-10-37. Forms of borrowing.

Upon the conditions and under the circumstances set forth in the Solid Waste Authority Act, the authority, to carry out the purposes of that act, from time to time may borrow money to defray the cost of any project, or any part thereof, as the board may determine and issue the following securities to evidence such borrowing:

A. notes;

B. warrants;

C. bonds;

D. temporary bonds; and

E. interim debentures.

History: Laws 1993, ch. 319, § 37.

74-10-38. Issuance of notes.

The authority is authorized to borrow money without an election in anticipation of taxes or other revenues, or both, and to issue notes to evidence the amount so borrowed.

History: Laws 1993, ch. 319, § 38.

74-10-39. Issuance of warrants.

The authority is authorized to defray the cost of any services, supplies, equipment or other materials furnished to or for the benefit of the authority by the issuance of warrants to evidence the amount due therefor, without an election, in anticipation of taxes or other revenues, or both.

History: Laws 1993, ch. 319, § 39.

74-10-40. Maturities of notes and warrants.

Notes and warrants may mature at such time not exceeding one year from the respective dates of their issuance as the board may determine. They shall not be extended or funded except by the issuance of bonds or interim debentures in compliance with Sections 41 and 43 [74-10-41 and 74-10-43 NMSA 1978] of the Solid Waste Authority Act.

History: Laws 1993, ch. 319, § 40.

74-10-41. Issuance of bonds and incurrence of debt.

The authority is authorized to borrow money in anticipation of taxes or other revenues, or both, and to issue bonds to evidence the amount so borrowed. No bonded indebtedness or any other indebtedness not payable in full within one year, except for interim debentures as provided in Sections 43 and 86 through 88 [74-10-43 and 74-10-86 to 74-10-88 NMSA 1978] of the Solid Waste Authority Act, shall be created by the authority without first submitting a proposition of issuing such bonds to the qualified

electors of the authority and being approved by a majority of such electors voting thereon at an election held for that purpose in accordance with Sections 13 through 17 [74-10-13, 74-10-14, 74-10-15 NMSA 1978] of that act. Bonds so authorized may be issued in one series or more and may mature at such time or times not exceeding forty years from their issuance as the board may determine. The total of all outstanding indebtedness at any one time shall not exceed thirty million dollars ($30,000,000) without prior approval of the state legislature.

History: Laws 1993, ch. 319, § 41.

ANNOTATIONS

Compiler's notes. — Laws 2019, ch. 212, § 284 repealed 74-10-16 and 74-10-17 NMSA 1978, effective April 3, 2019.

74-10-42. Issuance of temporary bonds.

The authority is authorized to issue temporary bonds, pending preparation of definitive bond or bonds and exchangeable for the definitive bond or bonds when prepared, as the board may determine. Each temporary bond shall set forth substantially the same conditions, terms and provisions as the definitive bond for which it is exchanged. Each holder of any such temporary security shall have all the rights and remedies which he would have as a holder of the definitive bond or bonds.

History: Laws 1993, ch. 319, § 42.

74-10-43. Issuance of interim debentures.

The authority is authorized to borrow money and to issue interim debentures evidencing construction or short-term loans for the acquisition or improvement and equipment of the solid waste system or any project in supplementation of long-term financing and the issuance of bonds as provided in Sections 86 through 88 [74-10-86 to 74-10-88 NMSA 1978] of the Solid Waste Authority Act.

History: Laws 1993, ch. 319, § 43.

74-10-44. Payment of securities.

All securities issued by the authority shall be authorized by resolution. The authority may pledge its full faith and credit for the payment of any securities authorized in the Solid Waste Authority Act, the interest thereon, any prior redemption premium or premiums and any charges appertaining thereto. Securities may constitute the direct and general obligations of the authority. Their payment may be secured by a specific pledge of tax proceeds and other revenues of the authority as the board may determine.

History: Laws 1993, ch. 319, § 44.

74-10-45. Additionally secured securities.

The board, in connection with such additionally secured securities, in the resolution authorizing their issuance or other instrument appertaining thereto, may pledge all or a portion of such revenues, subject to any prior pledges, as additional security for such payment of such securities, and at its option may deposit such revenues in a fund created to pay the securities or created to secure additionally their payment.

History: Laws 1993, ch. 319, § 45.

74-10-46. Pledge of revenues.

Any such revenues pledged directly or as additional security for the payment of securities of any one issue or series, which revenues are not exclusively pledged therefor, may subsequently be pledged directly or as additional security for the payment of the securities of one or more issue or series subsequently authorized.

History: Laws 1993, ch. 319, § 46.

74-10-47. Ranking among different issues.

All securities of the same issue or series shall, subject to the prior and superior rights of outstanding securities, claims and other obligations, have a prior, paramount and superior lien on the revenues pledged for the payment of the securities over and ahead of any lien thereagainst subsequently incurred of any other securities; provided, however, the resolution authorizing, or other instrument appertaining to, the issuance of any securities may provide for the subsequent authorization of bonds or other securities the lien for the payment of which on such revenues is on a parity with the lien thereon of the subject securities upon such conditions and subject to such limitations as the resolution or other instrument may provide.

History: Laws 1993, ch. 319, § 47.

74-10-48. Ranking among securities of same issue.

All securities of the same issue or series shall be equally and ratably secured without priority by reason of number, date of maturity, date of securities, of sale, of execution or of delivery, by a lien on such revenues in accordance with the provisions of the Solid Waste Authority Act and the resolution authorizing, or other instrument appertaining to, such securities, except to the extent such resolution or other instrument otherwise expressly provides.

History: Laws 1993, ch. 319, § 48.

74-10-49. Payment recital in securities.

Each security issued under the Solid Waste Authority Act shall recite in substance that the security and the interest on that security are payable solely from the revenues or other money pledged to the payment of those revenues. Securities specifically pledging the full faith and credit of the authority for their payment shall so state.

History: Laws 1993, ch. 319, § 49.

74-10-50. Incontestable recital in securities.

Any resolution authorizing, or other instrument appertaining to, any securities under the Solid Waste Authority Act may provide that each security authorized by such a resolution shall recite that it is issued under authority of that act. Such recital shall conclusively impart full compliance with all of the provisions of that act, and all securities issued containing such recital shall be incontestable for any cause whatsoever after their delivery for value.

History: Laws 1993, ch. 319, § 50.

74-10-51. Limitations upon payment of securities.

The payment of securities shall not be secured by an encumbrance, mortgage or other pledge of property of the authority, except for revenues, income, tax proceeds and other money pledged for the payment of securities. No property of the authority, subject to such exception, shall be liable to be forfeited or taken in payment of the securities.

History: Laws 1993, ch. 319, § 51.

74-10-52. Limitations upon incurring any debt.

Nothing in the Solid Waste Authority Act shall be construed as creating or authorizing the creation of an indebtedness on the part of any municipality or other public body included in the authority or elsewhere located.

History: Laws 1993, ch. 319, § 52.

74-10-53. Security details.

Any securities authorized to be issued in the Solid Waste Authority Act shall bear the date or dates, shall be in the denomination or denominations, shall mature at the time or times but in no event exceeding forty years from their date or any shorter limitation provided in that act, shall bear interest which may be evidenced by one or two sets of coupons, payable annually or semiannually, except that the first coupon or coupons, if any, appertaining to any security may represent interest for any period not in excess of one year, as may be prescribed by resolution or other instrument; and the securities and any coupons shall be payable in the medium of payment at any banking institution or

other place or places within or without the state, including but not limited to the office of the treasurer of the county in which the authority is located wholly or in part, as determined by the board, and the securities at the option of the board may be in one or more series, may be made subject to prior redemption in advance of maturity in the order or by lot or otherwise at the time or times without or with the payment of the premium or premiums not exceeding six percent of the principal amount of each security so redeemed, as determined by the board.

History: Laws 1993, ch. 319, § 53.

74-10-54. Capitalization of costs.

Any resolution authorizing the issuance of securities or other instrument appertaining thereto may capitalize interest on any securities during any period of construction or other acquisition estimated by the board and one year thereafter and any other cost of any project by providing for the payment of the amount capitalized from the proceeds of the securities.

History: Laws 1993, ch. 319, § 54.

74-10-55. Other security details.

Securities may be issued in such manner, in such form, with such recitals, terms, covenants and conditions and with such other details as may be provided by the board in the resolution authorizing the securities, or other instrument appertaining thereto, except as otherwise provided in the Solid Waste Authority Act.

History: Laws 1993, ch. 319, § 55.

74-10-56. Reissuance of securities.

Any resolution authorizing the issuance of securities or any other instrument appertaining thereto may provide for their reissuance in other denominations in negotiable or nonnegotiable form and otherwise in such manner and form as the board may determine.

History: Laws 1993, ch. 319, § 56.

74-10-57. Negotiability.

Subject to the payment provisions specifically provided in the Solid Waste Authority Act, the notes, warrants, bonds, any interest coupons thereto attached, temporary bonds and interim debentures shall be fully negotiable within the meaning of and for all the purposes of the Uniform Commercial Code [Chapter 55 NMSA 1978] except as the board may otherwise provide. Each holder of such security, or of any coupon

appertaining thereto, by accepting such security or coupon shall be conclusively deemed to have agreed that such security or coupon, except as otherwise provided, is and shall be fully negotiable within the meaning and for all purposes of that code.

History: Laws 1993, ch. 319, § 57.

74-10-58. Single bonds.

Notwithstanding any other provision of law, the board in any proceedings authorizing securities under the Solid Waste Authority Act:

A. may provide for the initial issuance of one or more securities, in this section called "bond", aggregating the amount of the entire issue or a designated portion thereof;

B. may make such provision for installment payments of the principal amount of any such bond as it may consider desirable;

C. may provide for the making of any such bond payable to bearer or otherwise, registrable as to principal or as to both principal and interest, and where interest accruing thereon is not represented by interest coupons, for the endorsing of payments of interest on such bonds; and

D. may further make provision in any such proceedings for the manner and circumstances in and under which any such bond may in the future, at the request of the holder thereof, be converted into securities of smaller denominations, which securities of smaller denominations may in turn be either coupon bonds or bonds registrable as to principal or principal and interest or both.

History: Laws 1993, ch. 319, § 58.

74-10-59. Lost or destroyed securities.

If lost or completely destroyed, any security may be reissued in the form and tenor of the lost or destroyed security upon the owner furnishing to the satisfaction of the board:

A. proof of ownership;

B. proof of loss or destruction;

C. a surety bond in twice the face amount of the security and any coupons; and

D. payment of the cost of preparing and issuing the new security.

History: Laws 1993, ch. 319, § 59.

74-10-60. Execution of securities.

Any security shall be executed in the name of and on behalf of the authority and signed by the chairman, with the seal of the authority affixed thereto and attested by the secretary, except for securities issued in book entry or similar form without the delivery of physical securities.

History: Laws 1993, ch. 319, § 60.

74-10-61. Interest coupons.

Except for any bonds which are registrable for payment of interest, interest coupons payable to bearer and appertaining to the bonds shall be issued and shall bear the original or facsimile signature of the chairman.

History: Laws 1993, ch. 319, § 61.

74-10-62. Facsimile signatures.

Any of the officers, after filing with the secretary of state his manual signature certified by him under oath, may execute or cause to be executed with a facsimile signature in lieu of his manual signature any security authorized in the Solid Waste Authority Act; provided that such a filing is not a condition of execution with a facsimile signature of any interest coupon, and provided that at least one signature required or permitted to be placed on each such security, excluding any interest coupon, shall be manually subscribed. An officer's facsimile signature has the same legal effect as his manual signature.

History: Laws 1993, ch. 319, § 62.

74-10-63. Facsimile seal.

The secretary may cause the seal of the authority to be printed, engraved, stamped or otherwise placed in facsimile on any security. The facsimile seal has the same legal effect as the impression of the seal.

History: Laws 1993, ch. 319, § 63.

74-10-64. Signatures of predecessors in office.

The securities and any coupons bearing the signatures of the officers in office at the time of the signing shall be the valid and binding obligations of the authority, notwithstanding that before the delivery thereof and payment therefor, any or all of the persons whose signatures appear on those securities or coupons shall have ceased to fill their respective offices.

History: Laws 1993, ch. 319, § 64.

74-10-65. Facsimile signatures of predecessors.

Any officer authorized or permitted in the Solid Waste Authority Act to sign any security or interest coupon, at the time of its execution and of the execution of a signature certificate, may adopt as and for his own facsimile signature the facsimile signature of his predecessor in office in the event that such facsimile signature appears upon the security or coupons appertaining thereto, or upon both the security and such coupons.

History: Laws 1993, ch. 319, § 65.

74-10-66. Repurchase of securities.

The securities may be repurchased by the authority out of any funds available for such purpose from the project to which they pertain at a price of not more than the principal amount thereof and accrued interest, plus the amount of the premium, if any, which might, on the next redemption date of such securities, be paid to the holders thereof if such securities should be called for redemption on such date pursuant to their terms, and all securities so repurchased shall be canceled.

History: Laws 1993, ch. 319, § 66.

74-10-67. Customary provisions.

The resolution authorizing the securities or other instrument appertaining thereto may contain any agreement or provision customarily contained in instruments securing securities, including without limiting the generality of the foregoing, covenants designated in Section 73 [74-10-73 NMSA 1978] of the Solid Waste Authority Act.

History: Laws 1993, ch. 319, § 67.

74-10-68. Sale of securities.

Any securities authorized in the Solid Waste Authority Act, except for warrants not issued for cash and except for temporary bonds issued pending preparation of definitive bond or bonds, shall be sold at public or private sale at, above or below par at a net effective interest rate not exceeding the maximum net effective interest rate permitted by the Public Securities Act [6-14-1 to 6-14-3 NMSA 1978] as amended and supplemented by the Solid Waste Authority Act.

History: Laws 1993, ch. 319, § 68.

74-10-69. Sale discount or commission prohibited.

No discount, except as provided by the Solid Waste Authority Act, or commission shall be allowed or paid on or for any security sale to any purchaser or bidder, directly or indirectly, but nothing contained in that act shall be construed as prohibiting the board from employing legal, fiscal, engineering and other expert services in connection with any project or facilities authorized in that act and with the authorization, issuance and sale of securities.

History: Laws 1993, ch. 319, § 69.

74-10-70. Application of proceeds.

All money received from the issuance of any securities authorized in the Solid Waste Authority Act shall be used solely for the purpose for which issued and the cost of any project thereby delineated. Any accrued interest and any premium shall be applied to the payment of the interest on, or the principal of, the securities, or both interest and principal, or shall be deposited in a reserve therefor, as the board may determine.

History: Laws 1993, ch. 319, § 70.

74-10-71. Use of unexpended proceeds.

Any unexpended balance of such security proceeds remaining after the completion of the acquisition or improvement and equipment of the project or the completion of the purpose for which such securities were issued shall be paid immediately into the fund created for the payment of the principal of such securities and shall be used therefor, subject to the provisions as to the times and methods for their payment as stated in the securities and the proceedings authorizing or otherwise appertaining to their issuance, or so paid into a reserve therefor.

History: Laws 1993, ch. 319, § 71.

74-10-72. Validity unaffected by use of proceeds.

The validity of such securities shall not be dependent on nor affected by the validity or regularity of any proceedings relating to the acquisition or improvement and equipment of the project or the proper completion of any project for which the securities are issued. The purchaser or purchasers of the securities shall in no manner be responsible for the application of the proceeds of the securities by the authority or any of its officers, agents and employees.

History: Laws 1993, ch. 319, § 72.

74-10-73. Covenants in security proceedings.

Any resolution or trust indenture authorizing the issuance of securities or any other instrument appertaining thereto may contain covenants and other provisions, notwithstanding such covenants and provisions may limit the exercise of powers conferred by the Solid Waste Authority Act, in order to secure the payment of such securities in agreement with the holders and owners of such securities, as the board may determine, including without limiting the generality of the foregoing, all such acts and things as may be necessary or convenient or desirable in order to secure the authority's securities, or in the discretion of the board tend to make the securities more marketable, notwithstanding that such covenant, act or thing may not be enumerated in that act, it being the intention of that act to give the authority power to do all things in the issuance of securities and for their security except as specifically limited in that act.

History: Laws 1993, ch. 319, § 73.

74-10-74. Remedies of security holders.

Subject to any contractual limitations binding upon the holders of any issue or series of securities, or trustee therefor, including but not limited to the restriction of the exercise of any remedy to a specified proportion, percentage or number of such holders, and subject to any prior or superior rights of others, any holder of securities, or trustee therefor, shall have the right and power for the equal benefit and protection of all holders of securities similarly situated:

A. by mandamus or other suit, action or proceeding at law or in equity to enforce his rights against the authority and the board and any of its officers, agents and employees, and to require and compel the authority or the board or any such officers, agents or employees to perform and carry out its and their duties, obligations or other commitments under the Solid Waste Authority Act and its and their covenants and agreements with the holder of any security;

B. by action or suit in equity to require the authority and the board to account as if they were the trustee of an express trust;

C. by action or suit in equity to have appointed a receiver, which receiver may enter and take possession of any system or project or services revenues from which are pledged for the payment of the securities, prescribe sufficient fees derived from the operation thereof, and collect, receive and apply all revenues or other money pledged for the payment of the securities in the same manner as the authority itself might do in accordance with the obligations of the authority; and

D. by action or suit in equity to enjoin any acts or things which may be unlawful or in violation of the rights of the holder of any security and to bring suit thereupon.

History: Laws 1993, ch. 319, § 74.

74-10-75. Limitations upon liabilities.

Neither the directors nor any person executing securities issued under the Solid Waste Authority Act shall be liable personally on the securities by reason of the issuance thereof. Securities issued pursuant to that act shall not be in any way a debt or liability of the state or of any municipality or other public body and shall not create or constitute any indebtedness, liability or obligation of the state or of any such municipality or other public body, either legal, moral or otherwise, and nothing contained in that act shall be construed to authorize the authority to incur any indebtedness on behalf of or in any way to obligate the state or any municipality or other public body, except the authority and except as otherwise expressly stated or necessarily implied in that act.

History: Laws 1993, ch. 319, § 75.

74-10-76. Cancellation of paid securities.

Whenever the treasurer shall redeem and pay any of the securities issued under the provisions of the Solid Waste Authority Act, he shall cancel the same by writing across the face thereof or stamping thereon the word "paid", together with the date of its payment, sign his name thereto and transmit the same to the secretary, taking his receipt therefor, which receipt shall be filed in the records of the authority. The secretary shall credit the treasurer on his books for the amount so paid.

History: Laws 1993, ch. 319, § 76.

74-10-77. Interest after maturity.

No interest shall accrue on any security in the Solid Waste Authority Act authorized after it becomes due and payable; provided, funds for the payment of the principal of and the interest on the security and any prior redemption premium due are available to the paying agent for such payment without default.

History: Laws 1993, ch. 319, § 77.

74-10-78. Refunding bonds.

Any bonds issued under the Solid Waste Authority Act may be refunded, without an election, but subject to provisions concerning their payment and to any other contractual limitations in the proceedings authorizing their issuance or otherwise appertaining thereto, pursuant to a resolution or resolutions to be adopted by the board in the manner provided in that act for the issuance of other securities, to refund, pay or discharge all or any part of the authority's outstanding bonds, heretofore or hereafter issued, including any interest thereon in arrears or about to become due, or for the purpose of reducing interest costs or effecting other economies or of modifying or eliminating restrictive contractual limitations appertaining to the issuance of additional bonds or any project, or any combination thereof.

History: Laws 1993, ch. 319, § 78.

74-10-79. Method of issuance.

Any bonds issued for refunding purposes may either be delivered in exchange for the outstanding bonds authorized to be refunded or may be sold as provided in the Solid Waste Authority Act for the sale of other bonds.

History: Laws 1993, ch. 319, § 79.

74-10-80. Limitations upon issuance.

No bonds may be refunded under the Solid Waste Authority Act unless the holders of the bonds voluntarily surrender them for exchange or payment or unless they either mature or are callable for prior redemption under their terms within ten years from the date of issuance of the refunding bonds. Provision shall be made for paying the bonds within that period of time. No maturity of any bonds refunded may be extended over fifteen years nor may any interest on the bonds be increased to any coupon rate exceeding the maximum net effective interest rate permitted by the Public Securities Act [6-14-1 to 6-14-3 NMSA 1978]. The principal amount of the refunding bonds may exceed the principal amount of the refunded bonds if the aggregate principal and interest costs of the refunding bonds do not exceed such unaccrued costs of the bonds refunded. The principal amount of the refunding bonds may also be less than or the same as the principal amount of the bonds refunded so long as provision is duly and sufficiently made for their payment.

History: Laws 1993, ch. 319, § 80.

74-10-81. Use of refunding bond proceeds.

The proceeds of refunding bonds shall either be immediately applied to the retirement of the bonds to be refunded or be placed in escrow to be applied to the payment of the bonds upon their presentation; provided, however, 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 or both interest and principal or may be deposited in a reserve therefor as the board may determine. The escrow shall not necessarily be limited to refunding bond proceeds but may include other money made available for such purpose. Any escrowed proceeds pending such use may be invested or reinvested in federal securities. Escrowed proceeds and investments, together with any interest to be derived from any such investment, shall be in an amount at all times sufficient as to principal, interest, any prior redemption premium due and any charges of the escrow agent payable therefrom to pay the bonds refunded as they become due at their respective maturities or due at designated prior redemption date or dates upon which the board shall exercise a prior redemption option. Upon establishment of an escrow in accordance with this section, the refunded bonds payable therefrom no longer constitute outstanding indebtedness of the authority.

History: Laws 1993, ch. 319, § 81.

74-10-82. Payment of refunding bonds.

Refunding revenue bonds may be made payable from any revenues derived from the operation of the solid waste system or any project, notwithstanding the pledge of such revenues for the payment of the outstanding bonds issued by the authority which are to be refunded is thereby modified. Any refunding revenue bonds shall not be made payable from taxes unless the bonds thereby refunded are payable from taxes.

History: Laws 1993, ch. 319, § 82.

74-10-83. Combination of refunding and other bonds.

Bonds for refunding and bonds for any other purpose or purposes authorized in the Solid Waste Authority Act may be issued separately or issued in combination in one series or more.

History: Laws 1993, ch. 319, § 83.

74-10-84. Supplemental provisions.

Except as specifically provided or necessarily implied in the Solid Waste Authority Act, the relevant provisions of that act pertaining to bonds generally shall be equally applicable in the authorization and issuance of refunding bonds, including their terms and security, the bond resolution, trust indenture, taxes and service charges and other aspects of the bonds.

History: Laws 1993, ch. 319, § 84.

74-10-85. Board's determination final.

The determination of the board that the limitations imposed upon the issuance of refunding bonds under the Solid Waste Authority Act have been met shall be conclusive in the absence of fraud or arbitrary and gross abuse of discretion.

History: Laws 1993, ch. 319, § 85.

74-10-86. Issuance of interim debentures and pledge of bonds as collateral security.

Notwithstanding any limitation or other provision in the Solid Waste Authority Act, whenever a majority of the qualified electors of the authority voting on a proposal to issue bonds has authorized the authority to issue bonds for any purpose authorized in that act, the authority is authorized to borrow money without any other election in anticipation of taxes, the proceeds of the bonds or any other revenues of the authority, or any combination thereof, and to issue interim debentures to evidence the amount so

borrowed. Interim debentures may mature at such time not exceeding a period of time equal to the estimated time needed to effect the purpose for which the bonds are so authorized to be issued, plus two years, as the board may determine. Except as otherwise provided in this section and in Sections 87 and 88 [74-10-87 and 74-10-88 NMSA 1978] of the Solid Waste Authority Act, interim debentures shall be issued as provided in that act for securities in Sections 66 and 68 [74-10-66 and 74-10-68 NMSA 1978] of that act. Taxes, other revenues of the authority, including without limiting the generality of the foregoing proceeds of bonds to be thereafter issued or reissued or bonds issued for the purpose of securing the payment of interim debentures may be pledged for the purpose of securing the payment of the interim debentures. Any bonds pledged as collateral security for the payment of any interim debentures shall mature at such time as the board may determine, but in no event exceeding forty years from the date of either any of such bonds or any of such interim debentures, whichever date is the earlier. Any such bonds pledged as collateral security shall not be issued in an aggregate principal amount exceeding the aggregate principal amount of the interim debenture secured by a pledge of such bonds nor shall they bear interest at any time which with any interest accruing at the same time on the interim debenture so secured exceeds six percent per year.

History: Laws 1993, ch. 319, § 86.

74-10-87. Interim debentures not to be extended.

No interim debenture issued pursuant to the provisions of Section 86 [74-10-86 NMSA 1978] of the Solid Waste Authority Act shall be extended or funded except by the issuance or reissuance of a bond or bonds in compliance with Section 88 [74-10-88 NMSA 1978] of that act.

History: Laws 1993, ch. 319, § 87.

74-10-88. Funding.

For the purpose of funding any interim debenture or interim debentures, any bond or bonds pledged as collateral security to secure the payment of such interim debenture or interim debentures may be reissued without an election, and any bonds not previously issued but authorized to be issued at an election for a purpose the same as or encompassing the purpose for which the interim debentures were issued may be issued for such a funding. Any such bonds shall mature at such time as the board may determine, but in no event exceeding forty years from the date of either any of the interim debentures so funded or any of the bonds so pledged as collateral security, whichever date is the earlier. Bonds for funding, including but not necessarily limited to any such reissued bonds, and bonds for any other purpose or purposes authorized in the Solid Waste Authority Act may be issued separately or issued in combination in one series or more. Except as otherwise provided in Sections 83 and 88 [74-10-83 and 74-10-88 NMSA 1978] of that act and in this section, any such funding bonds shall be issued as is provided for refunding bonds in Sections 78 through 84 [74-10-78 to 74-10-

84 NMSA 1978] of the Solid Waste Authority Act and provided for securities in Section 44 and Sections 81 through 87 [74-10-44 and 74-10-81 to 74-10-87 NMSA 1978] of that act.

History: Laws 1993, ch. 319, § 88.

74-10-89. Publication of resolution or proceedings.

In its discretion, the board may provide for the publication once in full of either any resolution or other proceedings adopted by the board ordering the issuance of any securities or, in the alternative, of notice thereof, which resolution, other proceedings or notice so published shall state the fact and date of such adoption and the place where such resolution or other proceedings have been filed for public inspection and also the date of the first publication of such resolution, other proceedings or notice and also state that any action or proceeding of any kind or nature in any court questioning the validity of the creation and establishment of the authority, or the validity or proper authorization of securities provided for by the resolution or other proceedings, or the validity of any covenants, agreements or contracts provided for by the resolution or other proceedings, shall be commenced within twenty days after the first publication of such resolution, other proceedings or notice.

History: Laws 1993, ch. 319, § 89.

74-10-90. Failure to contest legality constitutes bar.

If no such action or proceedings are commenced or instituted within twenty days after the first publication of such resolution, other proceedings or notice, then all residents and taxpayers and owners of property in the authority and all public bodies and all other persons whatsoever shall be forever barred and foreclosed from instituting or commencing any action or proceeding in any court or from pleading any defense to any action or proceedings questioning the validity of the creation and establishment of the authority, the validity or proper authorization of such securities or the validity of any such covenants, agreements or contracts. The securities, covenants, agreements and contracts shall be conclusively deemed to be valid and binding obligations in accordance with their terms and tenor.

History: Laws 1993, ch. 319, § 90.

74-10-91. Confirmation of contract proceedings.

In its discretion, the board may file a petition at any time in the district court in and for any county in which the authority is located wholly or in part, praying a judicial examination and determination of any power conferred or of any tax or rates or charges levied or of any act, proceeding or contract of the authority, whether or not the contract has been executed, including proposed contracts for the acquisition, improvement, equipment, maintenance, operation or disposal of any project for the authority. Such

petition shall set forth the facts whereon the validity of such power, assessment, act, proceeding or contract is founded and shall be verified by the chairman of the board. Such action shall be in the nature of a proceeding in rem, and jurisdiction of all parties interested may be had by publication and posting as provided in the Solid Waste Authority Act. Notice of the filing of the petition shall be given by the clerk of the court, under the seal thereof, stating in brief outline the contents of the petition and showing where a full copy of any contract therein mentioned may be examined. The notice shall be served by publication in at least five consecutive issues of a weekly newspaper of general circulation published in the county in which the principal office of the authority is located, and by posting the same in the office of the authority at least thirty days prior to the date fixed in the notice for the hearing on the petition. Jurisdiction shall be complete after such publication and posting. Any owner of property in the authority or person interested in the contract or proposed contract or in the premises may appear and move to dismiss or answer the petition at any time prior to the date fixed for the hearing or within such further time as may be allowed by the court, and the petition shall be taken as confessed by all persons who fail so to appear.

History: Laws 1993, ch. 319, § 91.

74-10-92. Review and judgment of court.

The petition and notice shall be sufficient to give the court jurisdiction, and upon hearing the court shall examine into and determine all matters and things affecting the question submitted, shall make such findings with reference thereto and render such judgment and decree thereon as the case warrants. Costs may be divided or apportioned among any contesting parties in the discretion of the trial court. Review of the judgment of the court may be had as in other similar cases, except that such review shall be applied for within thirty days after the time of the rendition of such judgment or within such additional time as may be allowed by the court within thirty days. The rules of civil procedure shall govern in matters of pleading and practice where not otherwise specified in the Solid Waste Authority Act. The court shall disregard any error, irregularity or omission which does not affect the substantial rights of the parties.

History: Laws 1993, ch. 319, § 92.

74-10-93. Purpose of tax exemptions.

The effectuation of the powers authorized in the Solid Waste Authority Act shall and will be in all respects for the benefit of the people of the state, including but not necessarily limited to those residing in the authority exercising any power under that act, for the improvement of their health and living conditions and for the increase of their commerce and prosperity.

History: Laws 1993, ch. 319, § 93.

74-10-94. Property exempt from general taxes.

The authority shall not be required to pay any general (ad valorem) taxes upon any property appertaining to any project authorized in the Solid Waste Authority Act and acquired within the state nor the authority's interest therein.

History: Laws 1993, ch. 319, § 94.

74-10-95. Securities and income therefrom exempt.

Securities issued under the Solid Waste Authority Act and the income therefrom shall forever be and remain free and exempt from taxation by the state, the authority and any other public body, except transfer, inheritance and estate taxes.

History: Laws 1993, ch. 319, § 95.

74-10-96. Freedom from judicial process.

Execution or other judicial process shall not issue against any property of the authority authorized in the Solid Waste Authority Act, nor shall any judgment against the authority be a charge or lien upon its property.

History: Laws 1993, ch. 319, § 96.

74-10-97. Resort to judicial process.

Section 96 [74-10-96 NMSA 1978] of the Solid Waste Authority Act does not apply to or limit the right of the holder of any security, his trustee or any assignee of all or part of his interest, the federal government when it is a party to any contract with the authority, and any other obligee under that act to foreclose, otherwise to enforce, and to pursue any remedies for the enforcement of any pledge or lien given by the authority on the proceeds of taxes, service charges or other revenues.

History: Laws 1993, ch. 319, § 97.

74-10-98. Legal investments in securities.

It shall be legal for the state and any of its agencies, departments, instrumentalities, corporations or political subdivisions or any political or public corporation, any bank, trust company, banker, savings bank or institution, any building and loan association, savings and loan association, investment company and any other person carrying on a banking or investment business, any insurance company, insurance association or any other person carrying on an insurance business and any executor, administrator, curator, trustee or any other fiduciary to invest funds or money in their custody in any of the securities authorized to be issued pursuant to the provisions of the Solid Waste Authority Act. Such securities shall be authorized security for all public deposits. Nothing contained in this section with regard to legal investments shall be construed as

relieving any public body or other person of any duty of exercising reasonable care in selecting securities.

History: Laws 1993, ch. 319, § 98.

74-10-99. Civil rights.

The authority damaged by any such act may also bring a civil action for damages sustained by any such act, and in such proceeding the prevailing party shall also be entitled to reasonable attorneys' fees and costs of court.

History: Laws 1993, ch. 319, § 99.

74-10-100. Liberal construction.

The Solid Waste Authority Act, being necessary to secure and preserve the public health, safety and general welfare, the rule of strict consideration shall have no application to that act, but it shall be liberally construed to effect the purposes and objects for which that act is intended.

History: Laws 1993, ch. 319, § 100.

ARTICLE 11
Tire Recycling (Repealed.)

74-11-1. Repealed.

History: Laws 1994, ch. 117, § 1 and Laws 1994, ch. 126, § 1; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-1 NMSA 1978, as enacted by Laws 1994, ch. 117, § 1 and Laws 1994, ch. 126, § 1, relating to the short title of the Tire Recycling Act, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

Saving clause. — Laws 2005, ch. 171, § 22, effective June 17, 2005, provided that the repeal of the Tire Recycling Act does not affect the validity of regulations enacted pursuant to the Tire Recycling Act, which shall continue in force and effect until amended or repealed; that repeal of the Tire Recycling Act does not affect prior violations of the Tire Recycling Act or regulations enacted pursuant to the Tire Recycling Act; and that all permits and registrations issued pursuant to the Tire Recycling Act shall remain in effect until they expire or they are suspended, revoked or otherwise modified.

74-11-2. Repealed.

History: Laws 1994, ch. 117, § 2 and by Laws 1994, ch. 126, § 2; 1995, ch. 57, § 1; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-2 NMSA 1978, as enacted by Laws 1994, ch. 117, § 2 and Laws 1994, ch. 126, § 2, relating to definitions, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

74-11-3. Repealed.

History: Laws 1994, ch. 117, § 3 and by Laws 1994, ch. 126, § 3; 1995, ch. 57, § 2; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-3 NMSA 1978, as enacted by Laws 1994, ch. 117, § 3 and Laws 1994, ch. 126, § 3, relating to prohibited acts, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

74-11-4. Repealed.

History: Laws 1994, ch. 117, § 4 and by Laws 1994, ch. 126, § 4; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-4 NMSA 1978, as enacted by Laws 1994, ch. 117, § 4 and Laws 1994, ch. 126, § 4, relating to administration of the Tire Recycling Act, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

74-11-5. Repealed.

History: Laws 1994, ch. 117, § 5 and by Laws 1994, ch. 126, § 5; 1995, ch. 57, § 3; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-5 NMSA 1978, as enacted by Laws 1994, ch. 117, § 5 and Laws 1994, ch. 126, § 5, relating to regulations, authority

and content, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

74-11-6. Repealed.

History: Laws 1994, ch. 117, § 6 and by Laws 1994, ch. 126, § 6; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-6 NMSA 1978, as enacted by Laws 1994, ch. 117, § 6 and Laws 1994, ch. 126, § 6, relating to solid waste permit exemptions, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

74-11-7. Repealed.

History: Laws 1994, ch. 117, § 7 and by Laws 1994, ch. 126, § 7; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-7 NMSA 1978, as enacted by Laws 1994, ch. 117, § 7 and Laws 1994, ch. 126, § 7, relating to departments to conduct surveys, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

74-11-8. Repealed.

History: Laws 1994, ch. 117, § 8 and by Laws 1994, ch. 126, § 8; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-8 NMSA 1978, as enacted by Laws 1994, ch. 117, § 8 and Laws 1994, ch. 126, § 8, relating to abatement of tire dumps, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

74-11-9. Repealed.

History: Laws 1994, ch. 117, § 9 and by Laws 1994, ch. 126, § 9; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-9 NMSA 1978, as enacted by Laws 1994, ch. 117, § 9 and Laws 1994, ch. 126, § 9, relating to authorization for abatement contracts, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

74-11-10. Repealed.

History: Laws 1994, ch. 117, § 10 and by Laws 1994, ch. 126, § 10; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-10 NMSA 1978, as enacted by Laws 1994, ch. 117, § 10 and Laws 1994, ch. 126, § 10, relating to compliance orders, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

74-11-11. Repealed.

History: Laws 1994, ch. 117, § 11 and by Laws 1994, ch. 126, § 11; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-11 NMSA 1978, as enacted by Laws 1994, ch. 117, § 11 and Laws 1994, ch. 126, § 11, relating to field citations, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

74-11-12. Repealed.

History: Laws 1994, ch. 117, § 12 and by Laws 1994, ch. 126, § 12; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-12 NMSA 1978, as enacted by Laws 1994, ch. 117, § 12 and Laws 1994, ch. 126, § 12, relating to judicial review of administrative actions, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

74-11-13. Repealed.

History: Laws 1994, ch. 117, § 13 and by Laws 1994, ch. 126, § 13; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-13 NMSA 1978, as enacted by Laws 1994, ch. 117, § 13 and Laws 1994, ch. 126, § 13, relating to grants, eligibility and applications, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

74-11-14. Repealed.

History: Laws 1994, ch. 117, § 14 and by Laws 1994, ch. 126, § 14; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-14 NMSA 1978, as enacted by Laws 1994, ch. 117, § 14 and Laws 1994, ch. 126, § 14, relating to the rubberized asphalt program, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

74-11-15. Repealed.

History: Laws 1994, ch. 117, § 15 and by Laws 1994, ch. 126, § 15; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-15 NMSA 1978, as enacted by Laws 1994, ch. 117, § 15 and Laws 1994, ch. 126, § 15, relating to the tire recycling fund, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

74-11-16. Repealed.

History: Laws 1994, ch. 117, § 16 and by Laws 1994, ch. 126, § 16; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-16 NMSA 1978, as enacted by Laws 1994, ch. 117, § 16 and Laws 1994, ch. 126, § 16, relating to the rubberized asphalt fund, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

74-11-17. Repealed.

History: Laws 1994, ch. 117, § 17 and by Laws 1994, ch. 126, § 17; repealed by Laws 2005, ch. 171, § 23.

ANNOTATIONS

Repeals. — Laws 2005, ch. 171, § 23 repealed 74-11-17 NMSA 1978, as enacted by Laws 1994, ch. 117, § 17 and Laws 1994, ch. 126, § 17, relating to retread rebates, effective June 17, 2005. For provisions of former section, *see* the 2004 NMSA 1978 on *NMOneSource.com*.

ARTICLE 12
Night Sky Protection

74-12-1. Short title.

This act [74-12-1 to 74-12-11 NMSA 1978] may be cited as the "Night Sky Protection Act".

History: Laws 1999, ch. 197, § 1.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 197 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 18, 1999, 90 days after adjournment of the legislature.

Compiler's notes. — The Night Sky Protection Act was originally enacted by Laws 1999, ch. 197, §§ 1 to 10 and codified as 74-12-1 to 74-12-10 NMSA 1978. Laws 2001, ch. 151, § 2 added a new section to the Night Sky Protection Act and has been codified as 74-12-11 NMSA 1978.

74-12-2. Purpose.

The purpose of the Night Sky Protection Act is to regulate outdoor night lighting fixtures to preserve and enhance the state's dark sky while promoting safety, conserving energy and preserving the environment for astronomy.

History: Laws 1999, ch. 197, § 2.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 197 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 18, 1999, 90 days after adjournment of the legislature.

74-12-3. Definitions.

As used in the Night Sky Protection Act:

A. "outdoor lighting fixture" means an outdoor artificial illuminating device, whether permanent or portable, used for illumination or advertisement, including searchlights, spotlights and floodlights, whether for architectural lighting, parking lot lighting, landscape lighting, billboards or street lighting; and

B. "shielded" means a fixture that is shielded in such a manner that light rays emitted by the fixture, either directly from the lamp or indirectly from the fixture, are projected below a horizontal plane running through the lowest point on the fixture where light is emitted.

History: Laws 1999, ch. 197, § 3.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 197 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 18, 1999, 90 days after adjournment of the legislature.

74-12-4. Shielding of outdoor light fixtures.

All outdoor lighting fixtures installed after January 1, 2000 shall be shielded, except incandescent fixtures of one hundred fifty watts or less and other sources of seventy watts or less.

History: Laws 1999, ch. 197, § 4.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 197 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 18, 1999, 90 days after adjournment of the legislature.

74-12-5. Nonconforming light fixtures.

A. In addition to other exemptions provided in the Night Sky Protection Act, an outdoor lighting fixture not meeting these provisions shall be allowed, if the fixture is extinguished by an automatic shutoff device between the hours of 11:00 p.m. and sunrise.

B. No outdoor recreational facility, whether public or private, shall be illuminated after 11:00 p.m. except for a national or international tournament or to conclude any

recreational or sporting event or other activity conducted, which is in progress prior to 11:00 p.m. at a ballpark, outdoor amphitheater, arena or similar facility.

History: Laws 1999, ch. 197, § 5.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 197 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 18, 1999, 90 days after adjournment of the legislature.

74-12-6. Use of mercury vapor lighting fixtures.

No new mercury vapor outdoor lighting fixtures shall be sold or installed after January 1, 2000.

History: Laws 1999, ch. 197, § 6.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 197 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 18, 1999, 90 days after adjournment of the legislature.

74-12-7. Exemptions.

A. The following are exempt from the requirements of the Night Sky Protection Act:

(1) outdoor lighting fixtures on advertisement signs on interstates and federal primary highways;

(2) outdoor lighting fixtures existing and legally installed prior to the effective date of the Night Sky Protection Act; however, when existing lighting fixtures become unrepairable, their replacements are subject to all the provisions of the Night Sky Protection Act;

(3) navigational lighting systems at airports and other lighting necessary for aircraft safety; and

(4) outdoor lighting fixtures that are necessary for worker safety at farms, ranches, dairies, feedlots or industrial, mining or oil and gas facilities.

B. The provisions of the Night Sky Protection Act are cumulative and supplemental and shall not apply within any county or municipality that, by ordinance or resolution, has adopted provisions restricting light pollution that are equal to or more stringent than the provisions of the Night Sky Protection Act.

History: Laws 1999, ch. 197, § 7.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 197 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 18, 1999, 90 days after adjournment of the legislature.

74-12-8. Construction industries division; duties.

The construction industries division of the regulation and licensing department shall review the outdoor lighting provisions in the uniform building codes used in New Mexico and make recommendations for appropriate changes to comply with the provisions of the Night Sky Protection Act and shall permit and inspect, to the standards set forth in the Night Sky Protection Act, all construction of and on state-owned buildings that is subject to permit and inspection under the Construction Industries Licensing Act [Chapter 60, Article 13 NMSA 1978].

History: Laws 1999, ch. 197, § 8; 2001, ch. 151, § 1.

ANNOTATIONS

The 2001 amendment, effective June 15, 2001, inserted the language beginning "and shall permit and inspect" at the end of the section.

74-12-9. Costs of replacement; recovery.

If public utilities are required pursuant to the provisions of the Night Sky Protection Act or by local government ordinances to accelerate replacement of lighting fixtures, the cost of such replacement shall be included in rates approved by the public regulation commission.

History: Laws 1999, ch. 197, § 9.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 197 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 18, 1999, 90 days after adjournment of the legislature.

74-12-10. Violations; penalty.

Any person, firm or corporation violating the provisions of the Night Sky Protection Act shall be punished as follows:

A. for a first offense, the offender may be issued a warning; and

B. for a second offense or offense that continues for thirty days from the date of the warning, twenty-five dollars ($25.00) minus the replacement cost for each offending fixture.

History: Laws 1999, ch. 197, § 10.

ANNOTATIONS

Effective dates. — Laws 1999, ch. 197 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective on June 18, 1999, 90 days after adjournment of the legislature.

74-12-11. Enforcement.

In order to promote the purposes of the Night Sky Protection Act and to provide uniform minimum outdoor lighting standards throughout the state, the construction industries division of the regulation and licensing department shall enforce the Night Sky Protection Act as it pertains to public buildings subject to permit and inspection under the Construction Industries Licensing Act [Chapter 60, Article 13 NMSA 1978] and each political subdivision of the state shall fully enforce the provisions of the Night Sky Protection Act.

History: Laws 2001, ch. 151, § 2; § 74-12-11 NMSA 1978, repealed and reenacted by Laws 2009, ch. 79, § 1.

ANNOTATIONS

Repeals and reenactments. — Laws 2009, ch. 79, § 1 repealed former 74-12-11 NMSA 1978, relating to enforcement, and enacted a new 74-12-11 NMSA 1978, effective June 19, 2009.

ARTICLE 13
Recycling and Illegal Dumping Act

74-13-1. Short title.

Sections 1 through 20 [74-13-1 to 74-13-20 NMSA 1978] of this act may be cited as the "Recycling and Illegal Dumping Act".

History: Laws 2005, ch. 171, § 1.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-2. Legislative purposes.

The purposes of the Recycling and Illegal Dumping Act are to:

A. protect the health and welfare of current and future residents of New Mexico by providing for the prevention and abatement of illegal dumpsites;

B. promote environmentally sound methods for reuse and recycling;

C. create a statewide recycling alliance involving the cooperation of cities, counties, state agencies, tribal governments, land grant communities and private business to encourage economic development, community development and collaboration that foster sustainable use of resources, increased recycling and a cleaner and healthier environment; and

D. enhance and coordinate existing highway litter control and removal and recycling efforts that include the recycling of tires, glass, plastic, metal, paper products, electronic waste and construction and demolition materials.

History: Laws 2005, ch. 171, § 2.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-3. Definitions.

As used in the Recycling and Illegal Dumping Act:

A. "abatement" means to reduce in amount, degree or intensity or to eliminate;

B. "agricultural use" means the beneficial use of scrap tires in conjunction with the operations of a farm or ranch that includes construction projects and aids in the storage of feed;

C. "alliance" means the recycling and illegal dumping alliance;

D. "board" means the environmental improvement board;

E. "civil engineering application" means the use of scrap tires or other recycled material in conjunction with other aggregate materials in engineering applications;

F. "composting" means the process by which biological decomposition of organic material is carried out under controlled conditions and the process stabilizes the organic fraction into a material that can be easily and safely stored, handled and used in an environmentally acceptable manner;

G. "cooperative association" means a refuse disposal district created pursuant to the Refuse Disposal Act [4-52-1 to 4-52-10, 4-52-11 to 4-52-15 NMSA 1978], a sanitation district created pursuant to the Water and Sanitation District Act [Chapter 73, Article 21 NMSA 1978], a special district created pursuant to the Special District Procedures Act [4-53-1 to 4-53-11 NMSA 1978] or other associations created pursuant to the Joint Powers Agreements Act [11-1-1 to 11-1-7 NMSA 1978] or the Solid Waste Authority Act [74-10-1 to 74-10-100 NMSA 1978];

H. "department" means the department of environment;

I. "dispose" means to deposit scrap tires or solid waste into or on any land or water;

J. "household" means any single and multiple residence, hotel or motel, bunkhouse, ranger station, crew quarters, campground, picnic ground or day-use recreation area;

K. "illegal dumping" means disposal of trash, scrap tires or any solid waste in a manner that violates the Solid Waste Act [74-9-1 to 74-9-43 NMSA 1978] or the Recycling and Illegal Dumping Act;

L. "illegal dumpsite" means a place where illegal dumping has occurred except as stated in Subsection A of Section 4 [74-13-4 NMSA 1978] of the Recycling and Illegal Dumping Act;

M. "market development" means activities to expand or create markets for recyclable and reusable materials;

N. "motor vehicle" means a vehicle or device that is propelled by an internal combustion engine or electric motor power that is used or may be used on the public highways for the purpose of transporting persons or property and includes any connected trailer or semitrailer;

O. "processing" means techniques to change physical, chemical or biological character or composition of solid waste but does not include composting, transformation or open burning;

P. "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;

Q. "reuse" means the return of a commodity into the economic stream without a change to its original form;

R. "scrap tire" means a tire that is no longer suitable for its originally intended purpose because of wear, damage or defect;

S. "scrap tire baling" means the process by which scrap tires are mechanically compressed and bound into block form;

T. "scrap tire generator" means a person who generates scrap tires, including retail tire dealers, retreaders, scrap tire processors, automobile dealers, automobile salvage yards, private company vehicle maintenance shops, garages, service stations and city, county and state government, but does not include persons who generate scrap tires in a household or in agricultural operations;

U. "scrap tire hauler" means a person who transports scrap tires for hire for the purpose of recycling, disposal, transformation or use in a civil engineering application;

V. "secretary" means the secretary of environment;

W. "tire" means a continuous solid or pneumatic rubber covering that encircles the wheel of a motor vehicle;

X. "tire-derived fuel" means whole or chipped tires that produce a low sulfur, high-heating-value fuel;

Y. "tire-derived product" means a usable product produced from the processing of a scrap tire but does not include baled tires;

Z. "tire recycling" means a process in which scrap tires are collected, stored, separated or reprocessed for reuse as a different product or shredded into a form suitable for use in rubberized asphalt or as raw material for the manufacture of other products; and

AA. "tire recycling facility" means a place operated or maintained for tire recycling but does not include:

(1) retail business premises where tires are sold, if no more than five hundred loose scrap tires or two thousand scrap tires, if left in a closed conveyance or enclosure, are kept on the premises at one time;

(2) the premises of a tire retreading business, if no more than three thousand scrap tires are kept on the premises at one time;

(3) premises where tires are removed from motor vehicles in the ordinary course of business, if no more than five hundred scrap tires are kept on the premises at one time;

(4) a solid waste facility having a valid permit or registration issued pursuant to the provisions of the Solid Waste Act [74-9-1 NMSA 1978] or regulations adopted pursuant to that act or registration issued pursuant to the Environmental Improvement Act [Chapter 74, Article 1 NMSA 1978]; or

(5) a site where tires are stored or used for agricultural uses.

History: Laws 2005, ch. 171, § 3.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-4. Prohibited acts.

A. A person shall not store or use in a civil engineering application, except for agricultural use, more than one hundred scrap tires anywhere in this state, unless the person has a valid permit or registration from the department.

B. A person shall not operate or maintain a tire recycling facility unless the facility has a valid permit issued pursuant to the provisions of the Recycling and Illegal Dumping Act or is a facility where tires are stored and used for agricultural uses and complies with rules enacted pursuant to the Recycling and Illegal Dumping Act.

C. A person shall not transport scrap tires for hire to a place other than a tire recycling facility unless the place is specifically excluded from the definition of a "tire recycling facility".

D. A person shall not transport scrap tires for hire either for disposal or recycling purposes without being registered as a scrap tire hauler by the department pursuant to rules adopted in accordance with the Recycling and Illegal Dumping Act.

E. A scrap tire generator shall not release scrap tires to a person other than a registered scrap tire hauler pursuant to the Recycling and Illegal Dumping Act or a registered commercial waste hauler pursuant to the Solid Waste Act [74-9-1 NMSA 1978].

F. A person shall not engage in the open burning of scrap tires.

G. A person shall not store or dispose of scrap tires or tire-derived products in a manner that creates a public nuisance, promotes the breeding or harboring of disease vectors or creates a potential for fire or other health or environmental hazards.

H. Except for agricultural uses, a person shall not store scrap tires or tire-derived products for a period exceeding twelve months unless specifically authorized by the secretary.

I. A scrap tire hauler shall not transport scrap tires without possessing a New Mexico scrap tire manifest approved by the department.

J. A person shall not engage in, maintain or allow illegal dumping.

History: Laws 2005, ch. 171, § 4.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-5. Facilities; entry by department; availability of records to department and others.

A. The secretary or any authorized representative, employee or agent of the department may:

(1) enter a facility of a scrap tire generator, scrap tire hauler or tire recycling facility at any reasonable time for the purpose of making a routine inspection or investigation of scrap tire management practices based on reasonable evidence of a violation of the Recycling and Illegal Dumping Act;

(2) take and analyze samples of the facility's 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 facility, and the owner or operator shall have the right to split the sample and conduct the owner or operator's own analysis;

(3) for the purposes of developing or assisting in the development of rules, conducting a study, taking corrective action or enforcing the provisions of the Recycling and Illegal Dumping Act, conduct monitoring or testing of the equipment, contents or surrounding soil, air, surface water or ground water at the facility of a scrap tire generator, scrap tire hauler or tire recycling facility; and

(4) in coordination with the secretary of transportation, conduct at weigh stations or any other adequate site or facility inspections of scrap tire haulers.

B. Records, reports or information obtained by the department pursuant to this section shall be available to the public, except that information shall be treated confidentially upon a showing, satisfactory to the department, that records, reports or information or a particular part of the records, reports or information, if made public, would divulge information entitled to protection under the provisions of 18 USCA Section 1905. That record, report 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 or to officers, employees or authorized representatives of the state when relevant in any proceedings pursuant to the Solid Waste Act [74-9-1 NMSA 1978].

C. A person not subject to the provisions of 18 USCA Section 1905 who knowingly and willfully divulges or discloses information entitled to protection pursuant to 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.

D. In submitting data pursuant to the Recycling and Illegal Dumping Act, a person required to provide such data may:

(1) designate, in writing and in such manner as the secretary may prescribe, the data the person believes is entitled to protection pursuant to this section; and

(2) submit the designated data separately from other data submitted pursuant to the Recycling and Illegal Dumping Act.

History: Laws 2005, ch. 171, § 5.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-6. Administration of act.

The department is responsible for the administration and enforcement of the provisions of the Recycling and Illegal Dumping Act and of all rules adopted by the board pursuant to the provisions of that act. The department is delegated all authority necessary and appropriate to carry out its responsibilities.

History: Laws 2005, ch. 171, § 6.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-7. Recycling and illegal dumping alliance.

A. The "recycling and illegal dumping alliance" is created and is comprised of one member from each of the following:

(1) state government;

(2) local government;

(3) a solid waste authority;

(4) an industry waste generator;

(5) a tribal government;

(6) a nonprofit organization;

(7) a recycling company;

(8) a retailer;

(9) an agricultural producer;

(10) a soil and water conservation district;

(11) a waste management company; and

(12) the public at large.

B. The secretary shall appoint members of the alliance to serve two-year terms as volunteers with no compensation from the state.

C. The alliance shall:

(1) develop strategies to increase recycling and decrease illegal dumping in New Mexico;

(2) create a state recycling plan, as a component of the New Mexico solid waste management plan, to establish programs and goals and update the plan every three years to measure progress and modify strategies; and

(3) review and make recommendations for funding grant applications from the recycling and illegal dumping fund.

History: Laws 2005, ch. 171, § 7.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-8. Rules; authority and content.

The board shall adopt rules to implement the provisions of the Recycling and Illegal Dumping Act. The rules shall be adopted pursuant to the provisions of the Environmental Improvement Act [Chapter 74, Article 1 NMSA 1978] and shall include:

A. requirements and procedures for the issuance of permits and registrations to tire recycling facilities, civil engineering applications, scrap tire generators and scrap tire haulers;

B. standards and requirements for tire recycling and scrap tire storage and processing;

C. record-keeping requirements for tire recycling facilities, scrap tire haulers and scrap tire generators;

D. financial assurance criteria for tire recycling facilities;

E. fire rules for storage of scrap tires and tire-derived products that are consistent with the rules or recommendations adopted by the state fire marshal;

F. criteria and procedures for making disbursements pursuant to grant and loan programs authorized from the recycling and illegal dumping fund;

G. requirements and procedures for contracting with counties, municipalities, Indian nations, pueblos and tribes, land grant communities and cooperative associations for the abatement of illegal dumpsites and recycling;

H. requirements and procedures for a scrap tire manifest system;

I. a fee schedule applicable to scrap tire haulers and tire recycling facilities not exceeding the estimated cost of investigating and issuing permits and registrations and conducting regulatory oversight of permitted and registered activities; and

J. a fee schedule applicable to scrap tire generators not exceeding the estimated cost of conducting regulatory oversight of scrap tire generators.

History: Laws 2005, ch. 171, § 8.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-9. Scrap tire manifest system.

A scrap tire generator who transports or offers for transportation, scrap tires for offsite handling, altering, storage, disposal or for any combination thereof shall complete a scrap tire manifest pursuant to rules adopted by the board. Upon demand, the manifest for every generator whose scrap tire load is transported shall be shown to an officer of the motor transportation division of the department of public safety, the New Mexico state police, a local law enforcement officer or the secretary or the secretary's designee.

History: Laws 2005, ch. 171, § 9.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-10. Solid waste permit exemption.

A person operating a tire recycling facility under a permit issued pursuant to the Recycling and Illegal Dumping Act shall not be required to obtain a permit for that facility pursuant to the Solid Waste Act [74-9-1 NMSA 1978].

History: Laws 2005, ch. 171, § 10.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-11. Abatement of illegal dumpsite.

A. The department may bring an abatement action pursuant to the provisions of Section 30-8-8 NMSA 1978 to eliminate an illegal dumpsite.

B. The secretary may act administratively to eliminate illegal dumpsites pursuant to the provisions of the Recycling and Illegal Dumping Act.

C. Nothing in this section shall prohibit a municipality, county, Indian nation, pueblo or tribe, land grant community or cooperative association from contracting for services to complete an abatement action.

History: Laws 2005, ch. 171, § 11.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-12. Authorization for abatement contracts.

The secretary may contract with the governing body of a county, municipality, Indian nation, pueblo or tribe, land grant community or cooperative association for the abatement of illegal dumpsites located within the boundaries of the county, municipality, Indian nation, pueblo or tribe, land grant community, cooperative association or solid waste authority. The contract shall provide for the reimbursement of the county, municipality, Indian nation, pueblo or tribe, land grant community or cooperative association for expenses incurred in bringing an abatement action, including court costs, reasonable attorney fees and the actual expense of elimination of the illegal dumpsite if that expense is not recovered from and paid by the owner or operator of the illegal dumpsite as a result of the abatement action.

History: Laws 2005, ch. 171, § 12.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-13. Enforcement; compliance orders.

A. Whenever the secretary determines that a person has violated or is violating any requirement or prohibition of the Recycling and Illegal Dumping Act, a rule adopted pursuant to that act or a 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 and requiring compliance immediately or within a specified time period or assessing a civil penalty for any past or current violation or both; and

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

B. A compliance order issued pursuant to this section may include a suspension or revocation of a permit or portion of the permit issued by the secretary. A penalty assessed in the compliance order shall not exceed five thousand dollars ($5,000) per day of noncompliance for each violation.

C. A compliance order issued pursuant to this section shall state with reasonable specificity the nature of the required corrective action or other response measure and shall specify a time for compliance.

D. A compliance 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 a request, the secretary promptly shall 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 a recommendation to the secretary, who shall make the final decision.

E. The secretary may seek enforcement of the order by filing an action for enforcement in the district court.

F. Upon request of a party, the secretary may issue subpoenas for the attendance and testimony of witnesses at the hearing and for the production of relevant documents. The secretary shall adopt procedural rules for the conduct of the hearing, including provisions for discovery.

G. In determining the amount of a penalty authorized to be assessed pursuant to this section, the secretary shall take into account the seriousness of the violation, good-faith efforts of the violator to comply with applicable requirements of the Recycling and Illegal Dumping Act or rules issued pursuant to its provisions and other relevant factors.

History: Laws 2005, ch. 171, § 13.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-14. Enforcement; field citations.

A. The board shall implement a field citation program by adopting rules 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 local government authorities or employees of the department as designated by the secretary.

B. A field citation issued pursuant to this section shall be final unless the person named in the citation files a written request for a public hearing with the secretary no later than fifteen days after the date on which the field citation is served on the person, in which case the enforcement of the field citation shall be suspended pending the issuance of a final order of the secretary after a public hearing. The procedures for scheduling and conducting a hearing on and for final disposition of a field citation shall be the same as those provided for a compliance order pursuant to the Recycling and Illegal Dumping Act.

C. Payment of a civil penalty required by a field citation issued pursuant to this section shall not be a defense to further enforcement by the department to correct a continuing violation or to assess the maximum statutory penalty pursuant to the provisions of the Recycling and Illegal Dumping Act if the violation continues.

D. In determining the amount of a penalty to be assessed pursuant to this section, the secretary or the person issuing a field citation shall take into account the seriousness of the violation, good-faith efforts of the violator to comply with the applicable requirements of the Recycling and Illegal Dumping Act or rules issued pursuant to its provisions and other relevant factors.

E. In connection with a proceeding pursuant to 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 adopt rules for discovery.

History: Laws 2005, ch. 171, § 14.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-15. Judicial review of administrative actions.

A person adversely affected by an administrative action taken by the secretary pursuant to the provisions of the Recycling and Illegal Dumping Act may appeal the action pursuant to Section 39-3-1.1 NMSA 1978.

History: Laws 2005, ch. 171, § 15.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-16. Penalty; criminal.

A. A person who knowingly violates Section 4 [74-13-4 NMSA 1978] of the Recycling and Illegal Dumping Act:

(1) is guilty of a misdemeanor if the violation involves a quantity of scrap tires or tire-derived products that is less than five thousand pounds and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978; or

(2) is guilty of a fourth degree felony if the violation involves a quantity of scrap tires or tire-derived products that is five thousand pounds or greater and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

B. A person who knowingly omits any substantive information or knowingly makes a false substantive statement or representation required pursuant to the Recycling and Illegal Dumping Act or rule adopted pursuant to the provisions of that 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 2005, ch. 171, § 16.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-17. Grants; eligibility; applications.

A. A municipality, county, Indian nation, pueblo or tribe, land grant community, cooperative association or solid waste authority that meets eligibility requirements established by the board may apply for a grant for providing funds to public landfills to offset the cost of collecting or recycling of tires or submit a competitive bid for a loan or contract for development costs or operating costs to establish a recycling facility, purchase equipment, perform marketing, purchase products produced by a recycling facility, provide educational outreach, develop recycling infrastructure, abate illegal dumpsites or contract with vendors to promote recycling and to abate illegal dumpsites consistent with provisions of the Recycling and Illegal Dumping Act. The first priority for funding shall be abatement of illegal scrap tire dumpsites and the recycling of scrap tires.

B. A grant, loan or contract for processing shall not be awarded pursuant to the Recycling and Illegal Dumping Act to a person who receives less than ninety-five percent of recyclable materials from sources in New Mexico.

C. Nothing in this section prohibits a municipality, county, Indian nation, pueblo or tribe, land grant community or cooperative association from contracting for services to complete an abatement action.

D. At least two-thirds of budgeted grant money in each fiscal year shall be allocated to tire abatement and recycling programs, and one-third of budgeted grant money in each fiscal year shall be allocated to abatement of illegal dumping and recycling of other solid wastes.

History: Laws 2005, ch. 171, § 17.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-18. Rubberized asphalt program.

The department of transportation may use rubberized asphalt in paving mixtures for state and local highway projects and to pay added expenses that may result from using rubberized asphalt. The department of transportation shall adopt rules for the administration of the rubberized asphalt program, including the development of procedures for disbursement of money to municipalities and counties for the use of rubberized asphalt in paving mixtures and shall develop paving specifications for the use of rubberized asphalt.

History: Laws 2005, ch. 171, § 18.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-19. Recycling and illegal dumping fund created.

The "recycling and illegal dumping fund" is created in the state treasury. Fees and penalties collected pursuant to the Recycling and Illegal Dumping Act shall be deposited into the fund. Money in the fund is appropriated to the department for abatement of illegal dumpsites, for processing, transportation or recycling of all recyclable materials and scrap tires, for providing funds to public landfills in New Mexico to offset the cost of

collecting or recycling of tires and for carrying out the provisions of the Recycling and Illegal Dumping Act. Any unexpended or unencumbered balance or income earned from the money in the recycling and illegal dumping fund remaining at the end of a fiscal year shall not revert to the general fund. Disbursements from the fund shall be by warrant drawn by the secretary of finance and administration pursuant to vouchers signed by the secretary of environment or the secretary's designee.

History: Laws 2005, ch. 171, § 19.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.

74-13-20. Rubberized asphalt fund created.

The "rubberized asphalt fund" is created in the state treasury. Money in the fund is appropriated to the department of transportation to pay additional expenses that might result from using rubberized asphalt paving mixes, to allocate at least fifty percent of the fund to local governments for that purpose and to carry out the provisions of the rubberized asphalt program, including hiring a term employee to administer the program. Disbursements from the fund shall be by warrant drawn by the secretary of finance and administration pursuant to vouchers signed by the secretary of transportation or the secretary's designee. Any unexpended or unencumbered balance remaining in the rubberized asphalt fund at the end of a fiscal year shall not revert to the general fund.

History: Laws 2005, ch. 171, § 20.

ANNOTATIONS

Effective dates. — Laws 2005, ch. 171 contained no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, was effective June 17, 2005, 90 days after adjournment of the legislature.