

## May 19, 2008 Clandestine Drug Laboratories Rules

The Honorable Cisco McSorley  
New Mexico State Senator  
3205 Berkeley Place NE  
Albuquerque, NM 87106

The Honorable Al Park  
New Mexico State Representative  
1840 Dakota NE  
Albuquerque, NM 87110

**Re:** Opinion Request - Clandestine Drug Laboratories Rules

Dear Senator McSorley and Representative Park:

You have requested our opinion regarding the New Mexico Environmental Improvement Board's ("Board") authority to promulgate regulations regarding the environmental remediation of illegal clandestine drug laboratories. It is our understanding that the Hazardous Waste Bureau of the New Mexico Environment Department ("Department") was the proponent of the regulations and offered the Hazardous Waste Act, Section 74-4-4, and Nuisance Abatement powers, Section 74-1-8, as legal authority for Board action. It is our understanding that the Board adopted the regulations in October 2007. Based on our examination of the relevant New Mexico statutes, opinions and case law authorities, and on the information available to us at this time, we conclude that the Hazardous Waste Act provides the Board with sufficient legal authority to promulgate the regulations.

A board or commission must have statutory authority to promulgate regulations. The state Supreme Court has stated: "The authority of an administrative agency to 'promulgate ... regulations must be found in and is limited by statute.'" Howell v. Heim, 118 N.M. 504, 882 P.2d 541 (1994) (citations omitted). The Court of Appeals recently added: "[R]egulations ... are presumptively valid and will be upheld if reasonably consistent with the authorizing statutes." See New Mexico Mining Ass'n v. New Mexico Water Quality Control Comm., 2007-NMCA-010, ¶ 12, 141 N.M. 41, 46. See also generally N.M. Petroleum Marketers Ass'n v. Environmental Improvement Board, 2007-NMCA-060, 141 N.M. 678 (Board has sufficient statutory authority to promulgate regulations regarding safety for convenience store employees).

The New Mexico Hazardous Waste Act ("Act") grants the Board the authority to adopt regulations "concerning hazardous substance incidents." NMSA 1978, Section 74-4-4(B) (1993). The Act defines "hazardous substance incident" as "any emergency incident involving a chemical or chemicals, including but not limited to ... accidental spills ... [and] explosions, which incident creates the reasonable probability of injury to human health or property." NMSA 1978, Section 74-4-3(H) (1992). The Act, however, does not define the terms "emergency" and "incident." According to the regulations:

“Upon identification by a law enforcement agency of a clandestine drug laboratory where chemicals and equipment were removed or residual contamination was observed, the property is presumed to constitute a site of a hazardous substance incident and a public nuisance until such time as the remediation required by this part is completed.” 20.4.5.9 NMAC.

One canon of statutory construction is that terms should be read according to their plain meaning. See Wilson v Denver, 125 N.M. 308, 314, 961 P.2d 153 (1998). The Compact Oxford English Dictionary defines “emergency” as “a serious, unexpected, and potentially dangerous situation requiring immediate action.” [www.askoxford.com](http://www.askoxford.com). It defines “incident” as “an event or occurrence” or “the occurrence of dangerous ... events.” See id.

It is our understanding that the Department, as the proponent of the regulations, presented witnesses and testimony that the act or event of clandestine drug production in home or hotel laboratories created a “serious” and “potentially dangerous situation” requiring “immediate action” to protect “human health” and “property.” This is because drug production from clandestine labs is likely to result in the release of hazardous chemicals (in a single release or a series of liquid or aerosol releases) that settles on items of property. A drug producer’s family and children who live in proximity to these labs are subject to exposure to these harmful chemicals. In addition, these labs could expose a homeowner, who has purchased the house, or a hotel guest, to harm since many of these chemicals do not easily dissipate off items of property.

The Department also presented testimony that drug production, particularly regarding the production of methamphetamine, uses hazardous chemicals to create the drugs. There was testimony that this production inevitably results in chemical spills on floors or explosions in rooms.

According to your letter, several legislators expressed concern that a “hazardous substance incident” should be limited to “a spill, fire or explosion.” [1] The Act’s plain language, however, does not support this limitation. It expressly defines a hazardous substance event as “any emergency incident ... including but not limited to ... accidental spills ... explosions.” NMSA 1978, Section 74-4-3(H) (1992) (emphasis added). This language allows for fact patterns beyond those expressly contemplated in the statute.[2] See Montoya v. N.M. Human Servs. Dep’t., 108 N.M. 263, 265, 771 P.2d 196, 198 (Ct. App. 1989).

Based on all of the above, there is a reasonable reading of the Hazardous Waste Act that the production of drugs in home laboratories creates a potentially dangerous situation/event involving chemicals that requires immediate action in order to avoid the reasonable probability of injury to human health or property.[3] Accordingly, we believe that the Board has sufficient authority under the Act to promulgate regulations concerning the environmental remediation of illegal clandestine drug laboratories.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

ZACHARY SHANDLER  
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

James Berzai, New Mexico Environment Department

[1] According to your letter, “[!]n 2007 alone, three bills were introduced containing similar provisions to those in the proposed rules ... all failed.”

[2] In addition, the Department presented a reasonable case that clandestine drug laboratories do result in accidental spills and explosions.

[3] Since the Hazardous Waste Act provides sufficient statutory authority to the Board, we do not need to examine the authority regarding the creation of a public nuisance.