Chapter 74

Environmental Improvement

Article 1

General Provisions

§ 74-1-1. Short title.

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

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

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 1 et seq.
Governmental recovery of cost of hazardous waste removal under Comprehensive Environmental Response, Compensation, and Liability Act (42 USCS §§ 9601 et seq.), 70 A.L.R. Fed. 329.
39A C.J.S. Health and Environment § 1 et seq.

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

The purpose of the Environmental Improvement Act [74-1-1 to 74-1-10 NMSA 1978] is to create an agency which will be responsible for environmental management and consumer protection in this state in order to ensure an environment that in the greatest possible measure: will confer optimum health, safety, comfort and economic and social well-being on its inhabitants; will protect this generation as well as those yet unborn from health threats posed by the environment; and will maximize the economic and cultural benefits of a healthy people.

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

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

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

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

§ 74-1-3. Definitions.

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

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

B. "director" means the director of the environmental improvement division;

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

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

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

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

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

A. The board shall consist of five members appointed by the governor, by and with the advice and consent of the senate. The members of the board shall be appointed for overlapping terms with no term exceeding five years. No more than three members shall be appointed from any [one] political party. Any vacancy occurring in the membership of the board shall be filled by appointment by the governor for the unexpired term.

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

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

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

Cross-references. - As to exemption of environmental improvement board from authority of secretary of health and environment, and as to staff support from environmental improvement division, see 9-7-13 NMSA 1978.

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

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

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

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 6, 134.
39A C.J.S. Health and Environment §§ 137, 138.

§ 74-1-6. Agency; powers.

The agency shall be organized within the health and environment department and shall have power to:

A. sue and be sued;

B. make contracts to carry out its delegated duties;

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

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

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

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

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

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

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

Cross-references. - For definition of "agency" and "board," see 74-1-3 NMSA 1978. As to creation of environmental improvement division, see 9-7-4 NMSA 1978.

Appropriations. - Laws 1989, ch. 336, § 1 appropriates $50,000 from the petroleum storage cleanup fund to the environmental improvement division to contract with the board of regents of the university of New Mexico for expenditure in the seventy-eighth fiscal year to provide for a study conducted by the institute of public law of a self-insurance program for owners of petroleum products storage systems for payment for petroleum storage cleanup, provided that no expenditure may be made from this appropriation without the approval in advance by the environmental improvement division. The environmental improvement division shall report to the second session of the thirty-ninth legislature its findings and recommendations including any necessary proposed legislation, regarding the self-insurance program. Any unexpended or unencumbered balance remaining at the end of the seventy-eighth fiscal year is to revert to the general fund.

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

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

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

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

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

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 6, 134.
39A C.J.S. Health and Environment § 133.

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

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

(1) food protection;

(2) water supply, and water pollution as provided in the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978];

(3) liquid waste and solid waste sanitation and refuse disposal, except nondomestic wastes resulting from the exploration, development, production, transportation, storage,

treatment or refinement of crude oil or natural gas or geothermal energy;

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

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

(6) noise control;

(7) nuisance abatement;

(8) vector control;

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

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

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

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

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

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.

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

The 1989 amendments. - Laws 1989, ch. 223, § 1, effective June 16, 1989, in Subsection A(2) inserting ", including regulations establishing a reasonable system of fees for the provision of services by the agency to owners and operators of water supply systems", was approved on April 5, 1989. However, Laws 1989, ch. 289, § 2, also effective June 16, 1989, in Subsection A, in Paragraph (3), inserting the language beginning "except nondomestic wastes" and adding Paragraph (13), was approved on

April 6, 1989. The section is set out as amended by Laws 1989, ch. 289, § 2. See 12-1-8 NMSA 1978.

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

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

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

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

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

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

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

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

(1) food protection;

(2) water supply;

(3) liquid waste and solid waste sanitation and refuse disposal, except nondomestic waste resulting from the exploration, development, production, transportation, storage, treatment or refinement of crude oil or natural gas or geothermal energy;

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

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

(6) noise control;

(7) nuisance abatement;

(8) vector control;

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

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

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

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

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

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., § 12-19-11, 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.

The 1989 amendments. - Laws 1989, ch. 223, § 2, effective June 16, 1989, adding all of the language of Subsection A(2) beginning with "including", was approved on April 5, 1989. However, Laws 1989, ch. 289, § 3, also effective June 16, 1989, in Subsection A, inserting the language beginning "except nondomestic wastes" in Paragraph (3) and adding Paragraph (13), was approved on April 6, 1989. The section is set out as amended by Laws 1989, ch. 289, § 3. See 12-1-8 NMSA 1978.

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

Board promulgates regulations. - There is no inconsistency or conflict between 3-48-2 NMSA 1978 and this section. The latter gives the board statewide responsibility for environmental management and protection, making the promulgation of regulations and

standards by the board in the areas of liquid waste and solid waste sanitation and refuse disposal mandatory. The former merely gives municipalities the option or discretion to enact ordinances governing the collection and disposal of refuse. New Mexico Mun. League, Inc. v. New Mexico Envtl. Imp. Bd., 88 N.M. 201, 539 P.2d 221 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

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

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

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

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

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

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

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

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

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

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

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

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

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

A. In the exercise of any of its powers or duties, the board shall act with independent legal advice. The manner in which such advice shall be 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 health and environment department to assure independent, impartial advice.

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

attorney general may, at the request of the board, file and defend lawsuits on behalf of the board.

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

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

A. In the exercise of any of its powers or duties, the commission shall act with independent legal advice. The manner in which such advice shall be 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 health and environment department 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 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.

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 has been compiled as 74-1-8.2 NMSA 1978. See 74-6-2 NMSA 1978 for the definition of "commission" and 74-6-4 NMSA 1978 for the general powers and duties of the commission.

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

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

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

regulation. In making its regulations, the board shall give the weight it deems appropriate to all relevant facts and circumstances presented at the public hearing, including but not limited to:

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

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

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

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

D. Notice of the hearing shall be given at least sixty days prior to the hearing date and shall state the subject, the time and the place of the hearing and the manner in which interested persons may present their views. The proposed language amending any existing regulation or any proposed new regulation shall be made available to the public as of the date the notice of the hearing is given. The notice shall also state where interested persons may secure copies of any proposed amendment or new regulation. The notice shall be published in a newspaper of general circulation in the area affected. Reasonable effort shall be made to give notice to all persons who have made a written request to the board for advance notice of hearings.

E. At the hearing, the board shall allow all interested persons reasonable opportunity to submit data, proposed changes to the proposed regulation, views or arguments orally or in writing and to examine witnesses testifying at the hearing. Any person heard or represented at the hearing shall be given written notice of the action of the board.

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

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

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

I. The procedure for perfecting an appeal to the court of appeals under this section

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

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

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

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

(3) otherwise not in accordance with law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

When a board adopts a regulation, which, when applied, leads to an unfavorable result to any "person," that "person" can appeal to the court of appeals to challenge the validity of the regulation. This "person" may be an ordinary lay person, unlearned in the law and procedural process. Kerr-McGee Nuclear Corp. v. New Mexico Envtl. Imp. Bd., 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

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

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 6, 134.
39A C.J.S. Health and Environment §§ 138, 142, 145.

§ 74-1-10. Penalty.

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

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

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

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

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 590 to 602.
Validity of state statutory provision permitting administrative agency to impose monetary penalties for violation of environmental pollution statute, 81 A.L.R.3d 1258.
39A C.J.S. Health and Environment § 139.

§ 74-1-11. Water supply fund created. (Effective until July 1, 1992.)

There is created in the state treasury the "water supply fund" to be administered by the environmental improvement division of the health and environment department. All fees collected pursuant to regulations promulgated by the environmental improvement board under Paragraph (2) of Subsection A of Section 74-1-8 NMSA 1978 shall be deposited in the fund. Money in the fund is appropriated to the environmental improvement division of the health and environment department for the purpose of paying the costs of administering any regulations promulgated by the board pursuant to Paragraph (2) of Subsection A of Section 74-1-8 NMSA 1978. On July 1, 1992 all balances in the water supply fund shall be deposited in the general fund.

History: Laws 1989, ch. 223, § 3.

Delayed repeals. - Laws 1989, ch. 223, § 4 repeals 74-1-11 NMSA 1978, as enacted by Laws 1989, ch. 223, § 3, effective July 1, 1992.

Effective dates. - Laws 1989, ch. 223 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

Compiler's notes. - The provision providing for fees under Paragraph (2) of Subsection (A) of 74-1-8 NMSA 1978 referred to in this section is not given effect. The amendment to that section by Laws 1989, ch. 223, § 2 added that language. However, a subsequent and controlling amendment to that section, by Laws 1989, ch. 289, § 3, did not contain the reference to fees.

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.

Cross-references. - For the Environmental Improvement Act, see 74-1-1 to 74-1-10 NMSA 1978. For the Pollution Control Revenue Bond Act, see 3-59-1 to 3-59-14 NMSA 1978.

The 1989 amendment, effective April 6, 1989, substituted "Chapter 74, Article 2 NMSA 1978" for "Sections 74-2-1 to 74-2-17 NMSA 1978".

Comparison to Federal Clean Air Act. - New Mexico's Air Quality Control Act is not generally more stringent than the Federal Clean Air Act except in areas of air pollution

prevention not preempted by the Federal Clean Air Act and not precluded by the limiting provisions in the Air Quality Control Act. 1987 Op. Att'y Gen. No. 87-11.

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

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 55 et seq.
Validity of regulation of smoke and other air pollution, 78 A.L.R.2d 1305.
Control of interstate pollution under Clean Air Act as amended in 1977 (42 USCS §§ 7401-7626), 82 A.L.R. Fed. 316.
Application of air quality modeling to decisionmaking under Clean Air Act (42 USCS §§ 7401-7426), 84 A.L.R. Fed. 710.
Standing of air pollution source to challenge Clean Air Act (42 USCS §§ 7401-7626) or its implementation, 85 A.L.R. Fed. 515.
Construction and application of § 307(b)(1) of Clean Air Act (42 USCS § 7607(b)(1)) pertaining to judicial review by courts of appeals, 86 A.L.R. Fed. 604.
What constitutes modification of stationary source, under § 111 (a)(3), (4) of Clean Air Act (42 USCS § 7411 (a)(3), (4)), so as to subject source to Environmental Protection Agency's new source performance standards, 94 A.L.R. Fed. 750.
39A C.J.S. Health and Environment § 130.

§ 74-2-2. Definitions.

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

A. "air contaminant" means any substance, including but not limited to any particulate matter, fly ash, dust, fumes, gas, mist, smoke, vapor, micro-organisms, radioactive

material, any combination thereof or any decay or reaction product thereof;

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

C. "board" means the environmental improvement board, the governing board of a municipality within a class A county, a class A county governing board, a board established by a municipality within a class A county, a board established by a class A county governing board or a joint board established by a class A county governing board and one or more municipal boards within that county responsible for the administration and enforcement of the provisions of the Air Quality Control Act;

D. "delayed compliance order" means any federally issued order pursuant to 42 U.S.C. Section 7413(d), or any assurance of discontinuance accepted by the board pursuant to Section 74-2-15 NMSA 1978, applicable to a source, postponing the date required for compliance by such source with any requirement of, any requirement established pursuant to or any requirement continued in effect by the Air Quality Control Act or the federal act;

E. "department" means the environmental improvement division or the administrative agency of a municipal, county or joint air quality control board within a class A county;

F. "director" means the administrative head of the department;

G. "emission limitation" and "emission standard" mean a requirement established by the board, the department or pursuant to the federal act which 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;

H. "environmental improvement division" means the environmental improvement division of the health and environment department;

I. "federal act" means the Clean Air Act, 42 U.S.C. Sections 7401 through 7642;

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

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

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

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

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

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

(1) a change in ownership of the source;

(2) routine maintenance, repair or replacement;

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

(4) unless previously limited by enforceable permit conditions:

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

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

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

N. "nonattainment area" means for any air contaminant an area which is shown by monitored data or which is calculated by air quality modeling or other methods determined by the administrator of the federal environmental protection agency to be reliable to exceed any national ambient air quality standard for that contaminant. "Nonattainment area" includes any area identified under Subparagraphs (A) through (C) of Section 107(d)(1) of the federal act, 42 U.S.C. Section 7501(d)(1);

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

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

Q. "regulated air contaminant" means any air contaminant, the emission or ambient

concentration of which is regulated pursuant to the Air Quality Control Act or the federal act;

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

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

T. "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; and

U. "state implementation plan" means any plan submitted by this state to the federal environmental protection agency pursuant to 42 U.S.C. Section 7410.

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.

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

The 1989 amendment, effective April 6, 1989, in Subsections C and E, substituted "class A county", rewrote Subsection N, substituted present Subsection O for the former Subsection which read "'person' means any individual, partnership, firm, public or private corporation, association, trust, estate, political subdivision or agency or any other legal entity or their legal representatives, agents or assigns", and made minor stylistic changes.

Clean Air Act. - Subparagraphs (A) through (C) of Section 107 (d)(1) of the federal act, referred to in Subsection N, are codified at 42 U.S.C. § 7407(d)(1), not at 42 U.S.C. § 7501(d)(1). There is no 42 U.S.C. § 7501(d)(1), but 42 U.S.C. § 7501(2) does contain a reference to Subparagraphs (A) through (C) of 42 U.S.C. § 7407(d)(1).

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

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

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

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

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

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

§ 74-2-3. State air pollution control agency.

A. The environmental improvement board is the state air pollution control agency for all purposes under federal legislation relating to air pollution and may take all action necessary to secure to this state and its political subdivisions the benefits of such federal acts. In taking any action under the Air Quality Control Act [this article], a majority of the environmental improvement board constitutes a quorum, but any action, order or decision of the environmental improvement board requires the concurrence of three members present at a meeting. 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 municipalities within A class counties or A class counties which have elected, by adopting the appropriate ordinance, to assume jurisdiction for the administration and enforcement of the Air Quality Control Act.

B. The director of the department shall keep full minutes of all transactions and proceedings of the board under the Air Quality Control Act and shall perform duties under the act prescribed by the board. The director is the custodian of all files and records of the board and shall meet with the board but does not have a vote.

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.

Cross-references. - As to definition of "board," "department" and "director," see 74-2-2 NMSA 1978. As to definition of "A class county," see 4-44-1 NMSA 1978. As to exemption of environmental improvement board from authority of secretary of health

and environment, and staff support from environmental improvement division, see 9-7-13 NMSA 1978.

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

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

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 51 et seq.
Orders or penalties against state or its officials for failure to comply with regulations directing state to regulate pollution-creating activities of private parties, under § 113 of Clean Air Act (42 U.S.C.S. § 1857c-8), 31 A.L.R. Fed. 79.
39A C.J.S. Health and Environment § 130.

§ 74-2-4. Municipal or county air quality control board.

A. Class A counties and any municipality within a class A county which provides for air quality control shall, by ordinance, provide for the local administration and enforcement of the Air Quality Control Act [this article]. The ordinance shall create a municipal, county or joint air quality control board to administer and enforce the provisions of the Air Quality Control Act within the boundaries of the municipality or county and shall provide for the appointment of a director who shall perform for the municipal, county or joint air quality control board the same duties as required of the director of the

environmental improvement division under the Air Quality Control Act. Prior to adopting any ordinance regulating air pollution, public hearings and consultations shall be held as directed by the governing body of the municipality or county 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.

B. Notwithstanding the provisions of Subsection A of this section, the environmental improvement board shall retain complete jurisdiction and control for the administration and enforcement of the Air Quality Control Act with respect to any act or failure to act, governmental or proprietary, of any municipality or county which causes or contributes to air pollution, including authority to proceed against a municipality or class A county 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.

C. Any class A county or any municipality within that county which provides, by ordinance, for local administration and enforcement of the Air Quality Control Act, which county or municipality within that county is contained within a federal transportation-related pollutant nonattainment area, may provide for a vehicle emission inspection and maintenance program for vehicles under twenty-six thousand pounds gross vehicle weight powered by a spark ignited internal combustion engine, which program shall be no more stringent than that required under the federal act or under federal air quality standards. The governing body of any class A county or any municipality within that county may promulgate 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.

D. Any class A county or any municipality within that county which has implemented a vehicle emission inspection and maintenance program may extend the enforcement of that program by entering into joint powers agreements with any contiguous municipality or county within the designated airshed, or the environmental improvement board and environmental improvement division.

E. No tax shall be imposed to fund any vehicle emission inspection and maintenance program until the governing body of a class A county or a municipality within that county has submitted the question of imposition of a tax to the registered voters of the county or municipality and those registered voters have approved the imposition of the tax.

F. No fee may be imposed by a county or municipality which exceeds two dollars ($2.00) for each vehicle subject to an emission inspection and maintenance program. Any such fee to be imposed shall first be approved by the governing body of a class A county or a municipality within that county. The above fee limitation shall not limit any charges for vehicle inspections by a private vehicle emission inspection and maintenance station.

G. Class A counties and municipalities within those counties having a vehicle emission inspection and maintenance program are 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 be authorized to test vehicles unless the station possesses a valid permit issued by the county or municipality. Permit fees shall be determined by county or municipal ordinance and shall not exceed two hundred dollars ($200) per year per station. Additionally, a municipality or county 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 electors of the county or municipality.

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.

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

The 1988 amendment, effective May 18, 1988, made minor stylistic changes in Subsections A and B, substituted "twenty-six thousand pounds gross vehicle weight powered by a spark ignited internal combustion engine" for "ten thousand pounds" in the first sentence of Subsection C, inserted "class 'A' " in Subsection E, and added Subsection F.

The 1989 amendment, effective April 6, 1989, deleted the former last sentence of Subsection C, which read "Any program enacted pursuant to this subsection shall be effective only from the effective date of this subsection until July 1, 1991"; in Subsection D, added "or the environmental improvement board and environmental improvement division" at the end; in Subsection E, deleted "fee or" preceding "tax" in three places, inserted "and maintenance" near the beginning, and substituted "registered voters" for "qualified electors" and "those registered voters" for "such electors"; added present Subsection F; redesignated former Subsection F as present Subsection G, deleting "as required in Subsection E of this section" from the end; and made minor stylistic changes.

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

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

Localities may impose criminal penalties for violations of act. - This article does not expressly deny to counties and municipalities the power to impose criminal penalties for violations of the act, thus such penalties are valid under N.M. Const., art. X, § 6. Chapman v. Luna, 101 N.M. 59, 678 P.2d 687 (1984), cert. denied, 474 U.S. 947, 106 S. Ct. 345, 88 L. Ed. 2d 292 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 51 et seq.
What are "land-use and transportation controls" which may be imposed, under § 100(a)(2)(B) of Clean Air Act of 1970 (42 U.S.C.S. § 7405), to insure maintenance of national primary ambient air quality standards, 30 A.L.R. Fed. 156.
39A C.J.S. Health and Environment § 130.

§ 74-2-5. Duties and powers of board.

A. The board shall prevent or abate air pollution.

B. The board shall:

(1) adopt, promulgate, publish, amend and repeal regulations consistent with the Air Quality Control Act [this article] to prevent or abate air pollution, including regulations prescribing air standards, within the geographic area of the board's jurisdiction, or any part thereof. Regulations may include regulations to protect visibility in mandatory class I areas, to prevent significant deterioration of air quality and to achieve national ambient air quality standards in nonattainment areas; provided that such regulations shall be no more stringent than but at least as stringent as required by the federal act and federal regulations pertaining to visibility protection in mandatory class I areas, prevention of significant deterioration and nonattainment areas and shall be applicable only to sources subject to such regulation pursuant to the federal act. Regulations may also prescribe standards of performance for sources and emission standards for hazardous air pollutants, provided that such regulations shall be no more stringent than but at least as stringent as required by federal standards of performance and shall be applicable only to sources subject to such federal standards of performance. Regulations shall not specify the method to be used to prevent or abate air pollution. Any regulation promulgated under this section shall be consistent with federal law, if any, relating to control of motor vehicle emission. In making its regulations, the board shall give weight it deems appropriate to all facts and circumstances, including but not limited to:

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

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

(c) 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;

(2) develop facts and make investigations and studies consistent with the Air Quality Control Act, and in connection therewith enter at all reasonable times in or upon any private or public property, except private residences, which the board has reasonable cause to believe is or will become a source of air contaminants contributing to air pollution, and require the production of information relating to emissions which 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 thereof shall be furnished to the owner or occupants of the premises investigated before the action is filed;

(3) cause to be instituted legal proceedings to compel compliance with the Air Quality Control Act or any regulation of the board;

(4) advise, consult, contract and cooperate with municipalities, A class counties, 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 municipalities, counties and the board, or any combination thereof, for control of air pollution in areas having related air pollution problems that overlap the boundaries of political subdivisions;

(5) encourage and make every reasonable effort to obtain voluntary cooperation by persons in the preservation, the restoration or the improvement of air purity;

(6) consult with any person proposing to construct, install or otherwise acquire an air contaminant source or device or system for the control thereof concerning the efficiency of the device or system or the air pollution problem which may be related to the source, device or system. Nothing in any such consultation relieves any person from compliance with the Air Quality Control Act, regulations in force pursuant thereto or any other provision of law;

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

(8) classify and record air contaminant sources which, in its judgment, may cause or contribute to air pollution, according to levels and types of emissions and other characteristics which relate to air pollution. Classifications made pursuant to this paragraph may be for application to the state as a whole or to any designated area of the state and shall be made with special reference to the effects on health, economic and social factors and physical effects on property; and

(9) develop and adopt a plan or plans for the regulation, control, prevention or abatement of air pollution, recognizing the differences, needs, requirements and conditions in the different areas of the state.

C. The board may adopt regulations requiring notice to the board of the intent to introduce or permit the introduction of an air contaminant into the air of the state.

D. The board shall enter into agreements and compacts with states that join our boundary.

E. The board may, by regulation, require any person emitting an air contaminant to:

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

(2) sample emissions in accordance with methods and at locations and intervals as may be prescribed by the board;

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

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

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

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.

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

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

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

No authority to plan industrial development. - There is nothing in the board's mandate that gives it the authority to plan for the industrial development of any area in the state; although the standards and regulations promulgated by the board will have an impact

on the industrial development of the area, such an impact should be as a consequence, not by design. Public Serv. Co. v. New Mexico Envtl. Imp. Bd., 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

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

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

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

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

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

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

Modification authorized to prevent pollution. - The board has the continuing authority to change the ambient air quality standard for sulfur dioxide after proper notice and hearing and to adopt regulations to implement or explain it, but it may not set a new

standard or adopt regulations implementing or explaining it for any reason other than to prevent or abate air pollution. Public Serv. Co. v. New Mexico Envtl. Imp. Bd., 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976).

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 51, 52, 55 et seq.
Validity of regulation of smoke and other air pollution, 78 A.L.R.2d 1305.
Air pollution control: validity of legislation permitting administrative agency to fix permissible standards of pollutant emission, 48 A.L.R.3d 326.
Construction and application of preemption sections (§§ 208, 210(c)(4)) of Clean Air Act (42 U.S.C.S. §§ 1857f-6a, 1857f-6c(c)(4)), 18 A.L.R. Fed. 971.
What are "land-use and transportation controls" which may be imposed, under § 100(a)(2)(B) of Clean Air Act of 1970 (42 U.S.C.S. § 1857c-5(a)(2)(B)), to insure maintenance of national primary ambient air quality standards, 30 A.L.R. Fed. 156.
Construction, applicability and effect of § 304 of Clean Air Amendments of 1970 (42 U.S.C.S. § 1857h-2) in actions against alleged violators, 37 A.L.R. Fed. 320.
Clean Air Act implementation plans for nonattainment areas, 90 A.L.R. Fed. 481.
39A C.J.S. Health and Environment § 130.

§ 74-2-5.1. Joint air quality control board reports.

The Albuquerque-Bernalillo county joint air quality control board shall provide to the legislature a performance audit, in consultation with the federal environmental protection

agency, of any vehicle emission inspection and maintenance program adopted pursuant to Subsection C of Section 74-2-4 NMSA 1978 by January 15 of every odd-numbered year from the effective date of this act through January 15, 1991.

History: Laws 1985, ch. 95, § 6.

"Effective date of this act". - The phrase "effective date of this act", referred to near the end of the section, means April 2, 1985, the effective date of Laws 1985, Chapter 95.

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

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 regulations or emission control requirement 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.

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 board for advance notice of its hearings.

D. 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.

E. The board may designate a hearing officer to take evidence in the hearing.

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

G. 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. Such appeals shall be governed by the provisions of Subsections H, I and J of Section 74-1-9 NMSA 1978.

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

Cross-references. - For definition of "board," see 74-2-2 NMSA 1978. As to notice by publication, see 14-11-1 NMSA 1978 et seq.

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 6, 134.
39A C.J.S. Health and Environment §§ 138, 142.

§ 74-2-7. Permits.

A. By regulation the board may require persons constructing or modifying any source to obtain a permit from the department prior to such construction or modification. Such regulations may include requirements relating to prevention of significant deterioration and to construction in nonattainment areas; provided that such requirements shall be no more stringent than but at least as stringent as required under the federal act and regulations adopted pursuant thereto.

B. Prior to the issuance of a permit, the department shall require the submission of plans, specifications and other relevant information which it deems necessary, including information the department deems necessary to ensure that regulations and standards under the Air Quality Control Act [this article] or the federal act are not violated.

C. The board shall adopt such regulations as are necessary to implement this section, including regulations governing the deadlines for processing permit applications and the public notice, comment period and public hearing, if any, required prior to the issuance of a permit. Such regulations adopted by the environmental improvement board shall include regulations governing notice to nearby states.

D. Any municipality within an A class county, or any A class county, which has elected, by adopting the appropriate ordinance, to assume jurisdiction for the administration and

enforcement of the Air Quality Control Act shall provide notice to the environmental improvement division of all permit applications by any source which 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.

E. The department may deny any application for a permit if:

(1) it appears that the construction or modification will not meet applicable regulations adopted pursuant to the Air Quality Control Act;

(2) the construction or modification will emit a hazardous air pollutant or an air contaminant in excess of a federal standard of performance or a regulation of the board;

(3) it appears that the construction or modification will cause or contribute to air contaminant levels in excess of any national or state, or, in A class counties, applicable local, ambient air quality standards; or

(4) any other provision of the Air Quality Control Act will be violated.

F. (1) The department shall, within thirty days, review any application submitted for completeness.

(2) If the application is judged complete, a letter to that effect shall be sent to the applicant. If the application is judged incomplete, a letter shall be sent to the applicant stating what additional information or points of clarification are necessary to judge the application complete.

(3) The department shall, as soon as practicable but not to exceed one hundred twenty days or one hundred eighty days if there is a hearing after the filing of a complete application for a permit, either grant, grant subject to conditions or deny the permit for the construction or modification of a source.

G. (1) Except as otherwise provided in Paragraph (2) of this subsection, the department may specify conditions to any permit granted under this section. Such conditions may include:

(a) placement of individual emission limits determined on a case-by-case basis on the source for which the permit is issued, but such individual emission limits shall be only as restrictive as the more stringent of the following: 1) the extent necessary to meet the requirements of the Air Quality Control Act and the federal act; or 2) the emission rate specified in the permit application;

(b) a requirement that such source install and operate control technology, determined on a case-by-case basis, sufficient to meet the requirements, pertaining to prevention of

significant deterioration or to sources locating in nonattainment areas, of the Air Quality Control Act and the federal act and regulations promulgated under either;

(c) compliance with applicable federal standards of performance;

(d) imposition of reasonable restrictions and limitations other than restrictions and limitations relating to emission limits or emission rates; or

(e) any combination of the above.

(2) In the case of a modification, the requirements of Paragraph (1) of this subsection apply only to the facility or facilities involved in such modification.

H. This section does not authorize the department 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.

I. (1) The board may provide by regulation a schedule of permit fees sufficient to cover:

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

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

(2) Initial fees are to be paid at the time the application for the permit is filed, and subsequent fees, if any, are to be paid as determined by the director.

(3) Fees collected pursuant to this section shall be deposited in the general fund of a municipality within an A class county if the application is for a new source within the municipality, or in the general fund of the A class county if the application is for a new source located outside the municipality but within the A class county. Fees collected pursuant to this section shall be deposited in the state general fund if the application is for a source located outside an A class county.

J. 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 board. Any conditions placed upon a permit by the department shall be enforceable to the same extent as a regulation of the board.

K. If the department denies a permit or grants the permit subject to conditions, the department must notify the applicant by certified mail of the action taken and the reasons therefor. If the applicant is dissatisfied with the action taken by the department, he may request a hearing before the board. The request must be made in writing to the director within thirty days after notice of the department's action has been received by

the applicant. Unless a timely request for hearing is made, the decision of the department shall be final.

L. If a timely request for hearing is made, the board shall hold a hearing within thirty days after receipt of the request. The department shall notify the applicant by certified mail of the date, time and place of the hearing. In the hearing, the burden of proof shall be upon the applicant. The board may designate a hearing officer to take evidence in the hearing. Based upon the evidence presented at the hearing, the board shall sustain, modify or reverse the action of the department.

M. An applicant may appeal the decision of the board by filing with the court of appeals a notice of appeal within thirty days after the date the decision is made. The appeal must be on the record made at the hearing. The applicant 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 applicant, including two copies which he shall furnish to the board. Upon appeal, the court of appeals shall set aside the decision of the board 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.

N. 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, board or court of appeals that a new source will or will not meet applicable local, state and federal air pollution standards and regulations shall be conclusive and is binding on every other state agency and as an issue before any other state agency shall be deemed resolved in accordance with that final decision.

O. Subject to the provisions of Section 74-2-4 NMSA 1978, if a municipal, county or joint air quality control board has adopted a permit regulation pursuant to this section, persons constructing or modifying any new source of air contaminant within the confines of the board's jurisdiction under the Air Quality Control Act must obtain a permit from the administrative agency of that board and not from the environmental improvement division.

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.

Cross-references. - For definitions of "department," "board" and "federal act," see 74-2-2 NMSA 1978. For definition of "class A county," see 4-44-1 NMSA 1978.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity, construction and application of statutes requiring assessment of environmental information prior to grants of entitlements for private land use, 76 A.L.R.3d 388.
Application of § 165 of Clean Air Act (42 USCS § 7475), pertaining to preconstruction requirements for prevention of significant deterioration, to particular emission sources, 86 A.L.R. Fed. 255.
39A C.J.S. Health and Environment §§ 134 to 149.

§ 74-2-8. Variances.

A. The board may grant an individual variance from the limitations prescribed under the Air Quality Control Act [this article], any regulation of the board, or any permit condition whenever it is found, upon presentation of adequate proof, that compliance with any part of that act, any regulation of the board, or any permit condition will result in an arbitrary and unreasonable taking of property or will impose an undue economic burden upon any lawful business, occupation or activity, and that the granting of the variance will not result in a condition injurious to health or safety.

B. No variance shall be granted pursuant to this section until the 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 is 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 or requirements from which variance is sought will necessitate the taking of measures which, 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 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 director. The director shall promptly investigate the petition and make recommendation to the board as to the disposition thereof. Upon receiving the recommendation of the director, the board shall, if the recommendation favors a variance, hold a public hearing prior to the granting of any variance. If the board is opposed to the granting of the variance, then a hearing shall be held upon the request of the petitioner, and in such hearings 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.

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

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

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

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

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

Notice and hearing prerequisite to granting variance. - The environmental improvement board cannot grant a variance without first having given the public reasonable notice and a hearing on the contemplated variance. Where the notice of the hearing on a

proposed amendment contains no mention of a variance, the board cannot legally grant a variance after the hearing. The order granting the variance is, therefore, void. 1976 Op. Att'y Gen. No. 76-23.

Burden of proving safety of variance on applicant. - The effect of the requirement of this section that the granting of the variance must not result in a condition injurious to health or safety is to impose the duty of proving a negative on the applicant for a variance. Duke City Lumber Co. v. New Mexico Envtl. Imp. Bd., 95 N.M. 401, 622 P.2d 709 (Ct. App. 1980), rev'd on other grounds, 101 N.M. 291, 681 P.2d 717 (1984).

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity, construction, and application of variance provisions in state and local air pollution control laws and regulations, 66 A.L.R.4th 711.
39A C.J.S. Health and Environment § 135.

§ 74-2-9. Variances; judicial review.

A. Any person to whom the board denies a variance, after a hearing, 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 after the board's denial.

B. The procedure for perfecting an appeal to the court of appeals under this section consists of the timely filing of a notice of appeal, in the court of appeals, with an attached copy of the regulation or permit condition from which the variance was sought and denied, a copy of the variance request and a copy of the board's findings and order, if any, denying the variance requested. The appellant shall certify in his notice of appeal that arrangements have been made with the board for preparation, at the appellant's expense, of a sufficient number of transcripts of the record of the hearing on which the appeal depends, to support his appeal to the court, including three copies which he shall furnish to the board. Such appeal shall be prosecuted in the same manner as other civil cases.

C. Upon appeal, the court of appeals shall set aside the board's denial of the variance

request 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. The appellant may apply to the court of appeals for a stay of enforcement of the board's order pending the determination of such appeal. The court of appeals may, upon hearing before the court and upon good cause shown, grant such stay.

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

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

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

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

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

§ 74-2-10. Emergency procedure.

Notwithstanding other provisions of the Air Quality Control Act [this article], if the director determines that any person is causing or contributing to air pollution of such characteristics and duration as to create an emergency which requires immediate action to protect human health or safety, the director shall order the person to reduce or cease immediately the emission of air contaminants creating the emergency condition. If the effectiveness of the order is to continue beyond forty-eight hours, the director shall file in the district court, not later than forty-eight hours after the date of the order, an action to extend the effectiveness of the order.

History: 1953 Comp., § 12-14-9, enacted by Laws 1967, ch. 277, § 9; 1970, ch. 58, § 7; 1971, ch. 277, § 23; 1972, ch. 51, § 5; 1981, ch. 373, § 6.

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

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

§ 74-2-11. Confidential information.

A. The following items furnished to or obtained by the board or the department concerning air contaminant sources are confidential if specifically marked as confidential at the time such items are submitted, and shall not be made a part of any public record unless the person expressly agrees to its publication:

(1) records or information relating to processes or production techniques unique to the owner or operator; and

(2) data relating to the profits and costs of the owner or operator which have not previously been released to the public.

B. This section shall not be construed to:

(1) limit the use of such records or information in any civil or criminal action, subject to such protection as the court may give; or

(2) prohibit the release of information concerning the nature and amount of emissions from any source.

History: 1953 Comp., § 12-14-10, enacted by Laws 1967, ch. 277, § 10; 1972, ch. 51, § 6; 1979, ch. 393, § 6.

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

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

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

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

§ 74-2-11.1. Limitations on regulations.

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

A. authorize the 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 board any jurisdiction or authority affecting the relation between employers and employees with respect to or arising out of any condition of air quality, 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; 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.

§ 74-2-12. Enforcement.

A. If, as a result of investigation, the department has good cause to believe that any person is violating any provision of the Air Quality Control Act [this article], any regulation of the board, any permit condition or any emergency order of the director, and if the department is unable within a reasonable time to obtain voluntary cooperation to prevent air pollution, the department may cause an action for injunction or other appropriate relief to be filed in the district court to secure the abatement of the emission of air contaminants or compliance with the provisions of that act, regulation, permit condition or emergency order. The action shall be filed in the district court of the county in which the emission of air contaminants originates or if the person has not obtained a permit in conformity with Section 74-2-7 NMSA 1978, the action shall be filed in Santa Fe county, or the county in which the permit should have been obtained.

B. In any action to enforce the provisions of the Air Quality Control Act, or any regulation, permit condition or emergency order, the environmental improvement board or environmental improvement division, shall be represented by the attorney general.

C. In any action to enforce the provisions of any municipal ordinance adopted in accordance with the provisions of the Air Quality Control Act or any regulation of a municipal air quality control board created thereunder, the board and the municipality shall be represented by the attorney of the municipality.

D. In any action to enforce the provisions of any county ordinance adopted in accordance with the Air Quality Control Act or any regulation of a county air quality control board created thereunder, the board and the county shall be represented by the district attorney within whose judicial district the county lies.

E. In addition to the remedies provided above, the trial court may impose civil penalties not exceeding one thousand dollars ($1,000) for each violation of the Air Quality Control Act or any regulation, permit condition or emergency order. Each day during any portion of which such violation occurs shall constitute a separate offense. In any action under this subsection, the defendant may demand a jury trial.

F. Any party aggrieved by any final judgment of the district court under the provisions of this section may appeal to the court of appeals as in other civil actions.

History: 1953 Comp., § 12-14-11, enacted by Laws 1967, ch. 277, § 11; 1970, ch. 58, § 8; 1971, ch. 277, § 24; 1972, ch. 51, § 7; 1973, ch. 322, § 6; 1979, ch. 393, § 8.

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 6.
Validity of regulation of smoke and other air pollution, 78 A.L.R.2d 1305.
Necessity of showing scienter, knowledge or intent, in prosecution for violation of air pollution or smoke control statute or ordinance, 46 A.L.R.3d 758.
Maintainability in state court of class action for relief against air or water pollution, 47 A.L.R.3d 769.
Propriety of court's consideration of ecological effects of proposed project in determining right of condemnation, 47 A.L.R.3d 1267.
Air pollution control: sufficiency of evidence of violation in administrative proceeding terminating in abatement order, 48 A.L.R.3d 795.
Pollution control: preliminary mandatory injunction to prevent, correct or reduce effects of polluting practices, 49 A.L.R.3d 1239.
Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency, 60 A.L.R.3d 665.
Recovery in trespass for injury to land caused by airborne pollutants, 2 A.L.R.4th 1054.

When statute of limitations begins to run as to cause of action for nuisance based on air pollution, 19 A.L.R.4th 456.
Standing to sue for violation of state environmental regulatory statute, 66 A.L.R.4th 685.
Construction, applicability and effect of § 304 of Clean Air Amendments of 1970 (42 U.S.C.S. § 1857h-2) in actions against alleged violators, 37 A.L.R. Fed. 320.
Construction and application of 42 USCS § 7604(d) pertaining to recovering costs of litigation in suits under Clean Air Act, 85 A.L.R. Fed. 118.
39A C.J.S. Health and Environment § 150.

§ 74-2-13. Inspection.

Any employee of the department or board, upon presentation of proper department or board credentials:

A. shall have at reasonable times, a right of entry to, upon or through any premises in which an emission source is located or in which are located any records required to be maintained by regulations of the board;

B. may at reasonable times have access to and copy any records required to be established and maintained by regulations of the board; and

C. inspect any monitoring equipment or methods required to be installed by regulations of the board.

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

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

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. Penalties.

A. Notwithstanding any other provision of the Air Quality Control Act [this article], any A class county or municipality within an A class county may prescribe penalties for violations of an ordinance:

(1) regulating open-fire burning or commercial, industrial 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 shall be a petty

misdemeanor to violate any regulation of the environmental improvement board:

(1) regulating open-fire burning or commercial, industrial 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.

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.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 51, 52.
Construction and application of preemption sections (§§ 208, 210(c)(4)) of Clean Air Act (42 U.S.C.S. §§ 1857f-6a, 1857f-6c(c)(4)), 18 A.L.R. Fed. 971.
What are "land-use and transportation controls" which may be imposed, under § 100(a)(2)(B) of Clean Air Act of 1970 (42 U.S.C.S. § 1857c-5(a)(2)(B)), to insure maintenance of national primary ambient air quality standards, 30 A.L.R. Fed. 156.
39A C.J.S. Health and Environment § 139.

§ 74-2-15. Additional means of enforcement.

As an additional means of enforcing the Air Quality Control Act [this article], any regulation of the board or any permit condition, the board may accept a written assurance of discontinuance of any act or practice deemed in violation of the Air Quality Control Act, any regulation adopted pursuant thereto, or any permit condition from any person engaging in, or who has engaged in, such act or practice, signed and acknowledged by the board, the department and the party affected. Any such assurance shall specify a time limit during which such discontinuance is to be accomplished. So long as the party affected complies with the provisions of the assurance of discontinuance, it shall not be subjected to the imposition of any fines or penalties by the board or the department for the specific act or practice covered by the assurance of discontinuance.

History: 1953 Comp., § 12-14-12.1, enacted by Laws 1970, ch. 58, § 10; 1979, ch. 393, § 9.

§ 74-2-15.1. Primary nonferrous smelter orders.

A. The board may issue a primary nonferrous smelter order to a primary nonferrous smelter if:

(1) such smelter was in existence on August 7, 1977;

(2) the requirement of the regulation with respect to which the order is issued is an emission limitation or standard for sulfur oxides which is necessary and intended to be itself sufficient to enable attainment and maintenance of state or national primary and secondary ambient air quality standards for sulfur oxides; and

(3) the board determines that such smelter is unable to comply with such requirement by the applicable date for compliance because no means of emission limitation applicable to such smelter which will enable it to achieve compliance with such requirement has been adequately demonstrated to be reasonably available, as determined by the board, taking into account the cost of compliance, non-air quality health and environmental impact and energy considerations.

B. An order issued to a smelter under the provisions of this section shall set forth compliance schedules containing increments of progress which require compliance with the requirement postponed as expeditiously as practicable. The increments of progress shall be limited to requiring compliance with Subsection D of this section and, in the case of a second order, to procuring, installing and operating the necessary means of emission limitation as expeditiously as practicable after the board determines such means have been adequately demonstrated to be reasonably available within the meaning of Paragraph (3) of Subsection A of this section.

C. No more than two primary nonferrous smelter orders may be issued pursuant to this section to any primary nonferrous smelter. The first such order issued to a smelter shall not result in the postponement of the requirement with respect to which such order is issued beyond January 1, 1983. The second such order shall not result in the postponement of such requirement beyond January 1, 1988.

D. (1) Each primary nonferrous smelter to which an order is issued pursuant to this section shall be required to use such interim measures for the period during which such order is in effect as may be necessary in the judgment of the board to assure attainment and maintenance of the state or national primary and secondary ambient air quality standards during such period, taking into account the aggregate effect on air quality of such order together with all variances, extensions, waivers, enforcement orders, delayed compliance orders and primary nonferrous smelter orders previously issued under the federal act or the Air Quality Control Act [this article]. Such interim measures shall include:

(a) a requirement that the source to which the order applies comply with such reporting requirements and conduct such monitoring as the board determines may be necessary;

(b) such measures as the board determines are necessary to avoid an imminent and substantial danger to human health; and

(c) except as provided in Subsection E of this section, continuous emission reduction technology.

(2) The board shall condition the use of the interim measures specified in Paragraph (1) of this subsection upon the agreement of the owner or operator of the smelter to:

(a) comply with such conditions as the board determines are necessary to maximize the reliability and enforceability of such interim measures, as applied to the smelter, in attaining and maintaining the state and national ambient air quality standards to which the order relates; and

(b) commit reasonable resources to research and development of appropriate emission control technology.

E. The requirement of Subsection D of this section for the use of continuous emission reduction technology may be waived with respect to a particular smelter by the board, after notice and hearing, and upon a showing by the owner or operator of the smelter that such requirement would be so costly as to necessitate permanent or prolonged temporary cessation of operations of the smelter. The administrator [of the environmental protection agency] shall be notified of each application for such waiver, and the board shall take no action on such waiver until receipt of the administrator's report, findings and recommendations pursuant to 42 U.S.C. Section 7419(d)(2). The administrator's report, findings and recommendations shall be made available to the public and shall be taken into account by the board in its decision on whether or not to grant the waiver authorized by this subsection.

F. In the case of any smelter which on August 7, 1977, uses continuous emission reduction technology and supplemental controls and which receives an initial primary nonferrous smelter order under this section, no additional continuous emission reduction technology shall be required as a condition of such order unless the board determines, at any time, after notice and public hearing, that such additional continuous emission reduction technology is adequately demonstrated to be reasonably available for the primary nonferrous smelter industry.

G. At any time during which an order under the provisions of this section applies, the board may hold a public hearing respecting the availability of technology. Any order under the provisions of this section shall be terminated if the board determines on the record, after notice and public hearing, that the conditions upon which the order was based no longer exist. If the owner or operator of the smelter to which the order is issued demonstrates that prompt termination of such order would result in undue hardship, the termination shall become effective at the earliest practicable date on which such undue hardship would not result, but in no event later than the date required pursuant to Subsection C of this section.

H. If the board determines that a smelter to which an order is issued pursuant to this section is in violation of any requirement of Subsection C or D of this section, the board shall:

(1) enforce such requirement under the provision of Section 74-2-12 NMSA 1978;

(2) after notice and opportunity for public hearing, revoke such order and enforce compliance with the requirement with respect to which such order was granted; or

(3) take any appropriate combination of such actions.

History: 1978 Comp., § 74-2-15.1, enacted by Laws 1979, ch. 393, § 10.

Meaning of "administrator". - The term "administrator," referred to throughout the last two sentences in Subsection E, apparently means the administrator of the federal environmental protection agency. See 42 U.S.C. § 7602 (a).

§ 74-2-16. Declaratory judgment on regulations.

In addition to any other remedy available, the validity or applicability of a regulation of the board may be determined in an action for a declaratory judgment. Any person or representative association, including but not limited to trade associations, labor unions or professional organizations, if one or more of its members could qualify as a plaintiff, may file the action. The board shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the board to pass upon the validity or applicability of the regulation in question.

History: 1953 Comp., § 12-14-12.2, enacted by Laws 1970, ch. 58, § 11.

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

The Air Quality Control Act [this article] is supplementary to other legislation and does not repeal any laws except those in direct conflict therewith. All county and municipal ordinances, and all state, county and municipal regulations relating to air quality and air pollution, are continued in effect following the effective date of the Air Quality Control Act unless revised or repealed; provided that copies of each ordinance and regulation have previously been filed under the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978] or are filed within thirty days after the effective date of the Air Quality Control Act.

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

"Effective date of the Air Quality Control Act". - The phrase "effective date of the Air Quality Control Act", referred to in two places, means April 3, 1967, the effective date of Laws 1967, Chapter 277.

§§ 74-2-18 to 74-2-22. Repealed.

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

Article 2A

Wood Burning Stoves and Fireplaces

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

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

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

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

History: Laws 1989, ch. 150, § 1.

Effective dates. - Laws 1989, ch. 150 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1989.

Article 3

Radiation Control

§ 74-3-1. Short title.

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

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

Cross-references. - For the Environmental Improvement Act, see 74-1-1 NMSA 1978 et seq. As to promulgation of standards of radiation control, see 74-1-7 and 74-1-8 NMSA 1978.

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - Liability for injury by X-ray, 41 A.L.R.2d 329.
Tort liability incident to nuclear accident or explosion, 21 A.L.R.3d 1356.

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

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

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

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

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

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

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

§ 74-3-3. Council duties; per diem.

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

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

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

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

§ 74-3-4. Definitions.

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

A. "board" means the environmental improvement board;

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

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

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

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

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

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

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

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

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

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

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

Cross-references. - As to exemption of environmental improvement board from authority of secretary of health and environment, and staff support from environmental improvement division, see 9-7-13 NMSA 1978.

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

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

Environmental improvement agency. - The environmental improvement agency, referred to in Subsections B and J, was abolished by Laws 1977, ch. 253, § 5. Section 9-7-4 NMSA 1978 creates the health and environment department and the environmental improvement division therein. Laws 1977, ch. 253, § 14, provides that all references to the agency mean the division.

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

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

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

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

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

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

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

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

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

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

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

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

Council's "advice and consent" must be clear before regulation adopted. - Before the environmental improvement board can formally adopt a regulation, it must obtain the express recommendation and approval of the regulation by the radiation technical advisory council. The "advice and consent" of the council must be stated plainly and unequivocally. Kerr-McGee Nuclear Corp. v. New Mexico Envtl. Imp. Bd., 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

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

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

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

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

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

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

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

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

C. Until the nuclear regulatory commission adopts regulations governing continued care activities, continued care fund deposits required from a uranium mill license holder shall be ten cents ($.10) per pound of U3O8 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.

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

The 1989 amendment, effective April 7, 1989, in Subsection A, deleted the former last sentence, which read "Income earned on the investment shall be credited to the

continued care fund for use as provided in the Radiation Protection Act" and, in Subsection B, substituted "and which involve" for "involving".

§ 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.

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

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

§ 74-3-9. Licensing of radioactive material.

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

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

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

(3) a license issued by the agency.

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

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

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

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

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

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

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

(3) otherwise not in accordance with law.

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

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 274, 276.
State regulation of nuclear power plants, 82 A.L.R.3d 751.
State or local regulation of transportation of hazardous materials as pre-empted by Hazardous Materials Transportation Act (49 U.S.C.S. § 1801 et seq.), 78 A.L.R. Fed. 289.

§ 74-3-10. Exemptions.

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

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

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

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

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

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

§ 74-3-11. Civil penalty; injunction.

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

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

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

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

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

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - Tort liability incident to nuclear accident or explosion, 7 A.L.R.3d 1536.
Pollution control: preliminary mandatory injunction to prevent, correct or reduce effects of polluting practices, 49 A.L.R.3d 1239.
Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency, 60 A.L.R.3d 665.

§ 74-3-12. Criminal penalty.

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

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

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

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

§ 74-3-13. Emergencies.

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

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

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

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

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

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

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

§ 74-3-15. Agreement status authorized.

The board and the agency, through the governor, may enter into an agreement with the nuclear regulatory commission, as provided in the Atomic Energy Act of 1954, as amended, providing for discontinuance of the regulatory authority of the nuclear regulatory commission and acceptance of that authority by the board and agency. For the duration of such an agreement, the board shall have authority to regulate the radioactive materials covered by the agreement for the protection of the public health and safety and the environment from radiation hazards.

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

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

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

§ 74-3-16. Discrimination.

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

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

Article 4

Hazardous Wastes

§ 74-4-1. Short title.

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

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

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.
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.

§ 74-4-2. Purpose.

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

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

§ 74-4-3. Definitions.

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

A. "board" means the environmental improvement board;

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

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

D. "division" means the environmental improvement division of the health and environment department;

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

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

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

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

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

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

(2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed. The term "hazardous waste" does not include 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;

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

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

L. "regulated substance" means:

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

(2) petroleum including crude oil or any fraction thereof which is liquid at standard conditions of temperature and pressure of 60 degrees fahrenheit and 14.7 pounds per square inch absolute;

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

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

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

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

Q. "treatment" means any method, technique or process, including neutralization, designed to change the physical, chemical or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste

nonhazardous, safer for transport, amenable for recovery, amenable for storage or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous; and

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

(1) farm, ranch or residential tank of 1,100 gallons or less capacity used for storing motor fuel or heating oil for noncommercial purposes;

(2) septic tank;

(3) pipeline facility, including gathering lines which are regulated under the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. App. 1671, et seq., or the Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. App. 2001, et seq., or which is an intrastate pipeline facility regulated under state laws comparable to either act;

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

(5) storm water or wastewater collection system;

(6) flow-through process tank;

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

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

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

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

The 1989 amendment, effective April 7, 1989, rewrote the section to the extent that a detailed comparison would be impracticable.

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

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

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

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

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

§ 74-4-3.1. Application of act.

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

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

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

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

§ 74-4-3.2. Repealed.

Repeals. - Laws 1989, ch. 4, § 1 repeals 74-4-3.2 NMSA 1978, as enacted by Laws 1987, ch. 179, § 2, relating to application of Hazardous Waste Act to the waste isolation

pilot plant, effective February 23, 1989. For provisions of former section, see 1987 Supplement to this pamphlet.

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

In addition to the meaning of hazardous waste as defined in Section 74-4-3 NMSA 1978, the term "hazardous waste" as used in the Hazardous Waste Act [this article] may include any material imported into the state of New Mexico for the purpose of disposal which is defined or classified as hazardous waste in the state of origin.

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

Emergency clauses. - Laws 1989, ch. 255, § 2 makes the act effective immediately. Approved April 5, 1989.

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

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

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

(2) establishing standards applicable to generators identified or listed under this subsection. Such standards shall establish requirements respecting:

(a) furnishing of 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 which 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 such as will identify accurately the waste;

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

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

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

(g) submission of reports to the director at such times as the director deems necessary, setting out the quantities of hazardous waste identified or listed under the Hazardous Waste Act [this article] that he 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) use of manifest system and any other reasonable means necessary to assure that all hazardous waste generated is designated for treatment, storage or disposal in, and arrives at, treatment, storage or disposal facilities, other than facilities on the premises where the waste is generated, for which a permit has been issued as provided in the Hazardous Waste Act; and that the generator of hazardous waste has a program in place to reduce the volume or quality and toxicity of waste to the degree determined by the generator to be economically practicable; and that the proposed method of treatment, storage or disposal is that practicable method currently available to the generator which 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. Such standards shall include but need not be limited to requirements respecting:

(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 facilities which the shipper designates on the manifest form to be a facility holding a permit issued under the Hazardous Waste Act or the Resource Conservation and Recovery Act, as amended, (42 U.S.C. 6901 et seq.);

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

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

and

(b) furnishing of 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. Where appropriate, the standards shall distinguish between new facilities and facilities in existence on the date of promulgation. Standards shall include, but need not be limited to, requirements respecting:

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

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

(c) treatment, storage or disposal of all such waste and any liquid which 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 director;

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

(g) compliance with the requirements of Paragraph (6) of this subsection respecting permits for treatment, storage or disposal;

(h) the taking of corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility regardless of the time at which waste was placed in such unit; and

(i) the taking of corrective action beyond a facility's boundaries where necessary to protect human health and the environment, unless the owner or operator of the facility concerned demonstrates to the satisfaction of the director that, despite the owner or operator's best efforts, the owner or operator was unable to obtain the necessary

permission to undertake such action. Regulations 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) which receive hazardous waste after July 26, 1982. No private entity shall be precluded by reason of criteria established under Subparagraph (f) of Paragraph (5) of this subsection 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 and operating 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 and revocation of permits issued under Paragraph (6) of this subsection, which regulations shall provide for prior notice and an opportunity for a hearing prior to the issuance, suspension or revocation of the permit unless otherwise provided in the Hazardous Waste Act; and

(8) establishing procedures for the inspection of facilities for the treatment, storage and disposal of hazardous waste which govern the minimum frequency and manner of the inspections, the manner in which records of such inspections will be maintained and the manner in which reports of such inspections shall be filed; provided, however, that inspections of permitted facilities will occur no less often than every two years.

B. The board shall adopt regulations:

(1) concerning hazardous substance incidents; and

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

C. The board shall adopt regulations concerning underground storage tanks which are equivalent to, and no more stringent than, federal regulations adopted by the federal environmental protection agency pursuant to the Resource Conservation and Recovery Act and which shall include:

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

(2) requirements for financial responsibility;

(3) standards for inventory control;

(4) standards for the detection of leaks from and the integrity testing and monitoring of underground storage tanks;

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

(6) requirements for record keeping; and

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

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

History: 1953 Comp., § 12-9B-4, enacted by Laws 1977, ch. 313, § 4; 1981 (1st S.S.), ch. 8, § 4; 1987, ch. 179, § 3; 1989, ch. 322, § 2.

Cross-references. - For definition of "agency," see 74-4-3 NMSA 1978.

The 1989 amendment, effective April 7, 1989, redesignated the subsections, paragraphs, and subparagraphs and changed the internal subsection references accordingly; in present Subsection A, deleted "and for underground storage tanks" following "management of hazardous wastes"; in Subsection B(2), substituted "the division" for "the agency"; added present Subsection D; and made minor stylistic changes throughout the section.

Resource Conservation and Recovery Act. - The Resource Conservation and Recovery Act, referred to in several places in this section, appears as 42 U.S.C. § 6901 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 6, 134.
State or local regulation of transportation of hazardous materials as pre-empted by Hazardous Materials Transportation Act (49 U.S.C.S. § 1801 et seq.), 78 A.L.R. Fed. 289.

§ 74-4-4.1. Hazardous agricultural waste; duties and responsibilities of the department of agriculture.

A. The department of agriculture shall be responsible for the enforcement of all board regulations adopted pursuant to the Hazardous Waste Act [this article] regarding generators of hazardous agricultural waste. The division shall enforce those board regulations pertaining to transporters, treaters, storers and disposers of hazardous agricultural waste.

B. In the exercise of the responsibility prescribed in Subsection A of this section, the department of agriculture shall have the same authority as that delegated to the division, including the director.

C. In the adoption of regulations pertaining to hazardous agricultural waste, the board shall make a reasonable effort to consult with the department of agriculture prior to the adoption of the regulations. The department of agriculture shall serve as the technical consultant to the board on matters concerning hazardous agricultural waste.

History: 1978 Comp., § 74-4-4.1, enacted by Laws 1981 (1st S.S.), ch. 8, § 5; 1989, ch. 322, § 3.

The 1989 amendment, effective April 7, 1989, substituted "the division" for "the agency" in the second sentence in Subsection A and in Subsection B.

Am. Jur. 2d, A.L.R. and C.J.S. references. - State or local regulation of transportation of hazardous materials as pre-empted by Hazardous Materials Transportation Act (49 U.S.C.S. § 1801 et seq.), 78 A.L.R. Fed. 289.

§ 74-4-4.2. Permits; issuance and revocation; appeal.

A. Each application for a permit under the Hazardous Waste Act [this article] shall contain such information as may be required under regulations promulgated by the board, including information respecting:

(1) estimates with respect to the composition, quantity and concentration of any hazardous waste identified or listed under Subsection A of Section 74-4-4 NMSA 1978 or combinations of any such hazardous waste and other solid waste proposed to be disposed of, treated, transported or stored and the time, frequency or rate of which the waste is proposed to be disposed of, treated, transported or stored; and

(2) the site where hazardous waste or the products of treatment of hazardous waste will be disposed of, treated, transported to or stored.

B. Hazardous waste permits issued after April 8, 1987 shall require corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage or disposal facility seeking a permit under this section.

C. The division shall provide timely review on all permit applications. Upon a determination by the director that the applicant has met the requirements adopted pursuant to Section 74-4-4 NMSA 1978, the director may issue a permit or a permit subject to any conditions necessary to protect human health and the environment for the facility.

D. The division may modify, suspend or revoke any permit issued under the Hazardous

Waste Act for:

(1) violation of any permit condition;

(2) misrepresentation of or failure to fully disclose all relevant facts and information in obtaining the permit;

(3) violation of any provision of the Hazardous Waste Act or any regulation promulgated pursuant to it; or

(4) in the case of research, development and demonstration permits, upon the determination that termination is necessary to protect human health and the environment.

E. No ruling shall be made on permit issuance, 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 division may, pursuant to Section 74-4-10 NMSA 1978, order the immediate termination of a research development and demonstration permit whenever it is determined that such termination is necessary to protect human health and the environment and may order the immediate suspension or revocation of a permit for a facility which has been ordered to take corrective action or other response measures for releases of hazardous waste into the environment.

F. The board shall provide a schedule of fees for businesses generating hazardous waste or seeking a permit for the management of hazardous waste, to be deposited to the credit of the hazardous waste fund, including but not limited to:

(1) a hazardous waste business fee applicable to any business engaged in a regulated hazardous waste activity, which shall be an annual flat fee based on the type of activity;

(2) a hazardous waste generation fee applicable to any business generating hazardous waste, which shall be based on the quantity of hazardous waste generated annually; however, when any material listed in Paragraph (2) of Subsection I of Section 74-4-3 NMSA 1978 is determined by the board to be subject to regulation under Subtitle C of the federal Resource Conservation and Recovery Act, the board may set a generation fee under this paragraph for that waste based on its volume, toxicity, mobility and economic impact on the regulated entity; and

(3) a hazardous waste permit application fee, not exceeding the estimated cost of investigating the application and issuing the permit, to be paid at the time the director notifies the applicant by certified mail that the application has been deemed administratively complete and a technical review is scheduled.

G. Any person adversely affected by a decision of the director concerning the issuance,

modification, suspension or revocation of a permit may appeal the decision by filing a notice of appeal with the court of appeals within thirty days after the date the decision is made. The appeal shall be on the record made at the hearing. The appellant shall certify in his notice of appeal that arrangements have been made with the division for 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 one copy which he shall furnish to the division.

H. Upon appeal, the court of appeals shall set aside the decision of the director only if found to be:

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

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

(3) otherwise not in accordance with law.

History: 1978 Comp., § 74-4-4.2, enacted by Laws 1981 (1st S.S.), ch. 8, § 6; 1987, ch. 179, § 4; 1989, ch. 322, § 4.

The 1989 amendment, effective April 7, 1989, substituted "the division" for "the agency" throughout the section; in Subsection A(1), inserted "Subsection A of"; in Subsection B, inserted "Hazardous wastes" at the beginning and substituted "after April 8, 1987" for "after the date of enactment of this provision"; in Subsection F, substituted "shall provide" for "may provide" near the beginning, deleted "application" following "schedule of", and substituted all of the language beginning with "businesses generating hazardous or" for "permits not exceeding the estimated cost of investigation and issuance of permits. Fees are to be paid at the time the application for the permit is filed. Fees collected pursuant to this section shall be deposited in the state treasury to the credit of the hazardous waste and underground storage tank fund".

Federal Resource Conservation and Recovery Act. - Subtitle C of the federal Resource Conservation and Recovery Act, referred to in Subsection F(2), appears as 42 U.S.C. § 6921.

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

A. For purposes of developing or assisting in the development of any regulations, conducting any study, taking any corrective action or enforcing the provisions of the Hazardous Waste Act [this article], upon request of the director or his authorized representative:

(1) any person who generates, stores, treats, transports, disposes of or otherwise handles or has handled hazardous wastes shall furnish information relating to such hazardous wastes and permit the director or his authorized representatives:

(a) to enter at reasonable times any establishment or other place maintained by any person where hazardous wastes are or have been generated, stored, treated, disposed of or transported from or where an underground storage tank is located; and

(b) to inspect and obtain samples from any person of any hazardous wastes and samples of any containers or labeling for the wastes; and

(2) any person who owns or operates an underground storage tank, or any tank subject to study under Section 9009 of the Resource Conservation and Recovery Act that is used for storing regulated substances, shall furnish information relating to such tanks, including their associated equipment and their contents, conduct monitoring or testing, permit the director or his authorized representative at all reasonable times to have access to and to copy all records relating to such tanks and permit the director or his authorized representative to have access for corrective action. For the purposes of developing or assisting in the development of any regulation, conducting any study, taking corrective action or enforcing the provisions of the Hazardous Waste Act, the director or his authorized representative is authorized:

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

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

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

(d) to take corrective action.

B. Any person owning property to which access is necessary in order to investigate or clean up a facility where hazardous waste is generated, stored, treated or disposed of, or where underground storage tanks are located, shall:

(1) permit the director or his authorized representative to obtain samples of soil or ground water, or both, at reasonable times; and

(2) provide access to such property for structures or equipment necessary to monitoring or cleanup of hazardous wastes or leaking from underground storage tanks; provided that:

(a) such structures or equipment do not unreasonably interfere with the owner's use of the property; or

(b) the owner is adequately compensated for activities which unreasonably interfere with his use or enjoyment of such property.

C. Each inspection shall be commenced and completed with reasonable promptness. If the director or his representative obtains any samples, prior to leaving the premises he shall give to the owner, operator or agent in charge a receipt describing the sample obtained and, if requested, a portion of each sample equal in volume or weight to the portion retained. If any analysis is made of the samples, a copy of the results of the analysis shall be furnished promptly to the owner, operator or agent in charge.

D. Any records, reports or information obtained by the division under this section shall be available to the public, except that upon a showing satisfactory to the division that records, reports or information, or a particular part thereof, to which the director or his authorized representatives have access under this section, if made public, would divulge information entitled to protection under Section 1905 of Title 18 of the United States Code, such information or particular portion thereof shall be considered confidential, except that such record, report, document or information may be disclosed to officers, employees or authorized representatives of the United States concerned with carrying out the Resource Conservation and Recovery Act, or when relevant in any proceedings under the Hazardous Waste Act.

E. Any person not subject to the provisions of Section 1905 of Title 18 of the United States Code who knowingly and willfully divulges or discloses any information entitled to protection under this subsection shall, upon conviction, be subject to a fine of not more than five thousand dollars ($5,000) or to imprisonment not to exceed one year or both.

F. In submitting data under the Hazardous Waste Act, a person required to provide such data may:

(1) designate the data the person believes is entitled to protection under this subsection; and

(2) submit such designated data separately from other data submitted under the Hazardous Waste Act. A designation under this paragraph shall be made in writing and in such manner as the director may prescribe.

History: 1978 Comp., § 74-4-4.3, enacted by Laws 1981 (1st S.S.), ch. 8, § 7; 1987, ch. 179, § 5; 1989, ch. 322, § 5.

The 1989 amendment, effective April 7, 1989, in Subsection A, added the introductory language, redesignated the former introductory language as present Paragraph (1), deleting therein "or who owns or operates an underground storage tank" following "has handled hazardous wastes" and "upon request" preceding "furnish information", and substituting "such hazardous wastes" for "such wastes or underground storage tanks", redesignated former Paragraphs (1) and (2) as present Subparagraphs (a) and (b), deleting from present Subparagraph (b), "or the condition and content of underground storage tanks", and added present Paragraph (2); added present Subsection B; redesignated former Subsections B and C as present Subsections C and D, in

Subsection D, substituting "the division" for "the agency" in two places; and added Subsections E and F.

Resource Conservation and Recovery Act. - See 42 U.S.C. § 6901 et seq.

Areas subject to inspection. - Regardless of whether each specific part of the premises is subject to regulation, the statute clearly allows an inspection of all areas where the hazardous waste is being generated, whether it is in an enclosed facility or not. New Mexico Envtl. Imp. Div. v. Climax Chem. Co., 105 N.M. 439, 733 P.2d 1322 (Ct. App. 1987).

Search warrant required in absence of consent. - In the event consent to enter and inspect premises for compliance with this article is denied, an administrative search warrant is required. New Mexico Envtl. Imp. Div. v. Climax Chem. Co., 105 N.M. 439, 733 P.2d 1322 (Ct. App. 1987).

Venue in action for search warrant. - An action by which the environmental improvement division sought an administrative warrant for inspection under this article was a transitory action and venue was controlled by 38-3-1A NMSA 1978, which allows an action to be brought in a county where the plaintiff resides. New Mexico Envtl. Imp. Div. v. Climax Chem. Co., 105 N.M. 439, 733 P.2d 1322 (Ct. App. 1987).

§ 74-4-4.4. Underground storage tanks; registration; installer certification; fees.

A. By regulation, the board shall require an owner of an underground storage tank to register the tank with the division and impose reasonable conditions for registration including the submission of plans, specifications and other relevant information relating to the tank. For purposes of this subsection only, the term "owner" means: in the case of an underground storage tank in use on November 8, 1984 or brought into use after that date, any person who owns an underground storage tank used for storage, use, or dispensing of regulated substances; and in the case of an underground storage tank in use before November 8, 1984 but no longer in use on that date, any person who owned such tank immediately before the discontinuation of its use. The owner of a tank taken out of operation on or before January 1, 1974 shall not be required to notify under this subsection. The owner of a tank taken out of operation after January 1, 1974 and removed from the ground prior to November 8, 1984 shall not be required to notify under this subsection. Evidence of current registration pursuant to this subsection shall be available for inspection at the site of the underground storage tank.

B. By regulation, the board shall require any person who, beginning thirty days after the United States environmental protection agency administrator prescribes the form of notice pursuant to Section 9002(a)(5) of the Resource Conservation and Recovery Act and for eighteen months thereafter, deposits a regulated substance into an underground storage tank to give notice of the registration requirements of Subsection A of this

section to the owner and operator of the tank.

C. By regulation, the board may require tank installers to obtain certification from the division and develop procedures for certification which will ensure that underground storage tanks are installed and repaired in a manner which will not encourage or facilitate leaking. If the board requires certification, it shall be unlawful for a person to install or repair an underground storage tank unless he is a certified tank installer. In accordance with the Uniform Licensing Act [61-1-1 to 61-1-31 NMSA 1978], the division may suspend or revoke the certification for a tank installer upon grounds that he:

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

(2) exhibited gross incompetence in the installation or repair of an underground storage tank; or

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

D. By regulation, the board shall provide a schedule of fees sufficient to defray the reasonable and necessary costs of:

(1) reviewing and acting upon applications for the registration of underground storage tanks;

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

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

History: 1978 Comp., § 74-4-4.4, enacted by Laws 1987, ch. 179, § 6; 1989, ch. 322, § 6.

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

The 1989 amendment, effective April 7, 1989, in the catchline, deleted "enforcement" preceding and "penalties" following "fees"; in Subsection A, substituted "the division" for "the environmental improvement division of the health and environment department" near the beginning of the first sentence; and, in Subsection C, deleted "Not before July 1, 1988" from the beginning and substituted "the division" for "the environmental improvement division of the health and environment department" near the beginning of the first sentence and "the division" for "the board" in the last sentence; and deleted former Subsections E through I, relating to enforcement and penalties.

Resource Conservation and Recovery Act. - Section 9002(a)(5) of the Resource Conservation and Recovery Act, referred to in Subsection B, appears as 42 U.S.C. § 6991a(a)(5).

§ 74-4-4.5. Hazardous waste and underground storage tank fund created; appropriation.

A. There is created in the state treasury the "hazardous waste and underground storage tank fund" which shall be administered by the agency. All balances in the fund are appropriated to that agency for the sole purpose of meeting necessary expenses in the administration and operation of the hazardous waste and underground storage tank programs.

B. All fees collected pursuant to Subsection F of Section 74-4-4.2 NMSA 1978 and Subsection D of Section 74-4-4.4 NMSA 1978 shall be transmitted to the state treasurer for credit to the hazardous waste and underground storage tank fund.

History: 1978 Comp., § 74-4-4.5, enacted by Laws 1987, ch. 179, § 7; 1989, ch. 322, § 7; 1989, ch. 324, § 36.

The 1989 amendments. Laws 1989, ch. 322, § 7, effective from April 7, 1989 until July 1, 1992, substituting "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, substituting "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 deleting the former third sentence which read "All interest earned on money in the fund shall be credited to the fund"; and, in Subsection B, substituting "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 adding the last sentence, was approved on April 7, 1989. However, Laws 1989, ch. 324, § 36, also effective April 7, 1989, in Subsection A, substituting "the agency" for "the environmental improvement division of the health and environment department" in the first sentence, substituting "that agency" for "that division" in the second sentence, and deleting the former last sentence, which read "All interest earned on money in the fund shall be credited to the fund"; and, in Subsection B, substituting "pursuant to Subsection F of Section 74-4-4.2 NMSA 1978 and Subsection D of Section 74-4-4.4 NMSA 1978" for "pursuant to Sections 74-4-4.2F and 74-4-4.4D NMSA 1978", was approved later on April 7, 1989. The section is set out as amended by Laws 1989, ch. 324, § 36. See 12-1-8 NMSA 1978.

Emergency clauses. - Laws 1987, ch. 179, § 12 makes the act effective immediately. Approved April 8, 1987.

§ 74-4-4.6. Underground storage tank fund created; appropriation. (Effective until July 1, 1992.)

A. There is created in the state treasury the "underground storage tank fund" which shall be administered by the division. All balances in the fund are appropriated to the division for the sole purpose of meeting necessary expenses in the administration and operation of the underground 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 underground storage tank fund. Effective July 1, 1992, all balances remaining in the underground storage tank fund shall be transferred to the general fund, and all fees collected pursuant to Subsection D of Section 74-4-4.4 NMSA 1978 shall be deposited in the general fund.

History: 1978 Comp., § 74-4-4.6, enacted by Laws 1989, ch. 322, § 8.

Delayed repeals. - Laws 1989, ch. 322, § 17 repeals 74-4-4.6 NMSA 1978, as enacted by Laws 1989, ch. 322, § 8, effective July 1, 1992.

Emergency clauses. - Laws 1989, ch. 322, § 18 makes the act effective immediately. Approved April 7, 1989.

§ 74-4-5. Adoption of regulations; notice and hearing; appeal.

A. No regulation shall be adopted, amended or repealed until after a public hearing by the environmental improvement board. Hearings on regulations shall be held in Santa Fe or within any 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) character and degree of injury to or interference with public health; and

(2) 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 thereof adopted by the board shall become effective until thirty days after its filing under the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978].

F. 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.

G. 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 a copy which he shall furnish to the board.

H. 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., § 12-9B-5, enacted by Laws 1977, ch. 313, § 5.

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

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

§ 74-4-6. Repealed.

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

§ 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.

Cross-references. - For definition of "division," see 74-4-3 NMSA 1978.

The 1989 amendment, effective April 7, 1989, substituted "division" for "agency" in the catchline and throughout the section, and deleted the former second sentence of Subsection A, regarding agency action pursuant to this subsection occurring beyond 48 hours after notification or initial agency involvement with the incident.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 6, 133, 134, 245, 246.

§ 74-4-8. Emergency fund.

The "hazardous waste emergency fund" is created in the state treasury. This fund shall be used for cleanup of hazardous substance incidents, disposal of hazardous substances and necessary repairs to or replacement of state property and may be used for the state's share of any response action taken under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. Sections 9601 et seq. The administrative and technical expenses of maintaining an emergency response program within the division shall be reimbursable on a quarterly basis from this fund. Any penalties collected by the division shall be credited to this fund. Amounts in the fund shall be deposited with the state treasurer and then disbursed pursuant to

vouchers signed by the director or his authorized representative upon warrants drawn by the secretary of finance and administration.

History: 1953 Comp., § 12-9B-8, enacted by Laws 1977, ch. 313, § 8; 1983, ch. 301, § 81; 1983, ch. 302, § 2; 1989, ch. 322, § 10.

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

The 1989 amendment, effective April 7, 1989, added the third sentence and, in the last sentence, deleted "of the agency" following "by the director".

§ 74-4-9. Existing hazardous waste facilities; interim status.

Any person owning or operating a hazardous waste facility who has met the requirements for interim status under 42 U.S.C. 6925 shall be deemed to have interim status under the Hazardous Waste Act [this article].

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

Repeals and reenactments. - Laws 1989, ch. 322, § 11 repeals former 74-4-9 NMSA 1978, as enacted by Laws 1981 (1st S.S.), ch. 8, § 8, and enacts the above section, effective April 7, 1989. For former provisions, see 1988 Replacement Pamphlet.

§ 74-4-10. Enforcement; compliance orders.

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 Hazardous Waste Act [this article], any regulation promulgated pursuant to that act or any condition of a permit issued under that act, the director shall give notice to the violator of his failure to comply with the requirement. If violation extends beyond the thirtieth day after the director's notification, 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 ten thousand dollars ($10,000) per day of noncompliance for each violation. In assessing such penalty, the director shall take into account the seriousness

of the violation and any good faith efforts to comply with the applicable requirements. For violations related to underground storage tanks, "per violation" means per tank.

C. If a violator fails to take corrective actions within the time specified in a compliance order, the director 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 under the Hazardous Waste Act.

D. Whenever on the basis of any information the director determines that the immediate termination of a research, development and demonstration permit is necessary to protect human health and the environment, the director 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 director 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 director may issue an order requiring corrective action, including corrective action beyond a 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 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 director may assess and such 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 under 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 insuror [insurer] or guarantor of an owner or operator of a treatment, storage or disposal facility or underground storage tank if:

(1) the owner or operator is in bankruptcy, reorganization or arrangement pursuant to the federal Bankruptcy Code; or

(2) jurisdiction in any state or federal court cannot with reasonable diligence be obtained over an owner or operator likely to be solvent at the time of judgment.

H. Any order issued pursuant to this section shall become final unless, no later than

thirty days after the order is served, the person 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. Such 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.

I. 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 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.

The 1989 amendment, effective April 7, 1989, rewrote the section to the extent that a detailed comparison would be impracticable.

Bankruptcy Act. - The federal Bankruptcy Act, referred to in Subsection G(1), appears as Title 11 of the United States Code.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 534 to 547.

§ 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.

Emergency clauses. - Laws 1989, ch. 322, § 18 makes the act effective immediately. Approved April 7, 1989.

§ 74-4-11. Penalty; criminal.

A. Any person who:

(1) knowingly transports or causes to be transported any hazardous waste identified or listed under the Hazardous Waste Act [this article] to a facility which does not have a permit under the Hazardous Waste Act;

(2) knowingly treats, stores or disposes of any hazardous waste identified or listed pursuant to the Hazardous Waste Act:

(a) without having obtained a hazardous waste permit under the Hazardous Waste Act;

(b) in knowing violation of any material condition or requirement of such permit; or

(c) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;

(3) knowingly omits material information or makes 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) knowingly generates, stores, treats, transports, disposes of, exports or otherwise handles any hazardous waste and who knowingly destroys, alters, conceals or fails to file any record, application, manifest, report or other document required to be maintained or filed for purposes of compliance with regulations promulgated under the Hazardous Waste Act;

(5) knowingly transports without a manifest or causes to be transported without a manifest any hazardous waste required by regulations promulgated under the Hazardous Waste Act to be accompanied by a manifest;

(6) knowingly exports 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 which is not in conformance with such agreement; or

(7) knowingly violates any provision of Section 74-4-4.4 NMSA 1978 or any regulation promulgated pursuant to that section or Subsection C of Section 74-4-4 NMSA 1978,

is guilty of a misdemeanor and shall upon conviction 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 less than one year or both. If the conviction is for a violation committed after a first conviction of the person under this section, the person shall be punished by a fine of not more than twenty-five thousand dollars ($25,000) per violation per day of violation or by imprisonment for not more than two years or both. For violations related to underground storage tanks, "per violation" means per tank.

B. Any individual who knowingly transports, treats, stores, disposes of or exports any hazardous waste in violation of Subsection A of this section and who knows at that time that he thereby places another person in imminent danger of death or serious bodily injury is guilty of a second degree felony and shall be sentenced to nine years imprisonment or a fine not to exceed on [one] hundred thousand dollars ($100,000), or both. Any person, other than an individual, that knowingly transports, treats, stores, disposes of or exports any hazardous waste in violation of Subsection A of this section and knows at that time that it thereby 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.

The 1989 amendment, effective April 7, 1989, in Subsection A, inserted "hazardous waste" in Paragraph (2)(a), added Paragraph (7), and, in the concluding paragraph, inserted "per violation per day" following "($10,000)" and inserted "per violation" following "($25,000)", and added the last sentence; in Subsection B, substituted "individual" for "person" near the beginning, inserted "and" preceding "who owes", and substituted the present language beginning with "is guilty of a second degree felony" for "shall upon conviction be subject to a fine of not more than one hundred thousand dollars ($100,000) or imprisonment for not more than fifteen years or both. A defendant that is an organization shall upon conviction of violating this section be subject to a fine of not more that two hundred fifty thousand dollars ($250,000)"; and deleted former Subsection C, which read "The provisions of this section shall not apply to a violation of Section 74-4-4.4 NMSA 1978 or any regulation promulgated pursuant to that section or Subsection K of Section 74-4-4 NMSA 1978".

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

§ 74-4-12. Penalty; civil.

Any person who violates any provision of the Hazardous Waste Act [this article], any

regulation made pursuant to that act or any compliance order issued by the director pursuant to Section 74-4-10 NMSA 1978 may be assessed a civil penalty not to exceed ten thousand dollars ($10,000) for each day during any portion of which a violation occurs. For violations related to underground storage tanks, "per violation" means per tank.

History: 1953 Comp., § 12-9B-12, enacted by Laws 1977, ch. 313, § 12; 1981 (1st S.S.), ch. 8, § 11; 1987, ch. 179, § 10; 1989, ch. 322, § 15.

The 1989 amendment, effective April 7, 1989, deleted the subsection designations, added the last sentence, and deleted former Subsection B, which read "The provisions of this section shall not apply to a violation of Section 74-4-4.4 NMSA 1978 or any regulation promulgated pursuant to that section or Subsection K of Section 74-4-4 NMSA 1978".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 518, 519.

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

A. Notwithstanding any other provision of the Hazardous Waste Act [this article], whenever the director is in receipt of evidence that the past or current handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste or the condition or maintenance of any underground storage tank may present an imminent and substantial endangerment to health or the environment, he may bring suit in the appropriate district court to immediately restrain any person, including any past or present generator, past or present transporter or past or present owner or operator of a treatment, storage or disposal facility, who has contributed or is contributing to such activity, to take such other action as may be necessary or both. A transporter shall not be deemed to have contributed or to be contributing to such handling, storage, treatment or disposal taking place after such solid waste or hazardous waste has left the possession or control of such transporter if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste. The director may also take other action, including but not limited to issuing such orders as may be necessary to protect health and the environment.

B. Any person who willfully violates or fails or refuses to comply with any order of the director under Subsection A of this section may in an action brought in the appropriate district court to enforce such order be fined not more than five thousand dollars ($5,000) for each day in which the violation occurs or the failure to comply continues.

C. Upon receipt of information that there is hazardous waste at any site which has presented an imminent and substantial endangerment to human health or the

environment, the director shall provide immediate notice to the appropriate local government agencies. In addition, the director shall require notice of such endangerment to be promptly posted at the site where the waste is located.

History: Laws 1983, ch. 302, § 3; 1987, ch. 179, § 11; 1989, ch. 322, § 16.

The 1989 amendment, effective April 7, 1989, in the first sentence in Subsection A, substituted "current handling" for "present handling" and "substantial endangerment" for "substantial danger", and inserted "including any past or present generator, past or present transporter or past or present owner or operator of a treatment, storage or disposal facility" and "or both" and added the next-to-last sentence; in Subsection B, inserted "in an action brought in the appropriate district court to enforce such order"; and added Subsection C.

Article 4A

Radioactive Materials

§ 74-4A-1. Radioactive material transport; conditions; definition.

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, including routing criteria. 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.

B. For the purposes of this section, "radioactive material" means any material or combination of materials which spontaneously emits ionizing radiation. Materials in which the estimated specific activity is not greater than 0.002 microcuries per gram of material, and in which the radioactivity is essentially uniformly distributed, are not considered to be radioactive materials. Radioactive materials includes but is not limited to:

(1) materials associated with the operation and decommissioning of nuclear reactors and the supporting fuel cycle;

(2) industrial radioisotope sources;

(3) radioactive materials used in nuclear medicine;

(4) radioactive materials used for research, education or training; and

(5) radioactive wastes;

but does not include radioactive material the regulation of which has been specifically preempted by federal law.

C. The environmental improvement division [of the health and environment department] shall have the authority to impose fines not to exceed one thousand dollars ($1,000) as set by regulation of the environmental improvement board for any violation of the board's regulations pertaining to the transport of radioactive materials.

D. Nothing in this section shall be construed to alter the obligation of the state under the April 3, 1974 agreement between the state and the atomic energy commission for the discontinuance of certain commission regulatory authority and responsibility.

History: Laws 1979, ch. 377, § 1; 1981, ch. 366, § 1.

Environmental improvement division. - The environmental improvement division, referred to in Subsection C, is part of the health and environment department, created by 9-7-4 NMSA 1978.

Law reviews. - For article, "Radioactive Wastes," see 24 Nat. Resources J. 967 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 6 Am. Jur. 2d Atomic Energy § 45 et seq.; 8 Am. Jur. 2d Aviation § 54; 61A Am. Jur. 2d Pollution Control § 252.
Validity of local regulation of hazardous waste, 67 A.L.R.4th 822.
State or local regulation of transportation of hazardous materials as pre-empted by Hazardous Materials Transportation Act (49 U.S.C.S. § 1801 et seq.), 78 A.L.R. Fed. 289.
39A C.J.S. Health and Environment § 61.

§ 74-4A-2. Short title.

Sections 74-4A-2 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.

§ 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 waste;

(2) the safe treatment and disposal of hazardous wastes and the regulation of hazardous waste generators;

(3) the transportation on New Mexico highways and streets of radioactive and hazardous materials;

(4) the disposition of uranium mine and mill tailings; and

(5) the need to provide efficient and timely emergency response to accidents or natural disasters involving the disposal, storage or transportation of radioactive and hazardous materials.

B. The legislature further finds that there is a need to centralize and coordinate information on these concerns and to develop recommendations for action by the state. It is the purpose of the Radioactive and Hazardous Materials Act [74-4A-2 to 74-4A-14 NMSA 1978] to provide a vehicle for proper consideration of these legitimate state concerns without unnecessarily hampering the nuclear energy industry or compromising the nation's defense.

History: Laws 1979, ch. 380, § 2; 1981, ch. 374, § 2; 1986, ch. 61, § 2.

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

For article, "Radioactive Wastes," see 24 Nat. Resources J. 967 (1984).

§ 74-4A-4. Definitions.

As used in the Radioactive and Hazardous Materials Act [74-4A-2 to 74-4A-14 NMSA 1978]:

A. "committee" means the joint interim legislative radioactive and hazardous materials committee;

B. "disposal" means the long-term isolation of radioactive material, including long-term monitored storage which permits retrieval of the radioactive material stored and includes the temporary or permanent disposal of all hazardous wastes;

C. "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 which 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;

D. "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;

E. "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;

F. "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;

G. "radioactive waste" means high-level waste, transuranic contaminated waste and low-level waste;

H. "spent fuel" means nuclear fuel that has been irradiated in and recovered from a civilian nuclear power plant;

I. "task force" means the radioactive waste consultation task force; and

J. "transuranic contaminated waste" means material contaminated with elements 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.

Section 402 of Federal Water Pollution Control Act. - As to Section 402 of the Federal Water Pollution Control Act, referred to in Subsection C, see 33 U.S.C. § 1342.

Atomic Energy Act of 1954, as amended. - As to the Atomic Energy Act of 1954, as amended, referred to in Subsection C, see 42 U.S.C. § 2011 et seq.

§ 74-4A-5. Repealed.

Repeals. - Laws 1981, ch. 374, § 7, repeals 74-4A-5 NMSA 1978, relating to state approval of disposal facilities, effective April 10, 1981. For present provisions, see 74-4A-11.1 NMSA 1978.

§ 74-4A-6. Task force.

There is created the "radioactive waste consultation task force". The task force shall consist of the secretaries of energy, minerals and natural resources department, taxation and revenue, health and environment and the chief highway administrator [secretary of highway and transportation], or their designees. The task force shall terminate on December 31, 1990 unless terminated sooner.

History: Laws 1979, ch. 380, § 5; 1986, ch. 61, § 4; 1987, ch. 234, § 80.

Cross-references. - As to secretary of energy, minerals and natural resources, see 9-5A-5 NMSA 1978. As to secretary of health and environment, see 9-7-5 NMSA 1978.

Secretary of highway and transportation. - Pursuant to Laws 1987, Chapter 268, the chief highway administrator, referred to in this section, is now the secretary of highway and transportation.

§ 74-4A-7. Duties of the task force.

A. The task force or its designee shall negotiate for the state with the federal government in all areas relating to siting, licensing and operation of new federal disposal facilities, including research, development and demonstration, for high-level radioactive wastes, transuranic radioactive wastes and low-level radioactive waste. This subsection shall not be construed to limit the powers of any agency otherwise authorized to negotiate with the federal government, and if such negotiation should also come within the authority of the task force, the task force shall provide assistance to that agency but shall not limit the agency's exercise of authority. Any action taken pursuant to this subsection may be disapproved by joint resolution of the legislature.

B. The task force may recommend legislation to implement the state's policies with respect to new federal disposal facilities.

C. The task force shall identify impacts of new federal disposal facilities within the state and shall disseminate that information.

D. The task force shall coordinate the investigations and studies undertaken by all state agencies and shall forward an executive summary of ongoing and recently completed investigations and studies, including information from federal or other studies, to the legislature and the governor as the studies are completed or information released.

E. The task force shall meet regularly with the committee and keep the committee apprised of all actions taken by the task force.

History: Laws 1979, ch. 380, § 6.

§ 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 until December 31, 1990 unless terminated sooner by the legislative council.

History: Laws 1979, ch. 380, § 8; 1983, ch. 22, § 2; 1986, ch. 61, § 6.

Cross-references. - As to the legislative council, see 2-3-1 NMSA 1978.

§ 74-4A-10. Membership; appointment; vacancies.

The committee shall be composed of eight members. The legislative council shall appoint four members from the house of representatives and four 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, 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.

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.

§ 74-4A-11. Committee duties.

At the beginning of each interim, the committee shall hold one organizational meeting to develop a work plan and budget for the period prior to January 1 preceding the next regular session of the legislature. The work plan and budget shall be submitted to the legislative council for approval. Upon approval of the work plan and budget by the legislative council, the committee shall examine all matters relevant to the purposes of the Radioactive and Hazardous Materials Act [74-4A-2 to 74-4A-14 NMSA 1978], and shall submit recommended legislation together with a report on the activities and expenditures of the committee, to the legislature. In making recommendations, the committee shall consider the following areas:

A. the applicability of the Price-Anderson Act to radioactive material transportation and radioactive waste disposal facilities;

B. the treatment, generation, storage, transportation or disposal of hazardous wastes;

C. the transportation of radioactive material;

D. compliance with environmental protection agency and the council on environmental quality of the office of surface mining regulations and standards pursuant to federal environmental statutes;

E. provision for an independent state review facility;

F. disposition of tailings and other wastes resulting from uranium mining and milling;

G. disposition of low-level wastes in New Mexico, including alternatives thereto such as participation in a regional compact with other states;

H. development of a state emergency response capability;

I. any other matter the committee deems relevant to the purposes of the Radioactive and Hazardous Materials Act;

J. possible procedures for effective consultation and negotiation with the federal government; and

K. such matters assigned by the legislature.

History: Laws 1979, ch. 380, § 10; 1981, ch. 374, § 5; 1986, ch. 61, § 7.

Cross-references. - As to legislative council, see 2-3-1 NMSA 1978.

Price-Anderson Act. - The Price-Anderson Act, referred to in Subsection A, appears as 42 U.S.C. §§ 2012, 2014, 2039, 2073, 2210, 2232 and 2239.

Environmental protection agency. - See 5 U.S.C. App. 1, Reorg. Plan No. 3 of 1970.

§ 74-4A-11.1. Condition.

No person shall store or dispose of radioactive materials, radioactive waste or spent fuel in a disposal facility until the state has concurred in the creation of the disposal facility except as specifically preempted by federal law. As used in this section, "disposal facility" means an engineered subterranean cavern designed primarily for the isolation of radioactive materials, radioactive waste or spent fuel other than tailings or other waste from the extraction, beneficiation or processing of ores and minerals.

History: 1978 Comp., § 74-4A-11.1, enacted by Laws 1981, ch. 374, § 6.

§ 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.

History: Laws 1979, ch. 380, § 12.

§ 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. Short title[; Site Identification Act].

This act [74-4A-15 to 74-4A-19 NMSA 1978] may be cited as the "Site Identification Act".

History: Laws 1981, ch. 253, § 1.

§ 74-4A-16. Legislative findings.

The legislature finds that:

A. quantities of low-level radioactive wastes are generated in New Mexico by a wide variety of governmental, industrial, medical and institutional operations essential to the economy and health and safety of this state;

B. at present most of this low-level waste must be transported hundreds of miles for disposal at the low-level waste disposal facility in Nevada which is one of only three operating facilities for commercial low-level wastes in this country;

C. current estimates of the nuclear regulatory commission indicate that the capacities of these three facilities will be expended between 1984 and 1989, after which new disposal facilities will have to be opened;

D. proposed federal legislation, statements by the president's state planning council, the national governors' association and other national organizations have indicated that disposal of low-level nuclear waste is a state problem and responsibility rather than a problem and responsibility of the federal government;

E. the hazards involved with the management of low-level waste are substantially less than those connected with high-level waste; and

F. proper treatment, storage and disposal of New Mexico's low-level waste is necessary if those generators of such waste are to continue with their normal operation. This is particularly true with respect to medicine where a number of diagnostic and therapeutic techniques rely on procedures which generate low-level waste. Absence of any permanent disposal method of this waste would substantially impair the diagnosis and treatment of certain types of cancer and other diseases.

History: Laws 1981, ch. 253, § 2.

§ 74-4A-17. Purpose of act.

The purpose of the Site Identification Act [74-4A-15 to 74-4A-19 NMSA 1978] is to permit New Mexico opportunity to avail itself of the lead time before 1984-1989 when the present out-of-state disposal facilities will be closed to the disposal of New Mexico's low-level waste by establishing criteria for selection of a disposal facility and by requiring the study and identification of at least three possible regional sites for disposal facilities in this state.

History: Laws 1981, ch. 253, § 3.

§ 74-4A-18. Definitions.

As used in the Site Identification Act [74-4A-15 to 74-4A-19 NMSA 1978]:

A. "board" means the environmental improvement board;

B. "committee" means the radioactive waste consultation committee;

C. "disposal facility" means a facility for the permanent disposal or interim storage of low-level waste;

D. "bureau" means the bureau of mines and mineral resources at the institute of mining and technology; and

E. "low-level waste" means waste not classified as high-level radioactive waste,

transuranic waste, spent nuclear fuel or byproduct material as defined in Section 11(e)2 of the Atomic Energy Act of 1954.

History: Laws 1981, ch. 253, § 4.

Atomic Energy Act. - Section 11(e)2 of the Atomic Energy Act of 1954, referred to in Subsection E, appears as 42 U.S.C. § 2014(e)(2).

§ 74-4A-19. Site identification.

The bureau, in consultation with the environmental improvement division [of the health and environment department] and the board, shall:

A. study the low-level waste disposal requirements of this state and shall report its findings to the committee;

B. investigate all geographical areas in this state determined to be feasible sites for a disposal facility for low-level waste generated in this state, and after such investigation and analysis of the results, identify at least three possible sites for a disposal facility compatible with the criteria provided for in the Site Identification Act [74-4A-15 to 74-4A-19 NMSA 1978]; and

C. report its findings and identified sites to the committee and to the first session of the thirty-sixth legislature.

History: Laws 1981, ch. 253, § 5.

Environmental improvement division. - See note following 74-4A-1 NMSA 1978.

Article 4B

Emergency Management

§ 74-4B-1. Short title.

Chapter 74, Article 4B NMSA 1978 may be cited as the "Emergency Management Act".

History: Laws 1983, ch. 80, § 1; 1984, ch. 41, § 1.

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.
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.

§ 74-4B-2. Findings and purpose.

A. The legislature finds that the use of hazardous materials, including radioactive materials, and the transportation of such materials through or within New Mexico occurs on a daily basis, and, no matter how safety-conscious facilities, users, shippers or carriers are, accidents may occur. In the event of an accident involving hazardous materials, resource requirements may be beyond the capability of local governments, and the state must be prepared to respond quickly and effectively to protect the health and safety of its citizens and the environment.

B. The legislature further finds that at the present time there is no statewide hazardous materials emergency response or emergency management plan and that no state agency is given explicit statutory authority for the management of an emergency involving radioactive materials.

C. It is the purpose of the Emergency Management Act [this article] to:

(1) provide that adequate hazardous materials emergency management capability exists in the state to protect the health and safety of New Mexico citizens and the environment;

(2) delineate those state agencies that are responsible for responding to a hazardous materials accident and providing for the control and management of such an accident, and to provide for the cooperation of other state agencies and local governments in emergency management; and

(3) provide for the formulation of a comprehensive hazardous materials emergency management plan which will be distributed statewide and which will be complied with by all persons who may be involved in responding to a hazardous materials accident.

History: Laws 1983, ch. 80, § 2.

§ 74-4B-3. Definitions.

As used in the Emergency Management Act [this article]:

A. "accident" means an event involving hazardous materials which may cause injury to persons or damage to property or release hazardous materials to the environment;

B. "administrator" means the hazardous materials emergency response administrator;

C. "board" means the hazardous materials safety board;

D. "chief" means the chief of the New Mexico state police;

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

F. "emergency management" means the ability to prepare for, respond to, mitigate, recover and restore the scene of an institutional, industrial, transportation or other accident;

G. "first responder" means the first law enforcement officer or other public service provider with a radio-equipped vehicle to arrive at the scene of an accident;

H. "hazardous materials" means hazardous substances, radioactive materials or a combination of hazardous substances and radioactive materials;

I. "hazardous substances" means flammable solids, semi-solids, liquids or gases, poisons, corrosives, explosives, compressed gases, reactive or toxic chemicals, irritants or biological agents, but does not include radioactive materials;

J. "plan" means the statewide hazardous materials emergency response plan;

K. "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 are not considered to be radioactive materials unless determined to be so by the radiation protection bureau of the environmental improvement division of the health and environment department for purposes of emergency response pursuant to the Emergency Management Act;

L. "responsible state agency" means an agency designated in Subsection D of Section 74-4B-5 NMSA 1978 with responsibility for managing a certain type of accident or performing certain functions at the scene of such accident;

M. "secretary" means the secretary of public safety; and

N. "task force" means the emergency management task force.

History: Laws 1983, ch. 80, § 3; 1984, ch. 41, § 2; 1986, ch. 62, § 1; 1989, ch. 149, § 10.

Cross-references. - As to radiation protection bureau of the environmental improvement division of the health and environment department, see 9-7-9 NMSA 1978. As to chief of the New Mexico state police, see 29-2-3 NMSA 1978.

The 1989 amendment, effective July 1, 1989, deleted "unintended" preceding "event" in Subsection A; added present Subsection E; redesignated former Subsections E through K as present Subsections F through L; added Subsection M; redesignated former Subsection L as present Subsection N; substituted "accident" for "hazardous materials

accident" throughout the section; and made minor stylistic changes throughout the section.

§ 74-4B-4. State responsibility for management of accidents; immunity from liability; cooperative agreements; private property.

A. The secretary shall have final authority to administer the provisions of the Emergency Management Act [this article].

B. As between state and local governments, the state government has the primary responsibility for the management of an accident, and the local government in whose jurisdiction the accident occurs shall assist the state in its management of the accident.

C. Nothing in the Emergency Management Act shall be construed as a waiver or alteration of the immunity from liability granted under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] or as a waiver of any other immunity or privilege under law.

D. The state, through the secretary or his designee, may enter into cooperative agreements with county and municipal governments for the management of accidents based on the severity of the accident and the resources of the local government. The plan shall set forth the criteria for determining when an accident may be managed by the local government in whose jurisdiction the accident occurred.

E. The state, through the secretary or his designee, may enter into cooperative agreements with the federal government, Indian tribes and pueblos and bordering states for assistance in the management of accidents.

F. Whenever an accident appears imminent or has occurred, employees or authorized persons of responsible state agencies as defined in Section 74-4B-5 NMSA 1978 are authorized to enter upon any buildings or premises for the purpose of determining whether it is necessary for emergency management procedures to be implemented. The state on-scene coordinator or a responsible state agency may take full control and custody of such buildings and premises for the purpose of managing the accident.

History: Laws 1983, ch. 80, § 4; 1984, ch. 41, § 3; 1986, ch. 62, § 2; 1989, ch. 149, § 11.

Cross-references. - As to immunity from civil liabilities or penalties for "good samaritans," see 74-4B-10.1 NMSA 1978.

The 1989 amendment, effective July 1, 1989, substituted "accidents" for "hazardous materials accidents" in the catchline and throughout the section; and substituted "secretary" for "chief" in Subsections A, D and E.

Am. Jur. 2d, A.L.R. and C.J.S. references. - State or local regulation of transportation of hazardous materials as pre-empted by Hazardous Materials Transportation Act (49 U.S.C.S. § 1801 et seq.), 78 A.L.R. Fed. 289.

§ 74-4B-5. State police emergency response officer; procedure for notification; cooperation of other state agencies and local governments.

A. The secretary, in addition to having final authority to administer the provisions of the Emergency Management Act [this article], shall be responsible for central coordination and communication in the event of an accident.

B. The chief shall designate one or more persons to be known as "state police emergency response officers". A state police emergency response officer shall be trained in accident evaluation and emergency response and shall be available to answer an emergency response call from the first responder.

C. In the event of an accident, if the first responder is a law enforcement officer, he shall immediately notify the state police district emergency response officer in his area, who shall in turn immediately notify the state police emergency response center. If the first responder is a person with radio capability tied into the radio communications bureau of the information systems division of the general services department, he shall immediately notify Santa Fe control, who shall in turn immediately notify the state police emergency response center. The state police emergency response center shall:

(1) evaluate and determine the scope of the accident based on information provided by the first responder;

(2) instruct the first responder on how to proceed at the accident scene;

(3) immediately notify the appropriate responsible state agency and advise it of the necessary response;

(4) notify the sheriff or chief of police in whose jurisdiction the accident occurred; and

(5) coordinate field communications and summon additional resources requested by the emergency management team.

D. The responsible state agencies shall be:

(1) the New Mexico state police division of the public safety department for coordination, law enforcement and traffic and crowd control;

(2) the environmental improvement division of the health and environment department for assistance with accidents involving radioactive or hazardous materials or hazardous

substances;

(3) the state fire marshal's office for assistance with any accident involving hazardous materials;

(4) the emergency medical services bureau of the health services division of the health and environment department for assistance with accidents involving casualties;

(5) the emergency planning and coordination bureau of the public safety department and the military division of the department of military affairs for assistance with accidents which require the evacuation of the vicinity of the accident or the use of the national guard of New Mexico; and

(6) the state highway and transportation department for assistance with road closures, designating alternate routes and related services.

E. Other state agencies and local governments shall assist the responsible state agencies when requested to do so.

F. Any driver of a vehicle carrying hazardous materials involved in an accident which may cause injury to persons or property or any owner, shipper or carrier of hazardous materials involved in an accident who has knowledge of such accident or any owner or person in charge of any building, premises or facility where such an accident occurs shall immediately notify the New Mexico state police division of the public safety department by the quickest means of communication available.

History: Laws 1983, ch. 80, § 5; 1984, ch. 41, § 4; 1986, ch. 62, § 3; 1989, ch. 149, § 12.

Cross-references. - As to environmental improvement division, see 9-7-4 NMSA 1978. As to emergency medical services bureau of the health services division of the health and environment department, see 9-7-9 NMSA 1978. As to radiation protection bureau of the environmental improvement division of the health and environment department, see 9-7-9 NMSA 1978. As to state fire marshal's office, see 59A-52-1 NMSA 1978.

The 1989 amendment, effective July 1, 1989, substituted "accident" for "hazardous materials accident" throughout the section; substituted "secretary" for "chief" in Subsection A; substituted "information systems" for "communications" in the second sentence of Subsection C; inserted "division of the public safety department" in Subsection D(1); in Subsection D(2) deleted "radiation protection bureau of the" preceding "environmental" and substituted "or hazardous materials or hazardous substances" for "materials"; deleted former Subsection D(3), which read: "The environmental improvement division for assistance with accidents involving hazardous substances"; redesignated former Subsections D(4) through D(7) as present Subsections D(3) through D(6); substituted all of the present language of Subsection D(5) preceding "military affairs" for "the civil emergency preparedness and military

divisions of the office of"; inserted "and transportation" in present Subsection D(6); and inserted "division of the public safety department" near the end of Subsection F.

Department of military affairs. - Pursuant to Laws 1987, Chapter 318, the office of military affairs, referred to in Subsection D(6), has been replaced by the department of military affairs. See 20-3-1 NMSA 1978.

State highway and transportation department. - Pursuant to Laws 1987, Chapter 268, the state highway department, referred to in Subsection D(7), has been replaced by the state highway and transportation department. See 67-3-6 NMSA 1978.

Reporting of train accidents involving hazardous cargo. - A state corporation commission rule requiring telephonic reporting to the state police of train accidents involving hazardous cargo was not in conflict with this article, nor was it inconsistent with federal regulations promulgated under the federal Hazardous Materials Transportation Act. Southern Pac. Transp. Co. v. Corporation Comm'n, 105 N.M. 145, 730 P.2d 448 (1986).

§ 74-4B-6. Emergency management task force; created; powers and duties.

A. The "emergency management task force" is created, composed of:

(1) the chief or his designee, who shall serve as vice chairman of the task force;

(2) the state fire marshal or his designee;

(3) a staff member of the environmental improvement division who is knowledgeable about radioactive materials, to be designated by the director of the division;

(4) a staff member of the environmental improvement division who is knowledgeable about hazardous substances, to be designated by the director of the division;

(5) the director of the technical and emergency support division or his designee;

(6) the chief of the emergency medical services bureau or his designee;

(7) the secretary of highway and transportation or his designee;

(8) the chairman of the state corporation commission or his designee;

(9) a representative of the governor, to be appointed by the governor, who is not an employee of any agency represented on the task force and who shall serve as chairman of the task force;

(10) the secretary of taxation and revenue or his designee; and

(11) the director of the information systems division of the general services department or his designee.

B. The attorney general's office shall serve as attorney for the task force.

C. The task force shall, at the direction of the state emergency response commission, develop and monitor a comprehensive plan, to include:

(1) procedures for initially assessing the scope and nature of an accident;

(2) procedures for notifying and assembling the proper emergency management team from the responsible state agencies;

(3) procedures for siting and operating an on-scene command post;

(4) an inventory and assessment of manpower, equipment and training within each responsible state agency as well as other state agencies and local governments and federal and private sources;

(5) an assessment of the adequacy and availability of training materials and facilities to train and cross-train emergency response teams and other persons involved in responding to an accident and an identification of training requirements to assure that such persons are adequately trained;

(6) the development of training programs for emergency response teams and other persons involved in responding to an accident;

(7) procedures for decontamination of emergency management personnel and equipment as well as medical and other facilities which may be used in the management of the accident;

(8) identification of the medical resources in the state and the location of specialized medical facilities for use in medical emergencies;

(9) information and training programs for hospital emergency room personnel and doctors;

(10) procedures for accident assessment and record keeping;

(11) procedures for periodic emergency management preparedness exercises and testing of the plan;

(12) a designation of areas of responsibility in the emergency management plan, including but not limited to:

(a) command and control of the accident scene and overall responsibility and authority for all emergency response activity;

(b) public health and safety, including rescue operations, emergency medical services, evacuation and containment of the accident scene;

(c) sanitation and decontamination services at the accident scene;

(d) communications, including statewide and on-scene communications;

(e) public works and engineering;

(f) transportation;

(g) social services;

(h) accident assessment, investigation and record keeping;

(i) protective response, including hazardous materials exposure control;

(j) environmental monitoring, control and cleanup; and

(k) public information;

(13) criteria for determining when an accident may be handled by a local government;

(14) procedures for entering into cooperative agreements between the state and local governments and between the state and the federal government, Indian tribes and pueblos and bordering states pursuant to Section 74-4B-4 NMSA 1978; and

(15) identification of information management resources necessary for effective emergency response activity.

D. The task force shall develop liaison with the trucking industry, the railroads and other areas of the private sector in the formulation of the plan.

History: Laws 1983, ch. 80, § 6; 1984, ch. 41, § 5; 1986, ch. 62, § 4; 1987, ch. 268, § 41; 1989, ch. 149, § 13.

Cross-references. - As to the chairman of the state corporation commission, see N.M. Const., art. XI, § 4. As to the environmental improvement division, see 9-7-4 NMSA 1978. As to the chief of the emergency medical services bureau, see 9-7-9 NMSA. As to the information systems division of the general services department, see 9-17-3 and 15-1-2 NMSA 1978. As to state fire marshal, see 59A-52-1 NMSA 1978.

The 1989 amendment, effective July 1, 1989, substituted "technical and emergency support" for "civil emergency preparedness" in Subsection A(5); substituted "director" for "chief of the radio communications bureau" in Subsection A(11); substituted "at the direction of the state emergency response commission" for "subject to the approval of the chief" in the introductory paragraph of Subsection C; in Subsection C(12) added all of the language of subparagraph (a) following "scene", deleted "and public information" at the end of Subparagraph (d), and added Subparagraph (k); added Subsection C(15); and in Subsection D deleted the former first sentence which read: "The task force may, subject to the approval of the chief, solicit and accept grants from federal or private sources for undertakings that further the purposes of the Emergency Management Act and may make such contracts as it deems necessary to carry out the purposes of that act."

§ 74-4B-6.1. Hazardous materials emergency response administrator; created; duties.

A. The position of "hazardous materials emergency response administrator" is created within the technical and emergency support division of the public safety department.

B. The administrator shall, subject to the approval of the director of the technical and emergency support division of the public safety department, provide staff support to the task force and the board and shall:

(1) maintain inventories and data bases relevant to the task force and board activities;

(2) maintain current rosters of emergency response personnel and other contact persons with knowledge, resources and capabilities for emergency response functions;

(3) update the plan and accompanying documents at the direction of the task force;

(4) schedule activities required by the task force and board; and

(5) perform other duties requested by the task force and board in accordance with the provisions of the Emergency Management Act [this article] and the plan.

C. Money appropriated to the public safety department for administering the Emergency Management Act or received through grants or other sources shall be expended upon vouchers signed by the director of the technical and emergency support division of the public safety department.

History: 1978 Comp., § 74-4B-6.1, enacted by Laws 1984, ch. 41, § 6; 1986, ch. 62, § 5; 1989, ch. 149, § 14.

The 1989 amendment, effective July 1, 1989, substituted the present language of Subsection A for "The position of 'hazardous materials emergency response

administrator' is created within the New Mexico state police. The administrator shall be a civilian employee of the state police and employed by the chief"; substituted "director of the technical and emergency support division of the public safety department" for "chief" in the introductory paragraph of Subsection B; deleted former Subsection B(5), which read: "control budgets and disburse funds appropriated to the New Mexico state police for administering the Emergency Management Act"; redesignated former Subsection D(6) as present Subsection D(5); and substituted the present language of Subsection C for "Money appropriated to the New Mexico state police for administering the Emergency Management Act or received through grants or other sources shall be expended upon vouchers signed by the administrator or his authorized representative".

§ 74-4B-7. Training officers.

Each responsible state agency shall designate one person who is knowledgeable in the area of hazardous materials accident response, as it applies to the functions of that agency, to be its training officer. It is the duty of the training officer to teach the appropriate personnel within the agency the proper methods of discharging the agency's responsibilities in responding to hazardous materials accidents. The training officer is also responsible for providing cross-training to personnel of other responsible state agencies and other persons as may be required by the hazardous materials safety board.

History: Laws 1983, ch. 80, § 7.

§ 74-4B-8. Hazardous materials safety board; creation; duties.

A. There is created the "hazardous materials safety board", composed of the training officers of the responsible state agencies. The chairman of the board shall be elected by the members of the board.

B. The board shall, at the direction of the state emergency response commission:

(1) establish a curriculum of accident response training for the personnel of each responsible state agency designed to implement the plan adopted by the task force;

(2) certify to each responsible state agency those persons who have completed the training curriculum or parts of the curriculum;

(3) meet at least every four months to review the training needs of each responsible state agency and formulate a plan to meet those needs;

(4) conduct, under the direction and administration of the state fire marshal, an annual comprehensive training course for all appropriate personnel from responsible state agencies, other state agencies and local governments, which course shall include

teaching the basic duties, responsibilities and procedures of responsible state agencies, other state agencies and local governments;

(5) in conjunction with the task force, prepare and submit to the state emergency response commission a budget for statewide training needs; and

(6) cooperate with and assist the task force as requested, including providing the task force with any requested information regarding safety and training of emergency response personnel.

History: Laws 1983, ch. 80, § 8; 1984, ch. 41, § 7; 1986, ch. 62, § 6; 1989, ch. 149, § 15.

Cross-references. - As to state fire marshal, see 59A-52-1 NMSA 1978.

The 1989 amendment, effective July 1, 1989, substituted "at the direction of the state emergency response commission" for "subject to the approval of the chief" in the introductory paragraph of Subsection B; deleted "hazardous materials" preceding "accident" in Subsection B(1); and substituted "state emergency response commission" for "legislature" in Subsection B(5).

§ 74-4B-9. Accident review; report.

After any hazardous materials accident which required the presence of an emergency management team, including a local government team pursuant to a cooperative agreement, the board shall meet to review the performance of the team and to establish the probable cause of the accident. The board shall report its findings to the task force and the local government in whose jurisdiction the accident occurred; provided, however, the conclusions contained in the report shall not be admissible in evidence in any court proceeding to prove or disprove the negligence of any party found by the report to have contributed to the cause of the accident. The report shall be filed with the state corporation commission and the administrator.

History: Laws 1983, ch. 80, § 9; 1984, ch. 41, § 8.

§ 74-4B-10. Clean-up.

Nothing in the Emergency Management Act [this article] shall be construed to relieve hazardous materials owners, shippers or carriers of their responsibilities and liability in the event of an accident. Such persons shall assist the state as requested in responding to an accident and are responsible for restoring the scene of the accident to the satisfaction of the state.

History: Laws 1983, ch. 80, § 10.

§ 74-4B-10.1. Good Samaritan law.

A. Notwithstanding any provision of law to the contrary, no person who provides assistance or advice in mitigating or attempting to mitigate the effects of an actual or threatened release of hazardous materials, or in preventing, cleaning up or disposing or attempting to prevent, clean up or dispose of such release, shall be subject to civil liabilities or penalties of any type.

B. The immunity provided for in Subsection A of this section does not apply to any person:

(1) whose act or omission caused, in whole or in part, the actual or threatened release of hazardous materials and who would otherwise be liable; or

(2) who receives compensation other than reimbursement for out-of-pocket expenses for his services in rendering assistance or advice.

C. Nothing in this section shall be construed to limit or otherwise affect the liability of any person for damages resulting from that person's gross negligence or reckless, wanton or intentional misconduct.

History: 1978 Comp., § 74-4B-10.1, enacted by Laws 1984, ch. 41, § 9.

Cross-references. - As to effect of this article on immunity law, see 74-4B-4 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 57A Am. Jur. 2d Negligence §§ 98, 114, 115.
Construction of "good Samaritan" statute excusing from civil liability one rendering care in emergency, 39 A.L.R.3d 222.

§ 74-4B-11. Repealed.

Repeals. - Laws 1989, ch. 149, § 16 repeals 74-4B-11 NMSA 1978, as amended by Laws 1986, ch. 62, § 7, relating to report of task force to committee governor and legislature, effective July 1, 1989. For provisions of former section, see 1988 Replacement Pamphlet.

§ 74-4B-12. Emergency response fund created.

A. There is created in the state treasury the "emergency response fund". The fund shall be invested in accordance with the provisions of Section 6-10-10 NMSA 1978.

B. The public safety department shall administer the emergency response fund for the purpose of equipping and training state and local first responders.

C. All balances in the emergency response fund shall be appropriated to the public safety department for the purpose of carrying out the provisions of Subsection B of this section and shall not revert.

D. No portion of the emergency response fund shall be used for activities that are inconsistent with the federal Hazardous Materials Transportation Act.

History: Laws 1988, ch. 14, § 6; 1989, ch. 324, § 37.

Cross-references. - As to the State Civil Emergency Preparedness Act, see Chapter 12, Article 10 NMSA 1978.

The 1989 amendment, effective April 7, 1989, deleted the former last sentence of Subsection A, which read "All income earned on the fund shall be credited to the fund".

Effective dates. - Laws 1988, ch. 14, § 8 makes the act effective on July 1, 1988.

Hazardous Materials Transportation Act. - The federal Hazardous Materials Transportation Act, referred to in Subsection D, appears as 46 U.S.C. § 170 and 49 U.S.C. §§ 103, 104, 106, 1471, 1472, 1801 to 1813.

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.

Resource Conservation and Recovery Act. - The federal Resource Conservation and Recovery Act, referred to in Subsection C, appears as 42 U.S.C. § 6901 et seq.

§ 74-4C-3. Definitions.

As used in the Hazardous Waste Feasibility Study Act [74-4C-1 to 74-4C-4 NMSA 1978]:

A. "committee" means the radioactive materials committee [radioactive and hazardous materials committee];

B. "division" means the environmental improvement division of the health and environment department;

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.

Cross-references. - As to the environmental improvement board, see 74-1-4 NMSA 1978.

Radioactive and hazardous materials committee. - The radioactive materials committee, referred to in Subsection A, is now the radioactive and hazardous materials committee. See 74-4A-9 NMSA 1978.

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

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

§ 74-4C-4. Hazardous waste feasibility study.

A. The committee, after consultation with the division as to the scope of the study, shall contract with public or private entities to study the magnitude of the problem of hazardous waste generation and disposal in New Mexico, including current and projected hazardous waste generation rates. If the committee determines that generation rates and transportation costs for out-of-state disposal are significant, the study shall address the need, location, conceptual design, ownership and estimated cost of a hazardous waste transfer facility to be located within the state. The facility should be capable of handling both small and large quantities of hazardous wastes. The committee shall provide for public hearing and input during the conduct of the study.

B. If the committee determines that there is a need for one or more hazardous waste transfer and waste exchange facilities, it shall make appropriate recommendations to the legislature.

History: Laws 1985 (1st S.S.), ch. 4, § 4.

Article 4D

Petroleum Storage Cleanup

§ 74-4D-1. Short title.

Sections 1 through 7 [74-4D-1 to 74-4D-7 NMSA 1978] of this act may be cited as the "Petroleum Storage Cleanup Act".

History: Laws 1988, ch. 70, § 1.

Effective dates. - Laws 1988, ch. 70, § 14 makes the act effective on July 1, 1988.

§ 74-4D-2. Purpose.

A. The legislature finds that leaks and spills associated with underground petroleum products storage systems pose a significant threat to the quality of the waters of the state, including public and private water supply systems, and that protection of the quality of these waters is of the highest importance. Further, the legislature finds that such leaks and spills pose significant threats to public health and safety by creating explosive hazards, toxic vapors, and other serious associated hazards.

B. The legislature intends by the enactment of the Petroleum Storage Cleanup Act [74-4D-1 to 74-4D-7 NMSA 1978] to exercise the police power of the state through the environmental improvement board and the health and environment department by conferring upon the board and the department the power to regulate the hazards and threats of danger and damage posed by leaks and spills from underground petroleum products storage systems, to require the prompt containment and removal of pollution occasioned thereby and to establish a fund to provide for the investigation, mitigation, containment and removal of releases of petroleum products from underground petroleum products storage systems, including the restoration of contaminated water supplies.

C. The legislature further intends by the enactment of the Petroleum Storage Cleanup Act to create a climate in which environmental liability insurance may become more available and affordable to owners of underground petroleum products storage systems.

D. The legislature finds that preservation of groundwater resources and of the public uses of those resources for water supplies is of grave public interest and concern to the state in promoting its general welfare, preventing disease, promoting health and providing for the public safety, and that the state's interest in this preservation outweighs

any burdens of absolute liability imposed by the legislature in the Petroleum Storage Cleanup Act upon those engaged in the use of underground petroleum products storage systems.

History: Laws 1988, ch. 70, § 2.

Effective dates. - Laws 1988, ch. 70, § 14 makes the act effective on July 1, 1988.

§ 74-4D-3. Definitions.

As used in the Petroleum Storage Cleanup Act [74-4D-1 to 74-4D-7 NMSA 1978]:

A. "board" means the environmental improvement board;

B. "director" means the director of the environmental improvement division of the health and environment department;

C. "division" means the environmental improvement division of the health and environment department;

D. "fund" means the petroleum storage cleanup fund;

E. "owner of a petroleum products storage system" means a person who holds title to or possesses an interest in a petroleum products storage system, but does not include the state, a person who, without participating in the management of a petroleum products storage system, holds indicia of ownership primarily to protect the owner's security interest in that system, or a political subdivision of the state that acquires a storage system through foreclosure of any lien, unless the holder of the security interest or the political subdivision participates in the management of the system;

F. "petroleum products" means gasoline, gasoline-alcohol fuel blends, kerosene, diesel engine fuel, fuel oil, burner oil and diesel fuel oil and aviation fuels;

G. "petroleum products storage system" means a single tank or combination of tanks, including underground pipes connected thereto, which are used to contain petroleum products if ten percent or more of the volume of the system is beneath the surface of the ground, but the term does not include any:

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

(2) septic tank;

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

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

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

(5) storm water or wastewater collection system;

(6) a flow-through process tank;

(7) liquid trap or associated gathering lines directly related to oil or gas production and gathering operations which includes sumps, well cellars and other traps used in association with oil and gas production, gathering and extraction operations, including gas process plants, and their attendant production and gathering lines, for the purpose of collecting oil, water and other liquids; such liquid traps may temporarily collect liquids for subsequent disposition or reinjection into a production or pipeline stream, or may collect and separate liquids from a gas stream; or

(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 floor;

H. "release" means any spilling, leaking, emitting, discharging, escaping, leaching or disposing of petroleum products from a petroleum products storage system into ground water, surface water or subsurface soils, in the amount of one hundred gallons or more;

I. "responsible party" means an owner of a petroleum products storage system or the owner, exclusive of the state, of petroleum products stored in such a system; and

J. "state" means the state of New Mexico, its branches, agencies, departments, boards, instrumentalities or institutions.

History: Laws 1988, ch. 70, § 3.

Effective dates. - Laws 1988, ch. 70, § 14 makes the act effective on July 1, 1988.

§ 74-4D-4. Corrective action for releases from petroleum products storage systems.

A. Any responsible party causing or allowing a release from a petroleum products storage system shall take action immediately to stop the release and shall investigate, contain and remove any resulting contamination. He shall within the shortest practical time replace or restore to an uncontaminated quality any private or public water supplies contaminated by the release. The responsible party shall within twenty-four hours of the release notify the director or the director's designee of the type, amount and location of the release. The board shall promulgate regulations governing reporting, investigation,

containment and removal of contamination resulting from releases of petroleum products. These regulations shall be known as "corrective action regulations". Corrective action regulations shall be adopted and subject to review pursuant to the procedures in Section 74-4-5 NMSA 1978, and shall, to the extent possible in the board's discretion, be consistent with the regulations adopted pursuant to Subsection K [sic] of Section 74-4-4 NMSA 1978. Reporting regulations, to the extent possible in the board's discretion, shall be consistent with the reporting requirements promulgated pursuant to the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978] and the Hazardous Waste Act [Chapter 74, Article 4 NMSA 1978].

B. Any records, reports or information obtained by the division under this section shall be available to the public, except that upon a showing satisfactory to the division that records, reports or information, or a particular part thereof, to which the director or his authorized representatives have access under this section, if made public, would divulge information entitled to protection under Section 1905 of Title 18 of the United States Code, such information or particular portion thereof shall be considered confidential, except that such record, report, document or information may be disclosed to officers, employees or authorized representatives of the United States concerned with carrying out the federal Resource Conservation and Recovery Act, or when relevant in any proceedings under the Hazardous Waste Act [Chapter 74, Article 4 NMSA 1978].

C. Whenever the director determines that any responsible party has caused or allowed a release and is violating or threatening to violate the Petroleum Storage Cleanup Act [74-4D-1 to 74-4D-7 NMSA 1978] or any regulation promulgated under authority of that act, the director may issue a compliance order stating with reasonable specificity the nature of the violation or the threatened violation and requiring compliance within a specified period of time. Any person wishing to appeal such a compliance order shall do so to the board within thirty days of issuance of the order. If the responsible party fails to file an appeal within thirty days of issuance of the order, the order is a final order of the board and not subject to review by any court or agency. The director shall notify the person receiving the compliance order of the appeal procedure. The board shall hold a hearing within thirty days of receiving such an appeal and shall rule on the appeal within fifteen days of the hearing.

D. Appeal from the decision of the board may be made by the responsible party or the division and shall be made to the state court of appeals within thirty days of the board's decision. The appeal must be on the record made at the board's hearing. The appellant shall certify in the 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 the appeal to the court, at the expense of the appellant, including two copies which the appellant shall furnish to the board. Upon appeal, the court of appeals shall set aside the decision of the board only if concluded 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 1988, ch. 70, § 4.

Effective dates. - Laws 1988, ch. 70, § 14 makes the act effective on July 1, 1988.

Resource Conservation and Recovery Act. - The federal Resource Conservation and Recovery Act, referred to in Subsection B, appears as 42 U.S.C. § 6901 et seq.

The reference in Subsection A to Subsection K of section 74-4-4 NMSA 1978 is apparently incorrect, as section 74-4-4 NMSA 1978 does not have a Subsection K.

§ 74-4D-5. Emergency procedures.

If the director determines that any person is causing or contributing to a release of petroleum products from a petroleum products storage system of such characteristics and duration so as to create an emergency that requires immediate action to protect human health, whether or not in violation of a compliance order issued under the authority of Section 4 [74-4D-4 NMSA 1978] of the Petroleum Storage Cleanup Act, the director may expend money from the fund to take any action necessary or appropriate to protect persons from injury or other harm that might arise from the emergency. Any costs that the agency incurs in taking action are recoverable from the responsible party pursuant to Sections 6 and 7 [74-4D-6 and 74-4D-7 NMSA 1978] of the Petroleum Storage Cleanup Act.

History: Laws 1988, ch. 70, § 5.

Effective dates. - Laws 1988, ch. 70, § 14 makes the act effective on July 1, 1988.

§ 74-4D-6. Petroleum storage cleanup fund created; uses.

A. There is created in the state treasury the "petroleum storage cleanup fund". The fund shall be administered by the division and expenditures from it shall be made upon vouchers signed by the director.

B. All money in the fund is appropriated to the division to carry out the purposes of the Petroleum Storage Cleanup Act [74-4D-1 to 74-4D-7 NMSA 1978]. Expenditures from the fund shall be limited to the investigation, cleanup and restoration of polluted soil and ground water due to releases from petroleum products storage systems. Cleanup and restoration activities may include, but are not limited to:

(1) elimination of any immediate threat to human health or the environment caused by

the release;

(2) assessment of contaminated sites;

(3) restoration or replacement of potable water;

(4) rehabilitation of soil, ground water and wells;

(5) maintenance and monitoring of contaminated sites;

(6) inspection and supervision;

(7) the state's share of federal leaking underground storage tank trust fund cleanup costs as required by the Resource Conservation and Recovery Act, 42 U.S.C. 6991b (h) (7) (b) (1976);

(8) orphan petroleum product leaks and spills if the division has exhausted applicable federal funds;

(9) reasonable administrative costs of the division of administering the fund or of performing any eligible activities listed in this section, up to three percent of the amount of the fund on January 1 of each year but not to exceed two hundred fifty thousand dollars ($250,000) in each year;

(10) costs of cost recovery, including reasonable attorney's fees; and

(11) any other circumstances approved in advance by the board.

C. The division shall give priority in its expenditure of money in the fund to those sites at which releases pose the greatest threat to human health or the environment.

D. Except as provided in Section 74-4D-5 NMSA 1978, prior to expending any money at a site, the director shall make a finding that the petroleum products storage system has had a release which poses a threat to human health or the environment. The director shall also make one of the following findings prior to expending money at a site:

(1) no person can be found, within ninety days or such shorter period as may be necessary to protect human health or the environment, who is:

(a) a responsible party;

(b) subject to corrective action regulations; and

(c) capable of carrying out such corrective action properly;

(2) a situation exists which requires prompt action by the state under this section to

protect human health and the environment; or

(3) the responsible party has failed or refused to comply with an order of the division issued under the Petroleum Storage Cleanup Act to comply with the corrective action regulations.

History: Laws 1988, ch. 70, § 6; 1989, ch. 324, § 38.

The 1989 amendment, effective April 7, 1989, in Subsection A, deleted the former last sentence, which read "Earnings of the fund are appropriated to the fund"; and, in Subsection D, substituted "Section 74-4D-5 NMSA 1978" for "Section 5 of the Petroleum Storage Cleanup Act" in the first sentence.

Effective dates. - Laws 1988, ch. 70, § 14 makes the act effective on July 1, 1988.

§ 74-4D-7. Cost recovery; limitation. (Effective until June 30, 1991.)

A. A person is liable to the state for that portion of costs specified in Subsection C of this section expended from the fund by the division arising from actions by the division authorized under the Petroleum Storage Cleanup Act [74-4D-1 to 74-4D-7 NMSA 1978] in connection with a petroleum products storage system as to which the person is a responsible party. The division shall take all necessary and appropriate legal action to recover from the responsible party those amounts. All money recovered pursuant to this subsection shall be paid into the fund. All costs arising under Subsection B of Section 74-4D-6 NMSA 1978 are recoverable costs subject to the limitations of Subsection C of this section.

B. The division need not complete a corrective action in order to seek cost recovery. The division may seek cost recovery at any stage of corrective action.

C. A responsible party shall pay to the state per incident of release the first twenty-five thousand dollars ($25,000) of costs expended pursuant to Section 74-4D-6 NMSA 1978 and shall also be liable to the state for fifty percent of those costs in excess of two hundred thousand dollars ($200,000) but less than one million dollars ($1,000,000), so that the total liability of the responsible party to the state shall at no time exceed four hundred twenty-five thousand dollars ($425,000) per incident of release.

History: Laws 1988, ch. 70, § 7; 1989, ch. 305, § 1.

The 1989 amendment, effective June 16, 1989, substituted "Section 74-4D-6 NMSA 1978" for "Section 6 of the Petroleum Storage Cleanup Act" in the last sentence of Subsection A and, in Subsection C, substituted all of the language beginning "pay to the state per incident of release" for "pay to and shall be liable to the state for the first one hundred thousand dollars ($100,000) of costs expended by the division and thereafter

shall be liable for fifty percent of the remaining costs expended but not to exceed liability for an additional four hundred fifty thousand dollars ($450,000)".

Effective dates. - Laws 1988, ch. 70, § 14 makes the act effective on July 1, 1988.

§ 74-4D-7. Cost recovery; limitation. (Effective June 30, 1991.)

A. A person is liable to the state for that portion of costs specified in Subsection C of this section expended from the fund by the division arising from actions by the division authorized under the Petroleum Storage Cleanup Act [74-4D-1 to 74-4D-7 NMSA 1978] in connection with a petroleum products storage system as to which the person is a responsible party. The division shall take all necessary and appropriate legal action to recover from the responsible party those amounts. All money recovered pursuant to this subsection shall be paid into the fund. All costs arising under Subsection B of Section 74-4D-6 NMSA 1978 are recoverable costs subject to the limitations of Subsection C of this section.

B. The division need not complete a corrective action in order to seek cost recovery. The division may seek cost recovery at any stage of corrective action.

C. A responsible party shall pay to and shall be liable to the state for the first one hundred thousand dollars ($100,000) of costs expended by the division and thereafter shall be liable for fifty percent of the remaining costs expended but not to exceed liability for an additional four hundred fifty thousand dollars ($450,000).

History: 1978 Comp., § 74-4D-7, enacted by Laws 1989, ch. 305, § 2.

Repeals and reenactments. - Laws 1989, ch. 305, § 2 repeals 74-4D-7 NMSA 1978, as amended by Laws 1989, ch. 305, § 1, and enacts the above section, effective June 30, 1991.

§ 74-4D-8. Limitation on requiring local government expenditures under act.

No regulations adopted under the provisions of the Petroleum Storage Cleanup Act [74-4D-1 to 74-4D-7 NMSA 1978] shall require any new service, or new or increased level of activity for local government without adequate funding.

History: Laws 1988, ch. 70, § 12.

Effective dates. - Laws 1988, ch. 70, § 14 makes the act effective on July 1, 1988.

Article 4E

Hazardous Chemicals Information Act

§ 74-4E-1. Short title.

Sections 1 through 9 [74-4E-1 to 74-4E-9 NMSA 1978] of this act may be cited as the "Hazardous Chemicals Information Act".

History: Laws 1989, ch. 149, § 1.

Effective dates. - Laws 1989, ch. 149, § 18 makes the Hazardous Chemicals Information Act effective on July 1, 1989.

§ 74-4E-2. Purpose of act.

The purpose of the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978] is to ensure that current information on the nature and location of hazardous chemicals is available to local emergency planning committees, emergency responders and the public as required by Title III.

History: Laws 1989, ch. 149, § 2.

Effective dates. - Laws 1989, ch. 149, § 18 makes the Hazardous Chemicals Information Act effective on July 1, 1989.

Meaning of Title III. - See Subsection H of 74-4E-3 NMSA 1978.

§ 74-4E-3. Definitions.

As used in the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978]:

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

B. "department" means the public safety department;

C. "emergency responder" means any law enforcement officer, firefighter, medical services professional or other person trained and equipped to respond to hazardous chemical releases;

D. "hazardous chemical" means any hazardous chemical, extremely hazardous substance, toxic chemical or hazardous material as defined by Title III;

E. "facility owner or operator" means any individual, trust, firm, joint stock company, corporation, partnership, association, state agency, municipality or county having legal

control or authority over buildings, equipment, structures and other stationary items which are located on a single site or on contiguous or adjacent sites. For the purposes of Section 5 [74-4E-5 NMSA 1978] of the Hazardous Chemicals Information Act, the term includes owners or operators of motor vehicles, rolling stock and aircraft;

F. "local emergency planning committee" means any local group appointed by the commission to undertake chemical release contingency planning;

G. "release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment of any hazardous chemical, extremely hazardous substance or toxic chemical. "Release" includes the abandonment or discarding of barrels, containers and other closed receptacles; and

H. "Title III" means the federal Emergency Planning and Community Right-to-Know Act of 1986.

History: Laws 1989, ch. 149, § 3.

Effective dates. - Laws 1989, ch. 149, § 18 makes the Hazardous Chemicals Information Act effective on July 1, 1989.

Emergency Planning and Community Right-to-Know Act of 1986. - The federal Emergency Planning and Community Right-to-Know Act of 1986, referred to in Subsection H, appears as 42 U.S.C. §§ 11001 to 11005, 11021 to 11023, and 11041 to 11050.

§ 74-4E-4. Commission created; membership; terms; duties; immunity granted.

A. The "state emergency response commission" is created. The commission shall consist of seven members who shall be qualified voters of the state of New Mexico. All members shall be appointed by the governor. Among the members appointed, there shall be representatives of private industry, federal facilities, public health and public safety. Appointments shall be made for four-year terms to expire on January 1 of the appropriate year. Commission members shall serve staggered terms as determined by the governor at the time of their initial appointments. Annually, the governor shall designate, from among the members, a chairman of the commission.

B. The commission shall:

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

(2) prescribe all reporting forms required by the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978];

(3) provide direction to the emergency management task force and the hazardous materials safety board;

(4) report periodically to the radioactive and hazardous materials committee; and

(5) report annually to the governor and the legislature.

C. The commission may solicit and accept grants from federal or private sources for undertakings that further the purpose of the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978] or the Emergency Management Act [Chapter 74, Article 4B NMSA 1978] and may make contracts necessary to carry out the purposes of both of those acts.

D. Commission members shall not vote by proxy. A majority of the members constitute a quorum for the conduct of business.

E. Commission members shall not be paid but shall receive per diem and mileage expenses as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

F. Immunity from tort liability for emergency response actions, including planning or preparation therefore, is granted to the state, its subdivisions and all their agencies, officers, agents and employees. Any waiver of immunity from tort liability granted under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall not be applicable to disaster or emergency response or planning.

History: Laws 1989, ch. 149, § 4.

Effective dates. - Laws 1989, ch. 149, § 18 makes the Hazardous Chemicals Information Act effective on July 1, 1989.

Meaning of Title III. - See Subsection H of 74-4E-3 NMSA 1978.

§ 74-4E-5. Notices and reports required; deadlines set.

A. Any facility owner or operator who is required by any section of Title III to file a written notice or report to the commission shall file that notice or report on or before the required deadline with the department. With the exception of the written follow-up emergency notice required in Section 304(c) of Title III, all notices shall be filed annually and shall confirm or amend information previously filed. Facility owners or operators shall file with the department:

(1) notice that an extremely hazardous substance, at or above a specified quantity, is present at a facility;

(2) notice that a release of any chemical substance has occurred at or above reportable quantities determined by the commission. The contents of the notice shall be determined by the commission. The notice shall be filed as soon as practicable following a release;

(3) an inventory form covering each hazardous material. This form shall be filed annually on or before March 1; and

(4) a toxic chemical release inventory form. This reporting requirement shall apply to facility owners and operators that have ten or more employees and that are in standard industrial classification codes 20 through 39, as in effect July 1, 1985. The form shall be filed annually on or before July 1.

B. The commission may simplify forms to be used for reporting, set deadlines for filing written notices or reports and adopt other regulations for the enforcement of the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978].

History: Laws 1989, ch. 149, § 5.

Effective dates. - Laws 1989, ch. 149, § 18 makes the Hazardous Chemicals Information Act effective on July 1, 1989.

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.

Effective dates. - Laws 1989, ch. 149, § 18 makes the Hazardous Chemicals Information Act effective on July 1, 1989.

§ 74-4E-7. Hazardous chemicals information management fund created; purpose. (Effective until July 1, 1992.)

A. There is created in the state treasury the "hazardous chemicals information

management fund". All fees collected and all penalties imposed by the Hazardous Chemicals Information Act [74-4E-1 to 74-4E-9 NMSA 1978] shall be deposited in the fund. Effective July 1, 1992, all fees collected pursuant to the Hazardous Chemicals Information Act shall be deposited in the general fund. All balances in the fund are appropriated, subject to legislative approval, to the department for the purpose of carrying out the provisions of Subsection B of this section and shall not revert.

B. The hazardous chemicals information management fund shall be administered by the department for the purpose of collecting and providing current information to state officials, local emergency planning committees, emergency responders and the public on the nature and location of hazardous chemicals within the state.

History: Laws 1989, ch. 149, § 7.

Delayed repeals. - Laws 1989, ch. 149, § 17 repeals 74-4E-7 NMSA 1978, as enacted by Laws 1989, ch. 149, § 7, effective July 1, 1992.

Effective dates. - Laws 1989, ch. 149, § 18 makes the Hazardous Chemicals Information Act effective on July 1, 1989.

§ 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.

Effective dates. - Laws 1989, ch. 149, § 18 makes the Hazardous Chemicals Information Act effective on July 1, 1989.

§ 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.

Effective dates. - Laws 1989, ch. 149, § 18 makes the Hazardous Chemicals Information Act effective on July 1, 1989.

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.

Repeals. - Laws 1979, ch. 82, § 3, repeals 74-5-2 NMSA 1978, relating to restrictions on the sale of certain aerosol products, effective March 16, 1979.

Article 6

Water Quality

§ 74-6-1. Short title. (Effective until July 1, 1994.)

This act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978] may be cited as the "Water Quality Act".

History: 1953 Comp., § 75-39-1, enacted by Laws 1967, ch. 190, § 1.

Delayed repeals. - See 74-6-14 NMSA 1978.

Cross-references. - For the Pollution Control Revenue Bond Act, see 3-59-1 NMSA 1978 et seq.

Water laws apply on Indian land. - Where non-Indians enter into long-term lease with an Indian tribe under which the non-Indians are to develop the land as a subdivision, state laws concerning subdivision control, construction licensing and water cannot be held inapplicable to the lessee because of federal preemption. Norvell v. Sangre de Cristo Dev. Co. 372 F. Supp. 348 (D.N.M. 1974), rev'd on other grounds, 519 F.2d 370 (10th Cir. 1975).

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

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 Nat.

Resources J. 693 (1979).

For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

For article, "Information for State Groundwater Quality Policymaking," see 24 Nat. Resources J. 1015 (1984).

For article, "Transboundary Toxic Pollution and the Drainage Basin Concept," see 25 Nat. Resources J. 589 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 134 et seq.
Standing to sue for violation of state environmental regulatory statute, 66 A.L.R.4th 685.
39A C.J.S Health and Environment § 131.

§ 74-6-2. Definitions. (Effective until July 1, 1994.)

As used in the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978]:

A. "water contaminant" means any substance which alters the physical, chemical or biological qualities of water;

B. "water pollution" means introducing or permitting the introduction into water, either directly or indirectly, of one or more water contaminants in such quantity and of such duration as may with reasonable probability injure human health, animal or plant life or property, or to unreasonably interfere with the public welfare or the use of property;

C. "wastes" means sewage, industrial wastes or any other liquid, gaseous or solid substance which will pollute any waters of the state;

D. "sewer system" means pipelines, conduits, pumping stations, force mains or any other structures, devices, appurtenances or facilities used for collecting or conducting wastes to an ultimate point for treatment or disposal;

E. "treatment works" means any plat or other works used for the purpose of treating, stabilizing or holding wastes;

F. "sewerage system" means a system for disposing of wastes, either by surface or underground methods, and includes sewer systems, treatment works, disposal wells and other systems;

G. "water" means all water including water situated wholly or partly within or bordering upon the state, whether surface or subsurface, public or private, except private waters that do not combine with other surface or subsurface water;

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

I. "commission" means the water quality control commission;

J. "constituent agency" means, as the context may require, any or all of the following agencies of the state:

(1) the environmental improvement division of the health and environment department;

(2) the state engineer and the interstate stream commission;

(3) the New Mexico department of game and fish;

(4) the oil conservation commission;

(5) the state park and recreation commission [state park and recreation division of the energy, minerals and natural resources department];

(6) the New Mexico department of agriculture;

(7) the state natural resource conservation commission [soil and water conservation division]; and

(8) the New Mexico bureau of mines [bureau of mines and mineral resources at the New Mexico institute of mining and technology]; and

K. "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance applicable to the source.

History: 1953 Comp., § 75-39-2, enacted by Laws 1967, ch. 190, § 2; 1970, ch. 64, § 1; 1971, ch. 277, § 49; 1973, ch. 326, § 1; 1977, ch. 253, § 73.

Delayed repeals. - See 74-6-14 NMSA 1978.

Park and recreation commission. - The park and recreation commission, referred to in this section, was abolished by Laws 1977, ch. 254, § 4. Section 9-5A-3 NMSA 1978 establishes the energy, minerals and natural resources department, consisting of several divisions, including a state park and recreation division. Section 16-2-3 NMSA 1978 provides that references to the commission shall mean the state park and recreation division.

Natural resource conservation commission. - Laws 1977, ch. 254, § 58, amends 73-20-28 NMSA 1978, changing the name of the natural resource conservation commission, referred to in this section, to the "soil and water conservation commission"; said commission is headed by a chairman. See 73-20-29 NMSA 1978.

Bureau of mines. - The "New Mexico bureau of mines," referred to in this section, refers to the bureau of mines and mineral resources, established by 69-1-1 NMSA 1978 as a department of the New Mexico institute of mining and technology.

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

§ 74-6-3. Water quality control commission created. (Effective until July 1, 1994.)

A. There is created the "water quality control commission" consisting of:

(1) the director of the environmental improvement division of the health and environment department or a member of his staff designated by him;

(2) the director of the department of game and fish or a member of his staff designated by him;

(3) the state engineer or a member of his staff designated by him;

(4) the chairman of the oil conservation commission or a member of his staff designated by him;

(5) the director of the state park and recreation division of the energy, minerals and natural resources department or a member of his staff designated by him;

(6) the director of the New Mexico department of agriculture or a member of his staff designated by him;

(7) the chairman of the soil and water conservation commission or a member of his staff designated by him;

(8) the director of the bureau of mines and mineral resources at the New Mexico institute of mining and technology or a member of his staff designated by him; and

(9) a representative of the public to be appointed by the governor for a term of four years and who shall be compensated from the budgeted funds of the health and environment department in accordance with the provisions of the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

B. No member of the commission shall receive or shall have received, during the previous two years, a significant portion of his income directly or indirectly from permit holders or applicants for a permit and shall, upon the acceptance of his appointment and prior to the performance of any of his duties, file a statement of disclosure with the secretary of state disclosing any amount of money or other valuable consideration, and its source, the value of which is in excess of ten percent of his gross personal income in each of the preceding two years, that he received directly or indirectly from permit holders or applicants for permits required under the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978].

C. The commission shall elect a chairman and other necessary officers and shall keep a record of its proceedings.

D. A majority of the commission constitutes a quorum for the transaction of business, but no action of the commission is valid unless concurred in by five or more members present at a meeting.

E. The commission is the state water pollution control agency for this state for all purposes of the Federal Water Pollution Control Act, the Water Quality Act of 1965 and the Clean Waters Restoration Act of 1966, and may take all action necessary and appropriate to secure to this state, its political subdivisions or interstate agencies the benefits of these acts.

F. The commission is administratively attached, as defined in the Executive Reorganization Act [9-1-1 to 9-1-10 NMSA 1978], to the health and environment department.

History: 1953 Comp., § 75-39-3, enacted by Laws 1967, ch. 190, § 3; 1970, ch. 64, § 2; 1971, ch. 277, § 50; 1973, ch. 326, § 2; 1977, ch. 253, § 74; 1987, ch. 234, § 81.

Delayed repeals. - See 74-6-14 NMSA 1978.

Cross-references. - As to exemption of water quality control commission from authority of secretary of health and environment, and as to staff support from the environmental improvement division, see 9-7-14 NMSA 1978. As to director of the New Mexico department of game and fish, see 17-1-5 NMSA 1978. As to the chairman of the oil conservation commission, see 70-2-4 NMSA 1978. As to the state engineer, see 72-2-1 NMSA 1978. As to the director of the New Mexico department of agriculture, see 76-1-3 NMSA 1978.

Federal acts. - The Federal Water Pollution Control Act, the Water Quality Act of 1965 and the Clean Waters Restoration Act of 1966, all referred to in Subsection E, were compiled as 33 U.S.C. § 1151 et seq., but are now omitted as superseded by 33 U.S.C. § 1251 et seq.

Park and recreation commission. - See same catchline under 74-6-2 NMSA 1978.

Natural resource conservation commission. - See same catchline under 74-6-2 NMSA 1978.

Bureau of mines. - See same catchline under 74-6-2 NMSA 1978.

Division may propose regulations to commission and act as interested party at hearings. - In light of the fact that the legislature has seen fit to have the director of the environmental improvement division sit as a member of the commission, the division may propose regulations to the commission and then act as an interested party at the hearings. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982) (decided prior to 1982 amendment of 74-6-9 NMSA 1978).

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

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

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

§ 74-6-4. Duties and powers of commission. (Effective until July 1, 1994.)

The commission:

A. may accept and supervise the administration of loans and grants from the federal government and from other sources, public or private, which loans and grants shall not be expended for other than the purposes for which provided;

B. shall adopt a comprehensive water quality program and develop a continuing planning process;

C. shall adopt water quality standards as a guide to water pollution control;

D. shall adopt, promulgate and publish regulations to prevent or abate water pollution in the state or in any specific geographic area or watershed of the state or in any part thereof, or for any class of waters. Regulations shall not specify the method to be used to prevent or abate water pollution, but may specify a standard of performance for new sources which reflects the greatest degree of effluent reduction which the commission determines to be achievable through application of the best available demonstrated control technology, processes, operating methods or other alternatives, including where practicable, a standard permitting no discharge of pollutants. In making its regulations, the commission shall give weight it deems appropriate to all facts and circumstances,

including but not limited to:

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

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

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

(4) successive uses, including but not limited to, domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses;

(5) feasibility of a user or a subsequent user treating the water before a subsequent use; and

(6) property rights and accustomed uses;

E. shall assign responsibility for administering its regulations to constituent agencies so as to assure adequate coverage and prevent duplication of effort. To this end, the commission may make such classification of waters and sources of water contaminants as will facilitate the assignment of administrative responsibilities to constituent agencies. The commission shall also hear and decide disputes between constituent agencies as to jurisdiction concerning any matters within the purpose of the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978]. In assigning responsibilities to constituent agencies, the commission shall give priority to the primary interests of the constituent agencies. The environmental improvement division of the health and environment department shall provide testing and other technical services;

F. may enter into or authorize constituent agencies to enter into agreements with the federal government or other state governments for purposes consistent with the Water Quality Act and receive and allocate to constituent agencies funds made available to the commission;

G. may grant an individual variance from any regulation of the commission, whenever it is found that compliance with the regulation will impose an unreasonable burden upon any lawful business, occupation or activity. The commission may grant a variance conditioned upon a person effecting a particular abatement of water pollution within a reasonable period of time. Any variance shall be granted for the period of time specified by the commission. The commission shall adopt regulations specifying the procedure under which variances may be sought, which regulations shall provide for the holding of a public hearing before any variance may be granted;

H. may adopt regulations to require the filing with it or a constituent agency, of proposed plans and specifications for the construction and operation of new sewer systems,

treatment works or sewerage systems or extensions, modifications of or additions to new or existing sewer systems, treatment works or sewerage systems. Filing with or approval by the federal housing administration of plans for an extension to an existing or construction of a new sewerage system intended to serve a subdivision substantially residential in nature shall be deemed compliance with all provisions of this subsection;

I. may adopt regulations requiring notice to it or a constituent agency of intent to introduce or allow the introduction of water contaminants into waters of the state;

J. may adopt regulations establishing pretreatment standards that prohibit or control the introduction into publicly owned sewerage systems of water contaminants which are not susceptible to treatment by the treatment works or which would interfere with the operation of the treatment works;

K. shall not require a permit respecting the use of water in irrigated agriculture, except in the case of the employment of a specific practice in connection with such irrigation that documentation or actual case history has shown to be hazardous to public health; and

L. shall coordinate application procedures and funding cycles for loans and grants from the federal government and from other sources, public or private, with the local government division of the department of finance and administration pursuant to the New Mexico Community Assistance Act.

History: 1953 Comp., § 75-39-4, enacted by Laws 1967, ch. 190, § 4; 1970, ch. 64, § 3; 1971, ch. 277, § 51; 1973, ch. 326, § 3; 1981, ch. 347, § 1; 1984, ch. 5, § 13.

Delayed repeals. - See 74-6-14 NMSA 1978.

Cross-references. - For certification of utility operators, see 61-30-1 NMSA 1978 et seq.

New Mexico Community Assistance Act. - See 11-6-1 NMSA 1978 and notes thereto.

Discretion in consideration of factors. - In adopting standards for organic compounds in groundwater, Subsection D does not require the record to contain the commission's consideration of every part within the six factors for each organic compound. The commission possesses reasonable discretion in its consideration of the six factors and in the weight it gives to each factor. Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1988).

No requirement that commission consider complete environmental impact. - There is no specific requirement in the commission's mandate that it consider to the fullest extent possible the environmental consequences of its action. The commission could in all good faith adopt a regulation governing the effluent quality of sewage so restrictive that municipalities would turn to methods other than those currently used to dispose of it which would have adverse environmental consequences far more serious than some pollution of the waters of the state. City of Roswell v. New Mexico Water Quality Control

Comm'n, 84 N.M. 561, 505 P.2d 1237 (Ct. App. 1972), cert. denied, 84 N.M. 560, 505 P.2d 1236 (1973) (decided under former law).

Commission may delegate authority to administer regulations. - Where the commission gives the environmental improvement division the authority to administer certain regulations, there is no unlawful delegation of authority. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982).

Numerical standards for organic compounds in rainwater. - The adoption of numerical standards for organic compounds in rainwater was not arbitrary and capricious, as they were technically achievable within the meaning of Subsection D. Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1988).

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For note, "Ground and Surface Water in New Mexico: Are They Protected Against Uranium Mining and Milling?" see 18 Nat. Resources J. 941 (1978).

For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 Nat. Resources J. 693 (1979).

For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

For article, "Information for State Groundwater Quality Policymaking," see 24 Nat. Resources J. 1015 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 133, 134.
39A C.J.S. Health and Environment §§ 133 to 136.

§ 74-6-5. Permits; appeals; penalty. (Effective until July 1, 1994.)

A. By regulation the commission may require persons to obtain from a constituent agency designated by the commission a permit for the discharge of any water contaminant either directly or indirectly into water.

B. Prior to the issuance of a permit, the constituent agency may require the submission of plans, specifications and other relevant information which it deems necessary.

C. The commission shall by regulation set the dates upon which applications for permits shall be filed and designate the time periods within which the constituent agency shall,

after the filing of an application for a permit, either grant the permit, grant the permit subject to conditions or deny the permit.

D. The constituent agency may deny any application for a permit if:

(1) it appears that the effluent would not meet applicable state or federal effluent regulations or limitations;

(2) any provision of the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978] would be violated; or

(3) it appears that the effluent would cause any state or federal stream standard to be exceeded.

E. The commission shall by regulation develop procedures which will insure that the public, affected governmental agencies and any other state whose water may be affected shall receive notice of each application for issuance or modification of a permit. No ruling shall be made on any application for a permit without opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.

F. Permits shall be issued for fixed terms not to exceed five years, except that for new discharges, the term of the permit shall commence on the date the discharge begins, but in no event shall the term of the permit exceed seven years from the date the permit was issued.

G. By regulation the commission may impose reasonable conditions upon permits requiring permittees to:

(1) install, use and maintain effluent monitoring devices;

(2) sample effluents in accordance with methods and at locations and intervals as may be prescribed by the commission;

(3) establish and maintain records of the nature and amounts of effluents and the performance of effluent control devices;

(4) provide any other information relating to the discharge of water contaminants; and

(5) notify a constituent agency of the introduction of new water contaminants from a new source and of a substantial change in volume or character of water contaminants being introduced from sources in existence at the time of the issuance of the permit.

H. The commission shall provide by regulation a schedule of fees for permits not exceeding the estimated cost of investigation and issuance, modification and renewal of

permits. Fees collected pursuant to this section shall be deposited in the water quality management fund. Effective July 1, 1992, all fees collected pursuant to this section shall be deposited in the general fund.

I. The issuance of a permit does not relieve any person from the responsibility of complying with the provisions of the Water Quality Act and any applicable regulations of the commission.

J. A permit may be terminated or modified by the constituent agency which issued it previous to its date of expiration for any of the following causes:

(1) violation of any condition of the permit;

(2) obtaining the permit by misrepresentation or failure to disclose fully all relevant facts;

(3) violation of any provisions of the Water Quality Act;

(4) violation of any applicable state or federal effluent regulations; or

(5) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

K. If the constituent agency denies, terminates or modifies a permit or grants a permit subject to condition, the constituent agency must notify the applicant or permittee by certified mail of the action taken and the reasons. If the applicant or permittee is dissatisfied with the action taken by the constituent agency, he may file a petition for hearing before the commission. The petition shall be made in writing to the director of the constituent agency within thirty days after notice of the constituent agency's action has been received by the applicant or permittee. Unless a timely request for hearing is made, the decision of the constituent agency shall be final.

L. If a timely petition for hearing is made, the commission shall hold a hearing within thirty days after receipt of the petition. The constituent agency shall notify the petitioner by certified mail of the date, time and place of the hearing. Provided that if the commission upon receipt of the petition deems the basis for the petition for hearing by the commission is affected with substantial public interest, it shall insure that the public shall receive notice of the date, time and place of the hearing and shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. Any public member submitting data, views or arguments orally or in writing shall be subject to examination at the hearing. In the hearing, the burden of proof shall be upon the petitioner. The commission may designate a hearing officer to take evidence in the hearing. Based upon the evidence presented at the hearing, the commission shall sustain, modify or reverse the action of the constituent agency.

M. If the petitioner requests, the hearing shall be recorded at the cost of the petitioner.

Unless the petitioner requests that the hearing be recorded, the decision of the commission shall be final.

N. A petitioner may appeal the decision of the commission by filing with the court of appeals a notice of appeal within thirty days after the date the decision is made. The appeal shall be on the record made at the hearing. The petitioner shall certify in his notice of appeal that arrangements have been made with the commission for preparation of a sufficient number of transcripts of the record of the hearing on which the appeal depends to support his appeal to the court, at the expense of the petitioner, including two copies which he shall furnish to the commission.

O. A person who violates any provision of this section is guilty of a misdemeanor and shall be punished by a fine of not less than three hundred dollars ($300) or more than ten thousand dollars ($10,000) per day or by imprisonment for not more than one year or both.

P. In addition to the remedy provided in Subsection O of this section, the trial court may impose a civil penalty for a violation of any provision of this section not exceeding five thousand dollars ($5,000) per day.

History: 1953 Comp., § 75-39-4.1, enacted by Laws 1973, ch. 326, § 4; 1985, ch. 157, § 1; 1989, ch. 248, § 1.

Delayed repeals. - See 74-6-14 NMSA 1978.

The 1989 amendment, effective June 16, 1989, in the first sentence of Subsection H, substituted "shall" for "may", deleted "application" preceding "fees", and inserted "modification and renewal"; deleted the former second sentence of Subsection H, which read: "Fees are to be paid at the time the application for the permit is filed"; substituted "water quality management fund" for "general fund" in the present second sentence of Subsection H; and added the last sentence of Subsection H.

Temporary provisions. - Laws 1989, ch. 248, § 2, effective June 16, 1989, creates in the state treasury the "water quality management fund" to be administered by the environmental improvement division of the health and environment department, provides for the deposit of fees collected and for appropriation of money in the fund to the division for the purpose of paying the costs of administering any regulations promulgated pursuant to Subsection H of Section 74-6-5 NMSA 1978, and provides that on July 1, 1992, all balances in the fund shall be deposited in the general fund.

Laws 1989, ch. 248, § 3 provides that § 2 of the act, creating the water quality management fund, is repealed effective July 1, 1992.

Commission's requirement of information to prevent water pollution within statutory mandate. - Where the objective of this article is to abate and prevent water pollution, it is not "clearly incorrect" for the commission to require a discharger of toxic pollutants to

provide a site and method for flow measurement and to provide any pertinent information relating to the discharge of water contaminants in order to demonstrate to the commission that the plans of the discharger will not result in a violation of the standards and regulations; these requirements are well within the statutory mandate. Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979).

In determining whether administrative interpretation is "clearly incorrect," the authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy. Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979).

Commission may delegate authority to administer regulations. - Where the commission gives the environmental improvement division the authority to administer certain regulations, there is no unlawful delegation of authority. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982).

Discharge of a toxic pollutant in violation of a discharge plan is a criminal act. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982).

Law reviews. - For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 Nat. Resources J. 693 (1979).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 133 to 136.
Validity of state statutory provision permitting administrative agency to impose monetary penalties for violation of environmental pollution statute, 81 A.L.R.3d 1258.
39A C.J.S. Health and Environment §§ 134, 145, 154.

§ 74-6-6. Adoption of regulations; notice and hearing. (Effective until July 1, 1994.)

No regulation or water quality standard or amendment or repeal thereof shall be adopted until after a public hearing within the area of the state concerned; provided that the commission may adopt water quality standards on the basis of the record of hearings held by the New Mexico department of public health [health and environment department] prior to the effective date of the Water Quality Act [74-6-1 to 74-6-4, 74-6-6

to 74-6-13 NMSA 1978] if those hearings were held in general conformance with the provisions of this section. Any person may recommend or propose regulations to the commission for promulgation. Hearings on regulations of statewide application shall be held at Santa Fe. Notice of the hearing shall be given at least thirty days prior to the hearing date and shall state the subject, the time and the place of the hearing and the manner in which interested persons may present their views. The notice shall also state where interested persons may secure copies of any proposed regulation or water quality standard. The notice shall be published in a newspaper of general circulation in the area affected. Reasonable effort shall be made to give notice to all persons who have made a written request to the commission for advance notice of its hearings. At the hearing, the commission shall allow all interested persons reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. The commission may designate a hearing officer to take evidence in the hearing. Any person heard or represented at the hearing shall be given written notice of the action of the commission. No regulation or water quality standard or amendment or repeal thereof adopted by the commission shall become effective until thirty days after its filing in accordance with the provisions of the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978]. The commission shall determine whether or not to hold a hearing within sixty days of submission of a proposed regulation.

History: 1953 Comp., § 75-39-5, enacted by Laws 1967, ch. 190, § 5; 1982, ch. 73, § 26.

Delayed repeals. - See 74-6-14 NMSA 1978.

Cross-references. - As to filing with the supreme court law librarian, see 14-4-9 NMSA 1978.

Department of public health. - Laws 1937, ch. 39, § 2, creating the state department of public health, referred to in the first sentence, was repealed by Laws 1968, ch. 37, § 3, that department being replaced by the health and social services department. Laws 1977, ch. 253, § 5, abolishes the health and social services department. Laws 1977, ch. 253, § 4 establishes the health and environment department. See 9-7-4 NMSA 1978.

"Effective date of the Water Quality Act". - The phrase "effective date of the Water Quality Act", referred to in the first sentence, means March 29, 1967, the effective date of Laws 1967, Chapter 190.

Division may propose regulations and act as interested party at hearings. - In light of the fact that the legislature has seen fit to have the director of the environmental improvement division sit as a member of the commission, the division may propose regulations to the commission and then act as an interested party at the hearings. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982) (decided prior to 1982 amendment of 74-6-9 NMSA 1978).

Adequacy of hearing. - Given the extensive nature of the public meetings and public hearing on the matter, with an opportunity to present evidence and cross-examine witnesses and with the prehearing disclosure of six references, the allegation of the concealment of the basic data on which standards for organic compounds in ground-water were based, was without merit. Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1988).

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 6, 134.
39A C.J.S. Health and Environment §§ 138, 142.

§ 74-6-7. Validity of regulation; judicial review. (Effective until July 1, 1994.)

A. Any person who is or may be affected by a regulation adopted by the commission may appeal to the court of appeal [appeals] for further relief. All such appeals shall be upon the record made at the hearing, and shall be taken to the court of appeals within thirty days after filing of the regulation under the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978].

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

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

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

(2) not supported by substantial evidence in the record or reasonably related to the prevention or abatement of water pollution; or

(3) otherwise not in accordance with law.

History: 1953 Comp., § 75-39-6, enacted by Laws 1967, ch. 190, § 6; 1970, ch. 64, § 4.

Delayed repeals. - See 74-6-14 NMSA 1978.

Standard is rule, if the proper procedure has been followed in promulgating it. Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979).

Standards adopted as rules are appealable. - Since the standards for the evaluation of waste water to determine whether it is contaminated were adopted as rules, they are appealable to the court of appeals. Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979).

Lack of numerical standards not basis for invalidating regulation. - Although there are no numerical standards in a regulation for what concentration of compounds triggers the label "toxic pollutant," this is not detrimental to a discharger where the director of the environmental improvement division will make that determination before a discharge plan is approved or disapproved, and the discharger will be notified. The lack of numerical standards is, therefore, not a basis for finding the regulation unconstitutional. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982).

Stay from operation of order or regulation. - Implicit in this section is the power to grant a stay from the operation of an administrative order or regulation, after due notice and opportunity for hearing. Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 105 N.M. 708, 736 P.2d 986 (Ct. App. 1986).

Evidence upon review. - The "whole record" standard of judicial review to findings of fact made by administrative agencies controls where the commission acts in its rule-making capacity. Therefor, such a review must include the record of all public meetings and pubic hearings. Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1988).

The legal residuum rule, which requires support by some evidence that would be admissible in a jury trial, is not applicable in a judicial review of a rule-making proceeding. Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1988).

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 Nat. Resources J. 693 (1979).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 38, 113, 179 to 181, 265, 273, 292.
Validity and construction of anti-water pollution statutes and ordinances, 32 A.L.R.3d 215.
Pollution control: validity and construction of statutes, ordinances or regulations controlling discharge of industrial wastes into sewer system, 47 A.L.R.3d 1224.
39A C.J.S. Health and Environment § 146.

§ 74-6-8. Duties of constituent agencies. (Effective until July 1, 1994.)

Each constituent agency shall administer regulations adopted pursuant to the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978], responsibility for the administration of which has been assigned to it by the commission.

History: 1953 Comp., § 75-39-7, enacted by Laws 1967, ch. 190, § 7.

Delayed repeals. - See 74-6-14 NMSA 1978.

Commission may delegate authority to administer regulations. - Where the commission gives the environmental improvement division the authority to administer certain regulations, there is no unlawful delegation of authority. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982).

Law reviews. - For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

§ 74-6-9. Powers of constituent agencies. (Effective until July 1, 1994.)

Each constituent agency may:

A. receive and expend funds appropriated, donated or allocated to the constituent agency for purposes consistent with the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978];

B. develop facts and make studies and investigations and require the production of documents necessary to carry out the responsibilities assigned to the constituent agency. The result of any investigation shall be reduced to writing and a copy thereof furnished to the commission and to the owner or occupant of the premises investigated;

C. report to the commission and to other constituent agencies water pollution conditions that are believed to require action where the circumstances are such that the

responsibility appears to be outside the responsibility assigned to the agency making the report;

D. make every reasonable effort to obtain voluntary cooperation in the prevention or abatement of water pollution;

E. upon presentation of proper credentials, enter at reasonable times upon or through any premises in which an effluent source is located or in which are located any records required to be maintained by regulations of the commission; provided that entry into any private residence without the permission of the owner shall be only by order of the district court for the county in which the residence is located and that, in connection with any entry provided for in this subsection, the constituent agency may:

(1) have access to any copy of the records;

(2) inspect any monitoring equipment or methods required to be installed by regulations of the commission; and

(3) sample any effluents;

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

G. on the same basis as any other person, present data, views or arguments and examine witnesses and otherwise participate at all hearings conducted by the commission or any other administrative agency with responsibility in the areas of environmental management or consumer protection, but shall not be given any special status over any other party; provided, that the participation by a constituent agency in a hearing shall not require the recusal or disqualification of the commissioner representing that constituent agency.

History: 1953 Comp., § 75-39-8, enacted by Laws 1967, ch. 190, § 8; 1973, ch. 326, § 5; 1982, ch. 73, § 27.

Delayed repeals. - See 74-6-14 NMSA 1978.

Division may propose regulations and act as interested party at hearings. - In light of the fact that the legislature has seen fit to have the director of the environmental improvement division sit as a member of the commission, the division may propose regulations to the commission and then act as an interested party at the hearings. Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982) (decided prior to 1982 amendment).

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

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

§ 74-6-10. Abatement of water pollution. (Effective until July 1, 1994.)

A. If, as a result of investigation, a constituent agency has good cause to believe that any person is violating or threatens to violate any regulation of the commission for the enforcement of which the agency is responsible, and, if the agency is unable within a reasonable time to obtain voluntary compliance, the commission may initiate proceedings in the district court of the county in which the violation occurs. The commission may seek injunctive relief against any violation or threatened violation of regulations, and such relief shall be subject to the continuing jurisdiction and supervision of the district court and the court's powers of contempt. The attorney general shall represent the commission.

B. In addition to the remedies provided in this section, the district court may impose civil penalties not exceeding one thousand dollars ($1,000) for each violation of the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978] or any regulation of the commission, and may charge the person convicted of such violation with the reasonable cost of treating or cleaning up waters polluted. Each day during any portion of which a violation occurs constitutes a separate violation.

C. Any party aggrieved by any final judgment of the district court under this section may appeal to the court of appeals as in other civil actions.

D. As an additional means of enforcing the Water Quality Act or any regulation of the commission, the commission may accept an assurance of discontinuance of any act or practice deemed in violation of the Water Quality Act or any regulation adopted pursuant thereto, from any person engaging in, or who has engaged in, such act or practice, signed and acknowledged by the chairman of the commission and the party affected. Any such assurance shall specify a time limit during which such discontinuance is to be accomplished.

History: 1953 Comp., § 75-39-9, enacted by Laws 1967, ch. 190, § 9; 1970, ch. 64, § 5.

Delayed repeals. - See 74-6-14 NMSA 1978.

Voluntary compliance no bar to assessment of civil penalties and cleanup costs. - The voluntary compliance provision of Subsection A does not apply to the remedies provided in Subsection B. The absence of voluntary compliance actions on the part of the state in a case does not prevent the state from seeking civil penalties and costs of cleanup under Subsection B. State ex rel. New Mexico Water Quality Control Comm'n v. Molybdenum Corp. of Am., 89 N.M. 552, 555 P.2d 375 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976).

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 534 to 547.
Injunction against pollution of stream by private persons or corporations, 46 A.L.R. 8.
Validity and construction of statutes, ordinances or regulations controlling discharge of industrial wastes into sewer system, 47 A.L.R.3d 1224.
Preliminary mandatory injunction to prevent, correct or reduce effects of polluting practices, 49 A.L.R.3d 1239.
Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency, 60 A.L.R.3d 665.
Validity, under federal constitution, of state statute or local ordinance regulating phosphate content of detergents, 21 A.L.R. Fed. 365.
39A C.J.S. Health and Environment §§ 150 to 154.

§ 74-6-11. Emergency procedure. (Effective until July 1, 1994.)

Notwithstanding any other provision of the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978], if any person is causing or contributing to water pollution of such characteristics and duration as to create an emergency which requires immediate action to protect human health, the director of the environmental improvement agency [environmental improvement division of the health and environment department] shall order the person to immediately abate the water pollution creating the emergency condition. If the effectiveness of the order is to continue beyond forty-eight hours, the director of the environmental improvement agency [environmental improvement division of the health and environment department] shall file an action in the district court, not later than forty-eight hours after the date of the order, to enjoin operations of any person in violation of the order.

History: 1953 Comp., § 75-39-10, enacted by Laws 1967, ch. 190, § 10; 1970, ch. 64, § 6; 1971, ch. 277, § 52.

Delayed repeals. - See 74-6-14 NMSA 1978.

Environmental improvement agency. - The environmental improvement agency, referred to in this section, was abolished by Laws 1977, ch. 253, § 5. Section 9-7-4 NMSA 1978 creates the health and environment department, consisting of several divisions, including an environmental improvement division, and Laws 1977, ch. 253, § 14 provides that all references to the agency shall mean the division.

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control §§ 493, 538, 539.
39A C.J.S. Health and Environment § 144.

§ 74-6-12. Limitations. (Effective until July 1, 1994.)

A. The Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978] does not grant to the commission or to any other entity the power to take away or modify property rights in water, nor is it the intention of the Water Quality Act to take away or modify such rights.

B. Effluent data obtained by the commission or a constituent agency shall be available to the public. Other records, reports or information obtained by the commission or a constituent agency shall be available to the public, except upon a showing satisfactory to the commission or a constituent agency that the records, reports or information or a particular part thereof, if made public, would divulge methods or processes entitled to protection as trade secrets.

C. The Water Quality Act does not authorize the commission to adopt any regulation with respect to any condition or quality of water if the water pollution and its effects are confined entirely within the boundaries of property within which the water pollution occurs when the water does not combine with other waters.

D. The Water Quality Act does not grant to the commission any jurisdiction or authority affecting the relation between employers and employees with respect to or arising out of any condition of water quality.

E. The Water Quality Act does not supersede or limit the applicability of any law relating to industrial health, safety or sanitation.

F. In the adoption of regulations and water quality standards and in any action for enforcement of the Water Quality Act and regulations adopted thereunder, reasonable degradation of water quality resulting from beneficial use shall be allowed.

G. The Water Quality Act does not permit the adoption of regulations or other action by the commission or other constituent agencies which would interfere with the exclusive authority of the oil conservation commission over all persons and things necessary to prevent water pollution as a result of oil or gas operations through the exercise of the

power granted to the oil conservation commission under Section 70-2-12 NMSA 1978, and other laws conferring power on the oil conservation commission.

History: 1953 Comp., § 75-39-11, enacted by Laws 1967, ch. 190, § 11; 1973, ch. 326, § 6.

Delayed repeals. - See 74-6-14 NMSA 1978.

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 Nat. Resources J. 693 (1979).

For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

§ 74-6-13. Construction. (Effective until July 1, 1994.)

The Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978] provides additional and cumulative remedies to prevent, abate and control water pollution, and nothing abridges or alters rights of action or remedies in equity under the common law or statutory law, criminal or civil. No provision of the Water Quality Act or any act done by virtue thereof estops the state or any political subdivision or person as owner of water rights or otherwise, in the exercise of their rights in equity or under the common law or statutory law to suppress nuisances or to abate pollution.

History: 1953 Comp., § 75-39-12, enacted by Laws 1967, ch. 190, § 12.

Delayed repeals. - See 74-6-14 NMSA 1978.

Court retains jurisdiction of case seeking tort and contract damages. - The trial court correctly retains jurisdiction of a case seeking tort and contract damages against a utility for its failure to supply water meeting certain minimal standards of quality since the government agencies involved have no expertise in considering tort and contractual claims and are without power to grant the relief that the plaintiffs have asked, and this section evidences the legislative intent that common-law remedies against water pollution be preserved. O'Hare v. Valley Utils., Inc., 89 N.M. 105, 547 P.2d 1147 (Ct. App.), modified, 89 N.M. 262, 550 P.2d 274 (1976).

Law reviews. - For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

§ 74-6-14. Termination of agency life; delayed repeal. (Effective until July 1, 1994.)

The water quality control commission is terminated on July 1, 1993 pursuant to the Sunset Act [12-9-11 to 12-9-21 NMSA 1978]. The commission shall continue to operate according to the provisions of Chapter 74, Article 6 NMSA 1978 until July 1, 1994. Effective July 1, 1994, Article 6, Chapter 74 is repealed.

History: 1978 Comp., § 74-6-13.1, enacted by Laws 1987, ch. 333, § 15.

Article 6A

Wastewater Facility Construction Loans

§ 74-6A-1. Short title.

This act [74-6A-1 to 74-6A-6 NMSA 1978] may be cited as the "Wastewater Facility Construction Loan Act".

History: Laws 1986, ch. 72, § 1.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 129 et seq.
39A C.J.S. Health & Environment § 106 et seq.

§ 74-6A-2. Purpose.

The purpose of the Wastewater Facility Construction Loan Act [74-6A-1 to 74-6A-6 NMSA 1978] is to provide local authorities in New Mexico with low-cost financial assistance in the construction of necessary wastewater facilities through the creation of a self-sustaining program so as to improve and protect water quality and public health.

History: Laws 1986, ch. 72, § 2; 1989, ch. 323, § 1.

The 1989 amendment, effective June 16, 1989, substituted "self-sustaining program" for "self-sustaining revolving loan program".

§ 74-6A-3. Definitions.

As used in the Wastewater Facility Construction Loan Act [74-6A-1 to 74-6A-6 NMSA 1978]:

A. "commission" means the water quality control commission;

B. "division" means the environmental improvement division of the health and environment department;

C. "financial assistance" means loans, loan guarantees, credit enhancement techniques to reduce interest on loans and bonds, bond insurance and bond guarantees or any combination of these purposes;

D. "fund" means the wastewater facility construction loan fund;

E. "local authority" means any municipality, county or sanitation district, recognized Indian tribe or other issuing agency pursuant to a joint powers agreement acting on behalf of any entity listed in this subsection;

F. "operate and maintain" means all necessary activities, including replacement of equipment or appurtenances, to assure the dependable and economical function of a wastewater facility in accordance with its intended purpose; and

G. "wastewater facility" means a publicly owned system for treating or disposing of wastes either by surface or underground methods. "Wastewater facility" includes any equipment, plant, treatment works, structure, machinery, apparatus, land or any combination thereof, which 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, and includes pumping and ventilating stations, facilities, plants and works, outfall sewers, interceptor sewers and collector sewers and other real or personal property and appurtenances incident to their use or operation. "Wastewater facility" also includes a nonpoint source water pollution control project as eligible under the federal Clean Water Act.

History: Laws 1986, ch. 72, § 3; 1989, ch. 323, § 2.

Cross-references. - As to water quality control commission, see 74-6-3 NMSA 1978. As to environmental improvement division of the health and environment department, see 9-7-4 NMSA 1978.

The 1989 amendment, effective June 16, 1989, added present Subsection C, redesignated former Subsections C through F as present Subsections D through G, in present Subsection E, inserted "recognized Indian tribe or other issuing agency pursuant to a joint powers agreement acting on behalf of any entity listed in this subsection", and substituted present Subsection G for the former subsection, which read "'Wastewater facility' means a publicly owned system for disposing of wastes, either by surface or underground methods, and includes sewer systems, treatment works, disposal wells and other systems".

Federal Clean Water Act. - As to the Federal Clean Water Act (which is also known as the Federal Water Pollution Control Act), see 33 U.S.C. § 1251 et seq.

§ 74-6A-4. Fund created; administration.

A. There is created in the state treasury a revolving loan fund to be known as the "wastewater facility construction loan fund". The division shall administer the fund and may make loans from the fund in accordance with the Wastewater Facility Construction Loan Act [74-6A-1 to 74-6A-6 NMSA 1978]. 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.

B. The division shall deposit in the fund all receipts from the repayment of loans and interest on the repayment of loans made pursuant to the Wastewater Facility Construction Loan Act.

C. The division shall deposit in the fund federal funds allocated to the state pursuant to the federal Clean Water Act for the purpose of making loans to local authorities.

D. State money appropriated to the division to carry out the provisions of the Wastewater Facility Construction Loan Act may be used to match federal funds allocated to the state pursuant to the federal Clean Water Act for the purpose of making loans to local authorities.

History: Laws 1986, ch. 72, § 4; 1989, ch. 323, § 3; 1989, ch. 324, § 39.

Cross-references. - As to the general fund, see 6-4-2 NMSA 1978.

The 1989 amendments. - Laws 1989, ch. 323, § 3, effective June 16, 1989, substituting references to providing financial assistance for references to making loans and "federal money" for "federal funds" throughout the section; in Subsection A, adding the second sentence; in Subsection B, substituting "repayment of principal and interest from financial assistance" for "repayment of loans"; in Subsection C, inserting "state appropriations and"; and adding Subsection E, was approved on April 7, 1989. However, Laws 1989, ch. 324, § 39, effective April 7, 1989, deleting the former third sentence in Subsection A, which read "Earning on balances in the fund shall be credited to the fund", was approved later on April 7, 1989. The section is set out as amended by Laws 1989, ch. 324, § 39. See 12-1-8 NMSA 1978.

Federal Clean Water Act. - As to the federal Clean Water Act, see 33 U.S.C. § 1251 et seq.

§ 74-6A-5. Loan program; duties of division and commission.

A. The commission shall adopt regulations to govern the application procedure and requirements for providing financial assistance under the Wastewater Facility Construction Loan Act [74-6A-1 to 74-6A-6 NMSA 1978]. The commission shall insofar

as possible coordinate application procedures and funding cycles with the New Mexico Community Assistance Act.

B. The division shall establish a program to provide financial assistance to local authorities, individually or jointly, for acquisition, construction or modification of wastewater facilities in accordance with the Wastewater Facility Construction Loan Act and regulations of the commission pursuant to that act.

C. The commission shall adopt a system for the ranking of wastewater facility construction projects, both eligible and ineligible for federal funding assistance, for which financial assistance applications have been received by the division. In establishing the system the commission shall consider, among other things, severity of pollution, public health, water quality, population and the eligibility of the facility construction project for federal funds. This priority system shall be reviewed annually by the commission.

D. The division shall prepare an annual report to the governor and the legislature.

E. The division shall have an annual audit performed on the administration of the fund.

F. In addition to the authority granted by the Water Quality Act [74-6-1 to 74-6-4, 74-6-6 to 74-6-13 NMSA 1978], the commission and division shall have such other authority as may be necessary and appropriate for the exercise of the powers and duties conferred by the Wastewater Facility Construction Loan Act.

History: Laws 1986, ch. 72, § 5; 1989, ch. 323, § 4.

The 1989 amendment, effective June 16, 1989, substituted references to financial assistance for references to loans throughout the section and, in Subsection B, inserted "acquisition" near the middle.

New Mexico Community Assistance Act. - See 11-6-1 NMSA 1978 and notes thereto.

§ 74-6A-6. Financial assistance; criteria.

A. Financial assistance shall be made only to local authorities that:

(1) meet the requirements for financial capability set by the division to assure sufficient revenues to operate and maintain the facility for its useful life and to repay the financial assistance;

(2) pledge sufficient revenues for repayment of the financial assistance, provided that such revenues may by law be pledged for that purpose;

(3) agree to operate and maintain the wastewater facility so that the facility will function

properly over its structural and material design life, which shall not be less than twenty years;

(4) agree to properly maintain financial records and to conduct an audit of the project's financial records;

(5) provide a written assurance, signed by an attorney, that the local authority has or will acquire proper title, easements and rights-of-way to the property upon or through which the wastewater facility proposed for funding is to be constructed or extended;

(6) require the contractor of the construction project to post a performance and payment bond in accordance with the requirements of Section 13-4-8 NMSA 1978;

(7) provide a written notice of completion and start of operation of the facility; and

(8) appear on the priority list of the fund.

B. Financial assistance may be used as provided in the federal Clean Water Act for the following uses:

(1) to award loans to local authorities;

(2) to guarantee or to purchase insurance for local obligations to improve credit market access or reduce interest rates; and

(3) to provide a source of revenue or security for the payment of principal and interest on revenue or general obligation bonds issued by the state if the bond proceeds are deposited in the fund.

C. A local authority may use the proceeds from financial assistance made under the Wastewater Facility Construction Loan Act [74-6A-1 to 74-6A-6 NMSA 1978] to provide a local match for a federal wastewater facility construction grant as allowed pursuant to the federal Clean Water Act.

D. Financial assistance made pursuant to the Wastewater Facility Construction Loan Act shall not be used by the local authority on any project constructed in fulfillment or partial fulfillment of requirements made of a subdivider by the provisions of the Land Subdivision Act [47-5-1 to 47-5-8 NMSA 1978] or the New Mexico Subdivision Act.

E. Except as otherwise provided in Subsection F of this section, financial assistance shall be made for a period of time not to exceed twenty years with an annual interest rate to be the lesser of five percent or the rate of interest determined by the state board of finance for the bonds funding the project, so that the interest rate shall comply with federal arbitrage requirements. Financial assistance shall be repaid in equal annual installments with the first annual installment due within one year of completion of the project.

F. A zero percent interest rate shall be approved by the division when the following conditions have been met by the local authority:

(1) the construction project is designed using the most cost effective and dependable option;

(2) the project cannot feasibly be reduced in scope or phased, so as to bring it within available loan funds and within reasonable average user cost;

(3) the local authority's average user cost is at least fifteen dollars ($15.00) per month; and

(4) the local authority's median household income is less than three-fourths of the statewide nonmetropolitan median household income.

G. Financial assistance shall be made only to local authorities that employ or contract with a registered professional engineer to provide and be responsible for engineering services on the project. Such services include, but are not limited to, an engineering report, construction contract documents, supervision of construction and start-up services.

H. Financial assistance shall be made only for eligible items. For financial assistance made entirely from state funds, eligible items include the costs of engineering feasibility reports, contracted engineering design, inspection of construction, special engineering services, start-up services, contracted construction, materials purchased or equipment leased for force account construction, land or acquistion [aquisition] 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 federal Clean Water Act.

History: Laws 1986, ch. 72, § 6; 1989, ch. 323, § 5.

Cross-references. - As to state board of finance, see 6-1-1 NMSA 1978.

The 1989 amendment, effective June 16, 1989, substituted references to financial assistance for references to loans throughout the section, made a number of subsection redesignations, and otherwise rewrote the section to the extent that a detailed comparison would be impracticable.

New Mexico Subdivision Act. - See 47-6-1 NMSA 1978 and notes thereto.

Federal Clean Water Act. - As to the federal Clean Water Act, referred to in Subsections B and C, see 33 U.S.C. § 1251 et seq.

Federal wastewater facilities construction grants. - As to federal wastewater facilities construction grants, see 33 U.S.C. §§ 1281, 1282, and 1285.

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.

Cross-references. - For general provisions on environmental improvement, see 74-1-1 NMSA 1978 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pollution Control § 1 et seq.
Standing to sue for violation of state environmental regulatory statute, 66 A.L.R.4th 685.
39A C.J.S. Health & Environment § 1 et seq.

§ 74-7-2. Purpose of act.

The purpose of the Environmental Compliance Act [74-7-1 to 74-7-8 NMSA 1978] is to foster a sensitivity to the environment, to improve industry's compliance with environmental regulations that seek to maintain the delicate ecological balance while still pursuing the industrial and technological development of New Mexico, to implement a systematic procedure to review compliance with environmental regulations and to improve the environmental regulatory process by enhancing communication between industry and regulatory agencies.

History: Laws 1983, ch. 29, § 2.

§ 74-7-3. Definitions.

As used in the Environmental Compliance Act [74-7-1 to 74-7-8 NMSA 1978]:

A. "board" means the environmental improvement board;

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

C. "division" means the environmental improvement division of the health and environment department;

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.

§ 74-7-4. Board; duties.

The duties of the board are to:

A. develop and maintain regulations and standards regarding environmental auditing programs; and

B. promulgate other regulations as necessary to carry out the provisions of the Environmental Compliance Act [74-7-1 to 74-7-8 NMSA 1978].

History: Laws 1983, ch. 29, § 4.

§ 74-7-5. Adoption of regulations; notice and hearing; appeal.

A. No regulations shall be adopted pursuant to the Environmental Compliance Act [74-7-1 to 74-7-8 NMSA 1978] until after a public hearing by the board. As used in this section, "regulation" includes any amendment or repeal thereof. Hearings on regulations shall be held pertaining to that environmental area which is substantially affected by the regulation. In making a regulation, the board shall give the weight it deems appropriate to all relevant facts and circumstances presented at the hearing, including but not limited to:

(1) the protection of the health and welfare of both the general public and the individual worker and the maintenance of the delicate ecological balance;

(2) the necessity for and technical practicability and economic reasonableness of taking action with respect to environmental auditing programs;

(3) the need to protect private proprietary processes;

(4) the level of management support within the specific regulated entity for the environmental auditing program;

(5) a regulated entity's established procedures to ensure compliance and correction of any environmental standards that are violated; and

(6) compliance with the requirements of the following federal laws and their associated standards, regulations and state implementing directives:

(a) the National Environmental Policy Act of 1969;

(b) the Federal Water Pollution Control Act;

(c) the Safe Drinking Water Act;

(d) the Resource Conservation and Recovery Act of 1976;

(e) the Used Oil Recycling Act of 1980;

(f) the Clean Air Act;

(g) the Toxic Substances Control Act;

(h) the Occupational Safety and Health Act of 1970;

(i) the Noise Control Act of 1972;

(j) the Hazardous Materials Transportation Act; and

(k) the Comprehensive Environmental Response, Compensation and Liability Act of 1980.

B. Notice of the hearing shall be given at least thirty days prior to the hearing date and shall state the subject, time and place of the hearing and the manner in which interested persons may present their views. The notice shall state where interested persons may secure copies of any proposed regulation. The notice shall be published in a newspaper of general circulation in the area affected. Reasonable effort shall be made to give notice to all persons who have made a written request to the board for advance notice of hearings.

C. At the hearing, the board shall allow all interested persons reasonable opportunity to submit data, views or arguments, orally or in writing, pertaining to the feasibility of conducting environmental audits.

D. No regulation or amendment or repeal thereof adopted by the board shall become effective until thirty days after its filing pursuant to the State Rules Act [14-3-24, 14-3-25,

14-4-1 to 14-4-9 NMSA 1978].

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

History: Laws 1983, ch. 29, § 5.

Federal acts. - The National Environmental Policy Act of 1969 appears as 42 U.S.C. §§ 4321, 4331 to 4335 and 4341 to 4347.

The Federal Water Pollution Control Act is omitted from the U.S. Code as superseded by 33 U.S.C. § 1251 et seq.

The Safe Drinking Water Act appears as 21 U.S.C. § 349 and 42 U.S.C. §§ 201 and 300f et seq.

The Resource Conservation and Recovery Act of 1976 appears as 42 U.S.C. § 6901 et seq.

The Used Oil Recycling Act of 1980 appears as 42 U.S.C. §§ 6901a, 6903, 6914a, 6915, 6916, 6932, 6943 and 6948.

The Clean Air Act appears as 42 U.S.C. § 7401 et seq.

The Toxic Substances Control Act appears as 15 U.S.C. § 2601 et seq.

The Occupational Safety and Health Act of 1970 appears as 29 U.S.C. § 651 et seq. and numerous other provisions.

The Noise Control Act of 1972 appears as 42 U.S.C. § 4901 et seq. and 49 U.S.C. § 1431.

The Hazardous Materials Transportation Act appears as 49 U.S.C. § 1801 et seq.

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 appears as 42 U.S.C. § 9601 et seq., 9631 to 9633 and numerous other provisions.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Affirmative defenses in actions challenging omission or adequacy of environmental impact statement under § 102(2)(C) of National Environmental Policy Act of 1969 (42 USCS § 4332(2)(C)), 63 A.L.R. Fed. 18. Environmental and conservation groups' standing to challenge omission or adequacy of environmental impact statement required by § 102(2)(C) of National Environmental Policy Act of 1969 (42 USCS § 4332(2)(C)), 63 A.L.R. Fed. 446.

§ 74-7-6. Division; duties.

The division shall establish guidelines for regulated entities concerning environmental auditing programs pursuant to the rules and regulations adopted in compliance with the Environmental Compliance Act [74-7-1 to 74-7-8 NMSA 1978].

History: Laws 1983, ch. 29, § 6.

§ 74-7-7. Regulated entities; environmental auditing programs.

Regulated entities may in cooperation with the division develop environmental auditing programs in compliance with the rules and regulations adopted pursuant to the Environmental Compliance Act [74-7-1 to 74-7-8 NMSA 1978] and may then apply to the division for certification. These environmental auditing programs shall be reviewed by the division and, upon a determination of compliance with established rules and regulations, shall be certified.

History: Laws 1983, ch. 29, § 7.

§ 74-7-8. Board and division; incentives.

Regulated entities shall be allowed a reasonable time as determined by the division to correct any potential problem areas identified in the environmental auditing process. The board and division shall develop incentives to encourage regulated entities to participate in the Environmental Compliance Act [74-7-1 to 74-7-8 NMSA 1978].

History: Laws 1983, ch. 29, § 8.

Article 8

Solid Waste Incineration

§ 74-8-1. Solid waste incineration prohibited.

No solid waste shall be disposed by incineration 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 or by interested persons prescribing allowable methods and standards for solid waste incineration. These regulations shall include stringent emissions discharge limits that protect public health and safety including but limited to establishing emission discharge limits to prevent the violation of any air quality or emission standards adopted by the

environmental improvement board.

As used in this section:

A. "solid waste" means any garbage, refuse, septage, 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; 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.

Effective dates. - Laws 1989, ch. 279, § 4, makes the act effective on July 1, 1989.

§ 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. These regulations shall prescribe that incinerator ash be managed as solid, special or hazardous waste.

History: Laws 1989, ch. 279, § 2.

Effective dates. - Laws 1989, ch. 279, § 4, makes the act effective on July 1, 1989.

§ 74-8-3. Exemptions.

A. For purposes of this act [74-8-1 to 74-8-3 NMSA 1978], medical waste incinerators generating less than three tons per day and medical waste incinerators that are in operation as of the effective date of this act are exempt. Utility boilers that do not use solid waste as a primary fuel are exempt.

B. The prohibitions set forth in Sections 1 and 2 [74-8-1, 74-8-2 NMSA 1978] of this act shall not apply to incinerators or the disposal of ash from incinerators which have interim status pursuant to the Hazardous Waste Act [Chapter 74, Article 4 NMSA 1978] and for which application B of Section 74-4-4.2 NMSA 1978 has been submitted to the environmental improvement division of the health and environment department prior to January 1, 1989.

History: Laws 1989, ch. 279, § 3.

Effective dates. - Laws 1989, ch. 279, § 4, makes the act effective on July 1, 1989.