

US EPA ARCHIVE DOCUMENT

ATTORNEY GENERAL'S STATEMENT FOR FINAL AUTHORIZATION

I hereby certify, pursuant to my authority as Assistant Attorney General contained in Sections 8-5-2.D and 5.A NMSA 1978, and in accordance with Section 3006(c) of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act, as amended (42 USC 6901, et. seq.), and 40 C.F.R. 271 that, in my opinion the laws of the State of New Mexico provide adequate authority to carry out the program set forth in the "Program Description" submitted by the Environmental Improvement Division of the New Mexico Health and Environment Department ("Division"). The specific authorities provided, which are contained in statutes or regulations lawfully adopted at the time of this Statement and which are or shall be in full force and effect at the time this Statement is signed and which shall be fully effective by the time the program is approved, include those identified below.

I. IDENTIFICATION AND LISTING

A. State statutes and regulations define hazardous waste so as to control all the hazardous waste controlled under 40 C.F.R. 261 as indicated in Checklist I A.

[Federal Authority: RCRA § 3001(b) (42 USC 6921); 40 C.F.R. 261, 271.9.]

Citation of Laws and Regulations; Dates of Enactment and Adoption

§ 74-4-3.H. NMSA 1978, enacted April 14, 1981;
Hazardous Waste Management Regulations ("HWMR" or the "Regulations"),
Sections 102 and 201, adopted November 19, 1982, as amended, effective February 4, 1984.

Remarks of the Attorney General

1. Although the New Mexico definition of "disposal" is different from the federal definition, the effect is equivalent. All conduct covered by the federal definition are covered by the general terms "abandon, deposit, inter, or otherwise discard material..." which are part of the New Mexico definition. The general term "deposit" would include all acts, such as spilling or leaking, which resulted in the laying down or accumulating of materials.

§§ 102.A.20 and 201.A.1., which are clearly authorized by the statute, more fully explain the activities covered by the statute:

102.A.20 - "Disposal" means to abandon, deposit, inter, or otherwise discard material as a final action after its use has been achieved or a use is no longer intended so that such material may enter the environment.

201.A.1.d - A material is 'disposed of' if it is discharged, deposited, injected, dumped, spilled, leaked or placed into or on any land or water so that such material or any constituent thereof may enter the environment or be emitted into the air or discharged into ground or surface water. (Emphasis added)

The regulatory provisions express the State's interpretation of the statutory definition and will be accorded great deference and followed if not otherwise wholly inconsistent with the statute. Bokum Resources Corp. v. New Mexico Water Quality Control Commission, 93 N.M. 546, 603 P. 2d. 285 (1979). This is especially true since the Environmental Improvement Board (EIB) is given express direction to adopt regulations equivalent to those regulations which EPA adopts. §74-4-4 NMSA 1978.

2. The New Mexico definition of "person" found at § 74-4-3.J. NMSA 1978, includes all those parties who are within the definition of that term under the federal regulation. 40 C.F.R. § 260.10. Though the New Mexico definition does not enumerate the entirety of those parties in the federal definition it nevertheless includes all parties listed in 40 CFR §260.10. This conclusion is based upon the catch all phrase "... or any other legal entity, its legal representatives, agents or assignees;" in the New Mexico definition. For comparison note that 40 C.F.R. § 260.10 "person" has no such catch all. The effect of the catch all is to include those parties who are not specifically enumerated.

Specifically, the State's definition includes federal agencies. In Southern Union Gas Co. v. New Mexico Public Service Commission, 82 N.M. 405, 482 P. 2d. 913 (1971) (overruled in part by De Vargas Savings & Loan Association v. Campbell, 87 N.M. 469, 535 P. 2d. 1320 (1975)) the New Mexico Supreme Court enumerated statutes that "specifically included the U.S." as a "person." Id. at 406. The Court listed as examples statutes that defined "person" as "the state and all of its political subdivisions" [Human Rights Act], "governmental subdivision or public or private organization of any character other than an agency" [Administrative Procedures Act], and "government or political subdivision, public corporation, public authority" [Uniform Disposition of Unclaimed Property Act]. Clearly, the language used in the Act is within type classified by the Supreme Court as including federal agencies.

Further, inclusion of the United States or federal agencies within the word "person" generally depends on the purpose, context, subject matter and legislative history of the statute in question. U.S. v. Cooper Corp., 312 U.S. 600, 604-605 (1941); Ohio v. Helvering, 292 U.S. 360, 370 (1934). A statute can be construed to include the U.S. if such construction is necessary to carry out the purpose of the statute. Helvering v. Stockholms Enskilda Bank, 293 U.S. 84, 93 (1934). Here, the stated purpose of the Act is "to help insure 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." Section 74-4-2 NMSA 1978. Additionally, the Act was designed to allow New Mexico to assume authorization under RCRA. It is consistent with the Act's purpose, context, subject matter, and legislative history to include federal agencies within the definition of "person."

3. In addition to examining the definition of "hazardous waste" in the Act, § 74-4-3.H NMSA 1978, it is also necessary to analyze the New Mexico regulatory definition, particularly § 201.A.5 regarding used, re-used, recycled or reclaimed wastes, to determine that New Mexico's universe of hazardous waste is the same as the federal universe. Note the equivalency of § 201.A.5 with 40 C.F.R. § 261.6(a).

B. State statutes and regulations contain a list of hazardous waste and characteristics for identifying hazardous waste which encompass all wastes controlled under 40 CFR 261 as indicated in Checklist I B and C.

[Federal Authority: RCRA § 3001(b) (42 USC 6921); 40 CFR 261, 271.9.]

Citation of Laws and Regulations; Dates of Enactment and Adoption

§§ 74-4-3.H. & 74-4-4.A. NMSA 1978, enacted April 14, 1981.
HWMR, Sections 201B. & C., adopted November 19, 1982, as amended, effective February 4, 1984.

II. STANDARDS FOR GENERATORS

A. State statutes and regulations provide coverage of all the generators covered by 40 CFR 262 as indicated in Checklist II.

[Federal Authority: RCRA § 3002 (42 USC 6922); 40 CFR 262, 271.10]

Citation of Laws and Regulations; Dates of Enactment and Adoption

§ 74-4-4.B NMSA 1978, enacted April 14, 1981;
HWMR, Sections 102.A.36, 203.A & 204, adopted November 19, 1982, as amended, effective February 4, 1984.

Remarks of the Attorney General

1. § 74-4-3.E NMSA 1978 defines "generator" as "any person producing hazardous waste." HWMR, § 102.A.36 further defines the term to mean "any person, by site, whose act or process produces hazardous waste identified or listed in Part II 201, or whose act first causes a hazardous waste to become subject to regulation." The regulation is the EIB's interpretation of the statutory term and "is persuasive and will not be lightly overturned." Perea v. Baca, 94 N.M. 624, 627, 614 P. 2d. 541, 544 (1980). The EIB's construction of the statutory term will be followed unless it is "clearly incorrect." Bokum Resources Corp. v. New Mexico Water Quality Control Commission, 93 N.M. 546, 555, 603 P. 2d. 285, 294 (1979).

The definition of "generator" in HWMR, § 102.A.36 is identical to the one found at 40 C.F.R. § 260.10. Moreover, the regulations cover all "generators" covered by 40 C.F.R. Part 262. HWMR, §§ 203.A & 204.

2. There has been some question of whether the Act limits the out of state shipment of hazardous waste. The apparent limiting effect of § 74-4-4.B (5) NMSA 1978 is illusory. Hazardous waste can be shipped out of New Mexico. The EIB has adopted regulations which interpret and implement the state statute in a fashion which is equivalent to the federal regulations. § 102.A.62 of the Regulations defines "off-site" as "any site which is not "on-site". This definition is equivalent to the federal definition of "Off-site". 40 C.F.R. § 270.2. New Mexico's regulatory

definition is the State's interpretation and should be accorded great deference and followed if not otherwise wholly inconsistent with the statute. Bokum Resources; See Udall v. Tallman, 380 U.S. 1 (1965). This is especially true since the EIB is given express direction to adopt regulations equivalent to those regulations which EPA adopts. § 74-4-4 NMSA 1978.

III. STANDARDS FOR TRANSPORTERS OF HAZARDOUS WASTE

A. State statutes and regulations provide coverage of all the transporters covered by 40 CFR 263 as indicated in Checklist III.

[Federal Authority: RCRA § 3003 (42 USC 6923); 40 CFR 263.10, 271.11]

Citation of Laws and Regulations; Dates of Enactment and Adoption

§ 74-4-4.C, G, & H NMSA 1978, enacted April 14, 1981;
HWMR, Sections 203.B. & 205., adopted November 19, 1982, as amended, effective February 4, 1984.

IV. STANDARDS FOR FACILITIES

A. State statutes and regulations provide permit standards for hazardous waste management facilities covered by 40 CFR 264 as indicated in Checklist IV A.

[Federal Authority: RCRA § 3004 (42 USC 6924); 40 CFR 264, 271.12]

Citation of Laws and Regulations; Dates of Enactment and Adoption

§§ 74-4-4.D & E NMSA 1978, enacted April 14, 1981;
§ 74-4-4.2 NMSA 1978, enacted April 14, 1981;
HWMR, Sections 203.C., 206.A., 206.B., 206.C., 206.D.,
301, 302, & 303, adopted November 19, 1982, as amended, effective February 4, 1984.

B. State statutes and regulations provide for interim status and include interim status standards for hazardous waste management facilities covered by 40 C.F.R. 265 as indicated in Checklist IV B;

1. State statutes and regulations authorize owners and operators of hazardous waste management facilities which would qualify for interim status under the federal program to remain in operation until a final decision is made on the permit application.

2. State law and regulations authorize continued operation of hazardous waste management facilities provided that owners and operators of such facilities comply with standards at least as stringent as EPA's interim status standards at 40 C.F.R. 265; and

3. State law and regulations assure that any facility qualifying for State interim status continues to qualify for Federal interim status.

[Federal Authority: RCRA § 3005(e) (42 USC 6925); 40 C.F.R. 265, 271.13(a)]

Citation of Laws and Regulations; Dates of Enactment and Adoption

§§ 74-4-4.D & E, 4.2, & 9 NMSA 1978, enacted April 14, 1981;
HWMR, Sections 203.C., 206.A., 206.B., 206.C.,
301, 302, & 303, adopted November 19, 1982, as amended, effective February 4,
1984.

V. REQUIREMENTS FOR PERMITS

State statutes and regulations provide requirements for permits as indicated in Checklist V.

[Federal Authority: RCRA § 3005 (42 USC 6925); RCRA § 7004 (42 USC 6974); 40 C.F.R. 271.13 and .14]

Citation of Laws and Regulations; Dates of Enactment and Adoption

§§ 74-4-4.D. & E., & 4.2 NMSA 1978, enacted April 14, 1981;
HWMR, Sections 301, 302, & 303, adopted November 19, 1982, as amended, effective
February 4, 1984.

Remarks of the Attorney General

1. § 74-4-4.D NMSA 1978 authorizes the EIB to adopt broad performance standards regulations concerning hazardous waste TSD facilities, including regulations governing the location, design and construction of such facilities, id at subsection (4). EIB has exercised this power and has adopted regulations equivalent to 40 C.F.R. § 270.10 (f) which authorizes imposition of a construction ban. §302.A.1.c..HWMR.
2. § 74-4-4.F NMSA 1978 authorizes the EIB to adopt regulations "establishing procedures for the issuance, suspension, and revocation of permits". The Board has exercised this authority and has adopted a comprehensive scheme governing permit issuance, modification, suspension and revocation which appears at pp. III - 46, 47, 48, and 49 in the Regulations. These regulations are equivalent to those found at 40 C.F.R. § 270.41 and 42: The Division notes that modification procedures are not specifically authorized by § 74-4-4.F, supra. However, § 74-4-4.2 NMSA 1978 expressly authorizes the Division to modify a permit. Certainly, §§ 74-4-4.F and 4.2, when read together, authorize the EIB to adopt procedures for modification of permits. Moreover the Board's adoption of these procedures should be accorded great deference and followed. See Bokum Resources.
3. § 74-4-4.2 D. NMSA 1978 requires that an "... opportunity for a public hearing [shall be afforded] all interested persons". In order to harmonize the New Mexico statute with the State's regulation and to be equivalent with federal regulations NMEID is amending its MOA to insure that all "interested persons" will be given an opportunity for a hearing. NMEID's authority to provide such assurances in the MOA is based upon the harmonious reading it gives to the terms "interested persons" in the statute and "affected persons" in the regulations. "Affected" and "interested" are not in conflict. For example, one affected is "[a]cted upon, influenced, concerned." Black's Law Dictionary (Rev. 4th Ed. 1968). Admittedly, "affected" and "interested" are different terms. However,

they are functionally equivalent. Since any purported conflict between the statute and regulation is apparent and not real the two terms should be construed harmoniously. Northern Natural Gas Company v. Grounds, 441 F.2d 704 (10th Cir. 1967). The Division's interpretation of its own regulation controls unless plainly erroneous or inconsistent with the State's statute. Bokum Resources.

4. Additionally, the exemption provided by §74-4-3.1 NMSA 1978 for the treatment, storage or disposal of wastes under a permit issued pursuant to the [N.M.] Surface Mining Act, §§ 69-25A-1 to 69-25A-35 NMSA 1978, or the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA) is equivalent to the exemption found in RCRA at 42 U.S.C. § 6925(f) (3005(f)).

RCRA exempts the "treatment, storage, or disposal of coal mining wastes and overburden which are covered by [a permit issued or approved under the Surface Mining Control and Reclamation Act of 1977]." RCRA § 3005(f), 42 U.S.C. § 6925(f). A permit issued pursuant to the New Mexico Surface Mining Act is a "permit issued or approved under [SMCRA]."

SMCRA, like RCRA, provides for federal or state issuance of surface mining and reclamation permits. 30 U.S.C. §§ 1253 & 1254. New Mexico's program was approved by the Secretary of Interior in 1980, pursuant to SMCRA. 30 C.F.R. § 931.10. Moreover, SMCRA defines "permit" to mean "a permit to conduct surface coal mining and reclamation operations issued by the State regulatory authority pursuant to a State program or by the Secretary [of Interior] pursuant to a Federal program." 30 U.S.C. § 1291(15). (Emphasis added.) A "State program" is "a program established by a State pursuant to [30 U.S.C. § 1253] to regulate surface coal mining and reclamation operations, on land within such State in accord with the requirements of [SMCRA] and regulations issued by the Secretary [of Interior] pursuant to [SMCRA]." 30 U.S.C. § 1291(25). New Mexico's program was established to assume such responsibility. Section 69-25A-2.H NMSA 1978. Therefore, a permit issued under the state Act is "issued or approved under [SMCRA]."

Additionally, under the New Mexico Surface Mining Act, a surface mining permit must be obtained by anyone who "... engages[s] in or carri[es] out any surface coal mining operations...", § 69-25A-9.A NMSA 1978. "[S]urface coal mining operations" under the State's Surface Mining Act not only includes "...excavation for the purpose of obtaining coal," but the term is also defined to mean "... uses of explosives and blasting and in situ distillation or retorting, leaching or other chemical or physical processing and the cleaning, concentrating or other processing or preparation, including loading of coal at or near the mine site." § 69-25A-3.P NMSA 1978. Therefore, under the State's Surface Mining Act such permits must not only be obtained for the treatment, storage, or disposal of coal mining wastes and overburden but for other activities as well.

The practical effect of considering §74-4-3.1 NMSA 1978 and § 69-25 A-4 P NMSA 1978 in combination as they bear on the issue of equivalency with 42 U.S.C. § 6921 is that so long as a party who holds a New Mexico surface mining permit limits his activities to "... the treatment, storage or disposal of [mining] wastes under a permit issued pursuant to the [N.M.] Surface

Mining Act", § 74-4-3.1 NMSA 1978, [emphasis added], his conduct is not governed by the Act. Thus, the N.M. exemption is equivalent to that in RCRA, 42.U.S.C. § 6921(f) (3005 (f)). To the extent that the N.M. holder of a surface mining permit engages in activities which go beyond mere treatment, storage or disposal of mining wastes or overburden he may nevertheless have to obtain a hazardous waste permit in addition to the N.M. surface mining permit.

VI. INSPECTIONS

State law provides authority for officers engaged in compliance evaluation activities to enter any conveyance, vehicle, facility or premises subject to regulation or in which records relevant to program operation are kept in order to inspect, monitor, or otherwise investigate compliance with the State program including compliance with permit terms and conditions and other program requirements. (States whose law requires a search warrant prior to entry conform with this requirement.)

[Federal Authority: RCRA §3007 (42 USC 6927), 40 C.F.R. 271.15]

Citation of Laws and Regulations; Dates of Enactment and Adoption
§ 74-4-4.3 NMSA 1978, enacted April 14, 1981.

Remarks of the Attorney General

Section 74-4-4.3 NMSA 1978 provides that: "[a]ny person who generates, stores, treats, transports, disposes of or otherwise handles or has handled hazardous wastes shall, upon request, furnish information relating to such wastes and permit the Director or his authorized representatives: (1) 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; and (2) to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling for such wastes.

Clearly, Division employees conducting compliance activities are "authorized representatives" within the meaning of § 74-4-4.3 supra. Therefore, the Act "provides authority for officers engaged in compliance evaluation activities to enter any conveyance, vehicle, facility or premises, subject to regulation or in which records relevant to program operation are kept in order to inspect, monitor, or otherwise investigate compliance with the state program including compliance with permit terms and conditions and other program requirements."

VII. ENFORCEMENT REMEDIES

State statutes and regulations provide the following:

- A. Authority to restrain immediately by order or by suit in State court any person from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment.

[Federal Authority: RCRA § 7003 (42 USC 6926); 40 C.F.R. 271.16(a)(1)]

Citation of Laws and Regulations; Dates of Enactment and Adoption
§ 74-2-10 NMSA 1978; § 74-4-7.A NMSA 1978;

§ 74-2-13 NMSA 1978, enacted April 7, 1983; § 74-6-11 NMSA 1978.

Remarks of the Attorney General

The State has the authority to bring suit to immediately restrain any person contributing to the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste which may present an imminent and substantial endangerment to health or the environment. Such suit rests on three distinct theories: (1) violation of the Hazardous Waste Act and Regulations; (2) public nuisance (statutory) and (3) public nuisance (common law).

Pursuant to § 74-4-13.A NMSA 1978 the Division Director can file a court action to immediately restrain activity which "... may present an imminent and substantial danger to health or the environment." Additionally, under the same section, the Director can also issue an administrative order whenever necessary "... to protect the health and environment." The "48" hour provision in § 74-4-7.A NMSA 1978 is inapplicable to the immediate restraint of unauthorized activity under § 74-4-13 NMSA 1978.

The provisions of § 74-4-13 NMSA 1978 are identical to the provisions of § 7003 of RCRA, 42 USC 6926.

Additionally, § 74-4-7.A. NMSA 1978 authorizes the Division to "take any action necessary or appropriate to protect persons from injury or other harm which might arise from hazardous substance incidents..." If such action taken is to continue beyond forty-eight (48) hours after the Division is notified of such incident or becomes involved, the Director is required to file suit in district court to extend such authority. A "hazardous substance incident" is defined as "any emergency incident involving a chemical or chemicals... which incident creates the reasonable probability of injury to human health or property. § 74-4-3.G NMSA 1978. Additionally, where the endangerment is through the air or water, the Director has authority to order immediate abatement of the pollution creating the emergency condition. Sections 74-2-10 and 74-6-11, NMSA 1978.

Further, even if the authority contained in §§ 74-2-10, 74-4-7.A., 74-4-13 and 74-6-11, supra is insufficient to abate the condition, the Division has the authority to seek immediate abatement where the action constitutes a violation of the Hazardous Waste Act and Regulations. The courts, through their equity jurisdiction, may take action to abate the conditions, even though no such express authority is provided in the Act. State v. Compere 44 N. M. 414, 103 P. 2d. 273 (1940). "[I]njunctive relief is granted to prevent irreparable injury for which there is no adequate and complete remedy at law." Hines Corp. v. City of Albuquerque, 95 N. M. 331, 621 P. 2d 1116 (1980).

A showing of a serious threat of imminent harm is sufficient where such harm will result in irreparable injury.... Where the imminent harm or conduct is or will be of a continuous nature, the constant recurrence of which renders a remedy at law inadequate, except by a multiplicity of suits, then the injury is irreparable at law and relief by injunction is therefore appropriate.

Winrock Enterprises, Inc. v. House of Fabrics of New Mexico, Inc., 91 N. M. 661, 664, 579 P. 2d 787, 790 (1978). Scott v. Jordan, 99 N. M. 567, 661 P. 2d. 59 (Ct. App. 1983). Where a condition constituting a violation of the Hazardous Waste Act and

Regulations exists and is causing immediate endangerment to health or the environment, the State can, and will, seek a temporary restraining order or preliminary injunction to abate the violation.

In addition to the theories outlined above, and for those fact situations not covered by the Hazardous Waste Act, the State has causes of action for statutory and common law public nuisance. Section 30-8-1 NMSA 1978 states:

A public nuisance consists of knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority which is either:

- A. injurious to public health, safety, morals or welfare; or
- B. interferes with the exercise and enjoyment of public rights, including the right to use public property.

Section 30-8-2, NMSA 1978 provides:

Polluting water consists of knowingly and unlawfully introducing any object or substance into any body of public water causing it to be offensive or dangerous for human or animal consumption or use. Polluting water constitutes a public nuisance.

For purposes of this section, "body of water" means any public: river or tributary thereof, stream, lake, pond, reservoir, acequia, canal, ditch, spring, well or declared or known ground waters.

Similarly, a public nuisance in common law is "anything menacing the health of the public generally." State v. Compere, 44 N.M. at 421. The statutory remedies to abate nuisances do not as a rule, supersede the common law remedies. State v. Johnson, 52 N. M. 229, 195 P. 2d 1017 (1948).

"It is firmly established in this jurisdiction that nuisances that adversely affect the public health, welfare or safety may be enjoined." Town of Clayton v. Mayfield, 82 N. M. 596, 485 P. 2d 352 (1971).

The fact that acts constituting a public nuisance are punishable criminally does not deprive equity of its power to enjoin a public nuisance where there is ample proof of irreparable injury to the public health, welfare or safety.

Id. State v. Compere, 44 N. M. 414, 103 P. 2d. 273. Generally, injunctive remedies include preliminary injunctions and temporary restraining orders.

In the case of imminently hazardous conditions, the State would sue under theories of statutory and common law public nuisance and would seek injunctive relief in the nature of a preliminary injunction or temporary restraining order. Thus, the State does have the authority to bring suit to immediately restrain any person from contributing to the handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste which may present an imminent and substantial endangerment to health or the environment.

- B. Authority to sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit.

[Federal Authority: RCRA § 3008 (42 USC 6928); 40 C.F.R. 271.16(a)(2)]

Citation of Laws and Regulations; Dates of Enactment and Adoption...

§ 74-4-10 NMSA 1978, enacted April 14, 1981;
§ 74-4-13 NMSA 1978, enacted April 7, 1983.

Remarks of the Attorney General

§ 74-4-10 NMSA 1978 provides that "[w]henver on the basis of any information the Director determines that any person is in violation of any requirements of the Hazardous Waste Act or regulations promulgated thereunder... the Director may commence a civil action in district court for appropriate relief, including a temporary or permanent injunction." Additionally, § 74-1-6.E NMSA 1978 provides that the Division has the power to "enforce the rules, regulations and orders promulgated by the Board and environmental management and consumer protection laws for which the [Division] is responsible by appropriate action in courts of competent jurisdiction."

The Division can enjoin threatened violations of program requirements. This can be done by administrative order followed by court action where such orders are not followed. § 74-4-10.A NMSA 1978. Where the threatened harm is imminent, the Division can act immediately through court action or issue an administrative order. § 74-4-13 NMSA 1978. These enforcement options apply to violations of permit requirements since these enforcement mechanisms apply to regulation violations and the regulations impose the duty to comply with the permit requirements. HWMR, § 302.F.

Thus, the Division has the "authority to sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement."

- C. Authority to assess or sue to recover in court civil penalties in at least the amount of \$10,000 per day for any program violation.

[Federal Authority: RCRA § 3008 (42 USC 6928); 40 C.F.R. 271.16(a)(3)(i)]

Citation of Laws and Regulations; Dates of Enactment and Adoption

§ 74-4-12 NMSA 1978; enacted April 14, 1981

§ 74-4-12 NMSA 1978 provides for the assessment of a civil penalty for violation of the Act, any Regulation promulgated thereunder, or any compliance order. This includes the violation of any permit requirement. See HWMR, § 302.F. Such penalty shall "not to exceed ten thousand dollars (\$10,000) for each day during any portion of which a violation occurs."

- D. Authority to obtain criminal penalties including fines in at least the amount of \$10,000 per day for any program violation.

[Federal Authority: RCRA § 3008 (42 USC 6928); 40 C.F.R. 271.16(a)(3)(ii)]

Citation of Laws and Regulations; Dates of Enactment and Adoption

§ 74-4-11 NMSA 1978; enacted April 14, 1981

Remarks of the Attorney General

The language of § 74-4-11 NMSA 1978 and §3008 (d) of RCRA concerning criminal violations are equivalent. There is no State equivalent to RCRA §3008 (f), 42 U.S.C. §6928 (f). The term, "knowingly" has not been construed under the Act. New Mexico state courts should follow RCRA and federal case law construing the term "knowingly", since the Act's provisions were taken from RCRA. Featherstone v. Bureau of Revenue, 58N.M. 557, 561, 273 P. 2d752 (1954). See Benavidez v. Benavidez, 99 N. M. 535, 660 P. 2d. 1017 (1983).

Thus, the Act allows the Division to seek criminal sanctions for violation of the Act and Regulations. § 74-4-11 NMSA 1978 allows the courts to impose a fine of not more than \$10,000 for the first conviction, and not more than \$25,000 for the second conviction. Jail sentences are also authorized for such convictions.

VIII. PUBLIC PARTICIPATION IN THE STATE ENFORCEMENT PROCESS

State laws and regulations provide for public participation in the State enforcement process by providing either:

A. Authority which allows intervention as of right in any civil or administrative action to obtain the remedies specified in VII A., B. and C. above by any citizen having an interest which is or may be adversely affected; or

B. Assurances that the state agency or enforcement authority will:

- (1) Investigate and provide written response to all citizen complaints duly submitted.
- (2) Not oppose intervention by any citizen where permissive intervention may be authorized by statute, rule, or regulation; and
- (3) Publish and provide at least 90 days for public comment on any proposed settlement of a State enforcement action.

[Federal Authority: RCRA § 7004, 40 CFR 123.128(f)(2)]

Citation of Laws and Regulations; Dates of Enactment and Adoption

N.M.R. Civ. P., Rule 24(a).

Remarks of the Attorney General

Rule 24(a) of the New Mexico Rules of Civil Procedure provides for intervention as of right "when the applicant [for intervention] claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest...." N.M.R. Civ. P., Rule 24(a) is similar to Rule 24(a), F.R. Civ. P.

Where a citizen has an interest which is or may be affected by Division enforcement action, he may intervene in such action pursuant to Rule 24, NMR Civ. P. The Division has also agreed in the MOA that it will not oppose intervention by any citizen on the grounds that his interests are adequately represented by the Division. None of the enforcement specified in VII is done through administrative proceedings.

IX AUTHORITY TO SHARE INFORMATION WITH EPA

State statutes and regulations provide authority for any information obtained or used in the administration of the State program to be available to EPA upon request without restriction.

[Federal Authority: RCRA § 3007(b) (42 USC 6927); 40 CFR 123.132(a)]

Citation of Laws and Regulations; Dates of Enactment and Adoption

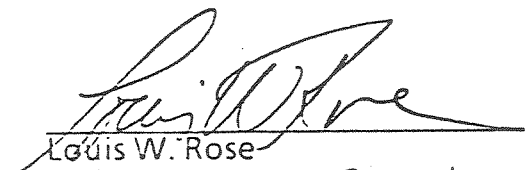
§ 74-4-4.3 C NMSA 1978, enacted April 14, 1981.

HWHR, Sections 303.P., adopted November 19, 1982, as amended, effective February 4, 1984.

Remarks of the Attorney General

Section 74-4-4.3.C NMSA 1978 provides that the Division, without respect for confidentiality, may disclose any "record, report, document or information" to "officers, employees or authorized representatives of the United States concerned with carrying out the Resource Conservation and Recovery Act." See also Section 303.P. of the Regulations.

Thus, the Act and Regulations "provide authority for any information obtained or used in the administration of the State program to be available to EPA upon request without restriction."


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