

US EPA ARCHIVE DOCUMENT

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 employee [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

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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.

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

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

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

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

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

Governmental recovery of cost of hazardous waste

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

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

Right to maintain action based on violation of

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

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

74-4-2. Purpose.

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

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

74-4-3. Definitions.

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

- A. "board" means the environmental improvement board;
- B. "director" or "secretary" means the secretary of environment;
- C. "disposal" means the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters;
- D. "division" or "department" means the department of environment;
- E. "federal agency" means any department, agency or other instrumentality of the federal government and any independent agency or establishment of that government, including any government corporation and the government printing office;
- F. "generator" means any person producing hazardous waste;
- G. "hazardous agricultural waste" means hazardous waste generated as part of his licensed activity by any person licensed pursuant to the Pesticide Control Act or any hazardous waste designated as hazardous agricultural waste by the board, but does not include animal excrement in connection with farm, ranch or feedlot operations;
- H. "hazardous substance incident" means any emergency incident involving a chemical or chemicals, including but not limited to transportation wrecks, accidental spills or leaks, fires or explosions, which incident creates the reasonable probability of injury to human health or property;
- I. "hazardous waste" means any solid waste or combination of solid wastes which because of their quantity, concentration or physical, chemical or infectious characteristics may:
 - (1) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or
 - (2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed. "Hazardous waste" does not include any of the following, until the board determines that they are subject to Subtitle C of the federal Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6901 et seq.: drilling fluids, produced waters and other wastes associated with the exploration, development or production of crude oil or natural gas or geothermal energy, any fly ash waste, bottom ash waste, slag waste, flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels, solid waste from the extraction, beneficiation or processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore or cement kiln dust waste;
- J. "manifest" means the form used for identifying the quantity, composition, origin, routing and destination of hazardous waste during transportation from point of generation to point of disposal, treatment or storage;

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

L. "regulated substance" means:

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

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

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

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

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

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

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

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

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

(2) septic tank;

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

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

(5) storm water or wastewater collection system;

(6) flow-through process tank;

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

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

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

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

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

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

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

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

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

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

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

74-4-3.1. Application of act.

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

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

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.

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

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

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

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

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

(1) for the identification and listing of hazardous wastes, taking into account toxicity, persistence and degradability, potential for accumulation in tissue and other related factors, including flammability, corrosiveness and other hazardous characteristics; provided that, except as authorized by Sections 74-4-3.3 and 74-8-2 NMSA 1978, the board shall not identify or list any solid waste or combination of solid wastes as a hazardous waste that has not been listed and designated as a hazardous waste by the federal environmental protection agency pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended;

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

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

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

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

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

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

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

(g) submission of reports to the secretary at such times as the secretary deems necessary, setting out the quantities of hazardous waste identified or listed pursuant to the Hazardous Waste Act [Chapter 74, Article 4 NMSA 1978] that the generator has generated during a particular time period and the disposition of all hazardous waste reported, the efforts undertaken during a particular time period to reduce the volume and toxicity of waste generated and the changes in volume and toxicity of waste actually achieved during a particular time period in comparison with previous time periods; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) the taking of corrective action beyond a facility's boundaries where necessary to protect human health and the environment unless the owner or operator of the facility concerned demonstrates to the satisfaction of the secretary that, despite the owner's or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such action. Regulations adopted and promulgated under this subparagraph shall take effect immediately and shall apply to all facilities operating under permits issued under Paragraph (6) of this subsection and to all landfills, surface impoundments and waste pile units, including any new units, replacements of existing units or lateral expansions of existing units, that receive hazardous waste after July 26, 1982. No private entity shall be precluded by reason of criteria established under Subparagraph (f) of this paragraph from the ownership or operation of facilities providing hazardous waste treatment, storage or disposal services where the entity can provide assurance of financial responsibility and continuity of operation consistent with the degree and duration of risks associated with the treatment, storage or disposal of specified hazardous waste;

(6) requiring each person owning or operating or both an existing facility or planning to construct a new facility for the treatment, storage or disposal of hazardous waste identified or listed under this subsection to have a permit issued pursuant to requirements established by the board;

(7) establishing procedures for the issuance, suspension, revocation and modification of permits issued under Paragraph (6) of this subsection, which regulations shall provide for public notice, public comment and an opportunity for a hearing prior to the issuance, suspension, revocation or major modification of any permit unless otherwise provided in the Hazardous Waste Act;

(8) defining major and minor modifications; and

(9) establishing procedures for the inspection of facilities for the treatment, storage and disposal of hazardous waste that govern the minimum frequency and manner of the

inspections, the manner in which records of the inspections shall be maintained and the manner in which reports of the inspections shall be filed; provided, however, that inspections of permitted facilities shall occur no less often than every two years.

B. The board shall adopt regulations:

- (1) concerning hazardous substance incidents; and
- (2) requiring notification to the department of any hazardous substance incidents.

C. The board shall adopt regulations concerning underground storage tanks as may be necessary to protect public health and the environment that are equivalent to and no more stringent than federal regulations adopted by the federal environmental protection agency pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended, and that shall include:

- (1) standards for the installation, operation and maintenance of underground storage tanks;
- (2) requirements for financial responsibility;
- (3) standards for inventory control;
- (4) standards for the detection of leaks from and the integrity testing and monitoring of underground storage tanks;
- (5) standards for the closure and dismantling of underground storage tanks;
- (6) requirements for record-keeping; and
- (7) requirements for the reporting, containment and remediation of all leaks from any underground storage tanks.

X D. Notwithstanding the provisions of Subsection A of this section, the board may adopt regulations for the management of hazardous waste and hazardous waste transformation that are more stringent than federal regulations adopted by the federal environmental protection agency pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended, if the board determines, after notice and public hearing, that such federal regulations are not sufficient to protect public health and the environment. As used in this subsection, "transformation" means an incinerator, pyrolysis, distillation, gasification or biological conversion other than composting.

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

History: 1953 Comp., § 12-9B-4, enacted by Laws 1977, ch. 313, § 4; 1981 (1st S.S.), ch. 8, § 4; 1987, ch. 179, § 3; 1989, ch. 322, § 2; 1992, ch. 43, § 2; 1993, ch. 127, § 1.

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

✓ **The 1992 amendment,** effective March 6, 1992, substituted "secretary" for "director" in Subsections A(2)(g), A(5)(c), and in the first sentence of Subsection A(5)(i); inserted "adopted and" in the second sentence of Subsection A(5)(i); substituted "owning or operating or both" for "owning and operating" in Subsection A(6); rewrote Subsection A(7); added present Subsection A(8); redesignated former Subsection A(8) as present Subsection A(9); substituted "department" for "division" in Subsection B(2); and made minor stylistic changes throughout the section.

✓ **The 1993 amendment,** effective June 18, 1993, inserted "as may be necessary to protect public health and the environment, that are" in the introductory language in Subsection A; inserted "as may be necessary to protect public health and the environment" in

the introductory language in Subsection C; added present Subsection D and redesignated former Subsection D as present Subsection E.

Resource Conservation and Recovery Act. — The Resource Conservation and Recovery Act of 1976, referred to in several places in this section, appears as 42 U.S.C. § 6901 et seq.

No excuse from compliance where insufficient funds in corrective action fund. — The owner or operator of an underground storage tank which has experienced a release is not excused from compliance with corrective action requirements by reason of the insufficiency or unavailability of monies in the corrective action fund to meet the costs of corrective action. 1991 Op. Att'y Gen. No. 91-08.

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

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

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

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

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — State or local regulation of transportation of hazard-

ous materials as pre-empted by Hazardous Materials Transportation Act (49 U.S.C.S. § 1801 et seq.), 78 A.L.R. Fed. 289.

74-4-4.2. Permits; issuance; denial; modification; suspension; revocation.

A. Each application for a permit pursuant to the Hazardous Waste Act [this article] shall contain information as may be required pursuant to Section 74-4-4.7 NMSA 1978 or pursuant to regulations promulgated by the board, including information with respect to:

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

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

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

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

D. The secretary may deny any permit application or modify, suspend or revoke any permit issued pursuant to the Hazardous Waste Act if the applicant or permittee has:

(1) knowingly and willfully misrepresented a material fact in the application for a permit;

(2) refused to disclose the information required under the provisions of Section 74-4-4.7 NMSA 1978;

(3) been convicted in any court, within ten years immediately preceding the date of submission of the permit application, of:

(a) a felony or other crime involving moral turpitude; or

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

(4) exhibited a history of willful disregard for environmental laws of any state or the United States;

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

(6) violated any provision of the Hazardous Waste Act, any regulation adopted and promulgated pursuant to that act or any condition of a permit issued under that act.

E. In making a finding under Subsection D of this section, the secretary may consider aggravating and mitigating factors.

F. If an applicant or permittee whose permit is being considered for denial or revocation, respectively, on any basis provided by Subsection D of this section has submitted an action plan that has been approved in writing by the secretary, and plan approval includes a period of operation under a conditional permit that will allow the applicant or permittee a reasonable opportunity to demonstrate its rehabilitation, the secretary may issue a conditional permit for a reasonable period of time. In approving an action plan intended to demonstrate rehabilitation, the secretary may consider:

- (1) implementation by the applicant or permittee of formal policies;
- (2) training programs and management control to minimize and prevent the occurrence of future violations;
- (3) installation by the applicant or permittee of internal environmental auditing programs;
- (4) the applicant's release or the permittee's release subsequent to serving a period of incarceration or paying a fine, or both after conviction of any crime listed in Subsection D of this section; and
- (5) any other factors the secretary deems relevant.

G. Notwithstanding the provisions of Subsection D of this section:

(1) a research, development and demonstration permit may be terminated upon the determination by the secretary that termination is necessary to protect human health or the environment; and

(2) a permit may be modified at the request of the permittee for just cause as demonstrated by the permittee.

H. No ruling shall be made on permit issuance, major modification, suspension or revocation without an opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing; provided, however, that the secretary may, pursuant to Section 74-4-10 NMSA 1978, order the immediate termination of a research development and demonstration permit whenever the secretary determines that termination is necessary to protect human health or the environment and may order the immediate suspension or revocation of a permit for a facility that has been ordered to take corrective action or other response measures for releases of hazardous waste into the environment.

I. The secretary shall hold a public hearing on a minor permit modification if the secretary determines that there is significant public interest in the minor modification.

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

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

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

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

History: 1978 Comp., § 74-4-4.2, enacted by Laws 1981 (1st S.S.), ch. 8, § 6; 1987, ch. 179, § 4; 1989, ch. 322, § 4; 1992, ch. 43, § 3.

The 1992 amendment, effective March 6, 1992,

substituted the present section catchline for "Permits; issuance and revocation; appeal"; inserted "pursuant to Section 74-4-4.7 NMSA 1978" in the introductory paragraph of Subsection A; twice substituted "secre-

tary" for "director" in Subsection C; rewrote Subsection D; added present Subsections E, F, and G; redesignated former Subsection E as present Subsection H; inserted "major" near the beginning of Subsection H while substituting "secretary" for "division" near the middle of that subsection; added present Subsection I; redesignated former Subsection F as present Subsection J; substituted "secretary" for "director" in Sub-

section J(3); deleted former Subsections G and H, relating to appeal; and made minor stylistic changes throughout the section.

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

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

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

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

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

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

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

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

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

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

(d) to take corrective action.

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

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

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

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

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

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

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

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

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

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

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

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

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 Env'tl. 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 Env'tl. 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 Env'tl. 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.

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

74-4-4.5. Hazardous waste fund created; appropriation.

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

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

History: 1978 Comp., § 74-4-4.5, enacted by Laws 1987, ch. 179, § 7; 1989, ch. 322, § 7; 1989, ch. 324, § 36; 1990, ch. 124, § 20.

74-4-4.6. Repealed.

Repeals. — Laws 1989, ch. 322, § 17 repeals 74-4-4.6 NMSA 1978, as enacted by Laws 1989, ch. 322, § 8, relating to creation of the underground storage

tank fund, effective July 1, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

74-4-4.7. Permit applicant disclosure.

A. Every applicant for a permit pursuant to the Hazardous Waste Act [this article] shall file a disclosure statement with the department with the information required by, and on a form developed by, the department in cooperation with the department of public safety, at the same time the applicant files the application for a permit with the secretary.

B. Upon the request of the secretary, the department of public safety shall prepare and transmit to the secretary an investigative report on the applicant based in part upon the disclosure statement. The report shall be prepared and transmitted within ninety days after

the receipt of a copy of an applicant's disclosure statement from the department. Upon good cause, the ninety days may be extended for a reasonable period of time by the secretary.

C. In preparing the investigative report, the department of public safety may request and receive criminal history information on the applicant from the federal bureau of investigation or any other law enforcement agency or organization. While the investigative report is being prepared by the department of public safety, the secretary may also request information regarding any person who will be or could reasonably be expected to be involved in management activities of the hazardous waste facility or any person who has a controlling interest in any permittee. The department of public safety shall maintain confidentiality regarding the information received from a law enforcement agency as may be imposed by that agency as a condition for providing that information to the department of public safety.

D. All persons required to file a disclosure shall provide any assistance or information requested by the department of public safety or the secretary and shall cooperate in any inquiry or investigation conducted by the department of public safety or any inquiry, investigation or hearing conducted by the secretary. Nothing in this section shall be construed to waive a person's constitutional right against self-incrimination.

E. If any of the information required to be included in the disclosure statement changes, or if any information is added after filing the statement, the person required to file it shall provide that information in writing to the secretary within thirty days after the change or addition. Failure to provide the information within thirty days may constitute the basis for the revocation of, or denial of an application for, any permit issued or applied for in accordance with Section 74-4-4.2 NMSA 1978, but only if, prior to any denial or revocation, the secretary notifies the applicant or permittee of the secretary's intention to do so and gives the applicant or permittee fourteen days from the date of the notice to explain why the information was not provided within the required thirty-day period. The secretary shall consider this information when determining whether to revoke or deny the permit.

F. No person shall be required to submit the disclosure statement required by this section if the person is:

- (1) the United States or any agency or instrumentality of the United States;
- (2) a state or any agency or political subdivision of a state; or
- (3) a corporation or an officer, director or shareholder of that corporation and that corporation:
 - (a) has on file and in effect with the federal securities and exchange commission a registration statement required under Section 5, Chapter 38, Title 1 of the federal Securities Act of 1933, as amended;
 - (b) submits to the secretary with the application for a permit evidence of the registration described in Subparagraph (a) of this paragraph and a copy of the corporation's most recent annual form 10-K or an equivalent report; and
 - (c) submits to the secretary on the annual anniversary of the date of the issuance of any permit it holds pursuant to the Hazardous Waste Act evidence of registration described in Subparagraph (a) of this paragraph and a copy of the corporation's most recent annual form 10-K or an equivalent report.

History: 1978 Comp., § 74-4-4.7, enacted by Laws 1992, ch. 43, § 4.

Emergency clauses. — Laws 1992, ch. 43, § 9 makes the act effective immediately. Approved March 6, 1992.

Securities Act of 1933. — Section 5, Chapter 38, Title 1 of the Federal Securities Act of 1933, appears as 15 U.S.C. § 77e(c).

74-4-4.8. Underground storage tank fund created; appropriation.

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

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

History: Laws 1993, ch. 298, § 2.

Effective dates. — Laws 1993, ch. 298, § 6 makes the act effective on April 7, 1993.

Compiler's notes. — Laws 1993, ch. 100, § 7 enacted a 74-4-4.8 NMSA 1978, creating an underground storage tank fund, effective March 31, 1993,

and was approved March 31, 1993. However, because of the enactment of 74-4-4.8 NMSA 1978 by Laws 1993, ch. 298, § 2, approved April 7, 1993, the section as enacted by Laws 1993, ch. 100 has not been set out. See 12-1-8 NMSA 1978.

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

A. No regulation shall be adopted, amended or repealed until after a public hearing by the board. Hearings on regulations shall be held in Santa Fe or in an area of the state substantially affected by the regulations. In making its regulations, the board shall give the weight it deems appropriate to all relevant facts and circumstances presented at the public hearing, including but not limited to:

(1) the character and degree of injury to or interference with the environment or public health; and

(2) the technical practicability and economic reasonableness of the regulation.

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

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

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

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

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

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

The 1992 amendment, effective March 6, 1992, deleted "appeal" at the end of the section catchline; deleted "environmental improvement" preceding

"board" in the first sentence of the introductory paragraph of Subsection A; inserted "the environment or" in Subsection A(1); deleted former Subsections F, G, and H, relating to appeal; and made minor stylistic changes throughout the section.

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

74-4-6. Repealed.

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

Compiler's notes. — Laws 1992, ch. 43, § 6 en-

acted a section designated 74-4-6 NMSA 1978 which has been redesignated by the compiler as 74-4-14 NMSA 1978.

74-4-7. Containment and cleanup of hazardous substance incidents; division powers.

The division may:

A. take any action necessary or appropriate to protect persons from injury or other harm which might arise from hazardous substance incidents, including but not limited to

providing for cleanup and disposal, coordinating the activities of other public officials and any other action the division deems necessary or appropriate;

B. notify any person who may have incurred or may incur physical injury from a hazardous substance incident that he should undergo medical examination; and

C. assess charges against persons responsible for hazardous substance incidents for costs the division incurs in cleanup of hazardous substance incidents, disposal of hazardous substances and for damage to state property. Amounts received in payment of such assessments shall be deposited in the hazardous waste emergency fund. Any person who is assessed charges pursuant to this subsection may appeal the assessment to the district court within thirty days of receipt of notice of the assessment.

History: 1953 Comp., § 12-9B-7, enacted by Laws 1977, ch. 313, § 7; 1989, ch. 322, § 9.

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

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

74-4-8. Emergency fund.

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

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

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

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

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

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

Repeals and reenactments. — Laws 1989, ch. 322, § 11 repeals former 74-4-9 NMSA 1978, as en-

acted by Laws 1981 (1st S.S.), ch. 8, § 8, and enacts the above section, effective April 7, 1989. For former provisions, see 1988 Replacement Pamphlet.

74-4-10. Enforcement; compliance orders; civil penalties.

A. Whenever on the basis of any information the secretary determines that any person has violated, is violating or threatens to violate any requirement of the Hazardous Waste Act [this article], any regulation adopted and promulgated pursuant to that act or any condition of a permit issued pursuant to that act, the secretary may:

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

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

B. Any order issued pursuant to Subsection A of this section may include a suspension or revocation of any permit issued by the secretary. Any penalty assessed in the order shall not exceed ten thousand dollars (\$10,000) per day of noncompliance for each violation. In

assessing the penalty, the secretary shall take into account the seriousness of the violation and any good-faith efforts to comply with the applicable requirements. For violations related to underground storage tanks, "per violation" means per tank.

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

(1) assess a civil penalty of not more than twenty-five thousand dollars (\$25,000) for each day of continued noncompliance with the order; and

(2) suspend or revoke any permit issued to the violator pursuant to the Hazardous Waste Act.

D. Whenever on the basis of any information the secretary determines that the immediate termination of a research, development and demonstration permit is necessary to protect human health and the environment, the secretary may order an immediate termination of all research, development and demonstration operations permitted pursuant to the Hazardous Waste Act at the facility.

E. Whenever on the basis of any information the secretary determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under Section 74-4-9 NMSA 1978, the secretary may issue an order requiring corrective action, including corrective action beyond a facility's boundaries or other response measure as he deems necessary to protect human health or the environment or may commence an action in district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.

F. Any order issued under Subsection E of this section may include a suspension or revocation of authorization to operate under Section 74-4-9 NMSA 1978 and shall state with reasonable specificity the nature of the required corrective action or other response measure and shall specify a time for compliance. If any person named in an order fails to comply with the order, the secretary may assess, and the person shall be liable to the state for a civil penalty in an amount not to exceed ten thousand dollars (\$10,000) for each day of noncompliance with the order.

G. Any order issued pursuant to this section, any other enforcement proceeding initiated pursuant to this section or any claim for personal or property injury arising from any conduct for which evidence of financial responsibility must be provided may be issued to or taken against the insurer or guarantor of an owner or operator of a treatment, storage or disposal facility or underground storage tank if:

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

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

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

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

J. Penalties collected pursuant to an administrative order shall be deposited in the state treasury to be credited to the hazardous waste emergency fund.

History: 1953 Comp., § 12-9B-10, enacted by Laws 1977, ch. 313, § 10; reenacted by 1981 (1st S.S.), ch. 8, § 9; 1987, ch. 179, § 8; 1989, ch. 322, § 12; 1992, ch. 43, § 7.

The 1992 amendment, effective March 6, 1992,

added "civil penalties" at the end of the section catchline, substituted "secretary" for "director" several times throughout the section, rewrote the introductory paragraph of Subsection A, and made minor stylistic changes throughout the section.

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

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

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

74-4-10.1. Hazardous waste monitoring, analysis and testing.

A. If the director determines, upon receipt of any information, that:

(1) the presence of any hazardous waste at a facility or site at which hazardous waste is or has been stored, treated or disposed of; or

(2) the release of any such waste from such facility or site may present a substantial hazard to human health or the environment, he may issue an order requiring the owner or operator of such facility to conduct such monitoring, testing, analysis and reporting with respect to such facility or site as the director deems reasonable to ascertain the nature and extent of such hazard.

B. In the case of any facility or site not in operation at the time a determination is made under Subsection A of this section with respect to the facility or site, if the director finds that the owner of such facility or site could not reasonably be expected to have actual knowledge of the presence of hazardous waste at such facility or site and of its potential for release, the director may issue an order requiring the most recent previous owner or operator of such facility or site who could reasonably be expected to have actual knowledge to carry out the provisions referred to in Subsection A of this section.

C. Any order under Subsection A or B of this section shall require the person to whom such order is issued to submit to the director, within thirty days from the issuance of such order, a proposal for carrying out the required monitoring, testing, analysis and reporting. The director may, after providing such person with an opportunity to confer with the director respecting such proposal, require such person to carry out such monitoring, testing, analysis and reporting in accordance with such proposal and such modifications in such proposal as the director deems reasonable to ascertain the nature and extent of the hazard.

D. (1) If the director determines that no owner or operator referred to in Subsection A or B of this section is able to conduct monitoring, testing, analysis or reporting satisfactory to the director, if the director deems any such action carried out by an owner or operator to be unsatisfactory or if the director cannot initially determine that there is an owner or operator referred to in Subsection A or B of this section who is able to conduct such monitoring, testing, analysis or reporting, the division may:

(a) conduct monitoring, testing or analysis, or any combination thereof, which he deems reasonable to ascertain the nature and extent of the hazard associated with the site concerned; or

(b) authorize a local authority or other person to carry out any such action; and

(c) in either event the director may require, by order, the owner or operator referred to in Subsection A or B of this section to reimburse the division or other authority or person for the costs of such activity. Any reimbursement to the division pursuant to this subparagraph shall be deposited to the credit of the hazardous waste fund.

(2) No order may be issued under this subsection requiring reimbursement of the costs of any action carried out by the division which confirms the results of an order issued under Subsection A or B of this section.

(3) For purposes of carrying out this subsection, the director or any authority or other person authorized under Paragraph (1) of this subsection may exercise the authorities set forth in Section 74-4-4.3 NMSA 1978.

E. The director may commence a civil action against any person who fails or refuses to comply with an order issued under this section. Such action shall be brought in the district court of the county in which the defendant is located, resides or is doing business. Such court shall have jurisdiction to require compliance with such order and to assess a civil penalty not to exceed five thousand dollars (\$5,000) for each day during which such failure or refusal occurs.

History: 1978 Comp., § 74-4-10.1, enacted by
Laws 1989, ch. 322, § 13.

74-4-11. Penalty; criminal.

A. No person:

- (1) shall knowingly transport or cause to be transported any hazardous waste identified or listed pursuant to the Hazardous Waste Act [this article] to a facility that does not have a permit under that act or the federal Resource Conservation and Recovery Act;
- (2) shall knowingly treat, store or dispose of any hazardous waste identified or listed pursuant to the Hazardous Waste Act:
 - (a) without having obtained a hazardous waste permit pursuant to that act or the federal Resource Conservation and Recovery Act;
 - (b) in knowing violation of any material condition or requirement of a hazardous waste permit; or
 - (c) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards;
- (3) shall knowingly omit material information or make any false statement or representation in any application, label, manifest, record, report, permit or other document filed, maintained or used for purposes of compliance with the Hazardous Waste Act;
- (4) who knowingly generates, stores, treats, transports, disposes of, exports or otherwise handles any hazardous waste shall knowingly destroy, alter, conceal or fail to file any record, application, manifest, report or other document required to be maintained or filed for purposes of compliance with regulations adopted and promulgated pursuant to the Hazardous Waste Act;
- (5) shall knowingly transport without a manifest or cause to be transported without a manifest any hazardous waste required by regulations adopted and promulgated pursuant to the Hazardous Waste Act to be accompanied by a manifest; or
- (6) shall knowingly export hazardous waste identified or listed pursuant to the Hazardous Waste Act:

- (a) without the consent of the receiving country; or

- (b) where there exists an international agreement between the United States and the government of the receiving country establishing notice, export and enforcement procedures for the transportation, treatment, storage and disposal of hazardous wastes, in a manner that is not in conformance with such agreement.

B. Any person who violates any of the provisions of Paragraphs (1) through (6) of Subsection A of this section is guilty of a fourth degree felony and upon conviction shall be punished by a fine of not more than ten thousand dollars (\$10,000) per violation per day or by imprisonment for a definite term of not more than eighteen months or both. For a second or subsequent violation of the provisions of Paragraphs (1) through (6) of Subsection A of this section, the person is guilty of a third degree felony and shall be punished by a fine of not more than twenty-five thousand dollars (\$25,000) per violation per day or by imprisonment for not more than three years or both.

C. Any person who knowingly violates any regulation adopted and promulgated pursuant to Subsection C of Section 74-4-4 or 74-4-4.4 NMSA 1978 is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five thousand dollars (\$5,000) per violation per day or by imprisonment for a definite term of one year or both. For violations related to underground storage tanks, "per violation" means per tank.

D. Any person who knowingly transports, treats, stores, disposes of or exports any hazardous waste in violation of Subsection A of this section and who knows at the time of the violation that he creates a substantial danger of a substantial adverse environmental impact, is guilty of a third degree felony if the violation causes a substantial adverse environmental impact.

E. As used in this section, a "substantial adverse environmental impact" exists when an act or omission of a person causes harm or damage:

- (1) to human beings; or

(2) to flora, wildlife, fish or other aquatic life or water fowl; to the habitats of wildlife, fish, other aquatic life, water fowl or livestock; to agricultural crops; to any ground water or surface water; or to the lands or waters of this state where such harm or damage amounts to more than ten thousand dollars (\$10,000).

F. Any person who knowingly transports, treats, stores, disposes of or exports any hazardous waste in violation of Subsection A of this section and who knows at the time of the violation that he creates a substantial danger of death or serious bodily injury to another person is guilty of a second degree felony and shall be sentenced to a term of imprisonment not to exceed nine years or a fine not to exceed one hundred thousand dollars (\$100,000), or both. Any person, other than an individual, that knowingly transports, treats, stores, disposes of or exports any hazardous waste in violation of Subsection A of this section and knows at that time that it places an individual in imminent danger of death or serious bodily injury is guilty of a second degree felony and shall be fined in an amount not to exceed two hundred fifty thousand dollars (\$250,000).

History: 1953 Comp., § 12-9B-11, enacted by Laws 1977, ch. 313, § 11; 1981 (1st S.S.), ch. 8, § 10; 1987, ch. 179, § 9; 1989, ch. 322, § 14; 1992, ch. 43, § 8.

The 1992 amendment, effective March 6, 1992, rewrote the provisions of former Subsection A and redesignated them as present Subsections A and B; added present Subsections C to E; redesignated former Subsection B as present Subsection F; and, in Subsection F substituted "creates a substantial danger" for "thereby places another person in imminent danger" and inserted "to another person" near the

middle of the first sentence while substituting "a term of imprisonment not to exceed nine years" for "nine years imprisonment" near the end of that sentence, and made minor stylistic changes throughout the subsection.

Resource Conservation and Recovery Act. — The federal Resource Conservation and Recovery Act, referred to in Subsection A, appears as 42 U.S.C. § 6901 et seq.

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

74-4-12. Penalty; civil.

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

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

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

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

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

B. Any person who willfully violates or fails or refuses to comply with any order of the director under Subsection A of this section may in an action brought in the appropriate

district court to enforce such order be fined not more than five thousand dollars (\$5,000) for each day in which the violation occurs or the failure to comply continues.

C. Upon receipt of information that there is hazardous waste at any site which has presented an imminent and substantial endangerment to human health or the environment, the director shall provide immediate notice to the appropriate local government agencies. In addition, the director shall require notice of such endangerment to be promptly posted at the site where the waste is located.

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

74-4-14. Administrative actions; judicial review.

A. Any person who is or may be affected by any final administrative action of the board or the secretary may appeal to the court of appeals for further relief within thirty days after the action. All appeals shall be upon the record before the board or the secretary.

B. For appeals of regulations, the date of the action shall be the date of filing of the regulation under the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978].

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

- (1) arbitrary, capricious or an abuse of discretion;
- (2) not supported by substantial evidence in the record; or
- (3) otherwise not in accordance with law.

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

- (1) by the board or the secretary, whichever took the action being appealed; or
- (2) by the court of appeals if the board or the secretary denies a stay or fails to act upon an application for a stay within sixty days after receipt.

History: 1978 Comp., § 74-4-14, enacted by Laws 1992, ch. 43, § 6.

Emergency clauses. — Laws 1992, ch. 43, § 9 makes the act effective immediately. Approved March 6, 1992.

Compiler's notes. — This section was enacted as 74-4-6 NMSA 1978 but was redesignated by the compiler, since a section with the same code number had previously been enacted (repealed by Laws 1981 (1st S.S.), ch. 8, § 12).

ARTICLE 4A

Radioactive Materials

Sec.	Sec.
74-4A-1. Radioactive material transport; conditions.	74-4A-9. Committee.
74-4A-2. Short title.	74-4A-10. Membership; appointment; vacancies.
74-4A-3. Purpose.	74-4A-11. Committee duties.
74-4A-4. Definitions.	74-4A-11.1. Condition.
74-4A-5. Repealed.	74-4A-12. Subcommittees.
74-4A-6. Task force.	74-4A-13. Interrelationship with task force.
74-4A-7. Duties of the task force.	74-4A-14. Staff.
74-4A-8. Powers of the task force.	74-4A-15 to 74-4A-19. Repealed.

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

A. The environmental improvement board shall have exclusive authority to promulgate regulations prescribing the conditions for transport of radioactive material on the highways. Such conditions shall include the conditions of transport that the environmental improvement board finds necessary to protect the health, safety and welfare of the citizens of the state. Except as specifically preempted by federal law, the state highway commission shall have the exclusive authority within New Mexico to designate highway routes for the transport of radioactive material. Any rule or regulation adopted by the environmental improvement board that designates highway routes for the transport of radioactive material and that was in effect prior to March 1, 1991, is deemed null and void. The state highway commission shall incorporate into the record and consider in the initial designa-

tion of routes for the transport of radioactive material, the evidentiary record from the environmental improvement board public hearings held for the purpose of receiving public comment regarding the designation of routes for the transport of radioactive material.

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

- (1) materials associated with the operation and decommissioning of nuclear reactors and the supporting fuel cycle;
- (2) industrial radioisotope sources;
- (3) radioactive materials used in nuclear medicine;
- (4) radioactive materials used for research, education or training; and
- (5) radioactive wastes;

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

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

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

History: Laws 1979, ch. 377, § 1; 1981, ch. 366, § 1; 1991, ch. 204, § 1.

Bracketed material. — The bracketed reference to the department of environment was inserted by the compiler, as Laws 1991, ch. 25, § 4 establishes the department of environment and provides that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment. The bracketed material was not enacted by the legislature and is not part of the law.

The 1991 amendment, effective April 4, 1991, in Subsection A, deleted "including routing criteria" at the end of the second sentence, rewrote the third sentence which read "Except as specifically preempted by federal law, the environmental improvement board shall have the exclusive authority within New Mexico to designate routes and otherwise regu-

late the transportation of radioactive material on the highways as it deems appropriate and necessary" and added the fourth and fifth sentences; rewrote Subsection B; and inserted "of the health and environment department" in Subsection C.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 6 Am. Jur. 2d Atomic Energy § 45 et seq.; 8 Am. Jur. 2d Aviation § 54; 61A Am. Jur. 2d Pollution Control § 252.

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

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

39A C.J.S. Health and Environment § 61.

74-4A-2. Short title.

Sections 74-4A-1 through 74-4A-14 NMSA 1978 may be cited as the "Radioactive and Hazardous Materials Act".

History: Laws 1979, ch. 380, § 1; 1981, ch. 374, § 1; 1986, ch. 61, § 1; 1991, ch. 204, § 2.

The 1991 amendment, effective April 4, 1991, substituted "74-4A-1" for "74-4A-2".

74-4A-3. Purpose.

A. The legislature finds that there is presently much public and state concern in the area of public health and safety over:

- (1) the proposed waste isolation pilot plant for defense-related radioactive wastes;
- (2) the safe treatment and disposal of hazardous wastes and the regulation of hazardous waste generators;
- (3) the effective provision of regulation and information regarding hazardous chemicals in the community and in the work place;
- (4) the effective control of contamination from underground storage tanks;