

**Testimony of
NMED Environmental Health Division
Before the Environmental Improvement Board
January 3, 2007**

Liquid Waste Disposal and Treatment Regulations

Process and Procedures Used in Development of Regulations

In 2005, the Environmental Health Division of the Environment Department (Collectively the Division) came before this Board to make significant changes to the Liquid Waste Disposal and Treatment Regulations. Those regulations became effective in September of 2005. Since that time, the Division has gained experience with the new regulations, and is now proposing amendments for their improvement and clean-up. On March 2, 2006 all persons on the EIB and Liquid Waste Program mailing lists were sent a letter giving them the opportunity to participate in and provide comments and recommendations to any part of the liquid waste regulations. On April 28, 2006 the Liquid Waste Program compiled a summary of proposed amendments received by interested stakeholders and sent it out to all interested parties as a result of the Division's March 2, 2006. All persons on the EIB and Liquid Waste Program mailing lists were also sent notices regarding public meetings that were held on May 3, 2006 and July 25, 2006 in Albuquerque to discuss proposed amendments that were compiled in the Division's April 28, 2006 Summary of Proposed Amendments. The proposed changes that the Division is proposing were posted on the Liquid Waste Program web page since August 22, 2005.

Impact of Regulations on Affected Entities and Public

The Environmental Health Division is proposing several amendments to the Liquid Waste Disposal and Treatment Regulations. These amendments are expected to improve the practical application of the regulations, making them more "user friendly." Tab A to this filing sets forth the proposed amendments with particularity and Mr. Brian Schall will provide testimony on the specific proposed changes.

Time line Analysis & Effective Date

The amendments will provide clarification and improve the effectiveness of the proposed regulations as soon as they become effective. It is anticipated that they can be filed with the state's record center soon after the Board issues a Statement of Reasons, and will be effective 30 days after filing.

Impact on Division Staff

The impact to Division staff will be to make the administration of the regulations better and clarify certain language so that multiple interpretations cannot be argued. Because several clarifications are being made, it is expected that the regulations will be easier to apply in a unified fashion throughout the State.

Identify and Address EJ Issues

The Liquid Waste Disposal and Treatment Regulations are designed to protect all people, regardless of race or income and to better insure that groundwater is better protected for all people in New Mexico.

Summary of Amendments

The following is a summary of amendments to the Liquid Waste Disposal and Treatment Regulations. Most of the changes are technical in nature, or are clarifications or minor word changes and are not opposed. Those that have opposition are noted, and will be addressed in a separate section on disputed issues.

- 20.7.3.7A(4) Removed ‘surface irrigation systems’ from definition of “alternative disposal. Surface irrigation was removed during the previous rule change but the reference in the definition was overlooked. Whether surface irrigation should be an accepted method of alternative disposal is a disputed issue and will be more fully addressed in that section of the testimony.
- 20.7.3.7A(6) Expanded the definition of “approved” to include a liquid waste system that permitted and installed in accordance with the regulations and persons or entities authorized by the department to perform activities on liquid waste systems. There are sections in the regulation that reference an approved system therefore the definition needed modified to encompass these references.
- 20.7.3.7C(2) Added a definition for “certificate of registration”. Sections of the regulations references a certificate of registration however the term is not defined.
- 20.7.3.7E(4) Added a definition for “elevated system”. Reference to elevated system is proposed in Section 807. This definition was added following the filing of the Division’s request for hearing due to stakeholder input.
- 20.7.3.7E(6) Currently Section 7E(5). Modified the definition of “established system” to include cesspools installed prior to Sept. 14, 1973.

Prior to Sept. 14, 1973, cesspools were a recognized means of disposal.

- 20.7.3.7L(2) Removed Type Ia and Type IV soils from the definition of “limiting layer”. Table 703.1 lists application rates for Type Ia and VI soils, thus these soils types are not limiting.
- 20.7.3.7M(5) Consolidated and simplified the definition of “modify”.
- 20.7.3.7S(13) Removed reference to soil types from the definition of “suitable soil”. Table 703.1 lists application rates for all soil types, thus all soil types are suitable for disposal.
- 20.7.3.201H Reduced the size of the replacement area from 100% to 50%. Added that for drip systems, a replacement area is not required. As the size of drainfields increased, it has become harder to meet the requirement for 100% replacement area. And as the drainfields size increases, the frequency of failures should decrease. Requiring some replacement/reserve area allows for the addition of drainfield if the design flows increase. Though originally disputed by the Homebuilders Association, we believe that a compromise has been reached for now, and this is no longer disputed.
- 20.7.3.201L Modified the language dealing with existing systems and regulations in effect at the time of installation to include “the current regulations, whichever is less stringent”. There are instances where the current regulation may be less stringent than a prior regulation.
- 20.7.3.201N Add clarifying language dealing with ‘Letter of Determination’. The general findings in a Letter of Determination do not supersede the actual site specific requirements.
- 20.7.3.201R(1) Language added stating that water softener waste not discharged to a conventional treatment unit may be discharged in accordance with other applicable regulations. The current regulation states that softener discharge ‘may’ be discharged to a conventional system. Therefore, the discharge may be discharged in an alternative manner and that discharge must not be contrary to other applicable requirements. The change supported by the Department is a clarification and is not opposed. Whether water softener waste should be allowed in conventional treatment units is a disputed issue raised by POWRA and will be discussed in the section on disputed issues.

- 20.7.3.201R(2) Language added language stating that the discharge of water softener waste must meet all other state and local regulations. Reasoning the same as above.
- 20.7.3.202A Added language that states that this section deals with both permitted and un-permitted systems. Also, clarifies that only that portion of the system being modified needs to meet current standards. The current regulation is confusing when dealing with the modification of an unpermitted system. This language will eliminate that confusion. The modified language also clarifies that only the portion of the system that is being modified needs to be brought up to current requirements.
- 20.7.3.202E Deleted original language and added new language stating that upon the issuance of a modification permit and subsequent approval of the construction, a previously un-permitted system shall become permitted.
- 20.7.3.203 Added 'Construction' to title for clarification. The change is to clarify that this section deals with inspections conducted for the construction of the system, not for property transfers.
- 20.7.3.203A Added sentence clarifying under what conditions test holes may not be required. The current regulation is confusing as to when test holes are required or when they are not.
- 20.7.3.203B(2) Moved to this section the requirement that all homeowner installed systems be inspected. This is currently found in the permitting section.
- 20.7.3.301C Corrected an oversight in the current regulations dealing with easements and lot size.
- 20.7.3.301I Added language that states that if a lot is reduced in size to the point that it no longer meets the required lot size, the existing permit shall be voided.
- 20.7.3.301J Added language that states if a lot is reduced in size but it still meets the required lot size, the permit shall be amended to reflect the new lot size.
- 20.7.3.302A Changes made to Table 302.1 to correct discrepancy in setbacks from seepage pits. Current regulations states the setback from a disposal field to a seepage pit is 10 feet, but the setback from a seepage pit to the disposal field is 5 feet.

- 20.7.3.401C Removed the language requiring all homeowner installed systems be inspection from this section and moved it to the section on inspections. Moved this language to the section on inspections.
- 20.7.3.401J(1) Added language for clarification purposes that states the treatment unit needs to meet the requirements in effect at the time of installation and the inspection is conducted using an approved form. Some septic tanks may not meet the current requirements but met the requirements at the time of their initial installation and are still functioning properly.
- 20.7.3.401K Updated language in paragraph (1) to be consistent with language in Department's policy on this subject. Also separated paragraph (3) into two paragraphs for clarification. The current language is too generalized and un-workable in the field. The proposed language is more specific as to the steps that need to be taken.
- 20.7.3.403E Added clarifying language requiring an amendment of permit to reflect ownership change upon transfer of property. The proposed language provide for the need to submit the proper form for the change of ownership to occur.
- 20.7.3.405B Changed notification requirements for the variance process. The current requirements are too burdensome. The Department found that the current language, especially in high density areas, created a hardship on the applicant.
- 20.7.3.501B Added language stating the treatment units must meet the regulation requirements. The proposed language clarifies what standards need to be met for approval.
- 20.7.3.601 Changed the wording to remove confusion with the terminology "ATU". In the industry language, ATU means 'aerobic treatment unit' not to be confused with an 'advanced treatment system'.
- 20.7.3.601D Change in language for reasons stated above.
- 20.7.3.601E Added new language requiring a sampling port on advanced treatment systems. Without the ability to obtain a representative effluent sample, the ability to monitor properly is compromised.
- 20.7.3.605B(3) Changed required treatment level to primary treatment to match Table 703.1 and added language stating disposal shall be by an appropriate, approved method.

- 20.7.3.605C Changed depth of suitable soil to 1 to 4 feet requiring secondary treatment and disinfection and required at least one foot of suitable soil to a limiting layer.
- 20.7.3.605D Corrected grammar.
- 20.7.3.701D Language added allowing inspections ports to be located below ground in a protected, locatable enclosure. Installation below ground will protect the inspection ports from damage. This language was added after the Division filed its request for hearing to take care of an issue identified by a stakeholder.
- 20.7.3.701E Removed reference to needing variance for seepage pit and changed setback from seepage pit to a trench to match requirement listed in Table 302.1.
- 20.7.3.701F Clarified and rearranged language dealing with headers to multiple trenches instead of a D-box.
- 20.7.3.701H Increased length of trench to 155 foot to accommodate the length of certain proprietary products. Changed amount of aggregate under drain line to match requirement in Subsection 703J.
- 20.7.3.702 Removed requirement that seepage pits shall require a variance for installation.
- 20.7.3.703B Language change to clarify that test holes may be required but are not always required to bring this section into agreement with Subsection 203A.
- 20.7.3.703F Removed restriction on conventional systems in Type IV soils to match requirements in Table 703.1.
- 20.7.3.703G Modified language dealing with appropriate disposal options. The proposed language brings this section in line with changes to other sections dealing with Type IV soils.
- 20.7.3.703J(6) Change requirement for minimum bottom area to a minimum total absorption area. The minimum area is equal to that required for a one-bedroom house.
- 20.7.3.801 Removed reference to 'surface application' as an alternative disposal method. This is a disputed issue and will be addressed separately as a disputed issue.

- 20.7.3.803D Clarified language dealing with the responsibility for operation and maintenance of cluster systems.
- 20.7.3.805A Simplification of existing language dealing with the treatment level for the use of effluent for irrigation.
- 20.7.3.805J Added less restrictive requirements for setbacks for irrigation systems to property lines and buildings. The current 5-foot setback eliminates the landscape areas that normally require irrigation.
- 20.7.3.807C Added language allowing other approved designs in lieu of the Wisconsin design.
- 20.7.3.807E & F Removed subsections since they duplicate what is require in design manual previously referenced.
- 20.7.3.807E, F & G Added specific language dealing with the installation of an elevated system. This language was added after the Division's request for hearing was filed, due to stakeholder input.
- 20.7.3.811A Remove restriction that gray water systems shall only be installed on 'single family' residential units, thus allowing the use of graywater on multiple family units, such as condos.
- 20.7.3.902E Removed language stating items needed to be performed for an inspection and replaced with requiring the use of the Department approved form, which is more encompassing that the current requirements. Also added language requiring the sampling of advance treatment systems if the sampling schedule is not up to date.
- 20.7.3.902E(3) Replaced the language requiring corrective action be completed in 15 days to requiring the submittal of an application within 15 days. The submittal of the application initiates the corrective action and permit conditions can set up a more realistic time frame.
- 20.7.3.904A Extended the date that individuals need to be certified until 2009 to allow time for training and testing. Once the certification programs are developed, there is a time frame needed to allow the affected individuals to complete the certification process.
- 20.7.3.907 Added language 'after due process is provided'.

Disputed Issues

The amendments being proposed by the Environmental Health Division are for the most part minor technical amendments, and are not controversial. However, at the final stakeholder meeting on July 25, 2006, the parties “agreed to disagree” on five issues:

1. surface application of liquid waste;
2. water softener waste restrictions;
3. administrative penalties for unpermitted systems installed on or after February 1, 2002;
4. drainfield replacement area; and
5. drainfield surge capacity.

1. Surface Application (20.7.3.7.A.4 and 801)

NMED has proposed to eliminate all surface application of liquid waste except as approved by variance. The reasons for this proposed amendment are as follows:

- a. surface application can create hazards to public health if a failure of the treatment system occurs;
- b. disinfection systems have not always been properly maintained on surface application systems that have been permitted in the past.

2. Water Softener Waste (20.7.3.201.R)

The existing Liquid Waste Regulations contain restrictions on the disposal of water softener waste into advanced treatment systems. NMED also has the authority to impose more stringent requirements, if necessary, to restrict the discharge of water softener waste into conventional systems as well. POWRA has proposed additional restrictions on the disposal of water softener waste into liquid waste systems on a statewide basis. NMED does not believe that sufficient data presently exist to support this proposed restriction.

3. Administrative Penalties for Unpermitted Systems Installed on or after February 1, 2002 (20.7.3.401.K)

The N.M. Environmental Improvement Act § 74-1-10 provides that the NMED Secretary “may” issue a compliance order assessing a civil penalty for any past or current violation of the Liquid Waste Regulations. As currently written, regulation 20.7.3.401.K.3 provides for a mandatory administrative penalty, which requires issuance of a compliance order as prescribed by law. This discrepancy between the statute and regulations is addressed by Liquid Waste Program Guidance #8 (copy attached, TAB C). NMED proposes to amend the regulation to make penalty assessment discretionary, in accordance with the statute.

4. Drainfield Reserve/Replacement Area (20.7.3.201.H)

NMHBA proposed to eliminate the requirement for an unobstructed drainfield reserve/replacement area equivalent to 100% of the required original disposal system. NMED and NMHBA have agreed to reduce the required reserve/replacement area to 50%.

5. Drainfield Surge Storage Capacity (20.7.3.7.A.1, 703.J.2 and 703.J.4)

The issue of absorption area was discussed extensively during the regulation amendment proceedings of 2004-05. Two national drainfield experts were brought in for a special Wastewater Technical Advisory Committee meeting on drainfield sizing. Both experts identified surge storage capacity as a necessary safety factor for drainfield design, and recommended a capacity of 12 to 18 inches below the invert of the drain pipe. After further discussion, however, NMED and other parties agreed to reduce the surge capacity from twelve to six inches, and six inches was adopted by the EIB. POWRA proposes to eliminate the six inches of surge capacity and calculate absorption area starting at the bottom of the invert of the drain pipe. NMED opposes the POWRA proposal on the basis that it offers no protection for surge capacity, and is contrary to the advice of the national experts who were consulted on this issue.

Effect on Small Business

The amendments to the Liquid Waste Disposal and Treatment Regulations are not expected to adversely affect small businesses. For the most part, the regulations apply to households.