

DRAFT

Chapter 74 - Environmental Improvement

Article 6C - New Mexico Pollutant Discharge Elimination System Program

1. Short Title.

Chapter 74, Article 6C NMSA 1978 may be cited as the “New Mexico Pollutant Discharge Elimination System Delegation Act”.

2. Purpose.

The purpose of the New Mexico Pollutant Discharge Elimination System Delegation Act is to authorize a permit program that complies with the Clean Water Act, 33 U.S.C. § 1251 et seq.

3. Definitions.

As used in the New Mexico Pollutant Discharge Elimination System Delegation Act:

A. "Act" means the New Mexico Pollutant Discharge Elimination System Delegation Act.

B. “commission” means the water quality control commission;

C. "department" means the New Mexico environment department;

D. “discharge” means the addition of any pollutant or combination of pollutants to a water of the United States from any point source, including surface runoff which is collected or channeled by human effort; discharges through pipes, sewers, or other conveyances owned by a state, municipality, or other person which does not lead to a treatment works; and discharges through pipes, sewers, or other conveyances leading into privately owned treatment works;

E. “federal act” means the Clean Water Act, 33 U.S.C. § 1251 et seq.;

F. "federal regulations" means those provisions adopted by the U.S. Environmental Protection Agency to implement the National Pollutant Discharge Elimination System;

G. "New Mexico Pollutant Discharge Elimination System" means that program authorized by the Act;

H. "National Pollutant Discharge Elimination System" means that program authorized by sections 318, 402, and 405 of the federal act for the discharge of a pollutant to a water of the United States;

I. “Permit” means either an individual or general permit issued the department under the New Mexico Pollutant Discharge Elimination System;

J. "Person" means any individual or entity, including a partnership, corporation, association, or interstate agency, or an agency, department or instrumentality of a state or the United States, including a federal facility, and any of officer, agent, or employee thereof;

K. "Point source" means any discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged, but not including return flow from irrigated agriculture or agricultural storm water runoff;

L. "Pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011 et

seq.), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term includes drilling fluids, produced waters and other non-domestic wastes associated with the exploration, development or production, transportation, storage, treatment or refinement of crude oil, natural gas, carbon dioxide gas or geothermal energy, but does not include sewage from vessels or water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well is used either to facilitate production or for disposal purposes, and if such injection or disposal will not result in the degradation of ground or surface water resources;

M. "Regional Administrator" means the Regional Administrator of Region VI of the U.S. Environmental Protection Agency.

N. "Water of the United States" means a water as defined in the federal regulations.

4. Permit Required.

A. No person shall discharge a pollutant from a point source to a water of the United States from a point source without a permit approved the department under the New Mexico Pollutant Discharge Elimination System.

B. The issuance of a permit does not convey any property rights or exclusive privileges, or authorize any injury to persons or property or invasion of other private rights, or any infringement of other laws, regulations, or ordinances.

5. Duties and powers of commission.

The commission shall:

A. adopt those rules to implement the New Mexico Pollutant Discharge Elimination System program, including the standards, requirements, exceptions, variances, and processes to grant, renew, modify, deny, and terminate permits, which are necessary and appropriate to obtain authorization from the Regional Administrator. In adopting the rules, the commission may incorporate by reference those sections or parts of the federal regulations that it deems necessary and appropriate;

B. adopt a schedule of fees sufficient to pay the cost of implementing the New Mexico Pollutant Discharge Elimination System program, including but not limited to the preparation and adoption of rules, review of applications, issuance and enforcement of permits and rules, compliance assistance, monitoring and inspection of facilities and discharges, data stewardship, records management, and administrative and legal costs. Fees collected pursuant to this section shall be deposited in the water quality management fund; and

C. hear and decide petitions for review of final actions to require, grant, renew, modify, deny, or terminate a permit, issue a compliance order, or grant or deny stays of such final actions.

6. Duties and powers of the department.

A. [TBD]

B. The department shall have all duties and powers necessary and appropriate to implement the New Mexico Pollutant Discharge Elimination System program, including but not limited to:

- (1) propose rules for adoption by the commission;
- (2) conduct investigations;
- (3) require monitoring, sampling, and reporting;

information;

(4) require the keeping and production of records, documents, and other

(5) review applications;

(6) require, grant, renew, modify, deny, or terminate permits;

(7) enter into or through a premise at which a discharge, or record related to such discharge, is or may be located, at a reasonable time and upon the presentation of proper credentials, and to inspect, sample, photograph, or collect other information related to such discharge or record, provided that entry into a private residence shall be allowed only by consent of the owner of the residence or order of the district court for the county in which the residence is located;

(8) issue compliance orders and file actions in the district court to enforce the Act, permits, and rules, including pretreatment standards and local limits adopted by publicly owned treatment works;

(9) enter into agreements with the Regional Administrator for the implementation of the New Mexico Pollutant Discharge Elimination System program;

(10) enter into agreements with other governmental entities; and

(11) receive and expend funds appropriated, authorized, granted, or donated.

7. Civil enforcement.

A. Whenever the department determines that a person violated or is violating a requirement of the Act, permit, or rule, the department may:

(1) issue a compliance order requiring compliance, modifying or terminating the permit, and assessing a civil penalty; or

(2) commence a civil action in district court requesting injunctive relief, including a temporary restraining order, modification or termination of the permit, and a civil penalty.

B. The civil penalty shall not be less than five thousand dollars (\$5,000) per day of noncompliance with each requirement of the Act or a rule or permit issued thereunder.

C. In determining the amount of any penalty assessed, the department or district court shall take into account the nature, circumstances, extent and gravity of the violation or violations, and, with respect to the violator, the ability to pay, prior history of such violations, degree of culpability, and economic benefit or savings (if any) resulting from the violation or violations, and such other matters as justice may require. A single operational event that leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

D. A compliance order shall become final unless, no later than thirty days after service, the person issued the compliance order submits a written request for a public hearing.

E. The department shall conduct a public hearing no later than ninety days after receipt of the written request for a public hearing.

F. Following a public hearing, the department shall issue a written decision that shall constitute the final action on the compliance order.

G. If a person fails to comply with the final action on the compliance order, the department may file a civil action in the district court to require compliance, modify or terminate the permit, collect the assessed civil penalty, and assess an additional civil penalty of not more than twenty-five thousand dollars (\$25,000) for each day of continued noncompliance with the compliance order.

- H. Civil penalties shall be deposited in the general fund.
8. Criminal enforcement.
- A. No person shall:
- (1) discharge a pollutant to a water of the United States without a permit for the discharge issued under the New Mexico Pollutant Discharge Elimination System program;
 - (2) violate a requirement of a permit issued under the Act;
 - (3) make a false material statement, representation, certification or omission of material fact in an application, record, report, plan or other document submitted or maintained under the Act or rule or permit issued thereunder;
 - (4) falsify, tamper with or render inaccurate a monitoring device, method or record maintained under the Act or rule or permit issued thereunder;
 - (5) fail to monitor, sample or report as required by a permit issued pursuant to under the Act or rule or permit issued thereunder; or
 - (6) violate a filing requirement under the Act or rule or permit issued thereunder.
- B. Any person who willfully or negligently either violates or causes or allows another person to violate paragraph (1) of this subsection is guilty of a fourth degree felony and shall be sentenced in accordance with Section 31-18-15 NMSA 1978.
- C. A person who is convicted of a second or subsequent violation of paragraph (1) of this subsection or who knowingly or negligently either violates or causes or allows another person to violate paragraph (1) of this subsection and thereby causes harm or damage to a human being or more than ten thousand dollars (\$10,000) damage or mitigation costs to flora, including agricultural crops, soil, fish or other aquatic life, waterfowl or other birds, livestock or wildlife or damage to their habitats, ground water or surface water, or lands of the state, is guilty of a third degree felony and shall be sentenced in accordance with Section 31-18-15 NMSA 1978.
- D. A person who knowingly or negligently violates paragraph (1) of this subsection and knows at the time of the violation that the action is creating a substantial danger of death or serious bodily injury to another person is guilty of a second degree felony and shall be sentenced in accordance with Section 31-18-15 NMSA 1978.
- E. In addition to the sentence specified in Section 31-18-15 NMSA 1978, a person guilty of a felony under this section may be assessed a penalty not less than ten thousand dollars (\$10,000) per day of noncompliance with each requirement of the Act or a rule or permit issued thereunder.
- F. In determining the amount of any penalty assessed, the department or district court shall take into account the nature, circumstances, extent and gravity of the violation or violations, and, with respect to the violator, the ability to pay, prior history of such violations, degree of culpability, and economic benefit or savings (if any) resulting from the violation or violations, and such other matters as justice may require. A single operational event that leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.
9. Petitions for review by commission.
- A. Any person who participated in and is adversely affected by a permitting action, or who was issued a compliance order, may file a petition for review before the commission no later than thirty days after the department gives notice of its final action.
- B. The person who files a timely petition for review may request a stay of the department's final action, which the commission may grant in whole or part after a hearing and a showing of good cause.

C. Unless the person files a timely petition for review, the department's final action shall not be subject to review by the commission.

10. Petitions for review by court of appeals.

A. Any person who is adversely affected by a regulation adopted by the commission or who filed a timely petition for review of the department's final action may appeal to the court of appeals for further relief no later than thirty days after the commission's final action. For a regulation, the date of filing under the State Rules Act shall be the date of the commission's final action.

B. The court of appeals shall decide a petition for review solely on the basis of the record made before the commission.

D. The New Mexico Rules of Civil Procedure pertaining to injunctions shall apply to a request for a stay of the commission's final action.

E. The court of appeals shall set aside the commission's final action only if the court finds that the action is:

- (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.

11. Limitations. The Act does not authorize the commission or department to require a permit that:

A. takes away or modifies a property right in water, except that the discharge of a pollutant to a water of the United States without a permit shall not be a property right in water;

B. affects the relation between employers and employees with respect to or arising out of any condition of water quality;

C. supersedes or limits the applicability of a law relating to industrial health, safety or sanitation;

D. applies to a discharge composed entirely of return flows from irrigated agriculture;

E. applies to a discharge of stormwater runoff from a mining operation or oil and gas exploration, production, processing, or treatment operation or transmission facility that is composed entirely of flows which are from conveyances or systems of conveyances, including but not limited to pipes, conduits, ditches and channels, used for collecting and conveying precipitation runoff and which are not contaminated by contact with, or do not come into contact with, any overburden, raw material, intermediate products, finished product, byproduct, or waste products located on the site of such operation or facility; or

F. applies to a discharge of runoff resulting from the following silviculture activities conducted in accordance with standard industry practice: nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance.

12. Confidential information.

A. Records, including the names and addresses of applicants and permittees, and applications, permits, inspections, and data related to discharges and ambient water quality obtained by the commission or department pursuant to the Act shall be available to the public.

B. Except as provided in Paragraph C of this subsection, for other records, the commission or department shall not disclose the record if a person with control of the record demonstrates to the commission or department that the record or part thereof, if made public, would divulge confidential business information or trade secrets.

C. Paragraph B of this subsection shall not apply to a record if disclosed:

- (1) to officers, employees or authorized representatives of the commission or department;
- (2) to officers, employees or authorized representatives of the United States; or
- (3) in a proceeding under the Act or federal act.

D. An officer, employee or authorized representative of the commission or department who knowingly or willfully discloses information which the commission or department has determined is confidential business information or a trade secret shall be fined not more than one thousand dollars (\$1,000) or imprisoned for not more than one year, or both.