

**NEW MEXICO
STATUTES
1978**

ANNOTATED

**Chapter 74
Environmental Improvement
Pamphlet 120**



2000 REPLACEMENT PAMPHLET

This pamphlet includes laws enacted through the Second Special Session of the Forty-Fourth Legislature (2000 (2nd S.S.)) and annotations through 2000-NMSC-011, 2000-NMCA-030, 120 S. Ct. 865, 199 F.3d 424, 76 F. Supp. 2d 1374, 190 F.R.D. 215, and 242 Bankr. 920.

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B. that available scientific information indicates a substantial possibility that fluoroalkanes, a major component of certain aerosol spray products, when discharged into the atmosphere, dissipate or impair the earth's protective layer of ozone; that the dissipation or impairment of even a small portion of the ozone layer is likely to decrease the screening of ultraviolet radiation; that any significant increase in human exposure to ultraviolet radiation is likely to increase the risk of skin cancer and other serious illness; that any significant increase in exposure of the environment to ultraviolet radiation may endanger the environment; and that therefore, the release of these aerosol spray products into the atmosphere is a significant hazard to the public health, safety and welfare of the citizens, and future citizens, of this state.

History: 1978 Comp., § 74-5-1, enacted by Laws 1977, ch. 384, § 1.

74-5-2. Repealed.

Repeals. — Laws 1979, ch. 82, § 3, repeals 74-5-2 NMSA 1978, relating to restrictions on the sale of certain aerosol products, effective March 16, 1979.

ARTICLE 6

Water Quality

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74-6-1. Short title.

Chapter 74, Article 6 NMSA 1978 may be cited as the "Water Quality Act".

History: 1953 Comp., § 75-39-1, enacted by Laws 1967, ch. 190, § 1; 1993, ch. 291, § 1.

Cross references. — For the Pollution Control Revenue Bond Act, see 3-59-1 NMSA 1978 et seq.

The 1993 amendment, effective June 18, 1993, substituted "Chapter 74, Article 6 NMSA 1978" for "This act".

Water laws apply on Indian land. — Where non-Indians enter into long-term lease with an Indian tribe under which the non-Indians are to develop the land as a subdivision, state laws concerning subdivision control, construction licensing and water cannot be held inapplicable to the lessee because of federal preemption. *Norvell v. Sangre de Cristo Dev. Co.*, 372 F. Supp. 348 (D.N.M. 1974), rev'd on other grounds, 519 F.2d 370 (10th Cir. 1975).

Provided Indian proprietary interest and self-government unimpaired. — The application

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

An implied private right of action does not exist under this section and a negligence per se claim may not be predicated on a violation of this section. *Schwartzman, Inc. v. Atchison, T. & S.F. Ry.*, 857 F. Supp. 838 (D.N.M. 1994).

Law reviews. — For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 Nat. Resources J. 693 (1979).

For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

For article, "Information for State Groundwater Quality Policymaking," see 24 Nat. Resources J. 1015 (1984).

For article, "Transboundary Toxic Pollution and the Drainage Basin Concept," see 25 Nat. Resources J. 589 (1985).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Standing to sue for violation of state environmental regulatory statute, 66 A.L.R.4th 685.

Measure and elements of damages for pollution of well or spring, 76 A.L.R.4th 629.

Liability insurance coverage for violations of anti-pollution laws, 87 A.L.R.4th 444.

39A C.J.S Health and Environment § 131.

74-6-2. Definitions.

As used in the Water Quality Act [Chapter 74, Article 6 NMSA 1978]:

A. "water contaminant" means any substance that could alter if discharged or spilled the physical, chemical, biological or radiological qualities of water. "Water contaminant" does not mean source, special nuclear or by-product material as defined by the Atomic Energy Act of 1954;

B. "water pollution" means introducing or permitting the introduction into water, either directly or indirectly, of one or more water contaminants in such quantity and of such duration as may with reasonable probability injure human health, animal or plant life or property, or to unreasonably interfere with the public welfare or the use of property;

C. "wastes" means sewage, industrial wastes or any other liquid, gaseous or solid substance which may pollute any waters of the state;

D. "sewer system" means pipelines, conduits, pumping stations, force mains or any other structures, devices, appurtenances or facilities used for collecting or conducting wastes to an ultimate point for treatment or disposal;

E. "treatment works" means any plant or other works used for the purpose of treating, stabilizing or holding wastes;

F. "sewerage system" means a system for disposing of wastes, either by surface or underground methods, and includes sewer systems, treatment works, disposal wells and other systems;

G. "water" means all water, including water situated wholly or partly within or bordering upon the state, whether surface or subsurface, public or private, except private waters that do not combine with other surface or subsurface water;

H. "person" means an individual or any other entity including partnerships, corporation, associations, responsible business or association agents or officers, the state or a political subdivision of the state or any agency, department or instrumentality of the United States and any of its officers, agents or employees;

I. "commission" means the water quality control commission;

J. "constituent agency" means, as the context may require, any or all of the following agencies of the state:

- (1) the department of environment;
- (2) the state engineer and the interstate stream commission;
- (3) the department of game and fish;
- (4) the oil conservation commission;
- (5) the state park and recreation division [state parks division] of the energy, minerals and natural resources department;
- (6) the New Mexico department of agriculture;
- (7) the soil and water conservation commission; and
- (8) the bureau of mines and mineral resources at the New Mexico institute of mining and technology;

K. "new source" means:

(1) any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance applicable to the source; or

(2) any existing source when modified to treat substantial additional volumes or when there is a substantial change in the character of water contaminants treated;

L. "source" means a building, structure, facility or installation from which there is or may be a discharge of water contaminants directly or indirectly into water;

M. "septage" means the residual wastes and water periodically pumped from a liquid waste treatment unit or from a holding tank for maintenance or disposal purposes;

N. "sludge" means solid, semi-solid or liquid waste generated from a municipal, commercial or industrial wastewater treatment plant, water supply treatment plant or air pollution control facility that is associated with the treatment of these wastes. "Sludge" does not mean treated effluent from a wastewater treatment plant;

O. "substantial adverse environmental impact" means that an act or omission of the violator causes harm or damage:

(1) to human beings; or

(2) that amounts to more than ten thousand dollars (\$10,000) damage or mitigation costs to flora, including agriculture crops; fish or other aquatic life; waterfowl or other birds; livestock or wildlife or damage to their habitats; or ground water or surface water or to the lands of the state;

P. "federal act" means the federal Water Pollution Control Act, its subsequent amendment and successor provisions; and

Q. "standards of performance" means any standard, effluent limitation or effluent standard adopted pursuant to the federal act or the Water Quality Act.

History: 1953 Comp., § 75-39-2, enacted by Laws 1967, ch. 190, § 2; 1970, ch. 64, § 1; 1971, ch. 277, § 49; 1973, ch. 326, § 1; 1977, ch. 253, § 73; 1993, ch. 291, § 2.

Bracketed material. — The bracketed reference to the state parks division was inserted by the compiler. The bracketed material was not enacted by the legislature and is not a part of the law. See 9-5A-6.1 NMSA 1978.

The 1993 amendment, effective June 18, 1993, in Subsection A, substituted "that could alter if discharged or spilled" for "which alters", inserted "or radiological", added the second sentence, and made a minor stylistic change; made a minor stylistic change in Subsection C; substituted "plant" for "plat" in Subsection E; rewrote Subsection H; in Subsection J, in Paragraph (1), deleted "environmental improvement division of the health and environment" preceding "department" and inserted "of environment" following "department", deleted "New Mexico" preceding "department" in Paragraph (3), substi-

tuted "division of the energy, minerals and natural resources department" for "commission" in Paragraph (5), substituted "soil and water" for "state natural resource" in Paragraph (7), in Paragraph (8), deleted "New Mexico" preceding "bureau" and added the language following "mines"; in Subsection K, added the Paragraph (1) designation, added Paragraph (2), and made a minor stylistic change; and added Subsections L through Q.

Compiler's notes. — The water quality control commission is terminated on July 1, 2005. See 74-6-17 NMSA 1978.

Water Pollution Control Act. — The federal Water Pollution Control Act appears as 33 U.S.C. § 1251 et seq.

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

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

74-6-3. Water quality control commission created. (Repealed effective July 1, 2006.)

A. There is created the "water quality control commission" consisting of:

(1) the secretary of environment or a member of his staff designated by him;

(2) the director of the department of game and fish or a member of his staff designated by him;

(3) the state engineer or a member of his staff designated by him;

(4) the chairman of the oil conservation commission or a member of his staff designated by him;

(5) the director of the state park and recreation division [state parks division] of the energy, minerals and natural resources department or a member of his staff designated by him;

(6) the director of the New Mexico department of agriculture or a member of his staff designated by him;

(7) the chairman of the soil and water conservation commission or a soil and water conservation district supervisor designated by him;

(8) the director of the bureau of mines and mineral resources at the New Mexico institute of mining and technology or a member of his staff designated by him; and

(9) three representatives of the public to be appointed by the governor for terms of four years and who shall be compensated from the budgeted funds of the department of environment in accordance with the provisions of the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

B. No member of the commission shall receive or shall have received, during the previous two years, a significant portion of his income directly or indirectly from permit holders or applicants for a permit and shall, upon the acceptance of his appointment and prior to the performance of any of his duties, file a statement of disclosure with the secretary of state disclosing any amount of money or other valuable consideration, and its source, the value of which is in excess of ten percent of his gross personal income in each of the preceding two years, that he received directly or indirectly from permit holders or applicants for permits required under the Water Quality Act [Chapter 74, Article 6 NMSA 1978].

C. The commission shall elect a chairman and other necessary officers and shall keep a record of its proceedings.

D. A majority of the commission constitutes a quorum for the transaction of business, but no action of the commission is valid unless concurred in by six or more members present at a meeting.

E. The commission is the state water pollution control agency for this state for all purposes of the federal act and the wellhead protection and sole source aquifer programs of the federal Safe Drinking Water Act and may take all action necessary and appropriate to secure to this state, its political subdivisions or interstate agencies the benefits of that act and those programs.

F. The commission is administratively attached, as defined in the Executive Reorganization Act [9-1-1 to 9-1-10 NMSA 1978], to the department of environment.

History: 1953 Comp., § 75-39-3, enacted by Laws 1967, ch. 190, § 3; 1970, ch. 64, § 2; 1971, ch. 277, § 50; 1973, ch. 326, § 2; 1977, ch. 253, § 74; 1987, ch. 234, § 81; 1993, ch. 291, § 3; 1997, ch. 82, § 1.

Delayed repeals. — Laws 1999, ch. 21, § 2 repeals 74-6-3 NMSA 1978, as enacted by Laws 1967, ch. 190, § 3, effective July 1, 2006.

Cross references. — As to exemption of water quality control commission from authority of secretary of environment, see 9-7A-13 NMSA 1978. As to director of the New Mexico department of game and fish, see 17-1-5 NMSA 1978. As to the chairman of the oil conservation commission, see 70-2-4 NMSA 1978. As to the state engineer, see 72-2-1 NMSA 1978. As to the director of the New Mexico department of agriculture, see 76-1-3 NMSA 1978.

Bracketed material. — The bracketed reference to the state parks division was inserted by the compiler; see 9-5A-6.1 NMSA 1978. The bracketed material was not enacted by the legislature, and it is not a part of the law.

The 1993 amendment, effective June 18, 1993, in Subsection A, substituted "secretary of environment" for "director of the environmental improvement division of the health and environment department" in Paragraph (1) and, in Paragraph (9), substituted "three representatives" for "a representative", deleted "health and environment" preceding "depart-

ment" and inserted "of environment" following "department"; in Subsection E, substituted "federal act and the wellhead protection and sole source aquifer programs of the federal Safe Drinking Water Act" for "Federal Water Pollution Control Act, the Water Quality Act of 1965 and the Clean Waters Restoration Act of 1966", and substituted "that act and those programs" for "these acts"; and in Subsection F, deleted "health and environment" preceding "department" and inserted "of environment" following "department".

The 1997 amendment, in Subsection A, substituted "soil and water conservation district supervisor" for "person" in Paragraph (7) and "terms" for "a term" in Paragraph (9). Laws 1997, ch. 82 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 20, 1997, 90 days after adjournment of the legislature.

Safe Drinking Water Act. — The federal Safe Drinking Water Act, referred to in Subsection E, appears as 21 U.S.C. § 349 and 42 U.S.C. § 300f et seq.

Authority of division to propose regulations and act as interested party at hearings. — In light of the fact that the legislature had seen fit to have the director of the environmental improvement division sit as a member of the commission, the division could propose regulations to the commission and then act as an interested party at the hearings.

Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982) (decided prior to 1982 amendment of 74-6-9 NMSA 1978 and the 1993 amendment of subsection A(1) of this section).

Law reviews. — For comment, "Control of Indus-

trial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

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

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

74-6-3.1. Legal advice.

A. In the exercise of any of its powers or duties, the water quality control commission shall act with independent legal advice. The manner in which such advice is provided shall be determined by the commission, but from among one of the following:

- (1) the office of the attorney general;
- (2) independent counsel hired by the commission, whether full- or part-time; or
- (3) another state agency whose function is sufficiently distinct from the department of environment and each constituent agency to assure independent, impartial advice.

B. Notwithstanding the provisions of Subsection A of this section, attorneys from constituent agencies may act for the water quality control commission in lawsuits filed against or on behalf of the commission, and the attorney general may, at the request of the commission, file and defend lawsuits on behalf of the commission.

History: 1978 Comp., § 74-1-8.1, enacted by Laws 1982, ch. 73, § 28; recompiled as 1978 Comp., § 74-1-8.2; 1991, ch. 25, § 32; recompiled as 1978 Comp., § 74-6-3.1 by Laws 1993, ch. 291, § 18.

The 1991 amendment, effective March 29, 1991, inserted "the water quality control" and "water quality control" preceding "commission" in the first sentence in Subsection A and in Subsection B; and, in Subsection A, substituted "department of environ-

ment" for "health and environment department" in Paragraph (3) and made a minor stylistic change.

Compiler's notes. — Laws 1982, ch. 73, § 28, enacted this section as 74-1-8.1 NMSA 1978, but since Laws 1982, ch. 73, § 23, had already enacted 74-1-8.1 NMSA 1978, this section was compiled as 74-1-8.2 NMSA 1978. See 74-6-2 NMSA 1978 for the definition of "commission" and 74-6-4 NMSA 1978 for the general powers and duties of the commission.

74-6-4. Duties and powers of commission. (Repealed effective July 1, 2006.)

The commission:

A. may accept and supervise the administration of loans and grants from the federal government and from other sources, public or private, which loans and grants shall not be expended for other than the purposes for which provided;

B. shall adopt a comprehensive water quality management program and develop a continuing planning process;

C. shall adopt water quality standards for surface and ground waters of the state subject to the Water Quality Act [Chapter 74, Article 6 NMSA 1978]. The standards shall include narrative standards and as appropriate, the designated uses of the waters and the water quality criteria necessary to protect such uses. The standards shall at a minimum protect the public health or welfare, enhance the quality of water and serve the purposes of the Water Quality Act. In making standards, the commission shall give weight it deems appropriate to all facts and circumstances, including the use and value of the water for water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes;

D. shall adopt, promulgate and publish regulations to prevent or abate water pollution in the state or in any specific geographic area, aquifer or watershed of the state or in any part thereof, or for any class of waters, and to govern the disposal of septage and sludge and the use of sludge for various beneficial purposes. The regulations governing the disposal of septage and sludge may include the use of tracking and permitting systems or other reasonable means necessary to assure that septage and sludge are designated for disposal in, and arrive at, disposal facilities, other than facilities on the premises where the septage and sludge is generated, for which a permit or other authorization has been issued

pursuant to the federal act or the Water Quality Act. Regulations shall not specify the method to be used to prevent or abate water pollution but may specify a standard of performance for new sources that reflects the greatest reduction in the concentration of water contaminants that the commission determines to be achievable through application of the best available demonstrated control technology, processes, operating methods or other alternatives, including where practicable, a standard permitting no discharge of pollutants. In making regulations, the commission shall give weight it deems appropriate to all relevant facts and circumstances, including:

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

(2) the public interest, including the social and economic value of the sources of water contaminants;

(3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with equipment and methods available to control the water contaminants involved;

(4) successive uses, including but not limited to, domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses;

(5) feasibility of a user or a subsequent user treating the water before a subsequent use;

(6) property rights and accustomed uses; and

(7) federal water quality requirements;

E. shall assign responsibility for administering its regulations to constituent agencies so as to assure adequate coverage and prevent duplication of effort. To this end, the commission may make such classification of waters and sources of water contaminants as will facilitate the assignment of administrative responsibilities to constituent agencies. The commission shall also hear and decide disputes between constituent agencies as to jurisdiction concerning any matters within the purpose of the Water Quality Act. In assigning responsibilities to constituent agencies, the commission shall give priority to the primary interests of the constituent agencies. The department of environment shall provide technical services, including certification of permits pursuant to the federal act;

F. may enter into or authorize constituent agencies to enter into agreements with the federal government or other state governments for purposes consistent with the Water Quality Act and receive and allocate to constituent agencies funds made available to the commission;

G. may grant an individual variance from any regulation of the commission, whenever it is found that compliance with the regulation will impose an unreasonable burden upon any lawful business, occupation or activity. The commission may only grant a variance conditioned upon a person effecting a particular abatement of water pollution within a reasonable period of time. Any variance shall be granted for the period of time specified by the commission. The commission shall adopt regulations specifying the procedure under which variances may be sought, which regulations shall provide for the holding of a public hearing before any variance may be granted;

H. may adopt regulations to require the filing with it or a constituent agency of proposed plans and specifications for the construction and operation of new sewer systems, treatment works or sewerage systems or extensions, modifications of or additions to new or existing sewer systems, treatment works or sewerage systems. Filing with and approval by the federal housing administration of plans for an extension to an existing or construction of a new sewerage system intended to serve a subdivision solely residential in nature shall be deemed compliance with all provisions of this subsection;

I. may adopt regulations requiring notice to it or a constituent agency of intent to introduce or allow the introduction of water contaminants into waters of the state;

J. may adopt regulations establishing pretreatment standards that prohibit or control the introduction into publicly owned sewerage systems of water contaminants that

are not susceptible to treatment by the treatment works or that would interfere with the operation of the treatment works;

K. shall not require a permit respecting the use of water in irrigated agriculture, except in the case of the employment of a specific practice in connection with such irrigation that documentation or actual case history has shown to be hazardous to public health or the environment; and

L. shall coordinate application procedures and funding cycles for loans and grants from the federal government and from other sources, public or private, with the local government division of the department of finance and administration pursuant to the New Mexico Community Assistance Act.

History: 1953 Comp., § 75-39-4, enacted by Laws 1967, ch. 190, § 4; 1970, ch. 64, § 3; 1971, ch. 277, § 51; 1973, ch. 326, § 3; 1981, ch. 347, § 1; 1984, ch. 5, § 13; 1993, ch. 291, § 4.

Delayed repeals. — Laws 1999, ch. 21, § 2 repeals 74-6-4 NMSA 1978, as enacted by Laws 1967, ch. 190, § 4, effective July 1, 2006.

Cross references. — For certification of utility operators, see 61-33-1 NMSA 1978 et seq.

The 1993 amendment, effective June 18, 1993, inserted "management" in Subsection B; in Subsection C, deleted "as a guide to water pollution control" following "standards" in the first sentence and added all of the remaining language following the first occurrence of "standards"; in Subsection D, rewrote the introductory paragraph, inserted "environment" in Paragraph (1), made minor stylistic changes in Paragraphs (2), (5), and (6), and added Paragraph (7); substituted the last sentence of Subsection E for the former last sentence which read "The environmental improvement division of the health and environment department shall provide testing and other technical services"; made minor stylistic changes in Subsections G, H, and J; and inserted "or the environment" in Subsection K.

New Mexico Community Assistance Act. — See 11-6-1 NMSA 1978 and notes thereto.

Discretion in consideration of factors. — In adopting standards for organic compounds in groundwater, Subsection D does not require the record to contain the commission's consideration of every part within the six factors for each organic compound. The commission possesses reasonable discretion in its consideration of the six factors and in the weight it gives to each factor. *Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1988) (decided prior to the 1993 amendment, which added Paragraph (7) to Subsection D).

No requirement that commission consider complete environmental impact. — There is no specific requirement in the commission's mandate that it consider to the fullest extent possible the

environmental consequences of its action. The commission could in all good faith adopt a regulation governing the effluent quality of sewage so restrictive that municipalities would turn to methods other than those currently used to dispose of it which would have adverse environmental consequences far more serious than some pollution of the waters of the state. *City of Roswell v. New Mexico Water Quality Control Comm'n*, 84 N.M. 561, 505 P.2d 1237 (Ct. App. 1972), cert. denied, 84 N.M. 560, 505 P.2d 1236 (1973) (decided under former law).

Commission may delegate authority to administer regulations. — Where the commission gives the environmental improvement division the authority to administer certain regulations, there is no unlawful delegation of authority. *Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n*, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982).

Numerical standards for organic compounds in rainwater. — The adoption of numerical standards for organic compounds in rainwater was not arbitrary and capricious, as they were technically achievable within the meaning of Subsection D. *Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1988).

Law reviews. — For comment, "Control of Industrial Water Pollution in New Mexico," see 9 *Nat. Resources J.* 653 (1969).

For note, "Ground and Surface Water in New Mexico: Are They Protected Against Uranium Mining and Milling?" see 18 *Nat. Resources J.* 941 (1978).

For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 *Nat. Resources J.* 693 (1979).

For article, "The Assurance of Reasonable Toxic Risk?" see 24 *Nat. Resources J.* 549 (1984).

For article, "Information for State Groundwater Quality Policymaking," see 24 *Nat. Resources J.* 1015 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A *Am. Jur. 2d Pollution Control* § 719.

39A *C.J.S. Health and Environment* §§ 133 to 136.

74-6-5. Permits; certification; appeals to commission.

A. By regulation the commission may require persons to obtain from a constituent agency designated by the commission a permit for the discharge of any water contaminant or for the disposal or re-use of septage or sludge.

B. The commission shall adopt regulations establishing procedures for certifying federal water quality permits.

C. Prior to the issuance of a permit, the constituent agency may require the submission of plans, specifications and other relevant information that it deems necessary.

D. The commission shall by regulation set the dates upon which applications for permits shall be filed and designate the time periods within which the constituent agency shall, after the filing of an administratively complete application for a permit, either grant the permit, grant the permit subject to conditions or deny the permit.

E. The constituent agency shall deny any application for a permit or deny the certification of a federal water quality permit if:

(1) the effluent would not meet applicable state or federal effluent regulations, standards of performance or limitations;

(2) any provision of the Water Quality Act [Chapter 74, Article 6 NMSA 1978] would be violated;

(3) the discharge would cause or contribute to water contaminant levels in excess of any state or federal standard. Determination of the discharges' effect on ground water shall be measured at any place of withdrawal of water for present or reasonably foreseeable future use. Determination of the discharges' effect on surface waters shall be measured at the point of discharge; or

(4) the applicant has, within the ten years immediately preceding the date of submission of the permit application:

(a) knowingly misrepresented a material fact in an application for a permit;

(b) refused or failed to disclose any information required under the Water Quality Act;

(c) been convicted of a felony or other crime involving moral turpitude;

(d) been convicted of a felony in any court for any crime defined by state or federal law as being a restraint of trade, price-fixing, bribery or fraud;

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

(f) had an environmental permit revoked or permanently suspended for cause under any environmental laws of any state or the United States.

F. The commission shall by regulation develop procedures that ensure that the public, affected governmental agencies and any other state whose water may be affected shall receive notice of each application for issuance or modification of a permit. No ruling shall be made on any application for a permit without opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.

G. The commission may adopt regulations for the operation and maintenance of the permitted facility, including requirements, as may be necessary or desirable, that relate to continuity of operation, personnel training and financial responsibility, including financial responsibility for corrective action.

H. Permits shall be issued for fixed terms not to exceed five years, except that for new discharges, the term of the permit shall commence on the date the discharge begins, but in no event shall the term of the permit exceed seven years from the date the permit was issued.

I. By regulation, the commission may impose reasonable conditions upon permits requiring permittees to:

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

(2) sample effluents and receiving waters for any known or suspected water contaminants in accordance with methods and at locations and intervals as may be prescribed by the commission;

(3) establish and maintain records of the nature and amounts of effluents and the performance of effluent control devices;

(4) provide any other information relating to the discharge or direct or indirect release of water contaminants; and

(5) notify a constituent agency of the introduction of new water contaminants from a new source and of a substantial change in volume or character of water contaminants being introduced from sources in existence at the time of the issuance of the permit.

J. The commission shall provide by regulation a schedule of fees for permits, not exceeding the estimated cost of investigation and issuance, modification and renewal of permits. Fees collected pursuant to this section shall be deposited in the water quality management fund.

K. The issuance of a permit does not relieve any person from the responsibility of complying with the provisions of the Water Quality Act, any applicable regulations or water quality standards of the commission or any applicable federal laws, regulations or standards.

L. A permit may be terminated or modified by the constituent agency that issued the permit prior to its date of expiration for any of the following causes:

- (1) violation of any condition of the permit;
- (2) obtaining the permit by misrepresentation or failure to disclose fully all relevant facts;
- (3) violation of any provisions of the Water Quality Act or any applicable regulations, standard of performance or water quality standards;
- (4) violation of any applicable state or federal effluent regulations or limitations; or
- (5) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

M. If the constituent agency denies, terminates or modifies a permit or grants a permit subject to condition, the constituent agency shall notify the applicant or permittee by certified mail of the action taken and the reasons.

N. A person who participated in a permitting action before a constituent agency or a person affected by a certification of a federal permit and who is adversely affected by such permitting action or certification may file a petition for review before the commission. The petition shall be made in writing to the commission within thirty days from the date notice is given of the constituent agency's action. Unless a timely petition for review is made, the decision of the constituent agency shall be final.

O. If a timely petition for review is made, the commission shall hold a hearing within ninety days after receipt of the petition. The commission shall notify the petitioner and the applicant or permittee if other than the petitioner by certified mail of the date, time and place of the hearing. If the commission deems the action that is the subject of the petition to be affected with substantial public interest, it shall ensure that the public receives notice of the date, time and place of the hearing and is given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. A person submitting data, views or arguments orally or in writing shall be subject to examination at the hearing. In the hearing, the burden of proof shall be upon the petitioner. The commission may designate a hearing officer to take evidence in the hearing. Based upon the evidence presented at the hearing, the commission shall sustain, modify or reverse the action of the constituent agency.

P. If the petitioner requests, the hearing shall be recorded at the cost of the petitioner. Unless the petitioner requests that the hearing be recorded, the decision of the commission shall be final.

History: 1953 Comp., § 75-39-4.1, enacted by Laws 1973, ch. 326, § 4; 1985, ch. 157, § 1; 1989, ch. 248, § 1; 1993, ch. 100, § 3; 1993, ch. 291, § 5; 1999, ch. 21, § 1.

1993 amendments. — Laws 1993, ch. 100, § 3, effective March 31, 1993, deleting the former last sentence of Subsection H, which read "Effective July 1, 1992, all fees collected pursuant to this section shall be deposited in the general fund" and making minor stylistic changes throughout the section, was approved March 31, 1993. However, Laws 1993, ch. 291, § 5, effective June 18, 1993, also amending this section, rewriting it to the extent that a detailed comparison would be impracticable, but not giving

effect to the changes made by the first 1993 amendment, was approved April 7, 1993. The section is set out as amended by Laws 1993, ch. 291, § 5. See 12-1-8 NMSA 1978.

The 1999 amendment, effective June 18, 1999, in Subsection N substituted "review" for "hearing" in two places and substituted "petition" for "request" in the last sentence, substituted "review" for "hearing" in the first sentence of Subsection O, and made minor stylistic changes.

Commission's requirement of information to prevent water pollution within statutory mandate. — Where the objective of this article is to abate and prevent water pollution, it is not "clearly

incorrect" for the commission to require a discharger of toxic pollutants to provide a site and method for flow measurement and to provide any pertinent information relating to the discharge of water contaminants in order to demonstrate to the commission that the plans of the discharger will not result in a violation of the standards and regulations; these requirements are well within the statutory mandate. *Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n*, 93 N.M. 546, 603 P.2d 285 (1979).

In determining whether administrative interpretation is "clearly incorrect," the authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent or policy. *Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n*, 93 N.M. 546, 603 P.2d 285 (1979).

Commission may delegate authority to administer regulations. — Where the commission gave the environmental improvement division [now department of environment] the authority to administer certain regulations, there was no unlawful dele-

gation of authority. *Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n*, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982).

Discharge of a toxic pollutant in violation of a discharge plan is a criminal act. *Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n*, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982).

Law reviews. — For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 *Nat. Resources J.* 693 (1979).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 *N.M.L. Rev.* 1 (1981).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A *Am. Jur. 2d Pollution Control* §§ 133 to 136.

Validity of state statutory provision permitting administrative agency to impose monetary penalties for violation of environmental pollution statute, 81 *A.L.R.3d* 1258.

39A *C.J.S. Health and Environment* §§ 134, 145, 154.

74-6-5.1. Disclosure statements.

A. The commission by regulation may require every applicant for a permit to dispose or use septage or sludge, or within a source category designated by the commission, to file with the appropriate constituent agency a disclosure statement. The disclosure statement shall be submitted on a form developed by the commission and the department of public safety. The commission in cooperation with the department of public safety shall determine the information to be contained in the disclosure statement. The disclosure statement shall be submitted to the constituent agency at the same time that the applicant files an application for a permit pursuant to Section 74-6-5 NMSA 1978. The commission shall adopt regulations designating additional categories of sources subject to the disclosure requirements of this section as it deems appropriate and necessary to carry out the purposes of this section.

B. Upon a request by the constituent agency, the department of public safety shall prepare and transmit to the constituent agency an investigative report on the applicant within ninety days after the department of public safety receives an administratively complete disclosure statement prepared by the applicant for a permit. The investigative report shall be based in part upon the disclosure statement. The ninety-day deadline for preparing the investigative report may be extended by the constituent agency for a reasonable period of time for good cause. The department of public safety in preparing the investigative report may request and receive criminal history information from any other law enforcement agency or organization. The constituent agency may also request information regarding a person who will be or could reasonably be expected to be involved in management activities of the permitted facility or a person who has a controlling interest in a permitted facility. The information received from a law enforcement agency shall be kept confidential by the department of public safety to the extent that confidentiality is imposed by the law enforcement agency as a condition for providing the information to the constituent agency or the commission.

C. All persons required to file a disclosure statement shall provide any assistance or information requested by the constituent agency or the department of public safety and shall cooperate in any inquiry or investigation conducted by the department of public safety. If a person required to file a disclosure statement refuses to comply with a formal request to answer an inquiry or produce information, evidence or testimony, the application of the applicant or the permit of the permittee shall be denied or terminated by the constituent agency.

D. If the information required to be included in the disclosure statement changes or if additional information should be added after the filing of the disclosure statement, the

person required to file the disclosure statement shall provide the information to the constituent agency in writing within thirty days after the change or addition. Failure to provide the information within thirty days shall constitute the basis for the termination of a permit or denial of an application for a permit. Prior to terminating a permit or denying an application for a permit, the constituent agency shall notify the permittee or applicant of the constituent agency's intent to terminate a permit or deny an application and the constituent agency shall give the permittee or applicant fourteen days from the date of notice to satisfactorily explain why the information was not provided within the thirty-day period. The constituent agency shall consider the explanation of the permittee or applicant when determining whether to terminate the permit or deny the application for a permit.

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

(1) the application is for a facility owned and operated by the state, a political subdivision of the state or an agency of the federal government or for the permitted disposal or use of septage or sludge on the premises where the sludge or septage is generated;

(2) the person has submitted a disclosure statement pursuant to this section within the previous year and no changes have occurred that would require disclosure under Subsection D of this section; or

(3) the person is 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 by Section 5, Chapter 38, Title 1 of the Securities Act of 1933, as amended;

(b) submits to the constituent agency with the application for a permit evidence of the registration described in Subparagraph (a) of this subsection and a copy of the corporation's most recent annual form 10-K or an equivalent report; and

(c) submits to the constituent agency on the anniversary date of the issuance of the permit evidence of registration described in Subparagraph (a) of this subsection and a copy of the corporation's most recent annual form 10-K or an equivalent report.

F. Permit decisions made pursuant to this section shall be subject to the procedures established in Section 74-6-5 NMSA 1978, including notice and appeals.

History: Laws 1993, ch. 291, § 12.
Securities Act of 1933. — Section 5, Chapter 38,

Title 1 of the Securities Act of 1933, referred to
Subsection E(3)(a), appears as 15 U.S.C. § 77e.

74-6-5.2. Water quality management fund created.

There is created in the state treasury the "water quality management fund" to be administered by the department of environment. All fees collected pursuant to the regulations adopted by the commission under Subsection H [J] of Section 74-6-5 NMSA 1978 shall be deposited in the fund. Money in the fund is appropriated to the department of environment for the purpose of administering the regulations adopted by the commission pursuant to Section 74-6-5 NMSA 1978. Disbursements from the fund shall be made upon warrants drawn by the secretary of finance and administration pursuant to vouchers signed by the secretary of environment.

History: Laws 1993, ch. 100, § 4.

Bracketed material. — The bracketed material in the second sentence was inserted by the compiler. It was not enacted by the legislature, and it is not a

part of the law. Laws 1993, ch. 291, § 5 rewrote 74-6-5 NMSA 1978, moving the provisions relating to fees to Subsection J, effective June 18, 1993.

74-6-6. Adoption of regulations and standards; notice and hearing.

A. No regulation or water quality standard or amendment or repeal thereof shall be adopted until after a public hearing.

B. Any person may petition in writing to have the commission adopt, amend or repeal a regulation or water quality standard. The commission shall determine whether to hold a hearing within ninety days of submission of the petition. The denial of such a petition shall not be subject to judicial review.

C. Hearings on regulations or water quality standards of statewide application shall be held in Santa Fe. Hearings on regulations or standards that are not of statewide application may be held within the area that is substantially affected by the regulation or standard. At least thirty days prior to the hearing date, notice of the hearing shall be published in the New Mexico register and a newspaper of general circulation in the area affected and mailed to all persons who have made a written request to the commission for advance notice of hearings and who have provided the commission with a mailing address. The notice shall state the subject, the time and the place of the hearing and the manner in which interested persons may present their views. The notice shall also state where interested persons may secure copies of any proposed regulation or water quality standard.

D. At the hearing, the commission shall allow all interested persons reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. The commission may designate a hearing officer to take evidence in the hearing. Any person heard or represented at the hearing shall be given written notice of the action of the commission.

E. No regulation or water quality standard or amendment or repeal thereof adopted by the commission shall become effective until thirty days after its filing in accordance with the provisions of the State Rules Act [Chapter 14, Article 4 NMSA 1978].

History: 1953 Comp., § 75-39-5, enacted by Laws 1967, ch. 190, § 5; 1982, ch. 73, § 26; 1993, ch. 291, § 6.

Cross references. — As to filing with the supreme court law librarian, see 14-4-9 NMSA 1978.

The 1993 amendment, effective June 18, 1993, inserted "and standards" in the catchline; inserted the subsection designations; in Subsection A, deleted "within the area of the state concerned; provided that the commission may adopt water quality standards on the basis of the record of hearings held by the New Mexico department of public health prior to the effective date of the Water Quality Act if those hearings were held in general conformance with the provisions of this section" from the end; in Subsection B, substituted the language following "Any person may" for "recommend or propose regulations to the commission for promulgation"; in Subsection C, in the first sentence, inserted "or water quality standards" and made a minor stylistic change, added the second sentence, in the third sentence, added "At least thirty days prior to the hearing date" and substituted the language following "hearing shall be" for "given at least thirty days prior to the hearing date and", inserted "The notice" at the beginning of the fourth sentence and deleted the last two sentences, which read "The notice shall be published in a newspaper of general circulation in the area affected. Reasonable effort shall be made to give notice to all persons who have made a written request to the commission for advance notice of its hearings"; and deleted the former second sentence of Subsection E, which read "The commission shall determine

whether or not to hold a hearing within sixty days of submission of a proposed regulation."

Authority of division to propose regulations and act as interested party at hearings. — In light of the fact that the legislature had seen fit to have the director of the environmental improvement division sit as a member of the commission, the division could propose regulations to the commission and then act as an interested party at the hearings. *Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n*, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982) (decided prior to 1982 amendment of 74-6-9 NMSA 1978 and the 1993 amendment to 74-6-3A(1)).

Adequacy of hearing. — Given the extensive nature of the public meetings and public hearing on the matter, with an opportunity to present evidence and cross-examine witnesses and with the prehearing disclosure of six references, the allegation of the concealment of the basic data on which standards for organic compounds in ground-water were based, was without merit. *Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1988).

Law reviews. — For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pollution Control § 4.

39A C.J.S. Health and Environment §§ 138, 142.

74-6-7. Administrative action; judicial review.

A. Except as otherwise provided in the Water Quality Act [Chapter 74, Article 6 NMSA 1978], a person who is adversely affected by a regulation adopted by the commission or by a compliance order approved by the commission or who participated in a permitting action or appeal of a certification before the commission and who is adversely affected by such action may appeal to the court of appeals for further relief. All such appeals shall be upon the record made before the commission and shall be taken to the court of appeals within thirty days after the regulation, compliance order, permitting action or certification that is being appealed occurred. If an appeal of a regulation is made, then the date of the commission's action shall be the date of the filing of the regulation under the State Rules Act [Chapter 14, Article 4 NMSA 1978].

B. Upon appeal, the court of appeals shall set aside the commission's 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.

C. After a hearing and a showing of good cause by the appellant, a stay of the action being appealed may be granted pending the outcome of the judicial review. The stay of the action may be granted by the commission or by the court of appeals if the commission denies a stay within ninety days after receipt of the application.

History: 1953 Comp., § 75-39-6, enacted by Laws 1967, ch. 190, § 6; 1970, ch. 64, § 4; 1993, ch. 291, § 7.

The 1993 amendment, effective June 18, 1993, substituted "Administrative Action" for "Validity of Regulation" in the catchline; rewrote Subsection A; deleted former Subsection B, relating to the procedure for perfecting an appeal; redesignated former Subsection C as present Subsection B; in present Subsection B, substituted "commission's action" for "regulation", deleted "or reasonably related to the prevention or abatement of water pollution" following "the record" in Paragraph (2), and made a minor stylistic change; and added present Subsection C.

Standard is rule, if the proper procedure has been followed in promulgating it. *Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n*, 93 N.M. 546, 603 P.2d 285 (1979).

Standards adopted as rules are appealable. — Since the standards for the evaluation of waste water to determine whether it is contaminated were adopted as rules, they are appealable to the court of appeals. *Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n*, 93 N.M. 546, 603 P.2d 285 (1979).

Lack of numerical standards not basis for invalidating regulation. — Although there are no numerical standards in a regulation for what concentration of compounds triggers the label "toxic pollutant," this is not detrimental to a discharger where the director of the environmental improvement division will make that determination before a discharge plan is approved or disapproved, and the discharger will be notified. The lack of numerical standards is, therefore, not a basis for finding the regulation unconstitutional. *Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n*, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982).

Stay from operation of order or regulation. — Implicit in this section is the power to grant a stay

from the operation of an administrative order or regulation, after due notice and opportunity for hearing. *Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 105 N.M. 708, 736 P.2d 986 (Ct. App. 1986) (decided prior to the 1993 amendment, which added the provisions in Subsection C authorizing a stay of the action being appealed).

Evidence upon review. — The "whole record" standard of judicial review to findings of fact made by administrative agencies controls where the commission acts in its rule-making capacity. Therefore, such a review must include the record of all public meetings and public hearings. *Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1988).

The legal residuum rule, which requires support by some evidence that would be admissible in a jury trial, is not applicable in a judicial review of a rule-making proceeding. *Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1988).

Law reviews. — For comment, "Control of Industrial Water Pollution in New Mexico," see 9 *Nat. Resources J.* 653 (1969).

For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 *Nat. Resources J.* 693 (1979).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 *N.M.L. Rev.* 1 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A *Am. Jur. 2d Pollution Control* §§ 117, 678 et seq., 749, 878, 881, 1249, 1578 to 1581, 1719, 1721.

Validity and construction of anti-water pollution statutes and ordinances, 32 *A.L.R.3d* 215.

Pollution control: validity and construction of statutes, ordinances or regulations controlling discharge of industrial wastes into sewer system, 47 *A.L.R.3d* 1224.

39A *C.J.S. Health and Environment* § 146.

74-6-8. Duties of constituent agencies.

Each constituent agency shall administer regulations adopted pursuant to the Water Quality Act [Chapter 74, Article 6 NMSA 1978], responsibility for the administration of which has been assigned to it by the commission.

History: 1953 Comp., § 75-39-7, enacted by Laws 1967, ch. 190, § 7.

Commission may delegate authority to administer regulations. — Where the commission gives the environmental improvement division the authority to administer certain regulations, there is

no unlawful delegation of authority. *Kerr-McGee Nuclear Corp. v. New Mexico Water Quality Control Comm'n*, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982).

Law reviews. — For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

74-6-9. Powers of constituent agencies.

Each constituent agency may:

A. receive and expend funds appropriated, donated or allocated to the constituent agency for purposes consistent with the Water Quality Act [Chapter 74, Article 6 NMSA 1978];

B. develop facts and make studies and investigations and require the production of documents necessary to carry out the responsibilities assigned to the constituent agency. The result of any investigation shall be reduced to writing and a copy furnished to the commission and to the owner or occupant of the premises investigated;

C. report to the commission and to other constituent agencies water pollution conditions that are believed to require action where the circumstances are such that the responsibility appears to be outside the responsibility assigned to the agency making the report;

D. make every reasonable effort to obtain voluntary cooperation in the prevention or abatement of water pollution;

E. upon presentation of proper credentials, enter at reasonable times upon or through any premises in which a water contaminant source is located or in which are located any records required to be maintained by regulations of the federal government or the commission; provided that entry into any private residence without the permission of the owner shall be only by order of the district court for the county in which the residence is located and that, in connection with any entry provided for in this subsection, the constituent agency may:

(1) have access to and reproduce for their use any copy of the records;

(2) inspect any treatment works, monitoring equipment or methods required to be installed by regulations of the federal government or the commission; and

(3) sample any effluents, water contaminant or receiving waters;

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

G. on the same basis as any other person, present data, views or arguments and examine witnesses and otherwise participate at all hearings conducted by the commission or any other administrative agency with responsibility in the areas of environmental management, public health or consumer protection, but shall not be given any special status over any other party; provided that the participation by a constituent agency in a hearing shall not require the recusal or disqualification of the commissioner representing that constituent agency.

History: 1953 Comp., § 75-39-8, enacted by Laws 1967, ch. 190, § 8; 1973, ch. 326, § 5; 1982, ch. 73, § 27; 1993, ch. 291, § 8.

The 1993 amendment, effective June 18, 1993, made a minor stylistic change in Subsection B; in Subsection E, in the introductory paragraph, substituted "a water contaminant" for "an effluent" and

inserted "federal government or the", inserted "and reproduce for their use" in Paragraph (1), in Paragraph (2), inserted "treatment works" and "federal government or the", inserted "water contaminant or receiving waters" in Paragraph (3); inserted "and standards" in Subsection F; and inserted "public health" in Subsection G.

Authority of division to propose regulations and act as interested party at hearings. — In light of the fact that the legislature had seen fit to have the director of the environmental improvement division sit as a member of the commission, the division could propose regulations to the commission and then act as an interested party at the hearings. *Kerr-McGee Nuclear Corp. v. New Mexico Water*

Quality Control Comm'n, 98 N.M. 240, 647 P.2d 873 (Ct. App. 1982) (decided prior to 1982 amendment and the 1993 amendment to 74-6-3A(1)).

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

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

74-6-10. Penalties enforcement; compliance orders; penalties; assurance of discontinuance.

A. Whenever, on the basis of any information, a constituent agency determines that a person violated or is violating a requirement, regulation or water quality standard adopted pursuant to the Water Quality Act [Chapter 74, Article 6 NMSA 1978] or a condition of a permit issued pursuant to that act, the constituent agency may:

(1) issue a compliance order requiring compliance immediately or within a specified time period or issue a compliance order assessing a civil penalty, or both; or

(2) commence a civil action in district court for appropriate relief, including injunctive relief.

B. A compliance order issued pursuant to Paragraph (1) of Subsection A of this section may include a suspension or termination of the permit allegedly violated.

C. A compliance order shall state with reasonable specificity the nature of the violation. Any penalty assessed in the compliance order shall not exceed:

(1) fifteen thousand dollars (\$15,000) per day of noncompliance with the provisions in Section 74-6-5 NMSA 1978, including a regulation adopted or a permit issued pursuant to that section; or

(2) ten thousand dollars (\$10,000) per day for each violation of a provision of the Water Quality Act other than the provisions in Section 74-6-5 NMSA 1978 or of a regulation or water quality standard adopted pursuant to the Water Quality Act.

D. In assessing a penalty authorized by this section, the constituent agency shall take into account the seriousness of the violation, any good faith efforts to comply with the applicable requirements and other relevant factors.

E. For purposes of this section, a single operational event that leads to simultaneous violations of more than one standard shall be treated as a single violation.

F. If a person fails to take corrective actions within the time specified in a compliance order, the constituent agency may:

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

(2) suspend or terminate the permit violated by the person.

G. Any compliance order issued by a constituent agency pursuant to this section shall become final unless, no later than thirty days after the compliance order is served, any person named in the compliance order submits a written request to the commission for a public hearing. The commission shall conduct a public hearing within ninety days after receipt of a request.

H. The commission may appoint an independent hearing officer to preside over any public hearing held pursuant to Subsection F of this section. The hearing officer shall:

(1) make and preserve a complete record of the proceedings; and

(2) forward to the commission a report that includes recommendations, if recommendations are requested by the commission.

I. The commission shall consider the findings of the independent hearing officer and, based on the evidence presented at the hearing, the commission shall make a final decision regarding the compliance order.

J. In connection with any proceeding under this section, the commission may:

(1) adopt rules for discovery procedures; and

(2) issue subpoenas for the attendance and testimony of witnesses and for relevant papers, books and documents.

K. Penalties collected pursuant to this section shall be deposited in the general fund.

L. As an additional means of enforcing the Water Quality Act or any regulation or standard of the commission, the commission may accept an assurance of discontinuance of any act or practice deemed in violation of the Water Quality Act or any regulation or standard adopted pursuant to that act, from any person engaging in, or who has engaged in, such act or practice, signed and acknowledged by the chairman of the commission and the party affected. Any such assurance shall specify a time limit during which the discontinuance is to be accomplished.

History: 1953 Comp., § 75-39-9, enacted by Laws 1967, ch. 190, § 9; 1970, ch. 64, § 5; 1993, ch. 291, § 9.

The 1993 amendment, effective June 18, 1993, rewrote this section to the extent that a detailed comparison would be impracticable.

Voluntary compliance no bar to assessment of civil penalties and cleanup costs. — The former voluntary compliance provision of Subsection A did not apply to the remedies provided for violations of this article. The absence of voluntary compliance actions on the part of the state in a case did not prevent the state from seeking civil penalties and costs of cleanup. *State ex rel. New Mexico Water Quality Control Comm'n v. Molybdenum Corp. of Am.*, 89 N.M. 552, 555 P.2d 375 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976) (decided prior to the 1993 amendment, which rewrote this section, deleting reference to voluntary compliance and shifting penalty provisions to 74-6-10.1 and 74-6-10.2 NMSA 1978).

Law reviews. — For comment, "Control of Indus-

trial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pollution Control § 2046 et seq.

Injunction against pollution of stream by private persons or corporations, 46 A.L.R. 8.

Validity and construction of statutes, ordinances or regulations controlling discharge of industrial wastes into sewer system, 47 A.L.R.3d 1224.

Preliminary mandatory injunction to prevent, correct or reduce effects of polluting practices, 49 A.L.R.3d 1239.

Right to maintain action to enjoin public nuisance as affected by existence of pollution control agency, 60 A.L.R.3d 665.

Validity, under federal constitution, of state statute or local ordinance regulating phosphate content of detergents, 21 A.L.R. Fed. 365.

39A C.J.S. Health and Environment §§ 150 to 154.

74-6-10.1. Civil penalties.

A. Any person who does not comply with the provisions of Section 74-6-5 NMSA 1978, including any regulation adopted pursuant to that section, or any permit issued pursuant to that section, shall be assessed civil penalties up to the amount of fifteen thousand dollars (\$15,000) per day of noncompliance for each violation.

B. Any person who violates any provision of the Water Quality Act [Chapter 74, Article 6 NMSA 1978] other than Section 74-6-5 NMSA 1978 or any person who violates any regulation, water quality standard or compliance order adopted pursuant to that act shall be assessed civil penalties up to the amount of ten thousand dollars (\$10,000) per day for each violation.

History: Laws 1993, ch. 291, § 14.

74-6-10.2. Criminal penalties.

A. No person shall:

(1) discharge any water contaminant without a permit for the discharge, if a permit is required, or in violation of any condition of a permit for the discharge from the federal environmental protection agency, the commission or a constituent agency designated by the commission;

(2) make any false material statement, representation, certification or omission of material fact in an application, record, report, plan or other document filed, submitted or required to be maintained under the Water Quality Act [Chapter 74, Article 6 NMSA 1978];

(3) falsify, tamper with or render inaccurate any monitoring device, method or record required to be maintained under the Water Quality Act;

(4) fail to monitor, sample or report as required by a permit issued pursuant to a state or federal law or regulation; or

(5) introduce into a sewerage system or into a publicly owned treatment works any water contaminant or hazardous substance, other than in compliance with all applicable federal, state or local requirements or permits, that the person knew or reasonably should have known could cause personal injury or property damage, which causes the treatment works to violate an effluent limitation or condition in a permit issued to the treatment works pursuant to the Water Quality Act or applicable federal water quality statutes.

B. Any person who knowingly violates or knowingly causes or allows another person to violate Subsection A of this section is guilty of a fourth degree felony and shall be sentenced in accordance with the provisions of Section 31-18-15 NMSA 1978.

C. Any person who is convicted of a second or subsequent violation of Subsection A of this section is guilty of a third degree felony and shall be sentenced in accordance with the provisions of Section 31-18-15 NMSA 1978.

D. Any person who knowingly violates Subsection A of this section or knowingly causes another person to violate Subsection A of this section and thereby causes a substantial adverse environmental impact is guilty of a third degree felony and shall be sentenced in accordance with the provisions of Section 31-18-15 NMSA 1978.

E. Any person who knowingly violates Subsection A of this section and knows at the time of the violation that he is creating a substantial danger of death or serious bodily injury to any other person is guilty of a second degree felony and shall be sentenced in accordance with the provisions of Section 31-18-15 NMSA 1978.

F. A single operational event that leads to simultaneous violations of more than one water contaminant parameter shall be treated as a single violation.

History: Laws 1993, ch. 291, § 15.

74-6-11. Emergency; powers of delegated constituent agencies; penalties.

A. If a constituent agency determines upon receipt of evidence that a pollution source or combination of sources over which it has been delegated authority by the commission poses an imminent and substantial danger to public health, it may bring suit in the district court for the county in which such a source is located to:

(1) restrain immediately any person causing or contributing to the alleged condition from further causing or contributing to the condition; or

(2) take such other action as deemed necessary and appropriate.

B. If it is not practicable to assure prompt protection of public health solely by commencement of a civil action as set forth in Subsection A of this section, the constituent agency may issue such orders as it deems necessary to protect public health. Any order issued by the constituent agency shall be effective for not more than seventy-two hours unless the constituent agency brings an action in district court within the seventy-two hour period. If the constituent agency brings an action within seventy-two hours of issuance of the order, the order shall be effective for one hundred sixty-eight hours or for a longer period of time authorized by the court.

C. Any person who willfully violates or fails or refuses to comply with an order issued by a constituent agency under Subsection B of this section shall, upon conviction, be punished by a fine of not more than five thousand dollars (\$5,000) for each day during which the violation, failure or refusal occurs.

History: 1953 Comp., § 75-39-10, enacted by Laws 1967, ch. 190, § 10; 1970, ch. 64, § 6; 1971, ch. 277, § 52; 1993, ch. 291, § 10.

The 1993 amendment, effective June 18, 1993, rewrote the catchline, which read "Emergency Proce-

dures"; deleted the former language of the section relating to the procedure followed by the director of the environmental improvement agency to abate water pollution, and added new Subsections A through C.

Law reviews. — For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pollution Control §§ 2012, 2050. 39A C.J.S. Health and Environment § 144.

74-6-12. Limitations.

A. The Water Quality Act [Chapter 74, Article 6 NMSA 1978] does not grant to the commission or to any other entity the power to take away or modify the property rights in water, nor is it the intention of the Water Quality Act to take away or modify such rights.

B. The Water Quality Act does not apply to any activity or condition subject to the authority of the environmental improvement board pursuant to the Hazardous Waste Act [Chapter 74, Article 4 NMSA 1978], the Ground Water Protection Act [Chapter 74, Article 6B NMSA 1978] or the Solid Waste Act except to abate water pollution or to control the disposal or use of septage and sludge.

C. The Water Quality Act does not authorize the commission to adopt any regulation with respect to any condition or quality of water if the water pollution and its effects are confined entirely within the boundaries of property within which the water pollution occurs when the water does not combine with other waters.

D. The Water Quality Act does not grant to the commission any jurisdiction or authority affecting the relation between employers and employees with respect to or arising out of any condition of water quality.

E. The Water Quality Act does not supersede or limit the applicability of any law relating to industrial health, safety or sanitation.

F. Except as required by federal law, in the adoption of regulations and water quality standards and in an action for enforcement of the Water Quality Act and regulations adopted pursuant to that act, reasonable degradation of water quality resulting from beneficial use shall be allowed. Such degradation shall not result in impairment of water quality to the extent that water quality standards are exceeded.

G. The Water Quality Act does not apply to any activity or condition subject to the authority of the oil conservation commission pursuant to provisions of the Oil and Gas Act [Chapter 70, Article 2 NMSA 1978], Section 70-2-12 NMSA 1978 and other laws conferring power on the oil conservation commission to prevent or abate water pollution.

H. When changes in dissolved oxygen, temperature, dissolved solids, sediment or turbidity in a water of the state is attributable to natural causes or to the reasonable operation of irrigation and flood control facilities that are not subject to federal or state water pollution control permitting, numerical standards for temperature, dissolved solids content, dissolved oxygen, sediment or turbidity adopted under the Water Quality Act do not apply. "Reasonable operation", as used in this subsection, shall be defined by regulation of the commission.

History: 1953 Comp., § 75-39-11, enacted by Laws 1967, ch. 190, § 11; 1973, ch. 326, § 6; 1993, ch. 291, § 11; 1995, ch. 133, § 1; 1999, ch. 152, § 1.

The 1993 amendment, effective June 18, 1993, deleted former Subsection B relating to the availability of data obtained by the commission to the public and inserted present Subsection B; in Subsection F, inserted "Except as required by federal law", substituted "pursuant to that act" for "thereunder", and added the last sentence; and rewrote Subsection G.

The 1995 amendment, effective June 16, 1995, substituted "pursuant to provisions of" for "under" in Subsection G, and added Subsection H.

The 1999 amendment, effective June 18, 1999, rewrote Subsection H which read: "When dissolved oxygen, sediment or turbidity in a water of the state

is attributable to natural causes or to the reasonable operation of irrigation and flood control facilities, numerical standards for dissolved oxygen, sediment or turbidity adopted under the Water Quality Act do not apply. 'Reasonable operation', as used in this subsection, shall be defined by regulation of the commission".

Solid Waste Act. — See 74-9-1 NMSA 1978 and notes thereto.

Law reviews. — For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

For note, "New Mexico Water Pollution Regulations and Standards Upheld," see 19 Nat. Resources J. 693 (1979).

For article, "The Assurance of Reasonable Toxic Risk?," see 24 Nat. Resources J. 549 (1984).

74-6-13. Construction.

The Water Quality Act [Chapter 74, Article 6 NMSA 1978] provides additional and cumulative remedies to prevent, abate and control water pollution, and nothing abridges or alters rights of action or remedies in equity under the common law or statutory law, criminal or civil. No provision of the Water Quality Act or any act done by virtue thereof estops the state or any political subdivision or person as owner of water rights or otherwise, in the exercise of their rights in equity or under the common law or statutory law to suppress nuisances or to abate pollution.

History: 1953 Comp., § 75-39-12, enacted by Laws 1967, ch. 190, § 12.

Court retains jurisdiction of case seeking tort and contract damages. — The trial court correctly retains jurisdiction of a case seeking tort and contract damages against a utility for its failure to supply water meeting certain minimal standards of quality since the government agencies involved have no expertise in considering tort and contractual

claims and are without power to grant the relief that the plaintiffs have asked, and this section evidences the legislative intent that common-law remedies against water pollution be preserved. *O'Hare v. Valley Utils., Inc.*, 89 N.M. 105, 547 P.2d 1147 (Ct. App.), modified, 89 N.M. 262, 550 P.2d 274 (1976).

Law reviews. — For comment, "Control of Industrial Water Pollution in New Mexico," see 9 Nat. Resources J. 653 (1969).

74-6-14. Recompiled.

Recompilations. — Section 74-6-14 NMSA 1978, as amended by Laws 1993, ch. 291, § 17, relating to

the termination of agency life, was recompiled as 74-6-17 NMSA 1978 in 1993.

74-6-15. Confidential information; penalties.

A. Records, reports or information obtained by the commission or a constituent agency pursuant to the Water Quality Act [Chapter 74, Article 6 NMSA 1978] shall be generally available to the public. All ambient water quality data and all effluent data obtained by the commission or a constituent agency shall be available to the public. Records, reports or information or particular parts of the records, reports or information shall be held confidential, if a person can demonstrate to the commission or constituent agency that the records, reports or information or particular parts of the records, reports or information, if made public, would divulge confidential business records or methods or processes entitled to protection as trade secrets. Except that the record, report or information may be disclosed:

(1) to officers, employees or authorized representatives of the commission or a constituent agency concerned with carrying out the purposes and provisions of the Water Quality Act;

(2) to officers, employees or authorized representatives of the United States government; or

(3) when relevant in any proceeding pursuant to the Water Quality Act or the federal act.

B. The commission shall promulgate regulations to implement the provisions of this section, including regulations specifying business records entitled to protection as confidential.

C. An officer, employee or authorized representative of the commission or a constituent agency who knowingly or willfully publishes, divulges, discloses or makes known any information that is required to be considered confidential pursuant to this section shall be fined not more than one thousand dollars (\$1,000) or imprisonment of not more than one year, or both.

History: Laws 1993, ch. 291, § 13.

74-6-16. Effect and enforcement of Water Quality Act during transition.

A. All rules, regulations, water quality standards and administrative determinations of the commission and any constituent agency pertaining to the Water Quality Act [Chapter 74, Article 6 NMSA 1978] that existed prior to the effective date of this 1993 act shall remain in full force and effect after that date until repealed or amended, unless in conflict with, prohibited by or inconsistent with the provisions of the Water Quality Act.

B. All enforcement actions taken before the effective date of this 1993 act shall be valid if based upon a violation of the Water Quality Act, including any regulation or water quality standard that was in effect at the time of the violation.

History: Laws 1993, ch. 291, § 16.

Compiler's notes. — The "effective date of this 1993 act", referred to in Subsection A, means June

18, 1993, the effective date of Laws 1993, ch. 29, which enacted this section.

74-6-17. Termination of agency life; delayed repeal.

The water quality control commission is terminated on July 1, 2005 pursuant to the Sunset Act [12-9-11 to 12-9-21 NMSA 1978]. The commission shall continue to operate according to the provisions of Chapter 74, Article 6 NMSA 1978 until July 1, 2006. Effective July 1, 2006, Sections 74-6-3 and 74-6-4 NMSA 1978 are repealed.

History: 1978 Comp., § 74-6-13.1, enacted by Laws 1987, ch. 333, § 15; 1993, ch. 291, § 17; 1999, ch. 21, § 2.

The 1993 amendment, effective June 18, 1993, substituted "1999" for "1993" in the first sentence, substituted "2000" for "1994" at the end of the second sentence, and rewrote the third sentence which read

"Effective July 1, 1994, Article 6, Chapter 74 is repealed."

The 1999 amendment, effective June 18, 1999, substituted "July 1, 2005" for "July 1, 1999" and "July 1, 2006" for "July 1, 2000" in two places and deleted "(being Laws 1967, Chapter 190, Sections 3 and 4, as amended)" following "74-6-4".

ARTICLE 6A

Wastewater Facility Construction Loans

Sec.

- 74-6A-1. Short title.
- 74-6A-2. Purpose.
- 74-6A-3. Definitions.
- 74-6A-4. Fund created; administration.
- 74-6A-5, 74-6A-6. Repealed.
- 74-6A-7. Loan program; administration.
- 74-6A-8. Financial assistance; criteria.
- 74-6A-9. Commission; powers.

Sec.

- 74-6A-10. Board; duties and powers.
- 74-6A-11. Wastewater suspense account created.
- 74-6A-12. Commission bonds.
- 74-6A-13. Agreement of the state not to limit or alter rights of obligees.
- 74-6A-14. Validation.
- 74-6A-15. Water quality control commission; instrumentality.

74-6A-1. Short title.

Chapter 74, Article 6A NMSA 1978 may be cited as the "Wastewater Facility Construction Loan Act".

History: Laws 1986, ch. 72, § 1; 1991, ch. 172, § 2.

The 1991 amendment, effective April 4, 1991, substituted "Chapter 74, Article 6A NMSA 1978" for "This act".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pollution Control § 718. 39A C.J.S. Health & Environment § 106 et seq.

74-6A-2. Purpose.

The purpose of the Wastewater Facility Construction Loan Act [Chapter 74, Article 6A NMSA 1978] is to provide local authorities in New Mexico with low-cost financial assistance

