

**NEW MEXICO
STATUTES
1978**

ANNOTATED

**Chapter 74
Environmental Improvement**

Pamphlet 120



2011 CUMULATIVE SUPPLEMENT

This supplement includes laws enacted since the 2000 Replacement Pamphlet through the First Session of the Fiftieth Legislature (2011) and annotations through 2011-NMSC-015 and 2011-NMCA-036.

C. Loan repayments shall be deposited into the brownfields cleanup revolving loan fund. Interest and earnings on the balance in the fund shall be credited to the brownfields cleanup revolving loan fund.

History: Laws 2006, ch. 62, § 2.

Effective dates. — Laws 2006, ch. 62, § 3 made the provisions of this section effective July 1, 2006.

ARTICLE 6

Water Quality

Sec.

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74-6-1. Short title.

Am. Jur. 2d, A.L.R. and C.J.S. references.
Actions brought under Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act)(33

U.S.C.A. § 1251 et seq.) - supreme court cases, 163 A.L.R. Fed 531.

74-6-2. Definitions.

As used in the Water Quality Act:

A. "gray water" means untreated household wastewater that has not come in contact with toilet waste and includes wastewater from bathtubs, showers, washbasins, clothes washing machines and laundry tubs, but does not include wastewater from kitchen sinks or dishwashers or laundry water from the washing of material soiled with human excreta, such as diapers;

B. "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 federal Atomic Energy Act of 1954;

C. "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;

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

E. "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;

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

G. "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;

H. "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;

I. "person" means an individual or any other entity, including partnerships, corporations, 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;

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

K. "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 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 geology and mineral resources at the New Mexico institute of mining and technology;

L. "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;

M. "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;

N. "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;

O. "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;

P. "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; ground water or surface water; or the lands of the state;

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

R. "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; 2001, ch. 246, § 13; 2003, ch. 7, § 1.

Cross references. — For the federal Water Pollution Control Act, see 33 U.S.C. § 1251 et seq.

For the federal Atomic Energy Act of 1954, see 42 U.S.C. § 2011 et seq.

The 2001 amendment, effective June 15, 2001, in Paragraph J(5), substituted "parks" for "park and

recreation"; in Paragraph J(8), substituted "geology" for "mines" and made stylistic changes.

The 2003 amendment, effective March 10, 2003, added present Subsection A and redesignated the subsequent subsections accordingly; and inserted "federal" preceding "Atomic Energy Act" near the end of Subsection B.

Am. Jur. 2d, A.L.R. and C.J.S. references. — What are "navigable waters" subject to Federal Water Pollution Control Act (33 U.S.C.A. § 1251 et seq.), 160 A.L.R. Fed. 585.

74-6-3. Water quality control commission created. (Repealed effective July 1, 2014.)

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

(1) the secretary of environment or a member of the secretary's staff designated by the secretary;

(2) the secretary of health or a member of the secretary's staff designated by the secretary;

(3) the director of the department of game and fish or a member of the director's staff designated by the director;

(4) the state engineer or a member of the state engineer's staff designated by the state engineer;

(5) the chair of the oil conservation commission or a member of the chair's staff designated by the chair;

(6) the director of the state parks division of the energy, minerals and natural resources department or a member of the director's staff designated by the director;

(7) the director of the New Mexico department of agriculture or a member of the director's staff designated by the director;

(8) the chair of the soil and water conservation commission or a soil and water conservation district supervisor designated by the chair;

(9) the director of the bureau of geology and mineral resources at the New Mexico institute of mining and technology or a member of the director's staff designated by the director;

(10) a municipal or county government representative; and

(11) four 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 NMSA 1978]. At least one member appointed by the governor shall be a member of a New Mexico Indian tribe or pueblo.

B. A member of the commission shall not receive, or shall not have received during the previous two years, a significant portion of the member's income directly or indirectly from permit holders or applicants for a permit. A member of the commission shall, upon the acceptance of the member's appointment and prior to the performance of any of the member's 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 the member's gross personal income in each of the preceding two years, that the member received directly or indirectly from permit holders or applicants for permits required under the Water Quality Act. A member of the commission shall not participate in the consideration of an appeal if the subject of the appeal is an application filed or a permit held by an entity that either employs the commission member or from which the commission member received more than ten percent of the member's gross personal income in either of the preceding two years.

C. The commission shall elect a chair 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 [9-9-1 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; 2001, ch. 246, § 14; 2001, ch. 267, § 1; 2003, ch. 165, § 2; 2007, ch. 183, § 1.

Delayed repeals. — For delayed repeal of this section, see 74-6-17 NMSA 1978

2001 amendments. — Laws 2001, ch. 267, § 1, effective June 15, 2001, substituting "parks division" for "parks and recreation division" in Paragraph A(5); adding Paragraph A(9) and redesignating former Paragraph A(9) as A(10); in Subsection B, inserting the period following "permit", "A member of the commission", and the last sentence of the subsection, was approved April 4, 2001. This section was also

amended by Laws 2001, ch. 246, § 14, effective June 15, 2001.

The 2003 amendment, effective July 1, 2003, substituted "geology" for "mines" preceding "and mineral resources" in Paragraph A(8); added the last sentence in Paragraph A(10); in Subsection B, substituted "A member of the commission shall not receive, or shall not" for "No member of the commission shall receive, or shall" at the beginning, substituted "A member of the commission shall not" for "No member of the commission shall" preceding "participate in the", deleted "10" preceding "percent of his", substituted "preceding" for "proceeding" near the end.

The 2007 amendment, effective June 15, 2007, added the secretary of health as a member of the commission.

74-6-4. Duties and powers of commission. (Repealed effective July 1, 2014.)

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 not adopt or promulgate a standard or regulation that exceeds a grant of rulemaking authority listed in the statutory section of the Water Quality Act authorizing the standard or regulation;

D. shall adopt water quality standards for surface and ground waters of the state based on credible scientific data and other evidence appropriate under the Water Quality Act. 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 circum-

stances, including the use and value of the water for water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial and other purposes;

E. 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 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;

F. 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, and shall maintain a repository of the scientific data required by this act;

G. 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;

H. 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;

I. 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;

J. 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;

K. shall specify in regulations the measures to be taken to prevent water pollution and to monitor water quality. The commission may adopt regulations for particular industries. The commission shall adopt regulations for the dairy industry and the copper industry. The commission shall consider, in addition to the factors listed in Subsection E of this section, the best available scientific information. The regulations may include variations in requirements based on site-specific factors, such as depth

and distance to ground water and geological and hydrological conditions. The constituent agency shall establish an advisory committee composed of persons with knowledge and expertise particular to the industry category and other interested stakeholders to advise the constituent agency on appropriate regulations to be proposed for adoption by the commission. The regulations shall be developed and adopted in accordance with a schedule approved by the commission. The schedule shall incorporate an opportunity for public input and stakeholder negotiations;

L. 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;

M. 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;

N. shall not require a permit for applying less than two hundred fifty gallons per day of private residential gray water originating from a residence for the resident's household gardening, composting or landscape irrigation if:

(1) a constructed gray water distribution system provides for overflow into the sewer system or on-site wastewater treatment and disposal system;

(2) a gray water storage tank is covered to restrict access and to eliminate habitat for mosquitos or other vectors;

(3) a gray water system is sited outside of a floodway;

(4) gray water is vertically separated at least five feet above the ground water table;

(5) gray water pressure piping is clearly identified as a nonpotable water conduit;

(6) gray water is used on the site where it is generated and does not run off the property lines,

(7) gray water is applied in a manner that minimizes the potential for contact with people or domestic pets;

(8) ponding is prohibited, application of gray water is managed to minimize standing water on the surface and to ensure that the hydraulic capacity of the soil is not exceeded;

(9) gray water is not sprayed;

(10) gray water is not discharged to a watercourse; and

(11) gray water use within municipalities or counties complies with all applicable municipal or county ordinances enacted pursuant to Chapter 3, Article 53 NMSA 1978; and

O. 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 [11-6-1 NMSA 1978].

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; 2001, ch. 240, § 1; 2001, ch. 281, § 1; 2003, ch. 7, § 2; 2009, ch. 194, § 1.

Delayed repeals. — For the delayed repeal of this section, see 74-6-17 NMSA 1978.

2001 amendments. — Laws 2001, ch. 281, § 1, effective June 15, 2001, substituting "based on credible scientific data and evidence appropriate under the Water Quality Act" for "subject to the Water Quality Act" in Subsection C and inserting "and shall maintain a repository of the scientific data required by this act" at the end of Subsection E was approved April 14, 2001. However, this section was also amended by Laws 2001, ch. 240, § 1, effective June 15, 2001. Because Laws 2001, ch. 240 was approved earlier on April 4, 2001, this section was set out as amended by Laws 2001, ch. 281, § 1. See 12-1-8 NMSA 1978.

The 2003 amendment, effective March 10, 2003, inserted present Subsection L and redesignated former Subsection L as Subsection M

The 2009 amendment, effective June 19, 2009, added Subsection C; in Subsection E, in the third sentence, after "Regulations" deleted "shall not spec-

ify the method to be used to prevent or abate water pollution, but", and added Subsection K.

Not vague or over-broad. — The Water Quality Control Commission's amended definition of surface waters of the state, which eliminates language referring to interstate commerce, is not unconstitutionally over-broad or vague. *N.M. Mining Assn. v. Water Quality Control Comm'n*, 2007-NMCA-084, 142 N.M. 200, 164 P.3d 81.

Relevant factors in adopting water quality standards. — The adoption of water quality standards is governed by Subsection C and the Commission is not required to consider technical feasibility and economic reasonableness of the standard or to determine that there is available demonstrated control technology to abate contamination to the standard. *New Mexico Mining Association v. New Mexico Water Quality Control Commission*, 2007-NMCA-010, 141 N.M. 41, 150 P.3d 991.

Substantial evidence. — The Commission's decision to revise the standard for uranium in groundwater was supported by substantial evidence, based on credible scientific data, where the Commission relied on the testimony of experts as to the appropriate standard for uranium in groundwater for the protection of public health; a peer-reviewed study on the toxic effects of uranium on humans, and the testimony of

epidemiologists about the populations in New Mexico that were especially sensitive to the toxic effect of uranium. *New Mexico Mining Association v. New Mexico Water Quality Control Commission*, 2007-NMCA-010, 141 N.M. 41, 150 P.3d 991.

The Water Quality Control Commission's amended definition of surface waters of the state, which eliminates language referring to interstate commerce, was adopted consistent with the requirements of the Water Quality Act, 33 U.S.C. §1251 (1972) and due process. *N.M. Mining Assn. v. Water Quality Control Comm'n*, 2007-NMCA-084, 142 N.M. 200, 164 P.3d 81.

The Water Quality Control Commission's decision to amend the definition of surface waters of the state to eliminate language referring to interstate commerce, which was not based on scientific evidence but on uncertainty about the scope of federal regulatory jurisdiction under the Clean Water Act, was supported by substantial evidence. *N.M. Mining Assn. v. Water Quality Control Comm'n*, 2007-NMCA-084, 142 N.M. 200, 164 P.3d 81.

State can adopt its own toxic pollutant criteria, rather than having the criteria imposed by the EPA. *University of California v. Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788.

Statement of reasons for adopting regulations need not state why the commission adopted each indi-

vidual provision of the standards or need not respond to all concerns raised in testimony as such a requirement would be unduly onerous for the commission and unnecessary for the purposes of appellate review. *University of California v. Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788.

Commission may delegate authority to administer regulations.

The federal Environmental Protection Agency did not act arbitrarily or capriciously in relying on a letter written by the chairman of the New Mexico Water Quality Control Commission interpreting a regulation of the Water Quality Control Commission. *Defenders of Wildlife v. U.S. Environmental Protection Agency*, 415 F.3d 1121 (10th Cir. 2005).

Tributaries of waters with fishery uses. — Nothing in the plain language of Subsection C of this section prohibits the commission from protecting waters with fishery uses by applying the standards to tributaries of those waters. *University of California v. Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788.

The commission has not designated a fishery use for tributaries by applying the human health standards to them. *University of California v. Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788.

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 reuse 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. The constituent agency has the burden of showing that each condition is reasonable and necessary to ensure compliance with the Water Quality Act and applicable regulations, considering site-specific conditions. After regulations have been adopted for a particular industry, permits for facilities in that industry shall be subject to conditions contained in the regulations. Additional conditions on a final permit may be imposed if the applicant is provided with an opportunity to review and provide comments in writing on the draft permit conditions and to receive a written explanation of the reasons for the conditions from the constituent agency.

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 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 discharge's effect on ground water shall be measured at any place of withdrawal of water for present or reasonably foreseeable future use. Determination of the discharge's 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, renewal or modification of a permit. Public notice shall include:

(1) for issuance or modification of a permit:

(a) notice by mail to adjacent and nearby landowners; local, state and federal governments; land grant organizations; ditch associations; and Indian nations, tribes or pueblos;

(b) posting at a place conspicuous to the public and near the discharge or proposed discharge site; and

(c) a display advertisement in English and Spanish in a newspaper of general circulation in the location of the discharge or proposed discharge; provided, however, that the advertisement shall not be displayed in the classified or legal advertisement sections; and

(2) for issuance of renewals of permits:

(a) notice by mail to the interested public, municipalities, counties, land grant organizations, ditch associations and Indian nations, tribes or pueblos; and

(b) a display advertisement in English and Spanish in a newspaper of general circulation in the location of the discharge; provided, however, that the advertisement shall not be displayed in the classified or legal advertisement sections.

G. 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 evidence, data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. The hearing shall be recorded. Any person submitting evidence, data, views or arguments shall be subject to examination at the hearing.

H. 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.

I. 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.

J. 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.

K. 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.

L. 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.

M. 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.

N. 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. Notice shall also be given by mail to persons who participated in the permitting action.

O. 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. Unless a timely petition for review is made, the decision of the constituent agency shall be final and not subject to judicial review. The petition shall:

- (1) be made in writing to the commission within thirty days from the date notice is given of the constituent agency's action;
- (2) include a statement of the issues to be raised and the relief sought; and
- (3) be provided to all other persons submitting evidence, data, views or arguments in the proceeding before the constituent agency.

P. If a timely petition for review is made, the commission shall consider the petition 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 review. If the petitioner is not the applicant or permittee, the applicant or permittee shall be a party to the proceeding. The commission shall ensure that the public receives notice of the date, time and place of the review.

Q. The commission shall review the record compiled before the constituent agency, including the transcript of any public hearing held on the application or draft permit, and shall allow any party to submit arguments. The commission may designate a hearing officer to review the record and the arguments of the parties and recommend a decision to the commission. The commission shall consider and weigh only the evidence contained in the record before the constituent agency and the recommended decision of the hearing officer, if any, and shall not be bound by the factual findings or legal conclusions of the constituent agency. Based on the review of the evidence, the arguments of the parties and recommendations of the hearing officer, the commission shall sustain, modify or reverse the action of the constituent agency. The commission shall enter ultimate findings of fact and conclusions of law and keep a record of the review.

R. Prior to the date set for review, if a party shows to the satisfaction of the commission that there was no reasonable opportunity to submit comment or evidence on an issue being challenged, the commission shall order that additional comment or evidence be taken by the constituent agency. Based on the additional evidence, the constituent agency may revise the decision and shall promptly file with the commission the additional evidence received and action taken. The commission shall consider the additional evidence within ninety days after receipt of the additional evidence and shall notify the petitioner and the applicant or permittee, if other than the petitioner, of the date, time and place of the review.

S. The commission shall notify the petitioner and all other participants in the review proceeding of the action taken by the commission and the reasons for that action.

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; 2005, ch. 195, § 1; 2009, ch. 194, § 2.

The 2005 amendment, effective June 17, 2005, added Subsection F(1) through (2) the public notice required for issuance or modification of a permit and for issuance of renewals of permits; provided in Subsection G that the hearing shall be recorded and that any person who submits evidence, data, views or arguments shall be subject to examination at the hearing; provided in Subsection N that notice shall also be given by mail to persons who participated in the permitting action; deletes the former provision to Subsection O that the petition shall be made in writing to the commission within thirty days from the date notice is given to the agency's action, provides that if a petition for review is not timely, the decision of the agency is not subject to judicial review; added Subsection O(1) through (3) to provide requirement relating to the petition; deleted provisions in former

Subsection O, which required the commission to hold a hearing and which related to the conduct of the hearing; deleted former Subsection P, which related to the recording of the hearing before the commission; provided in Subsection P that the commission shall consider the petition and that if the petitioner is not the applicant or permittee, the applicant or permittee shall be a party to the action; added Subsection Q, which provides for a record review by the commission or a hearing officer; added Subsection R which provides the commission may order that the agency take additional comment or evidence for review by the commission; and, added Subsection S to require the commission to give notice of the action taken by the commission and the reasons for that action.

The 2009 amendment, effective June 19, 2009, in Subsection D, added the second, third and fourth sentences.

Regulations distinguished. — There is no reason to disassociate the commission's general regulations relating to motions from those relating to formal and informal appeal petitions and appeal hearing proceed-

ings. *Gila Resources Information Project v. N.M. Water Quality Comm'n*, 2005-NMCA-139, 138 N.M. 625,

124 P.3d 1164, cert. denied, 2005-NMCERT-009, 138 N.M. 439, 120 P.3d 1182.

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

This section sets forth notice and hearing requirements, which are the same for standards or regulations. *University of California v. Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788.

Subsection D of this section requires commission to consider, among other things, the technical practicability and economic reasonableness of a regulation before adopting it. *University of California v. Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788.

Distinction of standard and regulation. — A standard defines the amount of contaminant in the ambient water and a regulation defines the conduct

necessary for an entity that discharges pollutants to comply with the standard. *University of California v. Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788.

Statement of reasons for adopting regulations need not state why the commission adopted each individual provision of the standards or need not respond to all concerns raised in testimony as such a requirement would be unduly onerous for the commission and unnecessary for the purposes of appellate review. *University of California v. Water Quality Control Comm'n*, 2004-NMCA-073, 136 N.M. 45, 94 P.3d 788.

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

Written basis for decision not required. — Even though statute does not explicitly state that the commission must provide a written factual and legal basis for its decision, administrative agencies must provide written factual and legal basis for their decisions in order to permit an effectual and meaningful review. *Gila Resources Information Project v. N.M. Water Quality Comm'n*, 2005-NMCA-139, 138 N.M. 625, 124 P.3d 1164, cert. denied, 2005-NMCERT-009, 138 N.M. 439, 120 P.3d 1182.

Limited appellate review. — Where all the commission provided was an unexplained conclusion of

prejudice with no evidentiary support in the record and a conclusion of lack of prejudice based on an unexplained determination, the appellate court is hardly able to effectively and meaningfully review whether the commission's ultimate decision to dismiss was erroneous under the Subsection B of this section standard of review. *Gila Resources Information Project v. N.M. Water Quality Control Comm'n*, 2005-NMCA-139, 138 N.M. 625, 124 P.3d 1164, cert. denied, 2005-NMCERT-009, 138 N.M. 439, 120 P.3d 1182.

74-6-10.2. Criminal penalties.

Case law. — Following reversal of a conviction under this section for knowingly violating a permit that had expired, an appellate court may not remand for entry of judgment of conviction and re-sentencing for the lesser-included offense of the attempt to violate the Water Quality Act where the jury had not been instructed on the lesser offense at trial and defendant had not offered a defense at trial to the lesser-included offense. *State v. Villa*, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017 (2004), reversing 2003-NMCA-142, 134 N.M. 679, 82 P.3d 46 (Ct. App. 2003).

Where defendant was charged with violating conditions of a permit which had "technically" expired as a matter of law before the alleged violations had occurred but which all parties believed to be in effect when the alleged violation had occurred, defendant was not guilty of violating a permit under this section. *State v. Villa*, 2003-NMCA-142, 134 N.M. 679, 82 P.3d 46 (Ct. App. 2003), affirmed 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017 (2004).

Provision in Section 74-6-10.2B NMSA 1978 which prohibits a person from knowingly allowing another person to violate this section was not unconstitutionally vague as applied where the defendant, who was hired as an environmental expert, knew the conditions of the disposal permit, and knew that waste dumped at the permitted site was not included in the permit, did not take any action to comply with the permit or to remedy the violations of which he had knowledge. *State v. Villa*, 2003-NMCA-142, 134 N.M. 679, 82 P.3d 46 (Ct. App. 2003), reversed on other grounds 2004-NMSC-031, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017 (2004).

Resentencing by appellate court. Following reversal of a conviction under this section for knowingly violating a permit that had expired, an appellate court may not remand for entry of judgment of conviction and re-sentencing for the lesser-included offense of the attempt to violate the Water Quality Act where the jury had not been instructed on the lesser offense at trial and defendant had not offered a defense at trial to the lesser-included offense. *State v. Villa*, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017 (2004), reversing 2003-NMCA-142, 134 N.M. 679, 82 P.3d 46 (Ct. App. 2003).

Where defendant was charged with violating conditions of a permit which had "technically" expired as a matter of law before the alleged violations had occurred but which all parties believed to be in effect when the alleged violation had occurred, defendant was not guilty of violating a permit under this section. *State v. Villa*, 2003-NMCA-142, 134 N.M. 679, 82 P.3d 46 (Ct. App. 2003), affirmed 2004-NMSC-031, 134 N.M. 367, 98 P.3d 1017 (2004).

Act not unconstitutional. — Provision in Section 74-6-10.2B NMSA 1978 which prohibits a person from knowingly allowing another person to violate this section was not unconstitutionally vague as applied where defendant, who was hired as an environmental expert, knew the conditions of the disposal permit, and knew that waste dumped at the permitted site was not included in the permit, did not take any action to comply with the permit or to remedy the violations of which he had knowledge. *State v. Villa*, 2003-NMCA-142, 134 N.M. 679, 82 P.3d 46 (Ct. App. 2003), reversed on other grounds 2004-NMSC-031, 134 N.M. 367, 98 P.3d 1017 (2004).

Resentencing on attempt counts after convictions for violations of statute were overturned for insufficient evidence deprived defendant of notice and opportunity to defend, was inconsistent with New Mexico law regarding jury instructions and preservation of error, because attempt offenses were not charged and jury was not instructed on them. *State v. Villa*, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017.

Conviction of offense not presented to jury. — Where a jury acquitted a defendant of 44 out of 52 charges of violating the Water Quality Act, and defendant appealed his convictions of the remaining eight felony counts, and the appellate court found insuffi-

cient evidence to sustain the eight convictions but remanded to the district court to enter judgment and resentencing for eight counts of attempt to commit the offenses of which the defendant was convicted, even though he was not charged with attempt and the jury was not instructed regarding the crime of attempt, a conviction of an offense not presented to the jury would deprive the defendant of notice and an opportunity to defend against that charge and would be inconsistent with New Mexico law regarding jury instructions and preservation of error. *State v. Villa*, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017.

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

The water quality control commission is terminated on July 1, 2013 pursuant to the Sunset Act [12-9-11 NMSA 1978]. The commission shall continue to operate according to the provisions of Chapter 74, Article 6 NMSA 1978 until July 1, 2014. Effective July 1, 2014, 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; 2005, ch. 208, § 26.

The 2005 amendment, effective June 17, 2005, changed the termination, operation and repeal dates.

ARTICLE 6A

Wastewater Facility Construction Loans

Sec.
74-6A-3. Definitions.
74-6A-4. Fund created; administration

Sec.
74-6A-4.1. Clean water administrative fund; created, use.

74-6A-3. Definitions.

As used in the Wastewater Facility Construction Loan Act:

- A. "administrative fee" means a fee assessed and collected by the department from a local authority on each loan and expressed as a percentage per year on the outstanding principal amount of the loan, payable by the borrower on the same date that principal and interest on the loan are due, for deposit in the clean water administrative fund;
- B. "commission" means the water quality control commission;
- C. "division" or "department" means the department of environment;
- D. "financial assistance" means loans, the purchase or refinancing of existing local political subdivision obligations, loan guarantees, credit enhancement techniques to reduce interest on loans and bonds, bond insurance and bond guarantees or any combination of these purposes;
- E. "fund" means the wastewater facility construction loan fund;
- F. "local authority" means any municipality, county, incorporated county, sanitation district, water and sanitation district or any similar district, recognized Indian tribe or other issuing agency created pursuant to a joint powers agreement acting on behalf of any entity listed in this subsection;
- G. "operate and maintain" means to perform all necessary activities, including replacement of equipment or appurtenances, to ensure the dependable and economical function of a wastewater facility in accordance with its intended purpose;
- H. "wastewater facility" means a publicly owned system for treating or disposing of sewage or wastes either by surface or underground methods, including any equipment, plant, treatment works, structure, machinery, apparatus or land, in any combination, that is acquired, used, constructed or operated for the storage, collection, reduction, recycling, reclamation, disposal, separation or treatment of water or wastes or for the final disposal of residues resulting from the treatment of water or wastes, such as pumping and ventilating stations, facilities, plants and works, outfall sewers, interceptor sewers and collector sewers and other real or personal property and appurtenances incident to their use or operation. "Wastewater facility" also includes a nonpoint source water pollution control project as eligible under the Clean Water Act;
- I. "account" means the wastewater suspense account;
- J. "board" means the state board of finance;

