APPROVED NOVEMBER 1, 2005

ENVIRONMENTAL IMPROVEMENT BOARD

MINUTES OF THE October 4th, 2005 MEETING

The New Mexico Environmental Improvement Board (EIB) Meeting was held on October 4th, 2005, starting at 9:30 am at the New Mexico State Records and Archives / State Library Building Room 2027 in Santa Fe, New Mexico.

Item #1: Roll Call

Members Present: Ms. Gay Dillingham, Chair
Mr. Clifford Stroud, Vice Chair
Mr. Ken Marsh, Member
Mr. Harold Tso, Member
Mr. Gregory Green, Secretary
Mr. Soren Peters, Member

Members Absent: Ms. Dolores Herrera, Member

Others Present:

Stephen Fox, Citizen	Barbara Claire, EIB Administrator
Rich Murray, public	Stevan Looney, Esq.
Sally Worthington, NMED	Kathryn Becker, OGC
Anthony TJ Trujillo, Gallagher & Kennedy	Tracy Hughes, OGC
Richard T. Murray, public	Barbara Kitay, NMED
Ken Stoller, MD	Jim Perry, NMED
Rep. Peter Wirth	Daniel Cobb, DOM
Jennie McCary	Michael Blershan (?)
Robert Benon	Dal Moellenberg, Gallagher & Kennedy
Mary Smith, AGO	Don Trigg, AGO
Barbara R. King	Chuck Noble, NMED OGC
Mary E. Day, NMED EJ	Jackie Jadrnak, ABQ Journal

Item #2: Approval of Agenda

ACTION: Member Green made a motion to approve the Agenda as presented. Vice Chair Stroud seconded. Motion carried unanimously.

Item #3: Public Comment Period

- Richard Murray, public – commented on the dangers of Aspartame, specifically mentioning formaldehyde. There are currently four states with limits on Aspartame. He cited the Ramazinni study in Italy whose research has proven that Aspartame causes cancers, lymphoma, and kidney problems in rats.

- Dr. Ken Stoller, public – Dr. Stoller emphasized the deleterious health effects of Aspartame on children's health and made the point that today's children have a plethora of neurobehavioral problems that could be conceivably attributed to Aspartame.
- Daniel Cobb, DOM, public – questioned whether FDA has proved that aspartame is safe. The Citizens of New Mexico should have the right to say it will not be allowed in New Mexico. New Mexico should explore the safety of these issues and not depend on the federal allowance and standards, citing Agent Orange and mercury as examples.
- Lehland Lerhman, public – noted that the Chair of the House Consumer and Public Affairs Committee, Gail Beam, stated that the EIB does have the statutory authority to outlaw Aspartame, as outlined in her letter to the EIB dated 9/29/05.
- Lauren Chapman – Hyman, public – stated to the Board that she is chronically ill from using Aspartame; she was a public educator and worked with Chair Gail Beam. She told the Board that children would choose diet soft drinks in school, and these foods and beverages should be removed from schools.
- Mike Blershan (?), public – spoke to agreements and contract, both written and spoken, with regards to the states and the federal government. If states give authority to the federal government, such as minting currency, then the states no longer retain the authority to mint currency. As to the health issue, if the states actually give this authority to the federal government, and the federal government fails to perform, then the agreement or contract is null and void and it is then up to the states to perform this duty.
- Laura Christensen, public – told the Board she has a friend, a diabetic, suffering from peripheral neuropathy and who drank diet sodas on a regular basis. Upon eliminating the diet sodas and Aspartame from her regime, her friend saw a reversal of these debilitating health effects in about three months.

Item #4 Request for a hearing in the Matter of a Proposed Replacement to 20.9.1 NMAC, Solid Waste Management Regulations, EIB 05-07 (R) (E. Gifford Stack, SWB; Chuck Noble, OGC) Time: 5 minutes.

Mr. Noble presented the requested changes to the Solid Waste Management Regulations to the Board. He noted that the Bureau is still in discussions with stakeholders, which may generate changes to the amended rules; any necessary revisions will be presented to the Board. The Department's Notice of Intent to Present Technical Testimony will include the final redlines of the rules. Mr. Noble requested the hearing be set for early January, which is expected to be four days in length. The last time the regulations were amended was 10 years ago. Member Marsh requested that the final redlines of the amended rules be given to the Board twenty (20) days (by December 15th) before the hearing and the Board concurred. Chair Dillingham polled the Board for their availability in early January. Doug Meiklejohn of the New Mexico Environmental Law Center requested the hearing be conducted as early as possible in January as interested parties will also be obligated to the Legislative session January 17th through February 17th, 2006. The Board set the hearing dates as January 3rd through January 6th, 2006. Vice Chair Stroud graciously agreed to sit as Hearing Officer.

Item #5 **Request for a Hearing and for Assignment of a Hearing Officer in the Matter of EIB 04-15 (P), Appeal of Air Quality Permit #1871-M1 Re issued to Mesa Oil. (Louis Rose, Mesa Oil; Lawrence Alba, George and Nancy Faust, and Ian Martin, Petitioners)**

Mr. Rose, representing his client Mesa Oil, requested the Board assign a Hearing Officer so the procedures can be set and a pre-hearing conference arranged. Mr. Rose further commented that there is no real dispute as to what the permit notice says, but rather the argument will be over the legal effect of the notice and whether or not it is defective. The Petitioners, who were not present at the meeting, waived the 60-day period for a hearing to be set. The defendant in the matter, Mesa Oil, had not waived the sixty-day period. After consideration and discussion, the Board appointed Member Green to sit as Hearing Officer who will proceed with a pre-hearing conference and set up a briefing schedule.

ACTION: **Member Stroud made a motion to appoint Member Green as Hearing Officer in EIB 04-15. Member Green seconded. Motion carried unanimously.**

Item #6 **Approval of the September 6th, 2005 meeting minutes**

After review and discussion, Member Green suggested the minutes be amended to reflect changes to the action under item 6.

ACTION: **Member Green made a motion to approve the September 6th, 2005 minutes as amended. Vice Chair Stroud seconded. Motion carried.**

Item #7: **Consideration of written public or oral statements in support of or in opposition to the Board's Legal Authority to Hold a Rulemaking Hearing in the matter of** EIB 05-11 (R), **Proposed Ban on Aspartame. (Stephen Fox, Petitioner, Stevan D. Looney, Esq.; Anthony J. Trujillo, Esq., Calorie Control Council) Time: 30 minutes.**

Stevan Looney, counsel for the Petitioner Stephen Fox, submitted to the Board a brief in support of the Board's authority to hold a hearing on the proposed new rule that seeks to ban Aspartame in New Mexico. Mr. Looney stated that what the Petitioner is asking for today is for fundamental due process of law, to be heard and to be able to present evidence to the Board. He added that the EIB has an obligation under the law to determine and to conduct due process for both sides. He further stated that state and local authority have the obligation to hold a hearing to protect the citizens of New Mexico. Although preemption is implied and the (dormant) Commerce Clause comes into play, this Board still has the power to hear and rule in the matter as per Sec. 25-2-15 NMSA.

Mr. Anthony Trujillo with Gallagher & Kennedy, representing the Calorie Control Council, presented his brief on legal argument not supporting the Board's authority to hear and rule on the matter. The key legal arguments include a discretionary issue, that there is nothing in the state rules that compel the Board to hear the matter. He stated that

the FDA has approved Aspartame and Sec. 25-2-15a NMSA is the limitation on the Board's authority, which allows them to make regulations under the Federal act. He stated the New Mexico Legislature has decided to limit the Board's authority to override Federal preemption laws. Mr. Trujillo stated that there is implied preemption and it would be a violation of the dormant Commerce Clause; he asked the EIB to deny the Petition to ban Aspartame.

Chair Dillingham asked Mr. Looney to return to the stand with Mr. Trujillo for a rebuttal period. After the Board heard rebuttals from both parties, a hearing was granted in the matter.

ACTION: **Vice Chair Stroud moved to grant a hearing for the week of July 17th through 24th, 2006, to hire an independent hearing officer funded by the Department, and to hire a medical expert, funded by the Department. Vice Chair Stroud amended his motion to request that the Department fund the independent Hearing Officer and medical expert. Member Tso seconded. The Board voted 4-yea and 2-no; Motion carried.**

Vote by Board:

Member Green:	No
Vice Chair Stroud:	Yes
Chair Dillingham:	Yes
Member Tso:	Yes
Member Marsh:	No
Member Peters:	Yes

Mr. Trigg informed the Board that the Legal Opinion process is, by statute, something that only elected officials can request.

Item #8 **Hearing and possible decision in the Matter to Amend Food Permit Fees Regulations 7.6.2.8 (K);** EIB 05-08 (R) **(Barb Kitay, NMED FOD/Food Safety, Kathryn Becker, NMED OGC) Hearing Officer: Harold Tso**

Member Tso, Hearing Officer in this matter, began the hearing at 11:40 am and closed the record at 12:00 noon. The Board deliberated and passed the proposed amendments as presented. Kathy Townsend court reporters transcribed the record of the hearing. The Board built their Statement of Reasons; Chair Dillingham stated the need to protect public health, the last fee increase was nearly five years ago, and stakeholders such as the New Mexico Restaurant Association both approve and support the new fee structure. The Board also cited that if the fee structures are not adopted, the Department will not be able to provide for the protection of the public's health.

ACTION: **Member Green moved to approve the proposed amendments to 7.6.2.8 (K) NMAC as presented. Vice Chair Stroud seconded. Motion carried unanimously.**

Item #9 **Deliberations and decision in the matter of Proposed Amendments to 20.1.1 NMAC, EIB Rulemaking Procedures and 20.1.2 NMAC, EIB Adjudicatory Procedures and a proposed New Part, EIB Housekeeping Rules.** EIB 05-10 (R).

The Board reconvened at 1:20 pm. The Board deliberated and voted on each of the proposed changes to the rulemaking and adjudicatory procedures; the record of the votes and proposed language for each adopted rule are contained in Tables 1 and 2 (attached hereto), 20.1.1 NMAC and 20.1.2 NMAC, respectively. The new part of EIB Housekeeping Rules was voted as a new part to NMAC, a new part number will be assigned at a later date. The Board will write the Statement of Reasons.

Item #10 **Other Business**

- **Convenience store rules hearing** – At Chair Dillingham's request, Ms. Smith briefed the Board on the rules appeal whose answer brief is due to be filed October 21, 2005. The Appellant's counsel will be filing a Reply Brief; they have 45 days after receipt of the Board's Brief (early January). They have also requested Oral Argument, although the Court of Appeals does not often grant this.

- Counsel Mary Smith informed the Board of a change in her status as the Board's legal counsel, effective immediately. Colleague Zachary Shandler from the Civil Division in the Attorney General's Office will stand in as the Board's counsel for the November and December meetings. The Board thanked Ms. Smith for her service to the Board over the last several years, for her presence, and wished her all the best in the future.

Item #11 **Next Meeting is November 1st and 2nd, 2005**

Item #12 **Adjournment**
As there was no other business before the Board, the meeting was adjourned at 4:55 pm.

ACTION: **Member Marsh made a motion to adjourn. Member Green seconded. Motion carried unanimously.**

The meeting adjourned at 4:50 pm.

Signature on file

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Gay Dillingham, EIB Chair