

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT DEPARTMENT**



**IN THE MATTER OF PROPOSED
REPEAL OF 20.5.17 NMAC AND REPLACEMENT
WITH 20.5.123 NMAC**

No. NMED 18-17(R)

**Resource Protection Division,
Petroleum Storage Tank Bureau,
New Mexico Environment Department,**

Petitioner.

ORDER AND STATEMENT OF REASONS

This matter comes before the Secretary of the Environment Department (“Secretary”) upon a petition filed by the New Mexico Environment Department (“Department”) on August 1, 2018, to repeal the current emergency version of 20.5.123 NMAC and replace it with a new 20.5.123 NMAC. The emergency version of 20.5.123 NMAC went into effect on July 31, 2018, after 20.5.17 NMAC was erroneously repealed without the order of the Secretary. The Secretary enacted 20.5.123 NMAC on an emergency basis on July 31, 2018, in accordance with NMSA 1978, §14-4-5.6. The emergency version did not differ from 20.5.17 NMAC in any substantive way and was merely a renumbering to create consistency with the remainder of the Petroleum Storage Tank Regulations. The other Petroleum Storage Tank Regulations, 20.5.101 NMAC through 20.5.122 NMAC, 20.5.124 NMAC, and 20.5.125 NMAC, were promulgated by the Environmental Improvement Board (“Board”) and took effect on July 24, 2018. The Board repealed 20.5.1 NMAC through 20.5.16 NMAC, 20.5.18 NMAC, and 20.5.19 NMAC, effective that same date.

A public hearing was held in Santa Fe, New Mexico on October 12, 2018. The Hearing Officer heard technical testimony from the Department and admitted exhibits into the record. On November 19, 2018, the Secretary rendered his final decision on the proposed regulatory changes to repeal the current emergency version of 20.5.123 NMAC and replace it with a new 20.5.123 NMAC as drafted in NMED Exhibit 1 for the reasons that follow:

STATEMENT OF REASONS

1. Pursuant to 20.1.9.12.A(1) NMAC, any person may petition the Secretary to adopt, amend, or repeal any regulation within the jurisdiction of the Secretary.
2. On August 1, 2018, the Department filed a petition with the Secretary for a public hearing in this matter. On August 7, 2018, the Secretary granted the Department's request for a hearing and scheduled the hearing for October 12, 2018, and continuing thereafter as necessary. The Secretary appointed Erin O. Anderson, Administrative Law Judge for the Department, to serve as Hearing Officer in this matter pursuant to 20.1.9.8 NMAC.
3. Public notice of the hearing was published in English and Spanish in four publications: the Albuquerque Journal, the New Mexico Register, the Santa Fe New Mexican, and the Las-Cruces Sun-News, (NMED Exhibits 5 through 8), on September 10 and 11, 2018. The notice stated that the Hearing Officer will not make a decision on the proposed regulatory changes at the conclusion of the hearing. The Secretary shall render his final decision on the proposed regulatory changes within 60 days following the close of the record.
4. Pursuant to the Revised Scheduling Order filed on August 27, 2018, the Department filed a Notice of Intent to Present Technical Testimony ("NOI") on September 21, 2018.
5. A hearing in this matter was held in Santa Fe, New Mexico on October 12, 2018, at which a reasonable opportunity for all persons to be heard was provided.

6. No members of the public attended the hearing or made comments.

7. In 1990, the New Mexico Legislature passed the Groundwater Protection Act (NMSA 1978, §§ 74-6B-1 to -14) and created the Corrective Action Fund, which is “intended to provide for financial assurance coverage required by federal law and shall be used by the division to take corrective action in response to a release.” NMSA 1978, § 74-6B-7.

8. Federal regulations set minimum requirements for financial assurance in 40 C.F.R. § 280, Subpart H.

9. The U.S. Environmental Protection Agency (“EPA”) required the Bureau and the Board to adopt many changes to the Petroleum Storage Tank Regulations in order to maintain New Mexico’s State Program Approval (“SPA”) status. The Bureau took this opportunity to propose updates to other areas of its regulations that were not required for SPA in order to streamline its processes and ensure that regulations matched current practices. Because 20.5.123 NMAC is promulgated by the Secretary rather than by the Board, the Bureau proposes this additional repeal and replace to keep the Corrective Action Fund Administration regulation consistent with the repeal and replace of the other Corrective Action Fund regulations promulgated by the Board that took effect on July 24, 2018.

10. The changes in the proposed repeal and replace of the current emergency version of 20.5.123 NMAC with a new 20.5.123 NMAC are predominately updates to ensure that the Bureau memorializes its current practices and streamlines certain processes for stakeholders, such as in the introduction of a limited scope bid process for small remediation projects and a more rapid administrative appeal process for offerors whose bids were not selected. Also, requirements that have previously caused confusion are also more thoroughly defined.

11. The Secretary may make and adopt such reasonable and procedural rules and

regulations as may be necessary to carry out the duties of the Department and its divisions, pursuant to NMSA 1978, § 9-7A-6.

12. One duty of the Department is to make expenditures from the Corrective Action Fund for corrective action taken by the state, owners, or operators at sites contaminated by storage tanks, in accordance with NMSA 1978, § 74-6B-7.

13. The Department is required to adopt rules to provide for payments from the Corrective Action Fund pursuant to NMSA 1978, § 74-6B-13.

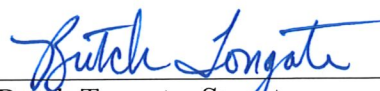
14. The notice and hearing requirements of NMSA 1978, § 9-7A-6(D), NMSA 1978 § 14-4-5.2, and 20.1.9.12.B NMAC were met.

15. The Secretary hereby repeals the current emergency version of 20.5.123 NMAC and replaces it with a new 20.5.123 NMAC for the reasons stated above.

ORDER

The proposed repeal of the current emergency version of 20.5.123 NMAC is approved, and replacement with a new 20.5.123 NMAC, as contained in NMED Exhibit 1, is adopted by the Secretary on November 19, 2018. Annotations to the adopted 20.5.123 NMAC, with any appropriate corrections of typographical errors or formatting, shall be filed with the New Mexico State Records Center as expeditiously as possible by the Department.

SIGNED this 19th day of November, 2018.



Butch Tongate, Secretary
New Mexico Environment Department
1190 St. Francis Drive, Suite S2100
Santa Fe, New Mexico 87505
(505) 827-2425
(505) 827-0310 Fax

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **Order and Statement of Reasons** was sent via the stated methods below on November 20, 2018:

Via hand delivery and email:

Mia Napolitano
Annie Maxfield
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Avenue NE, Ste 1000
Albuquerque, New Mexico 87102
mia.napolitano@state.nm.us
annie.maxfield@state.nm.us
Counsel for the New Mexico Environment Department



Pam, Castaneda, Hearing Clerk