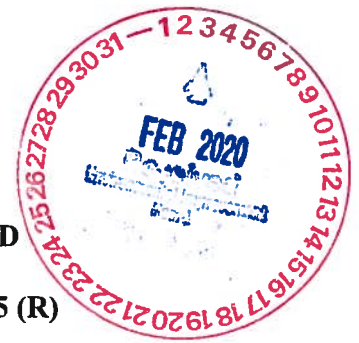


STATE OF NEW MEXICO
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD



IN THE MATTER OF PROPOSED
AMENDMENTS TO 20.4.2 NMAC –
Hazardous Waste Permit and Corrective Action Fees
AND 20.4.3 NMAC – *Annual Hazardous Waste Fees*

No. EIB 19-35 (R)

Hazardous Waste Bureau,
Resource Protection Division,
New Mexico Environment Department,

Petitioner.

ENVIRONMENTAL IMPROVEMENT BOARD'S
FINAL ORDER AND STATEMENT OF REASONS

This matter comes before the New Mexico Environmental Improvement Board (“Board”) upon a petition filed by the New Mexico Environment Department (“Department”) on September 9, 2019, to amend 20.4.2 NMAC – *Hazardous Waste Permit and Corrective Action Fees* and 20.4.3 NMAC – *Annual Hazardous Waste Fees* (the “Rules”). The Board met with a quorum on December 20, 2019 to conduct the public hearing, which was held in Santa Fe, New Mexico in accordance with the procedures found at 20.1.1 NMAC and was transcribed by Albuquerque Court Reporting Service.

The public notice requirements of 20.1.1 NMAC were met through publication of notices in English and Spanish in the Albuquerque Journal and the New Mexico Register, informing the public of the proposed changes and the date, time, and location of the public hearing.

During the hearing, the Board heard technical testimony from and questioned the Department’s witnesses and admitted the Department’s exhibits. The Department of Defense

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During the hearing, the Board heard technical testimony from and questioned the Department’s witnesses and admitted the Department’s exhibits. The Department of Defense

(“DoD”) filed a Notice of Intent to Present Technical Testimony pursuant to 20.1.1 NMAC. During the hearing, the Board heard technical testimony from and questioned DoD’s witness and admitted DoD’s exhibits. The New Mexico Environmental Law Center, on behalf of Nuclear Watch New Mexico, entered an Entry of Appearance pursuant to 20.1.1.303 NMAC and gave oral testimony at the hearing. The Board closed the record on December 20, 2019.

The Board deliberated the proposed rule changes on January 24, 2020. After Deliberation, the Board voted unanimously to adopt those amendments to 20.4.2 NMAC which proposed new unit types and associated new definitions and new review times, as proposed by the Department in NMED Exhibit C of the Department’s Notice of Intent to Present Technical Testimony (“Exhibit C”). The Board voted 5 to 1 in favor of adopting the remaining amendments to 20.4.2 NMAC, minus the increase in review times, as proposed by the Department in Exhibit C. The Board voted 5 to 1 in favor of adopting the amendments to 20.4.3 NMAC, as proposed by the Department in NMED Exhibit G of the Department’s Notice of Intent to Present Technical Testimony. The Board’s adoptions are for the reasons that follow:

STATEMENT OF REASONS

1. The Environmental Improvement Act, NMSA 1978, Section 74-1-8 and the Hazardous Waste Act, NMSA 1978, Sections 74-4-4.2(J) provide authority to the Board to amend the hazardous waste fee regulations after proper public notice and a hearing.

2. The Hazardous Waste Act (“Act”), NMSA 1978, Sections 74-4-1 to -14, provides authorization for the *Hazardous Waste Permit and Corrective Action Fees* at 20.4.2 NMAC and the *Annual Hazardous Waste Fees* at 20.4.3 NMAC.

3. Under Section 74-4-4.2(J) of the Act, the Environmental Improvement Board (“EIB”) “shall provide a schedule of fees for businesses generating hazardous waste, conducting permitted hazardous waste management activities or seeking a permit for the management of hazardous waste.” NMSA 1978, § 74-4-4.2(J).

4. The purpose of the *Hazardous Waste Permit and Corrective Action Fees* (20.4.2 NMAC) and the *Annual Hazardous Waste Fees* (20.4.3 NMAC) is to support regulatory oversight of hazardous waste facilities by the New Mexico Environment Department (“NMED”), through the Hazardous Waste Bureau (“Bureau”).

5. The EIB originally promulgated these rules as the Hazardous Waste Fee Regulations, EIB/HWFR-1, on October 28, 1988 and the Annual Hazardous Waste Fee Regulations, EIB/HWFR-1, on January 19, 1994.

6. The regulations were restructured to fit the NMAC format and became 20 NMAC 4.2, Hazardous Waste Fees and 20 NMAC 4.3, Annual Hazardous Waste Fees on November 30, 1995.

7. The Hazardous Waste Fees (20 NMAC 4.2) were amended on December 31, 1998 to incorporate fees associated with NMED’s authorization from the Environmental Protection Agency (“EPA”) for Resource Conservation and Recovery Act (“RCRA”) corrective action processes for permitted and interim status facilities.

8. The Annual Hazardous Waste Fees (20 NMAC 4.3) were recompiled on November 27, 2001 to comply with the new NMAC format as the current *Annual Hazardous Waste Fees* at 20.4.3 NMAC.

9. The Hazardous Waste Fees (20 NMAC 4.2) were renumbered, reformatted, amended and replaced on August 18, 2006 to comply with the new NMAC format and to reflect the updated

cost of operations and document review times for the HWB, becoming the current *Hazardous Waste Permit and Corrective Action Fees* at 20.4.2 NMAC.

10. In considering the proposed amendments, the Board is required to give the weight it deems appropriate to all relevant facts and circumstances presented at the public hearing, including but not limited to: (1) character and degree of injury to or interference with health, welfare, animal and plant life, property and the environment; (2) the public interest, including the social, economic and cultural value of the regulated activity and the social, economic and cultural effects of environmental degradation; and (3) technical practicability, necessity for and economic reasonableness of reducing, eliminating or otherwise taking action with respect to environmental degradation. NMSA 1978, Section 74-1-9 (B).

11. Under the authority of NMSA 1978, Sections 74-4-4.2(J), the *Hazardous Waste Permit and Corrective Action Fees* (20.4.2 NMAC) provide for the assessment of fees for “all persons who own or operate a permitted facility at which the treatment, storage, or disposal of hazardous waste is occurring or has occurred, all persons seeking or required to obtain a permit for the treatment, storage, or disposal of hazardous waste, and all persons engaging in or required to engage in closure, post closure care and corrective action under the Hazardous Waste Act.” 20.4.2.2 NMAC.

12. The Amendments to 20.4.2 NMAC are necessary to adjust the *Hazardous Waste Permit and Corrective Action Fees* to reflect current operational costs.

13. Amendments to 20.4.2 NMAC were proposed by NMED to more accurately represent document review times based on data acquired since the regulations became effective in August 2006, with average review times based on staff time tracking for document reviews between Fiscal Year 2008 and Fiscal Year 2018. The Board relied on public comment, technical testimony

presented by the DoD, and testimony by the Department which conveyed that the Department had never surpassed the existing review times for corrective action review, to find that adoption of the new document review times for existing unit types, as proposed by the Department in Exhibit C, would not be in the public interest.

14. Current fee regulations are based on 2002 costs for conducting document reviews and estimated review timeframes. The current fees are inadequate to support the Permits Management Program.

15. The updated rules will be based on current hourly costs of operation in combination with an adjustment for inflation based on the 2018 value of a 2004 dollar (\$1.34 in 2018 dollars).

16. Additionally, an annual adjustment of the fees for inflation using the Consumer Price Index for All Urban Consumers (CPI-U), United States City Average for All Items, published by the United States Department of Labor is incorporated into the rule through the proposed amendments.

17. Under the authority of NMSA 1978, Sections 74-4-4.2, the *Annual Hazardous Waste Fees* (20.4.3 NMAC) provide for the assessment of fees “to generators of hazardous waste, and to owners and operators of hazardous waste treatment, storage and disposal facilities which receive imported hazardous waste.” 20.4.3.2 NMAC.

18. The Amendments to 20.4.3 NMAC are necessary to revise and update the *Annual Hazardous Waste Fees*, which have not been updated since 1995.

19. The current fees do not reflect current operational costs and are inadequate to support the Compliance and Technical Assistance Management Program of the Bureau.

20. The amendments will simplify the annual fee structure to flat fees, rather than assessing a 1 cent per pound fee, as well as increase the annual fees for generators and add very small quantity generators into the fee structure.

21. In response to public comment by New Mexico State University, the proposed fee schedule in 20.4.3.201 NMAC was modified by the Department from the original petition to reflect an appropriate threshold for generators of hazardous waste.

22. Business fees are being redefined as fees for specific activities or events that occur at facilities or Bureau services that are requested by facilities. There are currently no fees for these activities.


23. Additionally, an annual adjustment of the fees for inflation using the Consumer Price Index for All Urban Consumers (CPI-U), United States City Average for All Items, published by the United States Department of Labor is incorporated into the rule through the proposed amendments.

24. The Board considered all facts and circumstances and concluded that the proposed amendments as adopted by the Board do not cause injury or interference with health, welfare, animal and plant life, property and the environment. The Board found the proposed amendments as adopted by the Board are technically practical, economically reasonable, and in the public interest.

ORDER

WHEREFORE, the Board hereby adopts those amendments to 20.4.2 NMAC which proposed new unit types and associated new definitions and new review times, as proposed by the Department in NMED Exhibit C to the Department's Notice of Intent to Present Technical Testimony in this matter. The Board further adopts the remaining amendments to 20.4.2 NMAC, minus the proposed increase in review times, as proposed by the Department in NMED Exhibit C to the Department's Notice of Intent to Present Technical Testimony in this matter. The Board further adopts the amendments to 20.4.3 NMAC, as proposed by the Department in NMED Exhibit G to the Department's Notice of Intent to Present Technical Testimony in this matter.

IT IS SO ORDERED.



JOHN VOLKERDING, Chair
New Mexico Environmental Improvement Board
1190 St. Francis Drive, Suite S2100
Santa Fe, New Mexico 87505
(505) 827-2425

Date: 2/3/2020

APPEAL PATH

Any aggrieved party may seek appellate review in the New Mexico Court of Appeals, pursuant to NMSA 1978, §74-1-9, and 20.1.1.500(A) NMAC. Direct appeals from orders shall be taken by filing a notice of appeal with the appellate court clerk within thirty (30) days from the date of the Order.

Certificate of Service

I hereby certify that on February 03, 2020 a copy of the **Environmental Improvement Board's Final Order and Statement of Reason** was emailed to the persons listed below. A copy will be mailed first class upon request.

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