

State of New Mexico
ENVIRONMENTAL IMPROVEMENT BOARD
Harold Runnels Building, N-4084
1190 St. Francis Drive, P. O. Box 26110
Santa Fe, New Mexico 87502

Approved June 7, 2006
Minutes of the
Environmental Improvement Board Meeting
May 2-5, 2006 Meeting
8:30 a.m.

New Mexico State Capitol Building Room 311
Santa Fe, New Mexico

Members Present: Gay Dillingham, Chair
Kathi Bearden, Member
Ken Marsh, Member
Mr. Soren Peters, Member
Mr. Harold Tso, Member
Dolores Herrera, Secretary
Gregory Green, Vice-Chair

Members Absent: None

Others Present:

Elizabeth Shields, NMCGA
Tracy Hughes, NMED General Counsel
Bill Grantham, NMED/OOTS
Felicia Orth, NMED/OOTS
Chuck Noble, NMED/OOTS
Richard Virtue, Virtue Law Firm
Pete Domenici, Jr., Domenici Law Firm
Marlene Feller
Regina Wheeler, Los Alamos County
Regino Romero
Marla Sheats
Connie Pasteris, NMED/SWB
Maureen Maher
George W. Akeley, Jr.
Auralie Ashley-Marx, NMED/SWB
Louis Rose, Montgomery Andrews Law Firm
Sofia Martinez
Edward J. Hansen, NMED/SWB
Robby Rodriguez

Dick Minzner, Rodey Law Firm
Carol Parker, NMED/OGC
Terry Riley
Contessa Archuleta
Lorraine Hollingsworth,
Domenici Law Firm
Cecilia Abeyta
Mark Miller, DSS&A
Bill Fulginiti
Sarah Piltch
Pat Shay, Rodey Law Firm
Rafael Valdepeña
I. Keith Gordon
E. Gifford Stack, NMED/SWB
Brad A. Jones, NMED/SWB
Eliot Gould
Mark Turnbough
Diana Bustamante
Skip Wrightson

Roderick Ventura, NMELC
Yana Merrell
Luke Cole
Lauro Silva
Irma Aceves
Douglas Meiklejohn, NMELC
Julio Dominguez
Charles A. White
Tom Parker

Allison Dellinger
Albert Dye
Jim Jordan
Tomasita Gonzalez
Joy Esparisa
Randall Van Vleck
Fred Sais
Claudine Martinez

Item 1: Roll Call

The Board administrator took the roll and noted a quorum was present (the Chair and Members Bearden, Marsh, Peters and Tso). Members Herrera and Green were late in arriving.

Item 2: Approval of Agenda

Action: Mr. Marsh moved that the agenda be approved as presented. Ms. Bearden seconded. The motion carried unanimously.

Item 3: Approval of March 7, 2006 and April 4, 2006 meeting minutes.

Action: Mr. Peters moved that the minutes of both meetings be approved. Mr. Marsh seconded. The motion carried unanimously.

The Board Chair then noted an error in the next meeting date at line 58 in the April 4th minutes.

Action: Mr. Marsh moved that the minutes of both meetings be approved after correcting the April 4th minutes indicating the Board's next meeting date as May 2-5, 2006. Ms. Bearden seconded. The motion carried unanimously.

Item 4: Request for hearing in the Matter of the Revised Petition for Proposed Amendments to 20.2.70 NMAC, Air Quality Rules, Operating Permits, EIB 05-12 (R). (Appearing for NMED, Tracy Hughes, General Counsel)

Ms. Hughes requested that the Board consider a revised Petition in EIB 05-12 (R). Ms. Hughes mentioned that the original Petition for Hearing request had previously been set on the Board's August 1, 2006 meeting calendar and that this request would not necessitate a change in that setting. Ms. Hughes introduced Richard Goodyear, Permits Program Manager, NMED Air Quality Bureau. Mr. Goodyear summarized the changes that have been made in the original petition relating to New Mexico's ambient air quality standards, specifically referring to a letter dated May 2, 2006, from the Air Quality Bureau, which letter was presented to Board members prior to the meeting

convening.

Mr. Peters asked if the air quality rules related to mines and mine workers. Mr. Goodyear stated that they would apply to any facility in the State that triggers the threshold for the applicability of the rules. Additionally, he stated that they did not apply to individual mine workers. Mr. Goodyear mentioned that he thought individual issues would likely come under the Occupation Health and Safety Act.

Action: **The Chair moved to accept the changes referenced in the letter dated May 2, 2006, from the Air Quality Bureau and that the hearing of EIB case No. 05-12(R) remain on the Board's August 1, 2006 meeting agenda. Mr. Marsh seconded. The motion carried unanimously.**

Item 5: **Request for hearing in the Matter of the Amended Petition to Amend Drinking Water Bureau Regulations 20.7.10: 7, 100, 101, 102, 103, 200, 201, 300, 400 and 600 NMAC, EIB 05-13 (R). (Appearing for NMED, Carol Parker, OGC)**

Ms. Parker asked the Board to consider the proposed amendments in the Petition to Amend Drinking Water Bureau Regulations as set out above. After a short discussion by the Board it was decided that Mr. Peters would act as hearing officer in EIB 05-13(R) at the Board's July 6, 2006 meeting.

Action: **Mr. Marsh moved to conduct the hearing of the Amended Petition to Amend Drinking Water Regulations, EIB 05-13 (R) at the July 6, 2006 EIB meeting. Mr. Tso seconded. Motion carried unanimously.**

Mr. Shandler pointed out that NMED brought items 4 and 5 before the Board again to assure the Board that the rule revisions are in final form at this time and are available for public scrutiny prior to the respective hearing dates on these amendments.

Item 6: **Update on options and Board authority as well as discussion and vote regarding instructions to hearing officer on amended hearing officer's report in the Aspartame matter. (Zachary Shandler, Board counsel)**

The Chair presented a brief status update of the Aspartame matter. She reminded the Board and meeting attendees that at the January 3, 2006 Board a motion was approved to postpone all hearings for six months to request legal advice from the Board's counsel on both the petition to ban Aspartame and labeling issues. The Chair stated that Mr. Shandler prepared a letter which had been distributed to Board members regarding some of the legal issues and the ramifications of those issues in this case. She then introduced Zachary Shandler, Board counsel, and requested that he summarize the issue and present his findings.

Mr. Shandler stated that his presentation was to be a legal discussion only and that there would be no admissions to the record. He mentioned that at the January 3, 2006

meeting the Board went into closed session regarding this matter on the advice of counsel. Subsequently, counsel for the main opponent of petitioner stated that he had never stated that his client was poised to sue as had been alleged in a newspaper article. Since that credible threat is no longer an issue the Board will not meet in closed session today.

Mr. Shandler explained that it was necessary for the Board to give the hearing officer substantive instructions at this juncture.

He referred to the letter which he had distributed to the Board characterizing it as “attorney-client privilege” and pointing out that it was in the Board’s discretion to release it publicly. Mr. Shandler went on to state that it was his intention to present several action options to the Board and facilitate the Board’s discussion of those options.

Those options include:

1. ***A Board vote on banning the sale of Aspartame products in New Mexico:*** He discussed the implications of such a move taking into account the arguments presented by both parties in this matter and the fact that this would be a national test case and should not be undertaken lightly. Mr. Shandler stated that in his opinion such action would surely result in legal challenges from the opponents to the petition as well as from the federal government.
2. ***Application of warning labels on products sold in New Mexico containing Aspartame:*** He again referred to the positions presented by both parties regarding labeling. He reiterated that legal challenges would again be a substantial and serious issue.
3. ***A Board hearing would be held and the record would be sent to the FDA:*** Mr. Shandler mentioned that he set out in some detail in his letter two current FDA reviews of ongoing Aspartame cases. He stated that the Board may wish to petition the FDA under its own docket number or use the docket number referenced in his letter. He noted that action on a petition could take anywhere from several months to several years depending upon the complexity of the science as well as FDA handling of open petitions filed earlier.
4. ***A Board hearing would be held and the record sent to Congress or to the New Mexico Legislature:*** Mr. Shandler mentioned that the U.S. House of Representatives passed the National Uniformity for Food Act which bill is currently in the Senate. There is the very real possibility that legal argument could be made that the bill would preempt all states from taking the action contemplated in the petition before the Board. The Board may wish to send the hearing record to Congress to educate them on the pros and cons of a state actually doing its own regulation. In 2006 the New Mexico Legislature was presented with a variety of bills directed at

amending the New Mexico Food Act that make it clear that the Board would have the authority to proceed under options 1 or 2. However, those bills died in the committee process. Holding a hearing and sending the record, pending a final decision, to the Legislature might make a persuasive argument to the Legislature to give the Board stated authority to proceed under all of these options.

5. ***A Board hearing would be held and the record sent to the New Mexico Department of Health, the New Mexico Public Education Department and the potentially future New Mexico Nutrition Council:*** Mr. Shandler discussed the jurisdiction of the Department of Health and the Public Education Department with respect to foods sold in vending machines as well foods sold in the State's schools. He stated that those departments have taken and are considering additional action relating to food items sold in those machines. He then discussed the uses those departments might make of a hearing record in making decisions relating to the contents of vending machines. Mr. Shandler mentioned that a bill to establish a New Mexico Nutrition Council was proposed during the 2006 session indicating that it also died in the committee process. However, he stated that should such a council be created during the 2007 Legislative Session that would provide yet another entity that could receive and make use of the hearing record.
6. ***The Board would hold a hearing and send the record to the New Mexico Environment Department:*** Mr. Shandler referred to the statutory authority of the Secretary of the Environment Department to issue public service announcements. He stated that in his opinion the Secretary would control what those announcements would say but that in making the record available to the Secretary it could assist the Secretary in the creation of announcements relating to Aspartame.
7. ***The Board would hold a hearing to receive public comment:*** Mr. Shandler explained that under this option a hearing would be held but that the record would not be sent any where and there would not be a final vote on any issue, the meeting would simply be held to provide a forum entirely for full public comment. He mentioned that the Board should be mindful of the fact that a hearing should not be held simply to provide a platform for public product slander.

In summary, Mr. Shandler explained that options 1 and 2 had serious and substantial risks attached to them. He stated that while legal challenges could still be filed, in his opinion, the Board could proceed with options 3 through 7, or any combination of them, because none of those options constitute a direct frontal attack on federal authority.

He went on to discuss the evidentiary standard with respect to these issues. He mentioned that the advantage the Board would have in using a stricter standard in this case than it might ordinarily have is that it would give the Board's findings a

greater credibility in the nationwide and worldwide scientific community. He stated that the disadvantage to maintaining a stricter standard is that it will likely bar public lay testimony.

He referred to his letter to the Board setting out and discussing the following evidentiary standard possibilities: Daubert, Significant Scientific Agreement Standard, or Credible Scientific Evidence Standard.

The Chair asked Mr. Shandler if the Board could limit the time frame of the hearing. Mr. Shandler stated that under ordinary circumstances the hearing officer would conduct a pre-hearing meeting and attempt to get the consent of the parties in setting out their respective requirements. Any party to a hearing has the option of appealing a hearing officer's decision regarding the setting of a time limitation. Mr. Shandler noted that the Ms. Orth, Hearing Officer, does require some direction from the Board with respect to hearing issues.

Following his presentation, there was lengthy discussion by the Board regarding Mr. Shandler's various options, degrees of evidentiary standard and courses of action available to the Board.

The Chair requested that the parties to the Aspartame matter, Stephen Fox, petitioner in the EIB Aspartame case, Terry Riley, appearing individually, Dick Minzer, representing Ajinomoto and Louis Rose, representing The Calorie Council, speak for three minutes each regarding their respective positions on the status of the initial petition.

There was discussion by the parties on issues relating to the options and evidentiary standards that have been presented by Mr. Shandler and the implications of those issues. Following position statements by Mr. Fox and Mr. Riley, Mr. Minzer and Mr. Rose both made the point that the only petition before the Board is the one to ban Aspartame and that in their view the Board cannot, under its rules, initiate a rulemaking other than that put forth by Mr. Fox.

The Chair asked Mr. Fox whether or not he was willing to amend his original petition requesting a ban of Aspartame. Mr. Fox stated that he was not. Board discussion followed relating to the position statements made by the parties and the ramifications of the Board's action relating to Mr. Fox's position with respect to amended his petition. The Chair asked Mr. Shandler if the Board had the authority to amend a previously filed petition. Mr. Shandler stated he could not definitively answer the question but that he was inclined to advise the Board that it should not attempt to amend a filed petition.

A lengthy Board discussion continued relating to the numerous issues and procedural difficulties inherent in this case, as well as the contemplated release of Mr. Shandler's letter to the public.

The Board continued the discussion concerning the release of Mr. Shandler's

letter to the public. Mr. Shandler noted that the letter was in lieu of an official NM Attorney General's opinion.

Action: **Ms. Herrera moved that the Board waive client privilege with respect to Mr. Shandler's letter and release copies of the letter to the public. Chair Dillingham seconded the motion.**

Following discussion a roll-call vote was taken and the motion failed; 3 affirmative, 4 negative:

Board vote

Kathi Bearden	yes
Gay Dillingham	yes
Gregory Green	no
Dolores Herrera	yes
Ken Marsh	no
Soren Peters	no
Harold Tso	no

Item 7: **Hearing and possible decision to consider a proposed replacement to 20.9.1 NMAC, Solid Waste Management Regulations, EIB 05-07 (R). (NMED-Chuck Noble, OGC; Auralie Ashley-Marx, SWB) Hearing Officer, Felicia Orth**

Ms. Orth as Hearing Officer presided over the hearing in this matter May 2, 3, 4 and 5, 2006. Kathy Townsend Court Reporters transcribed the hearing. All Notices of Intent to Present Technical Testimony were timely filed and are available for review, as well as public comment correspondence and the hearing transcript, in the office of the Environmental Improvement Board Administrator, New Mexico Environment Department, 1190 St. Francis Drive, Rm. N 2150, Santa Fe, New Mexico 87505.

Item 8: Other Business

None.

Item 9: Next Meeting – June 7, 2006 (to be held in Hobbs, NM)

Item 10: Adjournment - The meeting adjourned at 11:30 p.m., May 5, 2006.

Signature on File

Gay Dillingham, EIB Chair