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HOUSE BILL 278

45TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2001

INTRODUCED BY

John A. Heaton

AN ACT

RELATING TO THE ENVIRONMENT; AMENDING THE AIR QUALITY CONTROL ACT; CLARIFYING THE DEFINITION OF "POTENTIAL EMISSION RATE"; PROVIDING FOR LIMITATIONS ON CIVIL ACTIONS FOR VIOLATION OF THE ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. Section 74-2-2 NMSA 1978 (being Laws 1967, Chapter 277, Section 2, as amended) is amended to read:

"74-2-2. DEFINITIONS. -- As used in the Air Quality Control Act:

A. "air contaminant" means ~~[any]~~ a substance, including ~~[but not limited to]~~ any particulate matter, fly ash, dust, fumes, gas, mist, smoke, vapor, micro-organisms, radioactive material, any combination thereof or any decay or reaction product thereof;

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1           B. "air pollution" means the emission, except  
2 emission that occurs in nature, into the outdoor atmosphere of  
3 one or more air contaminants in quantities and of a duration  
4 that may with reasonable probability injure human health or  
5 animal or plant life or as may unreasonably interfere with the  
6 public welfare, visibility or the reasonable use of property;

7           C. "department" means the department of  
8 environment;

9           D. "director" means the administrative head of a  
10 local agency;

11           E. "emission limitation" [~~and~~] or "emission  
12 standard" [~~mean~~] means a requirement established by the  
13 environmental improvement board or the local board, the  
14 department, the local authority or the local agency or  
15 pursuant to the federal act that limits the quantity, rate or  
16 concentration, or combination thereof, of emissions of air  
17 contaminants on a continuous basis, including any requirements  
18 relating to the operation or maintenance of a source to assure  
19 continuous reduction;

20           F. "federal act" means the federal Clean Air Act,  
21 its subsequent amendments and successor provisions;

22           G. "federal standard of performance" means [~~any~~] a  
23 standard of performance, emission limitation or emission  
24 standard adopted pursuant to 42 U.S.C. Section 7411 or 7412;

25           H. "hazardous air pollutant" means an air

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1 contaminant that has been [~~classified~~] listed as a hazardous  
2 air pollutant pursuant to the federal act;

3 I. "local agency" means the administrative agency  
4 established by a local authority pursuant to Paragraph (2) of  
5 Subsection A of Section 74-2-4 NMSA 1978;

6 J. "local authority" means any of the following  
7 political subdivisions of the state that have, by following  
8 the procedure set forth in Subsection A of Section 74-2-4 NMSA  
9 1978, assumed jurisdiction for local administration and  
10 enforcement of the Air Quality Control Act:

11 (1) a county that was a class A county as of  
12 January 1, 1980; or

13 (2) a municipality with a population greater  
14 than one hundred thousand located within a county that was a  
15 class A county as of January 1, 1980;

16 K. "local board" means a municipal, county or  
17 joint air quality control board created by [~~any~~] a local  
18 authority;

19 L. "mandatory class I area" means any of the  
20 following areas in this state that were in existence on August  
21 7, 1977:

22 (1) national wilderness areas that exceed  
23 five thousand acres in size; and

24 (2) national parks that exceed six thousand  
25 acres in size;

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1 M "modification" means [~~any~~] a physical change  
2 in, or change in the method of operation of, a source that  
3 results in an increase in the potential emission rate of [~~any~~]  
4 a regulated air contaminant emitted by the source or that  
5 results in the emission of [~~any~~] a regulated air contaminant  
6 not previously emitted, but does not include:

7 (1) a change in ownership of the source;

8 (2) routine maintenance, repair or  
9 replacement;

10 (3) installation of air pollution control  
11 equipment, and all related process equipment and materials  
12 necessary for its operation, undertaken for the purpose of  
13 complying with regulations adopted by the environmental  
14 improvement board or the local board or pursuant to the  
15 federal act; or

16 (4) unless previously limited by enforceable  
17 permit conditions:

18 (a) an increase in the production rate,  
19 if such increase does not exceed the operating design capacity  
20 of the source;

21 (b) an increase in the hours of  
22 operation; or

23 (c) use of an alternative fuel or raw  
24 material if, prior to January 6, 1975, the source was capable  
25 of accommodating such fuel or raw material or if use of an

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1 alternate fuel or raw material is caused by ~~[any]~~ a natural  
2 gas curtailment or emergency allocation or ~~[any]~~ an other lack  
3 of supply of natural gas;

4 N. "nonattainment area" means for ~~[any]~~ an air  
5 contaminant an area that is designated "nonattainment" with  
6 respect to that contaminant within the meaning of Section  
7 107(d) of the federal act;

8 O. "person" includes an individual, partnership,  
9 corporation, association, the state or political subdivision  
10 of the state and any agency, department or instrumentality of  
11 the United States and any of their officers, agents or  
12 employees;

13 P. "potential emission rate" means the emission  
14 rate of a source at its maximum capacity ~~[in the absence of  
15 air pollution control equipment that is not vital to  
16 production of the normal product of the source or to its  
17 normal operation]~~ to emit a regulated air contaminant under  
18 its physical and operational design, provided any physical or  
19 operational limitation on the capacity of the source to emit a  
20 regulated air contaminant, including air pollution control  
21 equipment and restrictions on hours of operation or on the  
22 type or amount of material combusted, stored or processed,  
23 shall be treated as part of its physical and operational  
24 design only if the limitation or the effect it would have on  
25 emissions is enforceable;

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1 Q. "regulated air contaminant" means [~~any~~] an air  
2 contaminant, the emission or ambient concentration of which is  
3 regulated pursuant to the Air Quality Control Act or the  
4 federal act;

5 R. "secretary" means the secretary of environment;

6 S. "significant deterioration" means [~~any~~] an  
7 increase in the ambient concentrations of [~~any~~] an air  
8 contaminant above the levels allowed by the federal act or  
9 federal regulations for that air contaminant in the area  
10 within which the increase occurs;

11 T. "source" means [~~any~~] a structure, building,  
12 equipment, facility, installation or operation that emits or  
13 may emit [~~any~~] an air contaminant;

14 U. "standard of performance" means a requirement  
15 of continuous emission reduction, including any requirement  
16 relating to operation or maintenance of a source to assure  
17 continuous emission reduction;

18 V. "state implementation plan" means [~~any~~] a plan  
19 submitted by New Mexico to the federal environmental  
20 protection agency pursuant to 42 U.S.C. Section 7410; and

21 W. "toxic air pollutant" means [~~any~~] an air  
22 contaminant, except a hazardous air pollutant, classified by  
23 the environmental improvement board or the local board as a  
24 toxic air pollutant. "

25 Section 2. Section 74-2-7 NMSA 1978 (being Laws 1972,

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1 Chapter 51, Section 4, as amended) is amended to read:

2 "74-2-7. PERMITS--PERMIT APPEALS TO THE ENVIRONMENTAL  
3 IMPROVEMENT BOARD OR THE LOCAL BOARD--PERMIT FEES.--

4 A. By regulation, the environmental improvement  
5 board or the local board shall require:

6 (1) [~~any~~] a person intending to construct or  
7 modify any source, except as otherwise specifically provided  
8 by regulation, to obtain a construction permit from the  
9 department or the local agency prior to such construction or  
10 modification; and

11 (2) [~~any~~] a person intending to operate any  
12 source for which an operating permit is required by the 1990  
13 amendments to the federal act, except as otherwise  
14 specifically provided by regulation, to obtain an operating  
15 permit from the department or the local agency.

16 B. Regulations adopted by the environmental  
17 improvement board or the local board shall include at least  
18 the following provisions:

19 (1) requirements for the submission of  
20 relevant information, including [~~but not limited to~~]  
21 information the department or the local agency deems necessary  
22 to determine that regulations and standards under the Air  
23 Quality Control Act or the federal act will not be violated;

24 (2) specification of the deadlines for  
25 processing permit applications; provided the deadline for a

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1 final decision by the department or the local agency on a  
2 construction permit application may not exceed:

3 (a) ninety days after the application  
4 is determined to be administratively complete, if the  
5 application is not subject to requirements for prevention of  
6 significant deterioration, unless the secretary or the  
7 director grants an extension not to exceed ninety days for  
8 good cause, including the need to have public hearings; or

9 (b) one hundred eighty days after the  
10 application is determined to be administratively complete, if  
11 the application is subject to requirements for prevention of  
12 significant deterioration, unless the secretary or the  
13 director grants an extension not to exceed ninety days for  
14 good cause, including the need to have public hearings;

15 (3) that if the department or local agency  
16 fails to take final action on a construction permit  
17 application within the deadlines specified in Paragraph (2) of  
18 this subsection, the department or local agency shall notify  
19 the applicant in writing that an extension of time is required  
20 to process the application and specify in detail the grounds  
21 for the extension;

22 (4) a description of elements required before  
23 the department or local agency shall deem an application  
24 administratively complete;

25 (5) specification of the public notice,



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1 comment period and public hearing, if any, required prior to  
2 the issuance of a permit; provided the permit regulations  
3 adopted:

4 (a) by the environmental improvement  
5 board shall include provisions governing notice to nearby  
6 states; and

7 (b) by any local board shall include  
8 provisions requiring that notice be given to the department of  
9 all permit applications by any source that emits, or has a  
10 potential emission rate of, one hundred tons per year or more  
11 of any regulated air contaminant, including any source of  
12 fugitive emissions of each regulated air contaminant, at least  
13 sixty days prior to the date on which construction or major  
14 modification is to commence;

15 (6) a schedule of construction permit fees  
16 sufficient to cover the reasonable costs of:

17 (a) reviewing and acting upon any  
18 application for such permit; and

19 (b) implementing and enforcing the  
20 terms and conditions of the permit, excluding any court costs  
21 or other costs associated with an enforcement action;

22 (7) a schedule of emission fees consistent  
23 with the provisions of Section 502(b)(3) of the 1990  
24 amendments to the federal act;

25 (8) a method for accelerated permit

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1 processing that may be requested at the sole discretion of the  
2 applicant at the time the applicant submits a construction  
3 permit application and that:

4 (a) allows the department or local  
5 agency to contract with qualified outside firms to assist the  
6 department or local agency in its accelerated review of the  
7 construction permit application; provided that the department  
8 or local agency can contract with a qualified firm that does  
9 not have a conflict of interest; and

10 (b) establishes a process for the  
11 department or local agency to account for the expenditure of  
12 the accelerated permit processing fees;

13 (9) ~~allows~~ allowance for additional permit  
14 application fees, sufficient to cover the reasonable costs of  
15 an accelerated permit application review process. Before the  
16 applicant is notified that the permit application has been  
17 determined to be complete, the department or local board shall  
18 give the applicant a reasonable estimate of costs of an  
19 accelerated permit application review process;

20 (10) specification of the maximum length of  
21 time for which a permit shall be valid; provided that for an  
22 operating permit such period may not exceed five years; and

23 (11) for an operating permit only:

24 (a) provisions consistent with Sections  
25 502(b) and 505(b) of the federal act providing: 1) notice to

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1 and review and comment by the United States environmental  
2 protection agency; and 2) that if the department or local  
3 agency receives notice of objection from the United States  
4 environmental protection agency before the operating permit is  
5 issued, the department or the local agency shall not issue the  
6 permit unless it is revised and issued under Section 505(c) of  
7 the federal act;

8 (b) provisions governing renewal of the  
9 operating permit; and

10 (c) specification of the conditions  
11 under which the operating permit may be terminated, modified  
12 or revoked and reissued prior to the expiration of the term of  
13 the operating permit.

14 C. The department or the local agency may deny any  
15 application for:

16 (1) a construction permit if it appears that  
17 the construction or modification:

18 (a) will not meet applicable standards,  
19 rules or requirements of the Air Quality Control Act or the  
20 federal act; [~~or any regulation adopted pursuant to either; or~~

21 ~~(2) an operating permit if:~~

22 ~~(a) the source for which the permit is~~  
23 ~~sought will emit a hazardous air pollutant or any air~~  
24 ~~contaminant in excess of a federal standard of performance or~~  
25 ~~a regulation of the environmental improvement board or the~~

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1 ~~local board;~~

2 ~~(b) it appears that the source for~~  
3 ~~which the permit is sought]~~

4 (b) will cause or contribute to air  
5 contaminant levels in excess of ~~any~~ a national or state  
6 standard or, within the boundaries of a local authority,  
7 applicable local ambient air quality standards; or

8 (c) will violate any other provision of  
9 the Air Quality Control Act or the federal act ~~[will be~~  
10 ~~violated]~~; and

11 (2) an operating permit if the source will  
12 not meet the applicable standards, regulations or requirements  
13 pursuant to the Air Quality Control Act or the federal act.

14 D. The department or the local agency may specify  
15 conditions to any permit granted under this section,  
16 including:

17 (1) for a construction permit:

18 (a) a requirement that such source  
19 install and operate control technology, determined on a case-  
20 by-case basis, sufficient to meet the standards, rules and  
21 requirements of the Air Quality Control Act and the federal  
22 act; ~~[and regulations promulgated pursuant to either; and~~

23 ~~(2) for an operating permit:~~

24 ~~(a) imposition of]~~

25 (b) individual emission limits,

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1 determined on a case-by-case basis, but only as restrictive as  
2 necessary to meet the requirements of the Air Quality Control  
3 Act and the federal act or the emission rate specified in the  
4 ~~[operating]~~ permit application, whichever is more stringent;

5 ~~[(b)]~~ (c) compliance with applicable  
6 federal standards of performance;

7 ~~[(c) imposition of]~~ (d) reasonable  
8 restrictions and limitations not relating to emission limits  
9 or emission rates; or

10 ~~[(d)]~~ (e) any combination of the  
11 conditions listed in this paragraph; and

12 (2) for an operating permit, terms and  
13 conditions sufficient to ensure compliance with the applicable  
14 standards, rules and requirements pursuant to the Air Quality  
15 Control Act and the federal act.

16 E. This section does not authorize the department  
17 or the local agency to require the use of machinery, devices  
18 or equipment from a particular manufacturer if the federal  
19 standards of performance, state regulations and permit  
20 conditions may be met by machinery, devices or equipment  
21 otherwise available.

22 F. The issuance of a permit does not relieve any  
23 person from the responsibility of complying with the  
24 provisions of the Air Quality Control Act and any applicable  
25 regulations of the environmental improvement board or the

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1 local board. Any conditions placed upon a permit by the  
2 department or the local agency shall be enforceable to the  
3 same extent as a regulation of its board.

4 G. ~~Any~~ A person who participated in a permitting  
5 action before the department or the local agency shall be  
6 notified by the department or the local agency of the action  
7 taken and the reasons for the action. Notification of the  
8 applicant shall be by certified mail.

9 H. ~~Any~~ A person who participated in a permitting  
10 action before the department or the local agency and who is  
11 adversely affected by such permitting action may file a  
12 petition for hearing before the environmental improvement  
13 board or the local board. The petition shall be made in  
14 writing to the environmental improvement board or the local  
15 board within thirty days from the date notice is given of the  
16 department's or the local agency's action. Unless a timely  
17 petition for hearing is made, the decision of the department  
18 or the local agency shall be final.

19 I. If a timely petition for hearing is made, the  
20 environmental improvement board or the local board shall hold  
21 a hearing within sixty days after receipt of the petition.  
22 The environmental improvement board or the local board shall  
23 notify the petitioner and the applicant or permittee, if other  
24 than the petitioner, by certified mail of the date, time and  
25 place of the hearing. If the subject of the petition is a

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1 permitting action deemed by the environmental improvement  
2 board or the local board to substantially affect the public  
3 interest, the environmental improvement board or the local  
4 board shall ensure that the public receives notice of the  
5 date, time and place of the hearing. The public in such  
6 circumstances shall also be given a reasonable opportunity to  
7 submit data, views or arguments orally or in writing and to  
8 examine witnesses testifying at the hearing. Any person  
9 submitting data, views or arguments orally or in writing shall  
10 be subject to examination at the hearing.

11 J. The environmental improvement board or the  
12 local board may designate a hearing officer to take evidence  
13 in the hearing. All hearings shall be recorded.

14 K. The burden of proof shall be upon the  
15 petitioner. Based upon the evidence presented at the hearing,  
16 the environmental improvement board or the local board shall  
17 sustain, modify or reverse the action of the department or the  
18 local agency respectively.

19 L. Notwithstanding any other provision of law and  
20 subject to the provisions of Section 74-2-4 NMSA 1978, a final  
21 decision on a permit by the department, the environmental  
22 improvement board, the local agency, the local board or the  
23 court of appeals that a [new] source will or will not meet  
24 applicable local, state and federal air pollution standards  
25 and regulations shall be conclusive and is binding on every

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1 other state agency and as an issue before any other state  
2 agency shall be deemed resolved in accordance with that final  
3 decision.

4 M Subject to the provisions of Section 74-2-4  
5 NMSA 1978, if the local board has adopted a permit regulation  
6 pursuant to this section, persons constructing or modifying  
7 any [~~new~~] source within the boundaries of the local authority  
8 shall obtain a permit from the local agency and not from the  
9 department.

10 N. Fees collected pursuant to this section shall  
11 be deposited in:

12 (1) the state air quality permit fund created  
13 by Section 74-2-15 NMSA 1978 if collected by the department;  
14 or

15 (2) a fund created pursuant to Section  
16 74-2-16 NMSA 1978 if collected by a local agency pursuant to a  
17 permit regulation adopted by the local board pursuant to this  
18 section. "

19 Section 3. Section 74-2-12 NMSA 1978 (being Laws 1992,  
20 Chapter 20, Section 14) is amended to read:

21 "74-2-12. ENFORCEMENT-- COMPLIANCE ORDERS-- FIELD  
22 CITATIONS. --

23 A. [~~Whenever~~] When, on the basis of any  
24 information, the secretary or the director determines that  
25 [~~any~~] a person has violated or is violating [~~any~~] a



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1 requirement or prohibition of the Air Quality Control Act,  
2 [any] a regulation promulgated pursuant to that act or [any] a  
3 condition of a permit issued under that act, the secretary or  
4 the director may:

5 (1) issue a compliance order within one year  
6 after the first alleged violation stating with reasonable  
7 specificity the nature of the violation and requiring  
8 compliance immediately or within a specified time period or  
9 assessing a civil penalty for [any] a past or current  
10 violation, or both; or

11 (2) commence a civil action in district court  
12 for appropriate relief, including a temporary or permanent  
13 injunction.

14 B. [Any] An order issued pursuant to Subsection A  
15 of this section may include a suspension or revocation of any  
16 permit, or portion thereof, issued by the secretary or the  
17 director. Any penalty assessed in the order shall not exceed  
18 fifteen thousand dollars (\$15,000) per day of noncompliance or  
19 a total of two hundred thousand dollars (\$200,000) for each  
20 violation, except when the secretary and the attorney general,  
21 or the director and the attorney for the local authority  
22 determine that a matter involves a larger penalty amount or a  
23 longer period of violation is appropriate for administrative  
24 penalty action.

25 C. [Any] An order issued pursuant to Subsection A

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1 of this section shall become final unless, no later than  
2 thirty days after the order is served, the person named  
3 therein submits a written request to the secretary or the  
4 director for a public hearing. Upon such request, the  
5 secretary or the director shall promptly conduct a public  
6 hearing. The secretary or the director shall appoint an  
7 independent hearing officer to preside over the public  
8 hearing. The hearing officer shall make and preserve a  
9 complete record of the proceedings and forward his  
10 recommendation based thereon to the secretary or the director,  
11 who shall make the final decision.

12 D. The environmental improvement board or the  
13 local board may implement a field citation program through  
14 regulations establishing appropriate minor violations for  
15 which field citations assessing civil penalties not to exceed  
16 one thousand dollars (\$1,000) per day of violation may be  
17 issued by officers or employees of the department or the local  
18 agency as designated by the secretary or the director.

19 E. ~~[Any]~~ A person to whom a field citation is  
20 issued pursuant to Subsection D of this section may, within a  
21 reasonable time as prescribed by regulation by the  
22 environmental improvement board or the local board, elect to  
23 pay the penalty assessment or to request a hearing by the  
24 issuing agency on the field citation. If a request for  
25 hearing is not made within the time specified in the

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1 regulation, the penalty assessment in the field citation shall  
2 be final.

3 F. Payment of a civil penalty required by a field  
4 citation issued pursuant to Subsection D of this section shall  
5 not be a defense to further enforcement by the department or  
6 the local agency to correct a violation or to assess the  
7 maximum statutory penalty pursuant to other authorities in the  
8 Air Quality Control Act if the violation continues.

9 G. In determining the amount of ~~any~~ a penalty to  
10 be assessed pursuant to this section, the secretary, the  
11 director or the person issuing a field citation shall take  
12 into account the seriousness of the violation, any good-faith  
13 efforts to comply with the applicable requirements and other  
14 relevant factors.

15 H. In connection with ~~any~~ a proceeding under  
16 this section, the secretary or the director may issue  
17 subpoenas for the attendance and testimony of witnesses and  
18 the production of relevant papers, books and documents and may  
19 adopt rules for discovery procedures.

20 I. Penalties collected pursuant to an  
21 administrative order or a field citation shall be deposited in  
22 the:

23 (1) municipal or county general fund, as  
24 applicable, if the administrative order or field citation was  
25 directed to a source located within a local authority; or

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1 (2) state general fund if the administrative  
2 order or field citation was directed to any other source. "

3 Section 4. Section 74-2-12.1 NMSA 1978 (being Laws 1992,  
4 Chapter 20, Section 15) is amended to read:

5 "74-2-12.1. CIVIL PENALTY--REPRESENTATION OF DEPARTMENT  
6 OR LOCAL AUTHORITY--LIMITATION OF ACTIONS. --

7 A. [~~Any~~] A person who violates [~~any~~] a provision  
8 of the Air Quality Control Act or [~~any~~] a regulation, permit  
9 condition or emergency order adopted or issued pursuant to  
10 that act may be assessed a civil penalty not to exceed fifteen  
11 thousand dollars (\$15,000) for each day during any portion of  
12 which a violation occurs.

13 B. In [~~any~~] an action to enforce the provisions of  
14 the Air Quality Control Act or [~~any~~] an ordinance, regulation,  
15 permit condition or emergency order, adopted, imposed or  
16 issued pursuant to that act:

17 (1) the department shall be represented by  
18 the attorney general;

19 (2) a local authority that is a municipality  
20 shall be represented by the attorney of the municipality; and

21 (3) a local authority that is a county shall  
22 be represented by the district attorney within whose judicial  
23 district the county lies.

24 C. No action for civil penalty shall be commenced  
25 more than five years after the alleged violation. "