

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE BILL 655

46TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2003

AN ACT

RELATING TO THE ENVIRONMENT; AMENDING THE AIR QUALITY CONTROL
ACT TO PROVIDE FOR APPEALS TO THE ENVIRONMENTAL IMPROVEMENT
BOARD BASED ON THE RECORD OF A PUBLIC HEARING.

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

Section 1. Section 74-2-7 NMSA 1978 (being Laws 1972,
Chapter 51, Section 4, as amended) is amended to read:

"74-2-7. PERMITS--PERMIT REVIEW BY THE ENVIRONMENTAL
IMPROVEMENT BOARD OR THE LOCAL BOARD--PERMIT FEES.--

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

(1) a person intending to construct or modify
any source, except as otherwise specifically provided by
regulation, to obtain a construction permit from the department
or the local agency prior to such construction or modification;

1 and

2 (2) a person intending to operate any source
3 for which an operating permit is required by the 1990
4 amendments to the federal act, except as otherwise specifically
5 provided by regulation, to obtain an operating permit from the
6 department or the local agency.

7 B. Regulations adopted by the environmental
8 improvement board or the local board shall include at least the
9 following provisions:

10 (1) requirements for the submission of
11 relevant information, including information the department or
12 the local agency deems necessary to determine that regulations
13 and standards under the Air Quality Control Act or the federal
14 act will not be violated;

15 (2) specification of the deadlines for
16 processing permit applications; provided the deadline for a
17 final decision by the department or the local agency on a
18 construction permit application may not exceed:

19 (a) ninety days after the application is
20 determined to be administratively complete, if the application
21 is not subject to requirements for prevention of significant
22 deterioration, unless the secretary or the director grants an
23 extension not to exceed ninety days for good cause, including
24 the need to have public hearings; or

25 (b) one hundred eighty days after the

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

6 (3) ~~[that]~~ if the department or local agency
 7 fails to take final action on a construction permit application
 8 within the deadlines specified in Paragraph (2) of this
 9 subsection, the department or local agency shall notify the
 10 applicant in writing that an extension of time is required to
 11 process the application and specify in detail the grounds for
 12 the extension;

13 (4) a description of elements required before
 14 the department or local agency shall deem an application
 15 administratively complete;

16 (5) specification of the public notice and
 17 comment period ~~[and public hearing, if any]~~ on the application
 18 or draft permit required prior to the issuance of a permit;
 19 provided that the permit regulations adopted:

20 (a) by the environmental improvement
 21 board shall include provisions ~~[governing notice to nearby~~
 22 ~~states]~~ that ensure that the public, adjacent landowners,
 23 affected governmental agencies, area Indian nations, tribes or
 24 pueblos and any other state whose air may be affected are
 25 provided notice; and

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

9 (6) an opportunity for a public hearing before
10 the department, at which all interested persons shall be given
11 a reasonable opportunity to submit evidence, data, views and
12 arguments orally or in writing on the application or draft
13 permit and to examine witnesses testifying at the hearing. The
14 hearing shall be recorded. Any person submitting evidence,
15 data, views or arguments shall be subject to examination at the
16 hearing;

17 [~~6~~] (7) a schedule of construction permit
18 fees sufficient to cover the reasonable costs of:

19 (a) reviewing and acting upon any
20 application for such permit; and

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

24 [~~7~~] (8) a schedule of emission fees
25 consistent with the provisions of Section 502(b) (3) of the 1990

1 amendments to the federal act;

2 [~~(8)~~] (9) a method for accelerated permit
3 processing that may be requested at the sole discretion of the
4 applicant at the time the applicant submits a construction
5 permit application and that:

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

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

15 [~~(9)~~] (10) allowance for additional permit
16 application fees, sufficient to cover the reasonable costs of
17 an accelerated permit application review process. Before the
18 applicant is notified that the permit application has been
19 determined to be complete, the department or local agency shall
20 give the applicant a reasonable estimate of costs of an
21 accelerated permit application review process;

22 [~~(10)~~] (11) specification of the maximum
23 length of time for which a permit shall be valid; provided that
24 for an operating permit such period may not exceed five years;
25 and

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1 [~~(11)~~] (12) for an operating permit only:

2 (a) provisions consistent with Sections
3 502(b) and 505(b) of the federal act providing: 1) notice to
4 and review and comment by the United States environmental
5 protection agency; and 2) that if the department or local
6 agency receives notice of objection from the United States
7 environmental protection agency before the operating permit is
8 issued, the department or the local agency shall not issue the
9 permit unless it is revised and issued under Section 505(c) of
10 the federal act;

11 (b) provisions governing renewal of the
12 operating permit; and

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

17 C. The department or the local agency may deny any
18 application for:

19 (1) a construction permit if it appears that
20 the construction or modification:

21 (a) will not meet applicable standards,
22 rules or requirements of the Air Quality Control Act or the
23 federal act;

24 (b) will cause or contribute to air
25 contaminant levels in excess of a national or state standard

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1 or, within the boundaries of a local authority, applicable
2 local ambient air quality standards; or

3 (c) will violate any other provision of
4 the Air Quality Control Act or the federal act; and

5 (2) an operating permit if the source will not
6 meet the applicable standards, rules or requirements pursuant
7 to the Air Quality Control Act or the federal act.

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

10 (1) for a construction permit:

11 (a) a requirement that such source
12 install and operate control technology, determined on a case-
13 by-case basis, sufficient to meet the standards, rules and
14 requirements of the Air Quality Control Act and the federal
15 act;

16 (b) individual emission limits,
17 determined on a case-by-case basis, but only as restrictive as
18 necessary to meet the requirements of the Air Quality Control
19 Act and the federal act or the emission rate specified in the
20 permit application, whichever is more stringent;

21 (c) compliance with applicable federal
22 standards of performance;

23 (d) reasonable restrictions and
24 limitations not relating to emission limits or emission rates;
25 or

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1 (e) any combination of the conditions
2 listed in this paragraph; and

3 (2) for an operating permit, terms and
4 conditions sufficient to ensure compliance with the applicable
5 standards, rules and requirements pursuant to the Air Quality
6 Control Act and the federal act.

7 E. This section does not authorize the department
8 or the local agency to require the use of machinery, devices or
9 equipment from a particular manufacturer if the federal
10 standards of performance, state regulations and permit
11 conditions may be met by machinery, devices or equipment
12 otherwise available.

13 F. The issuance of a permit does not relieve any
14 person from the responsibility of complying with the provisions
15 of the Air Quality Control Act and any applicable regulations
16 of the environmental improvement board or the local board. Any
17 conditions placed upon a permit by the department or the local
18 agency shall be enforceable to the same extent as a regulation
19 of its board.

20 G. A person who participated in a permitting action
21 before the department or the local agency shall be notified by
22 the department or the local agency of the action taken and the
23 reasons for the action. Notification of the applicant shall be
24 by certified mail.

25 H. A person who participated in a permitting action

1 before the department or the local agency and who is adversely
 2 affected by such permitting action may file a petition for
 3 ~~[hearing]~~ review before the environmental improvement board or
 4 hearing before the local board. ~~[The petition shall be made in~~
 5 ~~writing to the environmental improvement board or the local~~
 6 ~~board within thirty days from the date notice is given of the~~
 7 ~~department's or the local agency's action.]~~ Unless a timely
 8 petition ~~[for hearing]~~ is made, the decision of the department
 9 or the local agency shall be final and not subject to judicial
 10 review. The petition shall:

11 (1) be made in writing to the environmental
 12 improvement board or the local board within thirty days from
 13 the date notice is given of the department's or the local
 14 agency's action;

15 (2) include a statement of the issues to be
 16 raised and the relief sought; and

17 (3) be served on all other persons submitting
 18 evidence, data, views or arguments in the proceeding before the
 19 department or the local agency.

20 I. If a timely petition ~~[for hearing]~~ is made, the
 21 environmental improvement board or the local board shall ~~hold~~
 22 ~~a hearing]~~ consider the petition within sixty days after
 23 receipt of the petition. The environmental improvement board
 24 or the local board shall notify the petitioner and the
 25 applicant or permittee, if other than the petitioner, by

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

13 J. For review by the environmental improvement
14 board, [or] the board shall review the record compiled before
15 the department, including the transcript of any public hearing
16 held on the application or draft permit, and shall allow any
17 party to submit arguments. The board may designate a hearing
18 officer to review the record and the arguments of the parties
19 and recommend a decision to the board. The board shall
20 consider and weigh only the evidence contained in the record
21 before the department and the recommended decision of the
22 hearing officer, if any, and shall not be bound by the factual
23 findings or legal conclusions of the department. The board
24 shall keep a record of the review. Based on the review of the
25 evidence, the arguments of the parties and the recommendation

1 of the hearing officer, if any, the board shall sustain, modify
 2 or reverse the action of the department.

3 K. Prior to the date set for review, if the
 4 environmental improvement board determines that proposed
 5 additional evidence, data, views or arguments are relevant and
 6 there was good reason for the failure to present the evidence,
 7 data, views or arguments in the proceeding before the
 8 constituent agency, the board shall order that additional
 9 evidence, data, views or arguments be taken by the department.
 10 Based on the additional evidence, data, views or arguments, the
 11 department may revise the permitting action and shall promptly
 12 file with the environmental improvement board the additional
 13 evidence, data, views or arguments received and the action
 14 taken.

15 L. For review by the local board, the board shall
 16 hold a hearing on the petition. The local board may designate
 17 a hearing officer to take evidence in the hearing and recommend
 18 a decision to the board. All interested persons shall be given
 19 a reasonable opportunity to submit evidence, data, views and
 20 arguments orally or in writing, and to examine witnesses
 21 testifying at the hearing. Any person submitting evidence,
 22 data, views or arguments shall be subject to examination at the
 23 hearing. All hearings shall be recorded. [K-] The burden of
 24 proof shall be upon the petitioner. Based upon the evidence
 25 presented at the hearing, [the environmental improvement board

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1 or] the local board shall sustain, modify or reverse the action
2 of the [~~department or the~~] local agency [~~respectively~~].

3 M. The environmental improvement board or the local
4 board shall notify the petitioner and all other participants in
5 the review of the action taken and the reasons for the action.

6 [~~L.~~] N. Notwithstanding any other provision of law
7 and subject to the provisions of Section 74-2-4 NMSA 1978, a
8 final decision on a permit by the department, the environmental
9 improvement board, the local agency, the local board or the
10 court of appeals that a source will or will not meet applicable
11 local, state and federal air pollution standards and
12 regulations shall be conclusive and is binding on every other
13 state agency and as an issue before any other state agency
14 shall be deemed resolved in accordance with that final
15 decision.

16 [~~M.~~] O. Subject to the provisions of Section 74-2-4
17 NMSA 1978, if the local board has adopted a permit regulation
18 pursuant to this section, persons constructing or modifying any
19 source within the boundaries of the local authority shall
20 obtain a permit from the local agency and not from the
21 department.

22 [~~N.~~] P. Fees collected pursuant to this section
23 shall be deposited in:

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

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

5 Section 2. Section 74-2-9 NMSA 1978 (being Laws 1971,
6 Chapter 57, Section 1, as amended) is amended to read:

7 "74-2-9. JUDICIAL REVIEW- ADMINISTRATIVE ACTIONS. --

8 A. Any person adversely affected by an
9 administrative action taken by the environmental improvement
10 board, the local board, the secretary or the director, other
11 than the adoption of a regulation, may appeal to the district
12 court [of appeals] pursuant to the provisions of Section
13 39-3-1.1 NMSA 1978. All appeals shall be upon the record made
14 at the hearing and shall be taken to the district court [~~of~~
15 ~~appeals~~] within thirty days following the date of the action.

16 B. [~~For appeals of regulations, the date of the~~
17 ~~action shall be the date]~~ A person who is or may be adversely
18 affected by a regulation adopted by the environmental
19 improvement board or the local board may appeal the regulation
20 by filing a notice of appeal with the court of appeals within
21 thirty days of the filing of the regulation by the
22 environmental improvement board or the local board pursuant to
23 the State Rules Act.

24 C. Upon appeal, the court of appeals shall set
25 aside the [~~action~~] regulation only if found to be:

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underscored material = new
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- 1 (1) arbitrary, capricious or an abuse of
- 2 discretion;
- 3 (2) not supported by substantial evidence in
- 4 the record; or
- 5 (3) otherwise not in accordance with law.

6 D. After a hearing and a showing of good cause by
7 the appellant, a stay of the action being appealed may be
8 granted:

9 (1) by the environmental improvement board,
10 the local board, the ~~[department]~~ secretary or the ~~[local~~
11 ~~agency]~~ director, whichever took the action being appealed; or

12 (2) by the court ~~[of appeals]~~ if the
13 environmental improvement board, the local board, the
14 ~~[department]~~ secretary or the ~~[local agency]~~ director denies a
15 stay or fails to act upon an application for a stay within
16 sixty days after receipt of the application. "

underscoring material = new
[bracketed material] = delete