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SENATE BILL 382

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

INTRODUCED BY

Cynthia Nava

AN ACT

RELATING TO THE ENVIRONMENT; AMENDING A SECTION OF THE AIR
QUALITY CONTROL ACT TO ALLOW THE DEPARTMENT OF ENVIRONMENT TO
DENY A PERMIT APPLICATION BASED ON POOR ENFORCEMENT HISTORY.

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 APPEALS TO 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;

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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

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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,
17 comment period and public hearing, if any, required prior to
18 the issuance of a permit; provided the permit regulations
19 adopted:

20 (a) by the environmental improvement
21 board shall include provisions governing notice to nearby
22 states; and

23 (b) by any local board shall include
24 provisions requiring that notice be given to the department of
25 all permit applications by any source that emits, or has a

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1 potential emission rate of, one hundred tons per year or more
2 of any regulated air contaminant, including any source of
3 fugitive emissions of each regulated air contaminant, at least
4 sixty days prior to the date on which construction or major
5 modification is to commence;

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

8 (a) reviewing and acting upon any
9 application for such permit; and

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

13 (7) a schedule of emission fees consistent
14 with the provisions of Section 502(b)(3) of the 1990 amendments
15 to the federal act;

16 (8) a method for accelerated permit processing
17 that may be requested at the sole discretion of the applicant
18 at the time the applicant submits a construction permit
19 application and that:

20 (a) allows the department or local
21 agency to contract with qualified outside firms to assist the
22 department or local agency in its accelerated review of the
23 construction permit application; provided that the department
24 or local agency can contract with a qualified firm that does
25 not have a conflict of interest; and

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1 (b) establishes a process for the
2 department or local agency to account for the expenditure of
3 the accelerated permit processing fees;

4 (9) allowance for additional permit
5 application fees, sufficient to cover the reasonable costs of
6 an accelerated permit application review process. Before the
7 applicant is notified that the permit application has been
8 determined to be complete, the department or local agency shall
9 give the applicant a reasonable estimate of costs of an
10 accelerated permit application review process;

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

14 (11) for an operating permit only:

15 (a) provisions consistent with Sections
16 502(b) and 505(b) of the federal act providing: 1) notice to
17 and review and comment by the United States environmental
18 protection agency; and 2) that if the department or local
19 agency receives notice of objection from the United States
20 environmental protection agency before the operating permit is
21 issued, the department or the local agency shall not issue the
22 permit unless it is revised and issued under Section 505(c) of
23 the federal act;

24 (b) provisions governing renewal of the
25 operating permit; and

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1 (c) specification of the conditions
2 under which the operating permit may be terminated, modified or
3 revoked and reissued prior to the expiration of the term of the
4 operating permit.

5 C. Except as provided in Subsection 0 of this
6 section, the department or the local agency may deny any
7 application for:

8 (1) a construction permit if it appears that
9 the construction or modification:

10 (a) will not meet applicable standards,
11 rules or requirements of the Air Quality Control Act or the
12 federal act;

13 (b) will cause or contribute to air
14 contaminant levels in excess of a national or state standard
15 or, within the boundaries of a local authority, applicable
16 local ambient air quality standards; or

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

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

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

24 (1) for a construction permit:

25 (a) a requirement that such source

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1 install and operate control technology, determined on a case-
2 by-case basis, sufficient to meet the standards, rules and
3 requirements of the Air Quality Control Act and the federal
4 act;

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

10 (c) compliance with applicable federal
11 standards of performance;

12 (d) reasonable restrictions and
13 limitations not relating to emission limits or emission rates;
14 or

15 (e) any combination of the conditions
16 listed in this paragraph; and

17 (2) for an operating permit, terms and
18 conditions sufficient to ensure compliance with the applicable
19 standards, rules and requirements pursuant to the Air Quality
20 Control Act and the federal act.

21 E. This section does not authorize the department
22 or the local agency to require the use of machinery, devices or
23 equipment from a particular manufacturer if the federal
24 standards of performance, state regulations and permit
25 conditions may be met by machinery, devices or equipment

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1 otherwise available.

2 F. The issuance of a permit does not relieve any
3 person from the responsibility of complying with the provisions
4 of the Air Quality Control Act and any applicable regulations
5 of the environmental improvement board or the local board. Any
6 conditions placed upon a permit by the department or the local
7 agency shall be enforceable to the same extent as a regulation
8 of its board.

9 G. A person who participated in a permitting action
10 before the department or the local agency shall be notified by
11 the department or the local agency of the action taken and the
12 reasons for the action. Notification of the applicant shall be
13 by certified mail.

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

24 I. If a timely petition for hearing is made, the
25 environmental improvement board or the local board shall hold a

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1 hearing within sixty days after receipt of the petition. The
2 environmental improvement board or the local board shall notify
3 the petitioner and the applicant or permittee, if other than
4 the petitioner, by certified mail of the date, time and place
5 of the hearing. If the subject of the petition is a permitting
6 action deemed by the environmental improvement board or the
7 local board to substantially affect the public interest, the
8 environmental improvement board or the local board shall ensure
9 that the public receives notice of the date, time and place of
10 the hearing. The public in such circumstances shall also be
11 given a reasonable opportunity to submit data, views or
12 arguments orally or in writing and to examine witnesses
13 testifying at the hearing. Any person submitting data, views
14 or arguments orally or in writing shall be subject to
15 examination at the hearing.

16 J. The environmental improvement board or the local
17 board may designate a hearing officer to take evidence in the
18 hearing. All hearings shall be recorded.

19 K. The burden of proof shall be upon the
20 petitioner. Based upon the evidence presented at the hearing,
21 the environmental improvement board or the local board shall
22 sustain, modify or reverse the action of the department or the
23 local agency respectively.

24 L. Notwithstanding any other provision of law and
25 subject to the provisions of Section 74-2-4 NMSA 1978, a final

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1 decision on a permit by the department, the environmental
2 improvement board, the local agency, the local board or the
3 court of appeals that a source will or will not meet applicable
4 local, state and federal air pollution standards and
5 regulations shall be conclusive and is binding on every other
6 state agency and as an issue before any other state agency
7 shall be deemed resolved in accordance with that final
8 decision.

9 M. Subject to the provisions of Section 74-2-4 NMSA
10 1978, if the local board has adopted a permit regulation
11 pursuant to this section, persons constructing or modifying any
12 source within the boundaries of the local authority shall
13 obtain a permit from the local agency and not from the
14 department.

15 N. Fees collected pursuant to this section shall be
16 deposited in:

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

19 (2) a fund created pursuant to Section
20 74-2-16 NMSA 1978 if collected by a local agency pursuant to a
21 permit regulation adopted by the local board pursuant to this
22 section.

23 O. The department may not deny an application for a
24 construction permit for a cotton gin if the applicant proposes
25 use of the best system of emissions reduction currently in use

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1 by cotton gins in the United States, as specified by regulation
2 of the environmental improvement board, and the cotton gin has
3 a potential emission rate, considering the use of the proposed
4 emissions reduction system and the proposed hours of operation,
5 of not more than fifty tons per year of any regulated air
6 contaminant for which there is a national ambient air quality
7 standard. The construction permit shall require that the
8 applicant use the proposed emission reduction system and limit
9 the hours of operation to the hours specified in the
10 application. For purposes of this subsection, "best system of
11 emissions reduction" for cotton gins means a system that will
12 result in emissions reduction equal to or greater than that
13 obtained by the use of condenser screens, seventy-mesh screen
14 or equivalent on low-pressure exhausts and high-efficiency
15 cyclone dust collectors on high-pressure exhausts.

16 P. The department or local agency may deny any
17 permit application or modify, suspend or revoke any permit
18 issued pursuant to the Air Quality Control Act if the applicant
19 or permittee has:

20 (1) knowingly misrepresented a material fact
21 in application for a permit;

22 (2) refused or failed to disclose the
23 information required by the provisions of the Air Quality
24 Control Act;

25 (3) been convicted in any court, within ten

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1 years immediately preceding the date of submission of the
2 permit application, of:

3 (a) a felony related to environmental
4 crime; or

5 (b) a crime defined by state or federal
6 statute as involving or being in restraint of trade, price-
7 fixing, bribery or fraud;

8 (4) exhibited a history of willful disregard
9 for environmental laws of any state or the United States; or

10 (5) had any permit revoked or permanently
11 suspended for cause under the environmental laws of any state
12 or the United States.

13 Q. In making a finding under Subsection P of this
14 section, the department or local agency may consider
15 aggravating and mitigating factors.

16 R. An applicant for a permit issued pursuant to the
17 Air Quality Control Act shall file a disclosure statement with
18 the department with the information required, and on a form
19 developed, by the department in cooperation with the department
20 of public safety at the same time the applicant files the
21 application for a permit pursuant to Section 74-2-7 NMSA 1978.

22 S. Upon the request of the department, the
23 department of public safety shall prepare and transmit to the
24 department an investigative report on the applicant based in
25 part upon the disclosure statement. The report shall be

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1 prepared and transmitted within ninety days after the receipt
2 of a copy of an applicant's disclosure statement from the
3 department. Upon good cause, the ninety-day period may be
4 extended for a reasonable period of time by the department.

5 T. In preparing the investigative report, the
6 department of public safety may request and receive criminal
7 history information on the applicant from the federal bureau of
8 investigation or any other law enforcement agency or
9 organization. While the investigative report is being prepared
10 by the department of public safety, the department may also
11 request information regarding any person who will be or could
12 reasonably be expected to be involved in management activities
13 of the permitted facility or any person who has a controlling
14 interest in a permitted facility. The department of public
15 safety shall maintain confidentiality regarding the information
16 received from a law enforcement agency as may be imposed by
17 that agency as a condition for providing that information to
18 the department of public safety.

19 U. All persons required to file a disclosure shall
20 provide any assistance or information requested by the
21 department of public safety or the department and shall
22 cooperate in any inquiry or investigation conducted by the
23 department of public safety or any inquiry, investigation or
24 hearing conducted by the department. If a person required to
25 file a disclosure statement refuses to comply with a formal

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1 request to answer an inquiry or produce information, evidence
2 or testimony, the application of the applicant or the permit of
3 the permittee may be denied or revoked by the department.

4 V. If any of the information required to be
5 included in the disclosure statement changes, or if any
6 information should be added after filing the statement, the
7 person required to file it shall provide that information in
8 writing to the department within thirty days after the change
9 or addition. Failure to provide the information within thirty
10 days may constitute the basis for the revocation or denial of
11 an application for any permit issued or applied for in
12 accordance with Section 74-2-7 NMSA 1978, but only if, prior to
13 any denial or revocation, the department notifies the applicant
14 or permittee of the department's intention to do so and gives
15 the applicant or permittee fourteen days from the date of the
16 notice to explain why the information was not provided within
17 the required thirty-day period. The department shall consider
18 this information when determining whether to revoke or deny the
19 permit.

20 W. A person shall not be required to submit the
21 disclosure statement required by this section if the person is:

22 (1) the United States or any agency or
23 instrumentality of the United States;

24 (2) a state or any agency or political
25 subdivision of a state; or

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1 (3) a corporation or an officer, director or
2 shareholder of the corporation and the corporation:

3 (a) has on file and in effect with the
4 federal securities and exchange commission a registration
5 statement required under Section 5, Chapter 38, Title 1 of the
6 federal Securities Act of 1933, as amended; and

7 (b) submits to the department with the
8 application for a permit evidence of the registration described
9 in Subparagraph (a) of this paragraph and a copy of the
10 corporation's most recent annual form 10-K or an equivalent
11 report."