

*State of New Mexico*  
**ENVIRONMENTAL IMPROVEMENT BOARD**  
*Harold Runnels Building, N-2150*  
*1190 S. St. Francis Drive, P. O. Box 26110*  
*Santa Fe, New Mexico 87502*

**Environmental Improvement Board Meeting**  
**January 8, 2008**  
**9:00 a.m.**

**New Mexico Energy, Minerals and Natural Resources Dept.**  
**Wendell Chino Building, Porter Hall**  
**1120 South St. Francis Drive**  
**Santa Fe, New Mexico 87501**

**Members Present:** Gregory Green, Chair  
Harold Tso, Secretary  
Abbas Ghassemi, Member  
Soren Peters, Member  
Gay Dillingham, Member

**Members Absent:** Dolores Herrera, Member  
Kathi Bearden, Vice-Chair

**Others Present:**

Bill Grantham, NMED/OGC	Jennifer Pruett, NMED/PSTB
Mary Uhl, NMED/AQB	Tom Gray, NMED/PSTB
Joe Godwin/NMED/PSTB	Dan Lopez, NMED/PSTB
Kalvin Martin, NMED/PSTB	Beth Gillia, Esq., Institute of Public Law
Andy Berger, NMED/AQB	T. J. Trujillo, Esq., Freepack/McMahon
Stephanie Reed, NMOGA	Louis Rose, Esq., C&E Concrete
Pat Shay, Esq., The Rodey Law Firm	Jim Davis, NMED/PSTB
Rita, Trujillo, NMED/AQB	Mark Jones, NMED/AQB
Kathryn Becker, NMED/OGC	Butch Tongate, NMED/EHD
Deborah Seligman	Adrian Jaramillo, NMED/PSTB
Leslie Barnhart, NMED/OGC	Mark Jones, NMED/AQB
Felicia Orth, NMED/OOTS	Zachary Shandler, Atty. General's Office

**Item 1. Roll Call**

Roll was taken and it was noted that a quorum was present.

**Item 2. Approval of Agenda**

**Action:** Mr. Peters moved approval of the agenda. Mr. Tso seconded. The motion passed unanimously.

**Please note:** Item 3 was discussed following agenda Item 5.

**Item 4. Public Comment**

There was no public comment.

**Item 5. Request for hearing in re: C&E Concrete Inc., NSR Permit No. 879-M-2 EIB 07-14 (A). Louis W. Rose, Esq., Montgomery & Andrews Law Firm, C&E Concrete.**

Mr. Rose noted that NMED had filed a Notice of Withdrawal in this matter and consequently, a hearing setting would not be necessary at this time.

**Item 3. Approval of December 3, 2007 meeting minutes**

**Action: Ms. Dillingham moved for approval of the December 3, 2007 meeting minutes. Mr. Tso seconded. The motion passed unanimously.**

**Item 6. Request for hearing in re: Proposed Changes to 11.5 NMAC, Occupational Health and Safety, EIB 07-15 (R). Kathryn Becker, NMED/OGC; Butch Tongate, NMED/EHD.**

Ms. Becker asked the Board to set a one day hearing in the referenced matter on the Board's May, 2008 meeting agenda.

**Action: Ms. Dillingham moved that the Board set the hearing in EIB 07-15 (R) Proposed Changes to 11.5 NMAC on the May meeting agenda, tentatively May 5, 2008, subject to a change in date. Mr. Peters seconded. The motion passed unanimously.**

**Item 7. Request for hearing in re: Proposed Repeal and Replacement of 20.2.7 NMAC, Excess Emission Reporting, EIB 07-16 (R). Leslie Barnhart, NMED/OGC; Andy Berger, NMED/AQB.**

Ms. Barnhart asked the Board to set the hearing in this matter on the Board's June 2, 2008 meeting agenda. She further asked that the Board approve a change regarding the time requirement for the filing of notices of intent to present technical testimony (NOIs). The current rules provide that parties must file NOIs fifteen (15) days prior to the date of hearing. Ms. Barnhart requested that, in this case, the NOIs be filed thirty (30) days prior to the date of hearing.

There was a brief discussion regarding future hearing scheduling.

Additionally, Ms. Barnhart asked that a hearing officer be appointed at this time.

Ms. Dillingham indicated she would be willing to act as hearing officer in this case.

**Action: Mr. Tso moved that the hearing in EIB 07-16 (R), Proposed Repeal and Replacement of 20.2.7 NMAC, Excess Emissions Reporting,**

**be set for hearing June 2, 2008 and that Ms. Dillingham act as hearing officer. Ms. Dillingham seconded.**

**Mr. Peters moved that all written materials, including but not limited to notices of intent to present technical testimony, be submitted thirty (30) days prior to the June 2, 2008 hearing date. Mr. Tso seconded.**

Additionally, it was noted that a hearing officer had not been appointed for the May, 2008 hearing in EIB 07-15 (R), Proposed Changes to 11.5 NMAC, Occupational Health and Safety.

**Mr. Tso moved that Mr. Peters be appointed hearing officer in EIB 07-15 (R) ), Proposed Changes to 11.5 NMAC, Occupational Health and Safety. Mr. Peters seconded.**

**The motions passed unanimously.**

Mr. Tso suggested that agenda Items 8, 9, 10 and 11 be deferred until Mr. Shandler arrives.

**Item 12. Hearing in re: Adoption of 20.2.86 NMAC, EIB 07-13 (R), Mercury Control Strategies for New Coal-Fired Power Plants. Bill Grantham, NMED/OGC; Andy Berger, NMED/AQB.**

Due to Ms. Herrera's absence, Mr. Green acted as hearing officer in this case.

At 9:25 a.m. the hearing in EIB 07-13 (R), Mercury Control Strategies for New Coal-Fired Power Plants commenced. Kathy Townsend Court Reporters transcribed the hearing. The transcript is available for review in the Office of the Environmental Improvement Board Administrator, New Mexico Environment Department, 1190 St. Francis Drive, Runnels Building Room N-2150, Santa Fe, New Mexico 85701.

The Board meeting reconvened at 10:55 a.m.

A discussion ensued with Mr. Shandler during which Board members expressed their respective reasons for determining that the Department's petition in this case should be granted. Mr. Peters suggested that it would be helpful if more mercury monitoring stations could be installed around the State to determine more specifically where high concentrations are occurring. Mr. Tso requested that Department staff come back to the Board sometime this year with information relating to concentrations of elemental mercury and organic mercury in the environment and provide additional information regarding mitigation efforts. Additionally, Ms. Dillingham requested that at the same time the Board be provided with information regarding when it might no longer be necessary for the State's waters to have warning signs posted with respect to mercury levels in the fish found in those waters.

**Action: Ms. Dillingham moved the Board's approval of the Adoption of 20.2.86 NMAC, EIB 07-13 (R), Mercury Control Strategies for New Coal-Fired Power Plants as proposed by NMED. Mr. Tso seconded.**

**Roll Call Vote:**

<b>Ms. Dillingham</b>	<b>yes</b>
<b>Mr. Peters</b>	<b>yes</b>
<b>Mr. Green</b>	<b>yes</b>
<b>Mr. Tso</b>	<b>yes</b>
<b>Mr. Ghassemi</b>	<b>yes</b>

**Item 8. Board approval of Statement of Reasons and Order in EIB 07-05 (A), Appeal of Clovis Ethanol Plant Permit. Zachary Shandler, Asst. Attorney General, Board counsel.**

Mr. Shandler summarized the background of the case and the Board's vote to remand the matter. The vote for remand was primarily due to the Board's observations that there seemed to be significant flaws in the notice process relating to the location of the proposed plant. In order to establish that the Order contained language reflecting the Board's wishes in this matter he went on to specifically discuss each provision of the Order with the Board. A lengthy discussion ensued between the Board and Mr. Shandler regarding revisions to the proposed Order specifically including a notice requirement informing all residences within a one-half mile radius of the exact proposed plant location as well as an impact model of train traffic in the area.

**Action: Mr. Tso moved to approve the Statement of Reasons and Order, as amended, in EIB 07-05 (A), Appeal of Clovis Ethanol Plant Permit, as well as including the correction of typographical errors and any other non-substantive changes. Mr. Ghassemi seconded.**

**Action: Roll Call Vote:**

<b>Ms. Dillingham</b>	<b>abstained</b>
<b>Mr. Green</b>	<b>yes</b>
<b>Mr. Ghassemi</b>	<b>yes</b>
<b>Mr. Peters</b>	<b>yes</b>
<b>Mr. Tso</b>	<b>yes</b>

**Item 9. Board approval of Statement of Reasons and Order in EIB 07-09 (R), Emissions Standards for New Motor Vehicles, 20.2.88 NMAC. Zachary Shandler, Asst. Attorney General, Board counsel.**

There was a very brief discussion of the proposed Statement of Reasons and Order in this case.

**Action: Ms. Dillingham moved to approve the Statement of Reasons and Order as presented, in EIB 07-09 (R) Emission Standards for New Motor Vehicles, 20.2.88 NMAC. Mr. Green seconded. The motion passed. Mr. Ghassemi abstained.**

Mr. Shandler suggested that instead of considering Item 10 at this time that the Board consider Item 11, EIB 07-05 (A) the New Mexico Environmental Law Center matter. The Board agreed.

**Item 11. Board discussion and possible decision regarding EIB 07-05 (A) New**

**Mexico Environmental Law Center Opposed Motion and Brief in Support re: Reconsideration of the Decision to Impose the Original Costs of Hearing on Appellants. Bruce Frederick, NMELC; Bill Grantham, NMED/OGC.**

Mr. Frederick presented an opening statement explaining the Environmental Law Center's position with respect to payment of the transcription costs in this case. He stated that it is the Law Center's contention, among a series of other reasons, that it is unreasonable to require non-profit organizations to expend large sums of money to bring an appeal matter before the Board and to do so had a chilling affect on those organizations' ability to appeal. He also noted that he felt the Board did not have the authority to impose payment of such transcription costs upon the Law Center.

There was a lengthy Board discussion with Mr. Frederick and Mr. Grantham regarding various issues surrounding the Law Center's decision to employ the court reporting service to transcribe the hearing.

Mr. Shandler pointed out to the Board its regulations relating to rule-making and adjudicatory cases. A Board discussion continued with Mr. Shandler regarding the interpretation of those regulations.

Mr. Green suggested that the Board deliberate further on this matter following a lunch break.

Mr. Frederick offered to bring copies of the two scheduling orders in this case for the Board to review after the lunch. His offer was accepted by the Chair.

The Board agreed to again take up this matter following its executive session and lunch break.

**Item 10. Board executive session in re: *State of New Mexico, ex rel., et al., Plaintiffs v. NM Environmental Improvement Board, Defendant, Third Judicial District Court, Dona Ana County, Cause No. CV 2007-2708. Zachary Shandler, Asst. Attorney General, Board Counsel.***

**Action: Mr. Peters moved that, pursuant to NMSA 1978 §10-15-1H7, the Board go into an executive session. Mr. Tso seconded.**

**Roll Call Vote:**

<b>Ms. Dillingham</b>	<b>yes</b>
<b>Mr. Ghassemi</b>	<b>yes</b>
<b>Mr. Green</b>	<b>yes</b>
<b>Mr. Peters</b>	<b>yes</b>
<b>Mr. Tso</b>	<b>yes</b>

Following the executive session and the Board's lunch break, the meeting reconvened at 1: 15 p.m.

**Action: Ms. Dillingham move that the Board return to its open meeting and noted that the executive session discussions related only to the court case noted at Item 10. Mr. Peters seconded. The motion passed unanimously**

## **Item 11. continued**

Board discussion resumed regarding Item 11 relating to the EIB 07-05 (A) the Clovis hearing transcript fees.

There was a lengthy discussion initiated by Mr. Green relating to the usefulness of transcripts to Board members who could not be present at hearings but by having the transcripts available to read are able to vote on matters before the Board. He also mentioned the Board's frequent referral to transcripts during case deliberations again noting that the transcript in this case was of benefit to the Board.

Mr. Peters commented on the importance of having a good record of the Board's actions so the Board can make decisions based upon accurate information. He further noted that it was his feeling that Board should "go dutch" with the Law Center by dividing the fees equally between the two entities.

Mr. Ghassemi noted that having the case transcript available had been of considerable benefit to him. He further indicated that he was in favor of Mr. Peters' suggestion that the cost be equally divided.

There was a brief discussion initiated by Ms. Dillingham regarding the Department's position with respect to the allocation of the transcript costs. Mr. Grantham noted that the Department did not oppose the Law Center's motion but did object to paying for the transcript.

Mr. Tso stated that he felt the Appellants should not have to pay for the transcript costs. He went on to state that, in his opinion, appeals coming from "grass roots" groups who are interested in their environment, health and welfare, frequently do not have the financial means to deal with items such as court reporting costs. He further stated that in his view, the lack of funding profoundly discourages appeals by such interested persons. He also mentioned the need to establish specific responsibility for these kinds of charges in pre-hearing documentation.

Ms. Dillingham expressed her agreement with Mr. Tso's position.

Mr. Green pointed out the difficulties inherent in attempting to treat appellants differently, i.e., a for-profit business as opposed to an advocacy group. He went on to briefly discuss whether or not the Board could make those kinds of decisions. He also mentioned that the Board had in fact set a precedent in this area by requiring others to pay transcription costs.

Ms. Dillingham asked Mr. Shandler whether or not it would be appropriate for her to vote on this issue. Mr. Shandler stated that it was his view that this was a matter separate from the hearing and that it would be appropriate for her to vote.

Mr. Frederick noted his objection, for the record, to any consideration of pre-hearing meeting discussions since those meetings were neither transcribed nor audio recorded.

**Action: Mr. Peters moved that the Board "go dutch," by dividing the costs equally between the NM Environmental Law Center and the Board, with respect to the payment of the court reporter's fees in**

**EIB 07-05 (A). Mr. Ghassemi seconded.**

**Roll Call Vote:**

<b>Ms. Dillingham</b>	<b>no</b>
<b>Mr. Ghassemi</b>	<b>yes</b>
<b>Mr. Green</b>	<b>yes</b>
<b>Mr. Peters</b>	<b>yes</b>
<b>Mr. Tso</b>	<b>no</b>

**The motion passed.**

**Item 13. Hearing in re: EIB 07-11 (R) Petroleum Storage Tank Bureau Petition for Regulatory Change. Beth Gillia, Esq., Bureau Attorney; Jennifer Pruett, NMED/PSTB; Jim Davis, NMED/PSTB. Hearing Officer Soren Peters**

At 1:30 p.m. Mr. Green turned the meeting over to Mr. Peters, Hearing Officer, in EIB 07-11 (R), Petroleum Storage Tank Bureau Petition for Regulatory Change and the hearing commenced. Kathy Townsend Court Reporters transcribed the hearing. The transcript is available for review in the Office of the Environmental Improvement Board Administrator, New Mexico Environment Department, 1190 St. Francis Drive, Runnels Building Room N-2150, Santa Fe, New Mexico 85701.

The Board reconvened its meeting at 3:15 p.m.

Mr. Shandler discussed, at some length, the individual provisions contained in the Statement of Reasons with the Board. The Board agreed that the Department had met its obligations with respect to these changes being very important for the protection of the State's ground water, especially the secondary containment requirements imposed by the EPA.

Mr. Shandler mentioned that there was a text change at 20.5.4.26 B NMAC, line 24, wherein the word "electrical" should be added and further that in all instances where the words "Indian Reservation" appeared, the words "Indian Lands" should be substituted.

**Action: Ms. Dillingham moved that the Board approve, as proposed by the Petroleum Storage Tank Bureau in EIB 07-11 (R), the requested Regulatory Changes, as amended by Mr. Tso to add the word "electrical" to 20.5.4.26 B following the word "stray" and before the word "currents" and to change all references to "Indian Reservations" to "Indian Lands." Mr. Peters seconded. The motion passed unanimously.**

**Item 14. Other Business:**

None

**Item 15. Next Regular Meeting: March 4, 2008, State Capitol Bldg. Rm. 317, Santa Fe.**

**Item 16. Adjournment**

**Action:**      **The Mr. Tso moved for adjournment at 4:10 p.m. Mr. Peters seconded.  
The motion passed unanimously.**

*Signature on File*

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Gregory Green, EIB Chair