

Approved March 7, 2006

ENVIRONMENTAL IMPROVEMENT BOARD

Minutes of the JANUARY 3, 2006 Meeting

The New Mexico Environmental Improvement Board (EIB) Meeting was held on January 3rd, 2006, starting at 9:00 a.m. at the Willie Ortiz Building, New Mexico State Personnel Office, Leo Griego Auditorium, 2600 Cerrillos Road, Santa Fe, New Mexico 87505.

Item #1: Roll Call

Members Present: Ms. Gay Dillingham, Chair
Mr. Clifford Stroud, Vice Chair
Mr. Ken Marsh, Member
Ms. Dolores Herrera, Member
Mr. Gregory Green, Secretary
Mr. Soren Peters, Member
Mr. Harold Tso, Member

Others Present:

Ray Garza	Daniel Cobb, DOM
Stevan Douglas Looney	Karen Dest
Toney Anaya	Phil Wardell
Abe Barr	Rich Murray
Anthony J. Trujillo, Gallagher & Kennedy	Rafael Valdepena
Peter Domenici, Jr., Domenici Law Firm	Albert Dye
Laura Charles-Hilman	Chris Nassell
Eliot Gould	Regina Wheeler
Claudine Martinez	Ana Marie Ortiz
Miro Kovacevich	Steve Hattenbach, Rodey Law Firm
Charlotte Cooke, ND	Sofia Martinez, NM Envir. Justice Center
Rod Ventura, NMELC	Leland Lehrman
Ken Stoller, MD	Ada Kafka
Diane Valverde, MSRDL	Ann-Frances Sutherlin
Richard Minzner, Rodey Law Firm	Sadaf Cameron
Ray Sisneros	Tracy Hughes, NMED, OGC
Kip Purcell	Richard Virtue, Virtue Law Firm
George W. Akeley, Jr., NMED, SWB	Marlene Feuer
Sheri Kotowski	David Stupin
Terry Nelson	Mark Miller, Stephens & Associates, Inc.
B.J. Brock	Cecilia Abeyta
Brad Jones, NMED, SWB	Auralie Ashley-Mary, NMED, SWB
Butch Tongate, NMED, OHSB	I. Keith Gordon, GEI
Derrith Watchman-Moore, NMED, OTS	Regina Romero

Joy Esparsen	Robert Gallegos
Chuck Noble, NMED	Felicia Orth, NMED
E. Gifford Stack, NMED	Sally Worthington, NMED
Zachary Shandler, NM Asst. Atty. General	Douglas Meiklejohn, NMELC
Stephen Fox	Louis Rose, Montgomery & Andrews
Don Trigg	

Item#1 Roll Call

The Administrator took roll call and noted a quorum was present.

Item #2: Approval of Agenda

Because of a time conflict, Mr. Marsh requested that agenda items numbered 9 and 10 be reversed allowing the election of officers to precede the hearing of **EIB 05-07 (R)**.

ACTION: Chair Dillingham made a motion to approve the Agenda with the change requested by Mr. Marsh. Member Peters seconded. Motion carried unanimously.

Item #3: Public Comment Period

Chair Dillingham asked for public comments, requesting that anyone wishing to speak to the Board limit their comments to four minutes.

The following individuals expressed their views relating to the dangers inherent in the product aspartame and stated their opposition to the continued inclusion of it in food products sold in the United States as well as in all other countries:

- Leland Lehrman
- Chris Nassell
- Lauren Charles Heifman
- Rich Murray
- Ken Stoller, MD
- Daniel Cobb, DOM

Chair Dillingham thanked the public commentators for their participation.

Mr. Shandler indicated to the Chair that he had a statement to make for the record relating to the preceding public comments and the presentation of documents by the speakers: no documents will be given to the Board until the hearing begins and the comments that were made regarding the scientific evidence were to be given no weight by the Board until commencement of the hearing.

Item #4: Approval of December 6, 2005 meeting minutes

The minutes were discussed and reviewed. Vice-Chair Stroud asked if the letter to legislators stating the Board’s reasons for the adoption of the regulations in EIB-05-09 (R) referred to in lines 105 through 107 was ready to be distributed. Mr. Green indicated that the letter should be ready for circulation to the Board by mid-January and would be sent to all legislators thereafter.

ACTION: Member Herrera moved to approve the December 6, 2005 minutes as amended. Member Peters seconded. Motion carried unanimously.

Item #5: Request for hearing in the Matter of Proposed Amendments to Drinking Water Bureau Regulations; EIB 05-13 (R); Tracy Hughes, OGC.

Ms. Hughes asked the Board to set a hearing on the proposed amendments. After discussion and deliberation by the Board it was decided that Hearing Officer Soren Peters would conduct the hearing at the Board's June 6, 2006 meeting.

ACTION: Member Green moved to conduct the hearing of EIB 05-13 (R) at the June 6, 2006 EIB meeting. Member Peters seconded. Motion carried unanimously.

Item #6: Executive Session Pursuant to 10-15-1(H)(7) Threatened Litigation. Update from Board Counsel regarding the Scheduling Order and Hearing Guidelines and possible Reconsideration of Decision to Hold a Hearing in EIB 05-11 (R), Ban on Aspartame.

Following discussion and deliberation regarding the appropriateness of conducting an executive session that included any portion of the reconsideration matter, Mr. Shandler advised the Board with respect to limiting the executive session solely to the threatened litigation issue.

ACTION: Member Green moved that the Board go into executive session to discuss pending or threatened litigation only. Member Herrera seconded. The motion carried unanimously.

The Board Chair requested all persons, other than Board members, leave the auditorium while the Board conducted its executive session.

When the meeting resumed the Board Chair noted that the Board and its counsel discussed only the issue of perceived or threatened litigation.

Item #6A: Update from Hearing Officer regarding the Scheduling Order and Hearing Guidelines and possible Reconsideration of the Decision to Hold a Hearing in EIB 05-11 (R), Ban on Aspartame. Louis Rose, Calorie Control Council; Richard Minzner, Ajinimoto; Stephen Fox, Petitioner and Stevan Looney, Counsel; Felicia Orth, Hearing Officer, Office of the Secretary, NMED.

Following Ms. Orth's status report on this matter, the Chair indicated that the four persons presenting comment relating to this issue would have seven minutes each.

Louis Rose, Calorie Control Council

Mr. Rose made several recommendations to the Board regarding the conduct of the hearing as set out in the proposed Hearing Guidelines. He felt a Hearing Officer's reported recommendation would create the basis for a much sounder decision. He stated that it was the Council's position that if the Board decides to hold a reconsideration hearing, it should be done outside the record.

Richard Minzner, Ajinimoto

Mr. Minzner stated that he felt that at the October 4th, 2005, meeting, the Board skipped an important issue: if one presumes the Board has the legal authority to issue regulations, is it wise to exercise that authority? He questioned whether the Board, with its limited resources, wants to involve itself in such a potentially massive undertaking. He challenged the accuracy and credibility of the content of studies that have been cited as supporting the withdrawal of aspartame from the marketplace. He mentioned the difficulties inherent in the logistics of managing the removal of the approximately 6,000 products currently sold in New Mexico that contain aspartame, particularly when they are sold in New Mexico's bordering states, Mexico and on the internet.

Stevan P. Looney, Attorney

Mr. Looney addressed Mr. Rose's suggestions regarding the Hearing Guidelines and noted that Mr. Fox, Petitioner in this matter, wrote stating that he had no problem with the Hearing Officer's initial scheduling order and guidelines. Mr. Looney commented that Mr. Minzner's allegation that a process was skipped at the October 4th, 2005 meeting is, in his view, wrong. The issue of the Board's authority to go forward was thoroughly examined then, and Mr. Minzner's comments are an attempt to persuade the Board to change its mind now. He requested that the Board not change its mind and move forward. The Board, at the October hearing, thought it had the power to go ahead with the hearing. It was the right decision then and it is the right decision today. The focus should now be on making it a manageable rule making, not an adjudicatory, hearing. He agrees with the suggestion that the Hearing Officer prepare a non-binding recommendation report as well as a pre-hearing scheduling order that would allow all parties an opportunity to present their case in a professional manner so the Board can make an intelligent informed decision.

Mr. Shandler asked for clarification of whether Mr. Looney is acting as Mr. Fox's attorney. Mr. Looney stated that he is a licensed attorney but that he and Mr. Fox are appearing individually.

Mr. Fox, Petitioner

Mr. Fox discussed in general terms the impact of aspartame on the population of the United States. He also stated that the hearing should be characterized as rule-making, not adjudicatory. Mr. Fox referred to several studies and reports supporting his views of the dangers of aspartame.

Mr. Shandler stated at this point that the Chair had previously very clearly stated and instructed all parties not to testify as to evidence.

Mr. Fox stated that what he was trying to accomplish was to assure that no one who wished to be involved in this case would be disregarded.

The Chair thanked the participants and asked the Board for comments.

ACTION: Mr. Green moved that the Board set a six month delay on both the evidence and the hearing, that Mr. Shandler advise the Board on the Board's ability to ban aspartame or to label it, and if it is Mr. Shandler's opinion that the Board does not have that authority, that he advise the Board of other avenues on these issues and on what authority the Board might have. Mr. Stroud seconded.

The Chair indicated that she would support the motion, that it is an unprecedented situation that the Board is in and that the Board should not move forward hastily.

Ms. Herrera stated that she believes that the Board is in compliance with the Open Meetings Act and that the Board has an obligation to the public to assure that all persons are treated fairly and responsibly by the Board.

The Chair stated that because of ex parte the Board members cannot receive information directly from interested parties; it needs to go through the Board Administrator. The Chair noted that this issue has been mentioned before at virtually every meeting but that Board members continue to get submittals. The Chair again asked that interested parties respect the request that submittals not be sent directly to Board members.

Mr. Shandler requested clarification of the current motion before the Board. Clarification was provided by Mr. Green.

Following discussion a roll-call vote was taken and the motion passed unanimously.

Mr. Shandler reiterated what the Chair had stated regarding the hearing and submission of documents. He stated that though the hearing had been postponed the Board members still acted as judges and that it was not appropriate to deliver evidence to Board members in any manner whatsoever. He added that if parties violated this directive it could mean the loss of their case.

Mr. Minzner stated that he was asked to produce a description of how Ajinimoto had arrived at a page estimate of one million pages of relevant material, and he submitted a document prepared by a Washington law firm that sets this out.

Item 7. Vote on Statement of Reasons in EIB 05-09 (R) In the Matter of the Petition for Public Hearing to Consider Adoption of Revisions to 20.2.74 NMAC – Prevention of Significant Deterioration and 20.2.79 NMAC – Permits Nonattainment Areas. Zachary

Shandler, Board Counsel

Mr. Shandler discussed the Statement with the Board members.

ACTION: Mr. Stroud moved that the Statement of Reasons be approved as submitted. The motion was seconded by Mr. Marsh. The motion carried unanimously.

Item 8. Discussion regarding Motion to Dismiss the Petition for Hearing to Rescind NSR Air Quality Permit No. 2195-J and NSR Air Quality Permit No. 2105-K, EIB 05-06 (P). Louis Rose, Univ. of Calif./DOE; Douglas Meiklejohn, NMELC

Mr. Green stated that there had been a pre-hearing meeting with the parties, which was attended by Board Chair Ms. Dillingham as well as Board Members Marsh and Green. Mr. Green also stated that several motions were heard and rulings were made on those motions but that two of the motions went to dismissing the case completely and only the entire Board can dismiss a case completely. He then asked for argument on the motion to dismiss for lack of jurisdiction from counsel. Mr. Louis Rose presented argument on behalf of DOE/LANL. Mr. Douglas Meiklejohn presented argument on behalf of Petitioners.

Mr. Green discussed the arguments presented by Messrs. Rose and Meiklejohn. And recommended that that the Board deny the motion to dismiss the petition for lack of jurisdiction.

ACTION: Mr. Green moved that the Motion to Dismiss the Petition for Lack of Jurisdiction be denied. The motion was seconded by Ms. Herrera.

Following discussion a roll-call vote was taken and the motion passed; 4 affirmative, 1 negative, one abstention, one recusal :

Board vote

Gay Dillingham	yes
Clifford Stroud	recused
Gregory Green	yes
Dolores Herrera	yes
Ken Marsh	no
Soren Peters	yes
Harold Tso	abstain

Mr. Green then returned to the issue of the motion for dismissal for failure to state a Claim, and requested argument.

Mr. Green discussed the arguments presented by Messrs. Rose and Meiklejohn and recommended that that the Board deny the motion to dismiss the petition for failure to state a claim.

ACTION: Mr. Green moved that the Motion to Dismiss the Petition for Failure to State a Claim be denied. The motion was seconded by Ms. Herrera.

Following discussion a roll-call vote was taken and the motion passed; 4 affirmative, 1 negative, one abstention, one recusal :

Board vote

Gay Dillingham	yes
Clifford Stroud	recused
Gregory Green	yes
Dolores Herrera	yes
Ken Marsh	yes
Soren Peters	no
Harold Tso	abstain

Item 9. Election of Officers

There is discussion among Board members regarding the election of officers. The Chair mentioned that the election would be for the Chair, Vice-Chair and Secretary.

ACTION: Mr. Tso moved that the Board cast a white ballot, stating that a white ballot would re-elect the current officers.

Mr. Green objected to the motion stating that he did not want to continue to serve as Secretary. The Chair asked if any member would volunteer to accept that position. Ms. Herrera agreed.

The Chair restates Mr. Tso's motion to cast a white ballot to keep the Board officers as currently comprised with the exception of the office of Secretary which will be filled by Ms. Herrera. The motion was seconded by Mr. Marsh.

Following discussion a roll-call vote was taken and the motion passed; 4 affirmative, 1 negative, with two abstentions:

Board vote

Gay Dillingham	abstain
Clifford Stroud	abstain
Gregory Green	yes
Dolores Herrera	yes
Ken Marsh	yes
Soren Peters	no
Harold Tso	yes

ACTION: Mr. Stroud moves that the Board recess for lunch.
Chair Dillingham states that the Board will reconvene at 2:15 p.m.

ITEM 10. Hearing and possible decision to consider the repeal and replacement of the Solid Waste Regulations, 20.9.1 NMAC, EIB 05-07 (R). E. Gifford Stack, Acting Chief, SWM, Chuck Noble, NMED/OGC. Hearing Officer: Clifford Stroud.

A public hearing was held at the Willie Ortiz Building, New Mexico State Personnel Office Leo Griego Auditorium, 2600 Cerrillos Road, Santa Fe, New Mexico, on January 3, 2006, regarding the repeal and replacement of the New Mexico Environment Department's Solid Waste Bureau regulations 20.9.1 NMAC. The hearing convened at 2:15 p.m. All members of the Environmental Improvement Board were present at the hearing. Vice-Chair Clifford Stroud acted as hearing officer for the proceeding. The hearing was transcribed and the transcripts of the hearing will be in the custody of the Board Administrator. Those documents are available for review upon request.

Prior to any technical testimony being given, the Hearing Officer heard a Motion for Continuance presented by Peter Domenici, Jr., counsel for Southwest Landfill, LLC. Mr. Domenici asserted that because of the time constraints inherent in reviewing proposed changes in the SWM final draft of the proposed regulations over the Christmas and New Year's holidays that the hearing setting of January 3, 2006, should be continued. Mr. Domenici stated that in order allow all interested parties to adequately prepare for the hearing that the hearing should be set at a date and time in the future that would permit the parties to review all changes to the SWM proposed final draft. Hearing Officer Stroud granted Mr. Domenici's motion and the matter was set for hearing at the Board's May 2nd meeting. Because of the number of parties that may wish to present technical testimony, the hearing is scheduled for May 2, 3, 4 and 5, 2006.

Item #11 Adjournment

The meeting adjourned at 3:35 p.m.

Signature on file

Gay Dillingham, EIB Chair