

State of New Mexico
ENVIRONMENTAL IMPROVEMENT BOARD
Harold Runnels Building, N-4084
1190 St. Francis Drive, P. O. Box 26110
Santa Fe, New Mexico 87502

Approved December 5, 2006
Environmental Improvement Board Meeting
October 3, 2006 Meeting
9:00 a.m.

Room 321, State Capitol Building
Santa Fe, New Mexico 87501

Members Present: Gay Dillingham, Chair
Gregory Green, Vice-Chair
Kathi Bearden, Member
Ken Marsh, Member
Soren Peters, Member
Harold Tso, Member

Members Absent: Dolores Herrera, Secretary

Others Present:

Carmela Starace	Andy Berger, NMED/AQB
Carol Parker, NMED/OGC	Mary Uhl, NMED/AQB
Rita Trujillo, NMED/AQB	Marlene Feuer, NMED/SWB
Mark Turnbough, WCI/CRLE/SWLF	Douglas Meiklejohn, SWOP/SVCNA
Claudine Martinez, SWL	Rafael Valdepeña, SWL
Mark Miller, NSWMA	Regina Romero
Chuck Noble, NMED/OGC	Mary Day, NMED
Sofia Martinez	Bill Fulginiti
Edward V. Pineda	Lynne Kinis
Keith Gordon	Auralie Ashley-Marx, NMED/SWB
Tannis Fox, NMED/OGC	Felicia Orth, NMED

Chair Gay Dillingham called the meeting to order at 9:15 a.m.

Item 1. Roll Call

The Board administrator took the roll and noted a quorum was present.

Item 2. Approval of Agenda

Action: Mr. Green moved that the agenda be approved as presented. Mr. Tso seconded. The motion carried unanimously.

Item 3. Approval of September 7, 2006 meeting minutes.

**Action: Mr. Green moved that the minutes of the meeting be approved.
Mr. Peters seconded. The motion carried unanimously.**

Item 4. Public Comment

Ms. Lynne Kinis of Corrales, New Mexico, again discussed her concerns regarding air pollution in Rio Rancho and Corrales which she attributes to Intel Corporation and requested that the information relating to Intel's possession of a minor source permit instead of a major source permit, which she requested at the Board's August 1, 2006 meeting, be provided to her. She also asked that other information which she requested at the August meeting be provided to her. Following a request by the Chair that Mr. Shandler render an opinion regarding the propriety of the Chair and Vice Chair accepting books offered by Ms. Kinis, she presented the Chair and Vice-Chair with copies of a book regarding alleged pollution by Intel entitled Boiling Frogs, Intel versus the Village. Ms. Kinis also asked that the Board meet in Albuquerque so that the local residents could present their views with respect to air pollution and Intel's alleged contribution to that pollution.

Mr. Edward V. Pineda of Rio Rancho, New Mexico, stated that the Board and the Department were not, in his view, being responsive to the issues that concerned not only him but also concerned others in Rio Rancho. He stated his views relating to his inability to get definitive answers from the Board and the Department with respect to his concerns. He noted that, for example, in August the Board had mentioned scheduling a meeting in Albuquerque or Rio Rancho to discuss Intel's shut-down, air pollution issues and other pertinent matters. He pointed out that as of October 3, 2006 no meeting to discuss these issues had been scheduled.

Following public comments, Mr. Shandler stated that he felt it was important to clarify the fact that the Board is a responsive body and that it is not the Board's role to conduct a fact hearing regarding public concerns without a petition for such a hearing having been filed with the Board setting out a petitioner's issues.

There was additional discussion regarding the requirements relating to the filing of a petition for hearing and the applicability of New Mexico's Open Records Act.

Item 5. Approval of Order in EIB 05-12 (R) Air Quality Bureau Operating Permits, amendments to 20.2.70 NMAC. Zachary Shandler, EIB counsel.

Mr. Shandler briefly reiterated factual information regarding the hearing in this matter and the Board's subsequent deliberations and asked the Board if there were any questions relating to the text of the proposed Order and Statement of Reasons for Amendment of Regulations with respect to amending 20.2.70 NMAC. He also mentioned the change proposed by El Paso Natural Gas and the stipulation entered into by the parties agreeing to that change.

The Chair acknowledged that the Order and Statement of Reasons accurately reflect the Board's decision in this matter.

Action: The Chair moved that the Order and Statement of Reasons, as amended,

in EIB 05-12 (R) be approved. Mr. Green seconded.

Mr. Pineda interrupted the vote to ask for an explanation, on behalf of all citizens, voters and taxpayers of New Mexico, of the Board's current discussion and actions. The Chair and Mr. Shandler stated that the Board was simply voting on the final Order and Statement of Reasons in a matter that had previously been the subject of a hearing and subsequent deliberations by the Board. The Chair added that any discussion relating to this matter was confined to Board members and did not properly involve an open discussion. Additionally, Mr. Shandler noted that the hearing in this case had been held, evidence taken and the record of the hearing had been closed. He pointed out that the current action simply memorialized the Board's oral decision made at an earlier meeting with respect to EIB 05-12 (R).

The Chair again requested the Board's vote.

The motion passed. Mr. Tso abstained from the vote.

Item 6. Approval of Order in EIB 05-13 (R) Drinking Water Regulations, amendments to 20.7.10 NMAC. Zachary Shandler, EIB counsel.

Mr. Shandler briefly reiterated factual information regarding the hearing in this matter and the Board's subsequent deliberations and asked the Board if there were any questions relating to the text of the proposed Order and Statement of Reasons for Amendment of Regulations with respect to amending 20.7.10 NMAC.

Action: Mr. Green moved that the Order and Statement of Reasons, as amended, in EIB 05-13 (R) be approved. Ms. Bearden seconded. The motion passed unanimously.

Item 7. NMED's update on the mercury reduction action plan and implementation of the Clean Air Mercury Rule. Mary Uhl, NMED/AQB; Andy Berger, NMED/AQB.

Ms. Uhl and Mr. Berger were present to discuss the development of Air Quality Bureau rules to implement New Mexico's obligations under the federal Clean Air Mercury Rule.

Mr. Berger stated that approximately eighteen months ago, EPA promulgated a series of rules which it identified as the Clean Air Mercury Rule (CAMR). The rules are intended to regulate mercury emissions from coal-fired power plants. He pointed out that New Mexico has two facilities that fall under those EPA rules. Basically, the rules establish mercury emission "budgets," or, amount of allowable mercury emissions that are assigned to each state. Additionally, he described an inter-state "cap and trade" program that is also available. He noted that there are two major policy decisions which are left to the states. The first is whether to join the trading program; the second is how to allocate the mercury budget that is given to each state under the rule. AQB is developing draft rules to implement these obligations. In the development process AQB has established mercury limitations for New Mexico. Mr. Berger mentioned that these draft rules would be presented to the Board for its consideration within the next few months. Additionally, he stated that the Bureau proposes that New Mexico not join the inter-state trading program. He also noted that New Mexico is

a party in a multi-state law suit against EPA with respect to the manner in which EPA promulgated the CAMR. That suit has yet to be resolved and there is no stay regarding implementation of the rule. Mr. Berger noted that a hearing had been scheduled on today's EIB agenda but was withdrawn in order to incorporate additional issues into the AQB's draft proposal. The CAMR will become effective in 2010. He again noted that the AQB would be re-petitioning the Board for a hearing date regarding this issue.

Mr. Tso, after noting that the mercury emission issue presented by Mr. Berger was confined to coal-fired power plants, asked Mr. Berger if any consideration had been given to the oil and gas industry which had, in the past, used mercury as part of its apparatus in measuring the pressure of oil and gas. He further stated that oil field workers were tested to monitor exposure to mercury in the oil and gas field scenario and some of those workers tested positive for the presence of mercury. He went on to ask if that situation would be considered in the future.

Mr. Berger stated that the proposed rules being discussed were limited to power plants by the EPA's promulgation of the power plant emission issue to the cap and trade program as well as the CAMR under Section 111 of the Clean Air Act. He went on to state that EPA might at some later time promulgate rules addressing other ways in which mercury is emitted into the air.

Ms. Uhl noted that through her involvement with the New Mexico Mercury Reduction Task Force she found that virtually all of the equipment Mr. Tso mentioned has been replaced and that mercury is no longer present in that particular oil and gas industry equipment.

Ms. Uhl went on to discuss House Memorial 5 which was approved during the 2006 Legislative Session. The memorial requested the Departments of Health and Environment to develop a state mercury reduction action plan with stakeholder involvement. The plan was to be presented at interim committee meetings during 2006. A working group of interested parties was convened. Ms. Uhl noted that the group has substantially completed its recommendations which are to be presented to the House of Representatives Health and Human Services Interim Committee in early November, 2006. The focus of the policy which the group proposes be adopted by New Mexico is to minimize harm from exposure to mercury by reducing or eliminating emissions in the use of mercury and/or mercury containing products to the greatest extent possible when the measures are technically and economically feasible, taking into account the health and environmental costs of exposure to mercury. The draft recommendations as currently written involve a funding request to implement strategies to reduce mercury in the environment immediately as well as to study what can be done in the future to minimize the exposure pathways. There is also a request for funding for monitoring, education and outreach to New Mexico's population regarding the hazards of mercury exposure. Ms. Uhl briefly mentioned several of the draft recommendations the group proposed be adopted as well as noting a number of products containing mercury currently in day-to-day use by the general population. She stated that the group would very likely recommend that an on-going advisory committee be established to continue to work on mercury reduction and elimination in New Mexico. She concluded by stating that a number of the recommendations would doubtless become regulations which would be considered by the Board.

The Board Chair expressed her thanks to Mr. Berger and Ms. Uhl that action was being taken with respect to mercury exposure. There was a brief discussion regarding products manufactured outside of New Mexico and the State's inability to control production and distribution of those products. Ms. Uhl noted that a number of other states were also restricting or looking into eliminating or reducing mercury containing products from the market place. Additionally, there was a brief discussion of the feasibility of product labeling and the constraints of inter-state commerce.

The report concluded with a general discussion of the implications of the Clean Air Mercury Rule and the trading program mentioned by Mr. Berger and the level of awareness in other states of the need for more aggressive control of mercury emissions as well as programs currently existing in other states.

Mr. Pineda stood and stated that he wanted to discuss the Intel shut-down issue. The Chair noted that the issue was not on the Board's agenda for today and further that the Board would place that discussion on a future agenda.

Item 8. Deliberations and possible decision in consideration of Proposed Replacement of 20.9.1 NMAC Solid Waste Management Regulations, EIB 05-07 (R), Felicia Orth, Hearing Officer.

The Chair and the Board expressed their gratitude to Ms. Orth for all of her hard work in handling the hearing in this matter, as well as for the Hearing Officer's Report and compiling a guide for the Board's use in deliberating on this matter.

The Chair noted that the Board deliberations could be handled, as suggested by Ms. Orth in her Guide for Deliberations, by beginning with the least controversial matters and working toward the most controversial matters. The Chair also mentioned that if it became necessary to re-call various individuals who had testified at the May, 2006 hearing, it would require re-opening the record and the presence of a court reporter.

Douglas Meiklejohn of the New Mexico Law Center objected to the Board using Ms. Orth's deliberations guide based on it having been distributed at today's meeting without allowing other parties to review and comment on the guide. The Chair noted that it had not been distributed because the Board had requested it the day before. Mr. Green mentioned that the Board had requested the guide be prepared in order to identify those sections that could be dealt with quickly because they are not controversial and move toward handling those sections that are controversial. He stated that when the Board considers those sections that are controversial, it will not only consider the Hearing Officer's Report but also the comments of all parties to the case on the Hearing Officer's Report as well as the transcript of testimony. Mr. Green went on to explain that the guide was simply a way for the Board to track the hearing issues to make sure it acted on all sections.

Ms. Dillingham then asked the Board if it wished to proceed with deliberations on the non-controversial issues first. She also asked Mr. Shandler how to deal with an issue if there is actually some controversy in an area that has been characterized as non-controversial in Ms. Orth's guide. Mr. Shandler stated that it was his understanding that the guide was simply a summary of the Hearing Officer's Report and where the guide is inconsistent with the

Hearing Officer's Report, the guide should not be adhered to but where the guide is consistent with the Report, it can be followed. Additionally, Mr. Shandler stated that if any party has a problem with a proposed section's controversial/non-controversial designation, the party should communicate directly with the Board regarding any area of contention.

The Board then began its deliberations on the amendments.

Mr. Shandler explained that following the issuance of a report by the Hearing Officer, other parties to the case could file objections to or comments on the Hearing Officer's Report.

There were no controversial amendments to Subpart X.

Subpart X – Miscellaneous

Mr. Green moved that the amendments proposed by the Department to Subpart X of the Solid Waste Management Regulations be adopted for the reasons offered at hearing, and that the clerical error identified in the Department's post-hearing submittal be corrected. Ms. Bearden seconded. The motion passed unanimously.

There were no controversial amendments to Subpart IX.

Subpart IX – Financial Assurance

Mr. Green moved that the amendments proposed by the Department in Subpart IX of the Solid Waste Management Regulations be adopted for the reasons offered at hearing. Mr. Peters seconded. The motion passed unanimously.

There were no controversial amendments proposed to Subpart VIII.

Subpart VIII – Groundwater Monitoring, Corrective Action

Ms. Dillingham moved that the amendments proposed by the Department to Subpart VIII of the Solid Waste Management Regulations be adopted for the reasons offered at hearing and in the Department's post-hearing submittals, that the typographical error identified in Section E be corrected and that the number "10" in Section 802.J.11 be corrected to read "3." Mr. Green seconded. The motion passed unanimously.

There were no controversial amendments proposed to Subpart VII.

Mr. Shandler suggested the use of the word "contested" instead of the word "controversial" in order to prevent any allegation of a subjective judgment being made.

Subpart VII – Special Waste Requirements

Ms. Dillingham moved that the amendments proposed by the Department

to Subpart VII of the Solid Waste Management Regulations be adopted for the reasons offered at hearing and in the Department’s post hearing submittal. Mr. Green seconded. The motion passed unanimously.

An additional change to the April 3, 2006 version of the Subpart VII regulations was discussed.

Mr. Green moved in Section 20.9.1.706G.3 (ii) the insertion of the following words “New Mexico” and the words “identified as generators of infectious waste under 20.9.1.706.A (1).” Mr. Peters seconded. The motion passed unanimously.

There were no contested amendments proposed to Subpart VI.

Subpart VI – Operator Certification

Ms. Bearden moved that the amendments proposed by the Department to Subpart VI of the Solid Waste Management Regulations be adopted for the reasons offered at hearing. Mr. Green seconded. The motion passed unanimously.

There was one contested amendment proposed to Subpart V, but it was not pursued by the National Solid Waste Management Association (NSWMA) through post-hearing submittals.

Subpart V – Closure and Post-Closure Requirements

Ms. Dillingham moved that the amendments proposed by the Department to Subpart V of the Solid Waste Management Regulations be adopted for the reasons offered at hearing, and that the change to Section 502A(1)(g) proposed by NSWMA at hearing not be adopted for the reasons offered by the Department in its post-hearing submittal. Ms. Bearden seconded. The motion passed unanimously.

There were no contested amendments proposed to Subpart IV.

Subpart IV - Solid Waste Facility Operating Requirements

Ms. Dillingham moved that the amendments proposed by the Department in Subpart IV of the Solid Waste Management Regulations be adopted for the reasons offered at hearing. Ms. Bearden seconded. The motion passed unanimously.

There were certain proposed amendments that were contested to Subpart III: specifically, Sections 302, 305 and 306. The remaining sections: specifically, Sections 301, 303, 304, 307, 308 and 309 were not contested. A minor correction is proposed for Section 10.

Subpart III – Maximum Size, Siting Criteria, Design Criteria

Sections 301, 303, 304, 307, 308 and 309

Mr. Tso moved that the amendments proposed by the Department to Sections 301, 303, 304, 307, 308 and 309 in Subpart III of the Solid Waste Management Regulations be adopted for the reasons offered at hearing. Mr. Green seconded.

Mr. Shandler interrupted the vote to ask for clarification with respect to the inclusion of Section 304 as an uncontested section. It was established that a reference to Section 304 in the Southwest Organizing Project's (SWOP) and the South Valley Coalition of Neighborhood Associations' (Coalition) Comments on the Hearing Officer's Report was a typographical error and should have referenced Section 305, not Section 304.

The motion passed unanimously.

The contested amendments in Subpart III, Section 302 at the hearing on this matter have been addressed to all parties' satisfaction in the Department's post-hearing submittal.

Subpart III - Section 302

Ms. Dillingham moved that the amendments ultimately proposed by the Department to Section 302 in Subpart III of the Solid Waste Management Regulations be adopted for the reasons offered at hearing and in NMED's post-hearing submittal. Mr. Green seconded. The motion passed unanimously.

There was one contested amendment proposed to Section 306 in Subpart III, but it was not pursued by the National Solid Waste Management Association (NSWMA) through post-hearing submittals.

Subpart III - Section 306

Ms. Bearden moved that the amendments proposed by the Department to Section 306 in Subpart III of the Solid Waste Management Regulations be adopted for the reasons offered at hearing and in NMED's post-hearing submittal. Mr. Green seconded. The motion passed unanimously.

Also, the Department agrees with Mr. Miller of the NSWMA that Section 310(1)(b) of Subpart III should be clarified.

Subpart III – Section 310(1)(b)

Ms. Dillingham moved that the amendments proposed by the Department to Section 310 in Subpart III of the Solid Waste Management Regulations be adopted for the reasons offered at hearing and in NMED's post-hearing submittal and that the words "if sludge is used" be inserted at the beginning of

**subparagraph (A)(1) (b) for clarification. Mr. Peters seconded.
The motion passed unanimously.**

There was one vigorously contested amendment in Section 305 (B) Subpart III relating to setback provisions for transfer stations and other processing facilities.

The Hearing Officer and Board discussed at length the wide range of viewpoints presented relating to appropriate setback distances from permanent structures to transfer stations and other processing facilities. The Department's proposal was a requirement of no less than 50 feet and no greater than 250 feet. It was noted by various Board members that in the event of a need for a shorter distance, local governments can grant variances with respect to setback distances.

Subpart III – Section 305 B

Mr. Green moved that transfer stations and processing facilities shall not be located within 250 feet of permitted residence, institution, school, place of worship or hospital that existed at the time the permit application was submitted unless that application demonstrates that a shorter distance of no less than 100 feet has been affirmatively approved by the local government. There was no second. The motion failed.

The Chair asked if there was another motion.

Mr. Green moved that transfer stations and processing facilities shall not be located within 250 feet of permitted residence, institution, school, place of worship or hospital that existed at the time the permit application was submitted unless that application demonstrates that a shorter distance of no less than 50 feet has been affirmatively approved by the local government. Mr. Peters seconded.

Roll Call Vote

Kathi Bearden	no
Gay Dillingham	yes
Gregory Green	yes
Ken Marsh	no
Soren Peters	yes
Harold Tso	yes

The motion passed, 4 votes in the affirmative; 2 votes in the negative.

Mr. Green stated that his reasoning regarding the setback requirements was based upon conclusions he drew from testimony that he heard and read. He stated that reducing the minimum setback requirement to 50 feet was necessary to protect the environment and New Mexico communities. Additionally, he stated that he had also relied upon testimony of other parties from the hearing record. He also noted that the setback footage range was appropriate and that local government is the correct venue for determining any deviation from the 50 foot

minimum. He mentioned that he thought a one-half mile setback requirement was too far because that great a distance would impede government's ability to provide adequate facilities in many urban areas.

There was discussion between Ms. Orth and the Board regarding the remainder of Section 305 and the uncontested proposed changes.

Mr. Green moved that the amendments proposed by the Department to the remainder of Section 305 of the Solid Waste Management Regulations be adopted for the reasons offered at hearing. Ms. Bearden seconded. The motion passed unanimously.

Numerous sections of the following subpart are contested.

Subpart II – Solid Waste Facility Permits and Registration

Subpart II – Section 201 D

- 1) *Who should prepare or approve the determination that a facility site is in a vulnerable area?*

The Board discussed the question of who would prepare or approve the determination that a facility site is in a vulnerable area. Two of the parties to the case, SWOP and the Coalition, proposed that the NMED Secretary make such decisions because an applicant for a permit is not objective. Discussion continued regarding NMED's opposition to designating the Secretary to act as the decision-maker. In further discussing the issue, it was noted that the Department had clarified its original language to provide that NMED would have to approve the determination made by the applicant and that this clarification had the approval of Southwest Landfill, LLC, Waste Management of New Mexico, Inc., the New Mexico Municipal League, the New Mexico Association of Counties, Mark Turnbough, Ph.D. and Gordon Environmental, Inc. as well as NSWMA. Additional discussion continued regarding the ramifications of an applicant's obligations with respect to preparation of a Community Impact Assessment as well as who should be charged with preparation of those assessments to assure they are unbiased.

Mr. Green moved to accept SWOP's language with the modification that the Department Secretary or the Secretary's designee in the Department would determine that the site or proposed site is in a vulnerable area. There was no second. The motion failed.

Mr. Green restated his motion to accept SWOP's language in Section 201 D, as SWOP proposed, with the language modification that the Department Secretary or the Department determine that the site or proposed site is in a vulnerable area. There was no second. The motion failed.

Board discussion resumed regarding the determining authority with respect to the designation of a vulnerable site.

Mr. Green moved that the amendments proposed by SWOP and the Coalition relating to the Department Secretary determining that a facility is in a vulnerable area in Section 201 D in Subpart II of the Solid Waste Management Regulations be adopted for the reasons offered at hearing and in post-hearing submittals. Mr. Tso seconded.

There was discussion regarding the motion. Mr. Shandler asked whether or not there was anything in the record noting objections by the Department or noting any matters relating to cost. It was established that there were no objections or directives relating to costs. Mr. Green stated that he had determined that he supported the advocates' proposed language amendments regarding the determination as to whether or not a facility's location was in a vulnerable area.

Roll Call Vote

Kathi Bearden	yes
Gay Dillingham	yes
Gregory Green	yes
Ken Marsh	no
Soren Peters	no
Harold Tso	yes

The motion passed, 4 votes in the affirmative; 2 votes in the negative.

Continuing re: sections of the following subpart that are contested

Subpart II – Solid Waste Facility Permits and Registration

Subpart II – Section 201 D

- 2) *Who should prepare the community impact assessment? Does the Department have the authority to direct payment by a permit applicant for a third-party consultant?*

A lengthy discussion was conducted regarding various aspects of the proposal by SWOP and the Coalition that an applicant would be obligated to pay for an assessment by an NMED approved contractor. The discussions related primarily to the legal position of the Department with respect to such a requirement as well as the Department's involvement in attempting to regulate an "approved list" of contractors that could be considered by applicants to conduct an assessment. Mr. Shandler pointed out that the Board does not have the authority to require a company to pay for an audit to be conducted by an auditor of the Department's choosing, citing a 1994 New Mexico Supreme Court case.

Ms. Bearden moved that the amendments proposed by SWOP and the Coalition relating to contractors performing community impact assessments in Section 201 D in Subpart II of the Solid Waste Management Regulations not be adopted for the reasons offered at Hearing and in post-hearing submittals. Mr. Peters seconded.

Mr. Green proposed a substitute motion moving the amendment proposed by SWOP and the Coalition requiring an applicant to hire a third-party contractor at the applicant's expense to conduct a community impact assessment.

The vote was interrupted for additional Board discussion relating to parameters for requiring independent third-party contractors to perform community impact assessments.

Ms. Dillingham seconded.

Roll Call Vote

Kathi Bearden	no
Gay Dillingham	yes
Gregory Green	yes
Ken Marsh	no
Soren Peters	no
Harold Tso	no

The substitute motion failed, 2 votes in the affirmative; 4 votes in the negative.

The Chair then requested that Ms. Bearden restate her motion and requested a roll call vote.

Ms. Bearden moved that the amendments proposed by NMED relating to contractors performing community impact assessments in Section 201 D in Subpart II of the Solid Waste Management Regulations be adopted for the reasons offered at Hearing and in post-hearing submittals. Mr. Marsh seconded.

There was Board discussion relating to issues brought up by Mr. Shandler regarding the sequence of events contemplated by the Board in an applicant obtaining a permit in conjunction with the designation of a vulnerable area. Ms. Bearden stated that she favored the Department's language because of the highly technical niche of expertise involved in this area and also she felt the Department's approach allowed an applicant applying for the permit some control over that permit. Ms. Bearden also noted that she thought the Secretary having the authority to determine whether an area was vulnerable or not was the catalyst for the next step in the process, the community impact statement.

Mr. Green proposed a substitute motion at Section 201 (D) (1), as a new section, stating that prior to the filing of the application, the applicant shall hire a third-party contractor from an approved list from the Department Secretary to conduct a community impact assessment. Mr. Tso seconded.

Roll Call Vote

Kathi Bearden	no
Gay Dillingham	no
Gregory Green	yes

Ken Marsh	no
Soren Peters	no
Harold Tso	yes

The motion substitute failed, 2 votes in the affirmative; 4 votes in the negative.

The Chair requested a roll call vote on Ms. Bearden’s original motion.

<u>Roll Call Vote</u>	
Kathi Bearden	yes
Gay Dillingham	yes
Gregory Green	no
Ken Marsh	yes
Soren Peters	yes
Harold Tso	yes

The motion passed, 5 votes in the affirmative; 1 vote in the negative.

Continuing re: sections of the following subpart that are contested

Subpart II – Solid Waste Facility Permits and Registration

Subpart II – Section 201 D

- 3) *Should an assessment be prepared where there is no significant public opposition?*

There was a brief Board discussion relating to this issue.

Mr. Green moved that NMED’s proposal to retain language giving the Secretary the authority to determine if there is not sufficient public opposition by residents of a vulnerable area, no community impact assessment is required. Ms. Bearden seconded.

Mr. Green noted that he felt consistency was very important and that authorizing the Secretary to determine whether or not there was sufficient public opposition regarding the necessity for a community impact statement was consistent with the Secretary having the authority to determine a vulnerable area.

<u>Roll Call Vote</u>	
Kathi Bearden	yes
Gay Dillingham	yes
Gregory Green	yes
Ken Marsh	yes
Soren Peters	yes
Harold Tso	yes

The motion passed unanimously.

Continuing re: sections of the following subpart that are contested

Subpart II – Solid Waste Facility Permits and Registration

Subpart II – Section 201 D

- 4) *Should a permit applicant seeking a modification that will result in a vertical expansion follow the procedures for a community assessment if it is in a vulnerable area?*

There was Board discussion relating to this matter.

Mr. Green moved that the Board accept SWOP and NMED’s proposed language to include vertical expansions when performing community impact assessments.

It was noted that the New Mexico Environmental Working Group and the Coalition were also supportive of that language.

Ms. Bearden seconded.

Mr. Green stated that he wished to support the concept that a vertical expansion in a community should trigger a community impact assessment because it has the potential for quality of life issues and a community should be afforded the opportunity to have input through the community impact assessment process.

Roll Call Vote

Kathi Bearden	yes
Gay Dillingham	yes
Gregory Green	yes
Ken Marsh	no
Soren Peters	yes
Harold Tso	yes

The motion passed, five votes in the affirmative; 1 vote in the negative.

Continuing re: sections of the following subpart that are contested

Subpart II – Solid Waste Facility Permits and Registration

Subpart II – Section 201 D

- 5) *Should the requirement for a community impact assessment apply when an applicant is seeking to make a change in the categories of waste accepted?*

There was Board discussion regarding language variations among the parties with respect to this question. It was noted that the Coalition and SWOP suggested language that was quite specific.

Mr. Green moved that the language proposed by SWOP regarding change of waste in a vulnerable area triggering a community impact assessment. There was no second. The motion failed.

The Chair asked if there was another motion.

Mr. Marsh moved that the Board accept the language proposed by NMED regarding change of waste. Ms. Bearden seconded.

Mr. Marsh noted that there had been adequate testimony as well as information contained in the Hearing Officer's Report pointing out that the safety and environmental concerns have already been met.

Mr. Green expressed his views regarding a community's need for an opportunity to review any change of waste accepted by an applicant.

Discussion continued regarding the change of waste issue and various forms of special waste.

Mr. Green moved a substitute motion that a change of waste accepted by an applicant could trigger a review by the Secretary as to whether or not to require a community impact assessment relating to such change. There was no second. The motion failed.

Mr. Marsh called the question. The Chair requested a roll-call vote. There was a request for restatement of Mr. Marsh's original motion.

Roll Call Vote

Kathi Bearden	yes
Gay Dillingham	yes
Gregory Green	no
Ken Marsh	yes
Soren Peters	yes
Harold Tso	yes

The motion passed, five votes in the affirmative; 1 vote in the negative.

Continuing re: sections of the following subpart that are contested

Subpart II – Solid Waste Facility Permits and Registration

Subpart II – Section 201 D

- 6) *Should the entire community impact assessment be published in Spanish or another language where appropriate? How is the*

decision to translate made? How many days should community members have to submit comments to the Secretary?

There was discussion relating to publishing in other languages. It was noted that everyone agreed that such publication should be done but that there is disagreement regarding how to decide when it is appropriate. There was discussion regarding percentages of populations requiring translated documents and discussion of the costs of publication.

Mr. Green moved for acceptance of SWOP’s proposal in Section 201 D regarding the five percent population percentage that triggers the necessity for notices and language translation. Ms. Bearden seconded.

There was a lengthy Board discussion regarding the costs of publications and costs of translation as well as involvement by the Department Secretary in decision making. There was also discussion of the problems surrounding the matter of publishing in a language other than English in areas where there are residents who speak and read other languages. It was noted by Mr. Shandler that notices, drafts and final community impact assessment documents have to be translated into Spanish (or other language if applicable) but the meetings must be conducted in plain language English. There was also a lengthy discussion regarding how information might best be disseminated, by means other than publication, to those individuals who do not speak or read English, in particular, the Native Americans living in New Mexico.

Ms. Bearden moved a substitute motion that the Board accept NMED’s language as shown on page 91 of the Hearing Officer’s Report, Section 201 D, subparagraph (2) with an addition at the second to last sentence as follows: “The Secretary may order that the assessment be published in a language in addition to English based on, but not limited to, expressions of interest at the scoping meeting.” Mr. Peters seconded.

The Chair requested a roll-call vote.

Roll Call Vote

Kathi Bearden	yes
Gay Dillingham	yes
Gregory Green	no
Ken Marsh	yes
Soren Peters	yes
Harold Tso	no

The motion passed, four votes in the affirmative; 2 votes in the negative.

A discussion ensued relating to the need for additional mediums that would more effectively present notices, publications and impact assessments in concerned communities. The use of video recording was discussed at some length.

Mr. Marsh moved that when it is deemed appropriate,

in addition to, or in lieu of publication, other mediums of disseminating community impact assessment information may be used, as the Secretary may determine. Mr. Green seconded. The motion passed unanimously.

The Board discussed the change in the time period in which community residents would have to submit comments following a community meeting.

Mr. Green moved that the Board accept NMEJWG’s proposal to increase the number of postings to eight in Section 201 G (5) Subpart II, and that a community meeting shall be held no less than thirty days following publication, Section 201 D (1) (a) and (b), Subpart II. Mr. Peters seconded.

Roll Call Vote

Kathi Bearden	yes
Gay Dillingham	yes
Gregory Green	yes
Ken Marsh	yes
Soren Peters	yes
Harold Tso	yes

The motion passed unanimously.

- 7) *Should the community impact assessment include an assessment of litter?*

There was Board discussion relating to the specific inclusion of the word litter in Section 201 D (2)(4).

Mr. Green moved that the amendments proposed by SWOP and the Coalition to include “litter” in the list of subjects which are part of the community impact assessment in Section 201 D in Subpart II of the Solid Waste Management Regulations be adopted for the reasons offered at hearing and in post-hearing submittals by SWOP, the Coalition and NMED. Ms. Bearden seconded. The motion passed unanimously.

Continuing re: sections of the following subpart that are contested

Subpart II – Solid Waste Facility Permits and Registration

Subpart II – Section 201 E

- 8) *Without a workable definition of “unreasonable concentration of regulated facilities” proposed at hearing, should this language be deleted from NMED’s original proposal? Should the Board look to statute from Arkansas for a standard? Should the Board*

*look to a definition from the Council of Environmental Quality
“Environmental Justice Guidance Under National Environmental
Policy Act” for “disproportionately high and adverse impact?”*

There was Board discussion regarding the use of a twelve mile distance as the benchmark for a determination of what distance between facilities would constitute “unreasonable concentration of regulated facilities” as well as other options that are available to make such a determination. A lengthy discussion continued relating to land-zoning processes.

Mr. Marsh moved for the acceptance of the NMED language on page 96 of the Hearing Officer’s Report, Paragraph E. Mr. Green seconded. The motion passed unanimously.

- 9) *Should the regulations mandate that the impact of granting a permit be considered together with the impacts of other existing facilities?*

There was Board discussion relating to the proposed language submitted by SWOP and the Coalition. It was agreed that it was not necessary to move for Board action on this matter as it had been dealt with in an earlier vote.

- 10) *Should the regulation mandate that the consideration of mitigation measures include a consideration of emissions from other facilities?*

The Board discussed the ramifications of emission considerations.

Mr. Marsh moved for the acceptance of the NMED language at page 104 of the Hearing Officer’s Report, Section 201 E, Part (8), Subpart II. Ms. Bearden seconded.

Mr. Green moved a substitute motion to include SWOP’s language.

There was a brief discussion by the Board.

Mr. Marsh seconded Mr. Green’s substitute motion and called the question. The substitute motion failed on a voice vote.

A vote was then taken on the original motion.

Roll Call Vote

Kathi Bearden	yes
Gay Dillingham	yes
Gregory Green	no
Ken Marsh	yes
Soren Peters	yes
Harold Tso	yes

The motion passed, five votes in the affirmative; one in the negative.

Continuing re: sections of the following subpart that are contested

Subpart II – Solid Waste Facility Permits and Registration

Subpart II – Section 211 E

- 11) *Should the Secretary be required to deny an application if an applicant fails to comply with any of the application requirements or fails to prove the issuance would not result in a concentration of facilities or fails to prove that there will not be a disproportionate effect on a socioeconomic group?*

There was a lengthy Board discussion with Ms. Orth regarding the implementation of the Secretary's authority with respect to this issue.

Mr. Marsh moved for the acceptance of the NMED language on page 114 of the Hearing Officer's Report at Section 211, paragraph B. setting out the authority of the Department Secretary relating to the issuance of permits. Mr. Peters seconded.

Roll Call Vote

Kathi Bearden	yes
Gay Dillingham	yes
Gregory Green	yes
Ken Marsh	yes
Soren Peters	yes
Harold Tso	yes

The motion passed unanimously.

Continuing re: sections of the following subpart that are contested

Subpart II – Solid Waste Facility Permits and Registration

Subpart II – Section 220-222

- 12) *Should composting and recycling facilities be permitted rather than registered even if they do not accept solid waste?*

The Board considered the implications of requiring permits for composting and recycling facilities.

Mr. Green moved for the acceptance of NMED's proposed language for Sections 220-222. Ms. Bearden seconded.

Mr. Green noted as grounds for his motion that the advocates have not met the burden of changing these facilities to a permitted rather than just a registered facility.

The motion passed unanimously.

Continuing re: sections of the following subpart some of which are contested

Subpart I – General Provisions

Subpart I – Section 20.9.1.7 Definitions

“Asbestos Waste”

Ms. Dillingham moved the acceptance of NMED’s definition of “regulated asbestos waste” as shown on page 20 of the Hearing Officer’s Report. Mr. Green seconded. The motion passed unanimously.

“Community”

There was Board discussion regarding appropriate distance recommendations from a “community” to a landfill.

Mr. Green moved for the acceptance of NMED’s proposed language for this definition except where changed from a four mile radius to a five mile radius. There was no second. The motion failed.

Mr. Marsh moved for the acceptance of NMED’s proposed language for this definition as set out at page 20 of the Hearing Officer’s Report, indicating a four mile radius. Mr. Green seconded. The motion passed unanimously.

“Economically Stressed Household”

There was a short discussion relating to this definition.

Mr. Green moved for the acceptance of SWOP’s and the Coalition’s proposed recommendation of 150% over the federal poverty level as shown at page 23 of the Hearing Officer’s Report. Mr. Tso seconded.

There was a lengthy Board discussion with respect to household yearly income, the federal poverty level, the number of persons in a household and the 150% figure.

Roll Call Vote

Kathi Bearden	yes
Gay Dillingham	yes
Gregory Green	yes
Ken Marsh	yes
Soren Peters	yes
Harold Tso	yes

The motion passed unanimously.

Mr. Marsh moved for the acceptance of NMED’s language as shown on page 22 of the Hearing Officer’s Report.

Ms. Dillingham made a friendly amendment to that motion to include after the word “at” 150%. Mr. Tso seconded.

A discussion of the number of family members in a household was held. Mr. Marsh called the question.

Roll Call Vote

Kathi Bearden	yes
Gay Dillingham	yes
Gregory Green	no
Ken Marsh	yes
Harold Tso	yes

The motion passed, four votes in the affirmative; one vote in the negative.

“Quasi-Judicial Proceeding”

Ms. Bearden moved for the adoption of the language as finally proposed by NMED. Mr. Green seconded. The motion passed unanimously.

“Vulnerable Area”

The Board conducted a lengthy discussion of how the language differed in the various proposals.

Mr. Green moved for the acceptance of SWOP’s and the Coalition’s language as shown on page 45 as paragraphs (a) and (b) of the Hearing Officer’s Report. Ms. Dillingham seconded.

There was a discussion of the motion and its possible impacts.

Roll Call Vote

Kathi Bearden	no
Gay Dillingham	yes

Gregory Green	yes
Ken Marsh	no
Harold Tso	no

The motion failed, two votes in the affirmative; three votes in the negative.

Mr. Marsh moved for the acceptance of NMED’s proposed language defining “Vulnerable Area” as shown on page 39 as paragraphs (a), (b) and (c) of the Hearing Officer’s Report. Mr. Green seconded.

Roll Call Vote

Kathi Bearden	yes
Gay Dillingham	yes
Gregory Green	yes
Ken Marsh	yes
Harold Tso	yes

The motion passed unanimously.

“Regulated Facility”

There was a lengthy Board discussion of the various definitions proposed by parties.

Ms. Bearden moved for the acceptance of NMED’s proposed language defining “Regulated Facility” as shown on page 31 as paragraphs (a), (b), (c) and (d) of the Hearing Officer’s Report. Mr. Marsh seconded.

Ms. Bearden stated that she favored the Department’s language in this instance because it is more definitive and straightforward than that proposed by any of the other parties to this matter.

Mr. Green moved a friendly amendment to add as paragraph (e) SWOP and Coalition definition language as shown on page 31 as paragraph (e) of the Hearing Officer’s Report.

There was a brief Board discussion of the friendly amendment.

Ms. Bearden declined to accept Mr. Green’s friendly amendment.

Roll Call Vote on Ms. Bearden’s Motion

Kathi Bearden	yes
Gay Dillingham	no
Gregory Green	no
Ken Marsh	yes
Harold Tso	no

The motion failed, two votes in the affirmative; three votes in the negative.

Mr. Green moved for the acceptance of NMED’s proposed language defining “Regulated Facility” as shown on page 31 as paragraphs (a), (b), (c) and (d) of the Hearing Officer’s Report and add paragraph (e) from the SWOP and Coalition definition, also on page 31. Ms. Dillingham seconded.

Mr. Tso moved a substitute motion for acceptance of NMED’s proposed definition on page 31 at 20.9.1.7.R(6) entitled “Regulated Facility,” adding the following as paragraph (e) or a facility that has obtained or is required to obtain a permit pursuant to the United States Clean Water Act or the New Mexico Water Quality Act or both and that has or may have the potential to have a significant adverse effect on human health or the environment. Mr. Green seconded.

Roll Call Vote

Kathi Bearden	no
Gay Dillingham	no
Gregory Green	yes
Ken Marsh	no
Harold Tso	yes

The substitute motion failed, two votes in the affirmative; three votes in the negative.

The Chair asked for a roll call vote on Mr. Green’s original motion.

Roll Call Vote

Kathi Bearden	no
Gay Dillingham	no
Gregory Green	yes
Ken Marsh	no
Harold Tso	no

The motion failed, one vote in the affirmative; four votes in the negative.

Mr. Marsh moved for the acceptance of NMED’s proposed language defining “Regulated Facility” as shown on page 31 as paragraphs (a), (b), (c) and (d) of the Hearing Officer’s Report. Ms. Bearden seconded.

Roll Call Vote

Kathi Bearden	yes
Gay Dillingham	yes

Gregory Green	yes
Ken Marsh	yes
Harold Tso	yes

The motion carried unanimously.

“Vadose Zone”

Ms. Dillingham moved the acceptance of NMED’s definition of “vadose zone” as shown on pages 38 and 39 of the Hearing Officer’s Report. Ms. Bearden seconded. The motion passed unanimously.

Uncontested versions of regulations.

Subparts I and II

Mr. Green moved that the Board approve all uncontested sections of the regulations in Subparts I and II. Ms. Dillingham seconded. The motion passed unanimously.

Mr. Noble requested that the Board approve allowing NMED to make non-substantive changes so the regulations can be formatted in a manner acceptable to New Mexico Records and Archives. Those changes could include items such as cross-references, section numbers, typographical errors as well as grammatical changes.

Ms. Dillingham moved that the Board allow NMED staff to make all necessary non-substantive changes so the regulations can be formatted in a manner acceptable to the New Mexico State Records which includes such items as cross-references, section numbers, typographical errors and grammatical changes. Mr. Green seconded. The motion passed unanimously.

“Environmental Justice”

Ms. Orth read the following definition from the Final Report on Environmental Justice in New Mexico prepared by the Alliance for Transportation Institute for NMED in November, 2004:

Environmental Justice means the fair treatment and meaningful involvement of all people regardless of race, ethnicity, culture, income, or educational level with respect to the development, implementation and enforcement of environmental laws, regulations, and policies. Environmental justice seeks to ensure that no population is forced to shoulder a disproportionate burden of the negative human health and environmental impacts of pollution or other environmental hazards.

Mr. Green moved that the definition of “Environmental

Justice as read by Ms. Orth be adopted. Ms. Bearden seconded. The motion passed unanimously.

The Chair extended her appreciation and thanks to everyone involved in the process of amending these regulations.

Item 9: Other business

None.

Item 10: Next Meeting – TBA

There was a discussion regarding whether it was necessary to hold a meeting in November. Mr. Green noted that the Board had mentioned holding the November meeting in Albuquerque so the Air Quality Bureau report on the Intel shut-down on July 19, 2006 could be presented and reviewed. The discussion continued regarding options available to the Board with respect to a November meeting. There was also discussion regarding holding the December 5th meeting in Albuquerque. Mr. Green volunteered to go to Albuquerque November 9th on behalf of the Board at which time the Air Quality Bureau would present its report on the Intel shut-down. It was agreed that Mr. Shandler would review the Public Meeting Act and communicate with Mr. Green regarding holding a November 9, 2006 meeting in Albuquerque.

Item 11: Adjournment

Mr. Green moved to adjourn the meeting. Ms. Bearden seconded. The motion carried unanimously, the meeting adjourned at 6:00 p.m. October 3, 2006.

Signature on File

Gay Dillingham, EIB Chair