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New Mexico Air Quality Control Act
Chapter 74, Article 2

2000 Replacement Pamphlet
(with 2012 Cumulative Supplement Amendments and
without history and case notes)

ARTICLE 2
Air Pollution

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74-2-1. Short title.

Chapter 74, Article 2 NMSA 1978 may be cited as the "Air Quality Control Act".

74-2-2. Definitions.

As used in the Air Quality Control Act:

A. "air contaminant" means a substance, including any particulate matter, fly ash, dust, fumes, gas, mist, smoke, vapor, micro-organisms, radioactive material, any combination thereof or any decay or reaction product thereof;

B. "air pollution" means the emission, except emission that occurs in nature, into the outdoor atmosphere of one or more air contaminants in quantities and of a duration that may with reasonable probability injure human health or animal or plant life or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property;

C. "department" means the department of environment;

D. "director" means the administrative head of a local agency;

E. "emission limitation" or "emission standard" means a requirement established by the environmental improvement board or the local board, the department, the local authority or the local agency or pursuant to the federal act that limits the quantity, rate or concentration, or combination thereof, of emissions of air contaminants on a continuous basis, including any requirements relating to the operation or maintenance of a source to assure continuous reduction;

F. "federal act" means the federal Clean Air Act, its subsequent amendments and successor provisions;

G. "federal standard of performance" means a standard of performance, emission limitation or emission standard adopted pursuant to 42 U.S.C. Section 7411 or 7412;

H. "hazardous air pollutant" means an air contaminant that has been listed as a hazardous air pollutant pursuant to the federal act;

I. "local agency" means the administrative agency established by a local authority pursuant to Paragraph (2) of Subsection A of Section 74-2-4 NMSA 1978;

J. "local authority" means any of the following political subdivisions of the state that have, by following the procedure set forth in Subsection A of Section 74-2-4 NMSA 1978, assumed jurisdiction for local administration and enforcement of the Air Quality Control Act:

(1) a county that was a class A county as of January 1, 1980; or

(2) a municipality with a population greater than one hundred thousand located within a county that was a class A county as of January 1, 1980;

K. "local board" means a municipal, county or joint air quality control board created by a local authority;

L. "mandatory class I area" means any of the following areas in this state that were in existence on August 7, 1977:

(1) national wilderness areas that exceed five thousand acres in size; and

(2) national parks that exceed six thousand acres in size;

M. "modification" means a physical change in, or change in the method of operation of, a source that results in an increase in the potential emission rate of a regulated air contaminant emitted by the source or that results in the emission of a regulated air contaminant not previously emitted, but does not include:

(1) a change in ownership of the source;

(2) routine maintenance, repair or replacement;

(3) installation of air pollution control equipment, and all related process equipment and materials necessary for its operation, undertaken for the purpose of complying with regulations adopted by the environmental improvement board or the local board or pursuant to the federal act; or

(4) unless previously limited by enforceable permit conditions:

(a) an increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(b) an increase in the hours of operation; or

(c) use of an alternative fuel or raw material if, prior to January 6, 1975, the source was capable of accommodating such fuel or raw material or if use of an alternate fuel or raw material is caused by a natural gas curtailment or emergency allocation or an other lack of supply of natural gas;

N. "nonattainment area" means for an air contaminant an area that is designated "nonattainment" with respect to that contaminant within the meaning of Section 107(d) of the federal act;

O. "person" includes an individual, partnership, corporation, association, the state or political subdivision of the state and any agency, department or instrumentality of the United States and any of their officers, agents or employees;

P. "potential emission rate" means the emission rate of a source at its maximum capacity to emit a regulated air contaminant under its physical and operational design, provided any physical or operational limitation on the capacity of the source to emit a regulated air contaminant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored or processed, shall be treated as part of its physical and operational design only if the limitation or the effect it would have on emissions is enforceable by the department or the local agency pursuant to the Air Quality Control Act or the federal act;

Q. "regulated air contaminant" means an air contaminant, the emission or ambient concentration of which is regulated pursuant to the Air Quality Control Act or the federal act;

R. "secretary" means the secretary of environment;

S. "significant deterioration" means an increase in the ambient concentrations of an air contaminant above the levels allowed by the federal act or federal regulations for that air contaminant in the area within which the increase occurs;

T. "source" means a structure, building, equipment, facility, installation or operation that emits or may emit an air contaminant;

U. "standard of performance" means a requirement of continuous emission reduction, including any requirement relating to operation or maintenance of a source to assure continuous emission reduction;

V. "state implementation plan" means a plan submitted by New Mexico to the federal environmental protection agency pursuant to 42 U.S.C. Section 7410; and

W. "toxic air pollutant" means an air contaminant, except a hazardous air pollutant, classified by the environmental improvement board or the local board as a toxic air pollutant.

74-2-3. Environmental improvement board.

A. In taking any action under the Air Quality Control Act [Chapter 74, Article 2 NMSA 1978], a majority of the environmental improvement board constitutes a quorum, but any action, order or decision of the environmental improvement board requires the concurrence of three members present at a meeting.

B. Except as provided in the Air Quality Control Act, the jurisdiction of the environmental improvement board extends to all areas of the state except within the boundaries of a local authority.

74-2-4. Local authority.

A. A county or municipality meeting the qualifications set forth in Paragraph (1) or (2) of Subsection J of Section 74-2-2 NMSA 1978 may assume jurisdiction as a local authority by adopting an ordinance providing for the local administration and enforcement of the Air Quality Control Act [Chapter 74, Article 2 NMSA 1978]. The ordinance shall:

(1) create a local board to perform, within the boundaries of the local authority, those functions delegated to the environmental improvement board under the Air Quality Control Act, except any functions reserved exclusively for the environmental improvement board;

(2) create a local agency to administer and enforce the provisions of the Air Quality Control Act within the boundaries of the local authority that shall, within the boundaries of the local authority, perform all of the duties required of the department and exert all of the powers granted to the department, except for those duties and powers reserved exclusively for the department; and

(3) provide for the appointment of a director who shall perform for the local authority the same duties as required of the secretary under the Air Quality Control Act, except the duties and powers reserved exclusively for the secretary.

B. At least a majority of the members of a local board shall be individuals who represent the public interest and do not derive any significant portion of their income from persons subject to or who appear before the local board on issues related to the federal act or the Air Quality Control Act.

C. Prior to adopting any ordinance regulating air pollution, public hearings and consultations shall be held as directed by the local authority adopting the ordinance. The provisions of any ordinance shall be consistent with the substantive provisions of the Air Quality Control Act and shall provide for standards and regulations not lower than those required by regulations adopted by the environmental improvement board.

D. Notwithstanding the provisions of Subsection A of this section, the environmental improvement board and the secretary shall retain jurisdiction and control for the administration and enforcement of the Air Quality Control Act as determined in that act with respect to any act or failure to act, governmental or proprietary, of any local authority that causes or contributes to air pollution, including proceeding against a local authority as provided in Section 74-2-12 NMSA 1978. "Failure to act", as used in this section, includes failure to act against any person violating the applicable ordinance or regulation adopted pursuant thereto.

E. Any local authority that is located within a transportation-related pollutant nonattainment area or maintenance area may provide for a vehicle emission inspection and maintenance program for vehicles under twenty-six thousand pounds gross vehicle weight powered by a spark-ignited internal combustion engine, which program shall be no more stringent than that required under the federal act or under federal air quality standards. Any two or more local authorities may adopt identical rules and regulations necessary to implement the vehicle emission inspection and maintenance program, including examining the alternatives of public or private operation of the program.

F. Any local authority that has implemented a vehicle emission inspection and maintenance program may extend the enforcement of that program by entering into joint powers agreements with any municipality or county within the designated airshed or with the department.

G. No tax shall be imposed to fund any vehicle emission inspection and maintenance program until the local authority has submitted the question of imposition of a tax to the registered voters of the local authority and those registered voters have approved the imposition of the tax.

H. A local authority having a vehicle emission inspection and maintenance program shall conduct the vehicle emission inspection and maintenance program through a decentralized privately owned and operated system unless air quality emissions result in automatic implementation of another type of program under the terms of a contingency plan required and approved by the United States environmental protection agency. The local authority shall set the emission inspection fee by ordinance.

I. A local authority having a vehicle emission inspection and maintenance program is authorized to adopt rules, regulations and guidelines governing the establishment of private vehicle emission inspection and maintenance stations. No private vehicle emission inspection and maintenance station shall test vehicles unless the station possesses a valid permit issued by the local agency. Permit fees shall be determined by ordinance of the local authority and shall not exceed two hundred dollars ($200) per year per station. Additionally, a local authority may charge a permit fee of up to thirty-five dollars ($35.00) per year for each vehicle emissions mechanic and for each vehicle emissions inspector. The imposition of permit fees does not require a vote of the registered voters of the local authority.

74-2-5. Duties and powers; environmental improvement board; local board.

A. The environmental improvement board or the local board shall prevent or abate air pollution.

B. The environmental improvement board or the local board shall:

(1) adopt, promulgate, publish, amend and repeal regulations consistent with the Air Quality Control Act to attain and maintain national ambient air quality standards and prevent or abate air pollution, including regulations prescribing air standards, within the geographic area of the environmental improvement board's jurisdiction or the local board's jurisdiction, or any part thereof; and

(2) adopt a plan for the regulation, control, prevention or abatement of air pollution, recognizing the differences, needs, requirements and conditions within the geographic area of the environmental improvement board's jurisdiction or the local board's jurisdiction or any part thereof.

C. Regulations adopted by the environmental improvement board or the local board may:

(1) include regulations to protect visibility in mandatory class I areas to prevent significant deterioration of air quality and to achieve national ambient air quality standards in nonattainment areas; provided that such regulations:

(a) shall be no more stringent than but at least as stringent as required by the federal act and federal regulations pertaining to visibility protection in mandatory class I areas, pertaining to prevention of significant deterioration and pertaining to nonattainment areas; and

(b) shall be applicable only to sources subject to such regulation pursuant to the federal act;

(2) prescribe standards of performance for sources and emission standards for hazardous air pollutants that, except as provided in this subsection:

(a) shall be no more stringent than but at least as stringent as required by federal standards of performance; and

(b) shall be applicable only to sources subject to such federal standards of performance;

(3) include regulations governing emissions from solid waste incinerators that shall be at least as stringent as, and may be more stringent than, any applicable federal emission limitations;

(4) include regulations requiring the installation of control technology for mercury emissions that removes the greater of what is achievable with best available control technology or ninety percent of the mercury from the input fuel for all coal-fired power plants, except for coal-fired power plants constructed and generating electric power and energy before July 1, 2007;

(5) require notice to the department or the local agency of the intent to introduce or permit the introduction of an air contaminant into the air within the geographical area of the environmental improvement board's jurisdiction or the local board's jurisdiction; and

(6) require any person emitting any air contaminant to:

(a) install, use and maintain emission monitoring devices;

(b) sample emissions in accordance with methods and at locations and intervals as may be prescribed by the environmental improvement board or the local board;

(c) establish and maintain records of the nature and amount of emissions;

(d) submit reports regarding the nature and amounts of emissions and the performance of emission control devices; and

(e) provide any other reasonable information relating to the emission of air contaminants.

D. Any regulation adopted pursuant to this section shall be consistent with federal law, if any, relating to control of motor vehicle emissions.

E. In making its regulations, the environmental improvement board or the local board shall give weight it deems appropriate to all facts and circumstances, including but not limited to:

(1) character and degree of injury to or interference with health, welfare, visibility and property;

(2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and

(3) technical practicability and economic reasonableness of reducing or eliminating air contaminants from the sources involved and previous experience with equipment and methods available to control the air contaminants involved.

74-2-5.1. Duties and powers of the department and the local agency.

The department and the local agency for their respective jurisdictions shall:

A. develop facts and make investigations and studies consistent with the Air Quality Control Act [Chapter 74, Article 2 NMSA 1978] and, as required for enforcement of that act, enter at all reasonable times in or upon any private or public property, except private residences, that the department or the local agency has reasonable cause to believe is or will become a source contributing to air pollution and require the production of information relating to emissions that cause or contribute to air pollution. The results of any such investigations shall be reduced to writing if any enforcement action is contemplated, and a copy shall be furnished to the owner or occupants of the premises before the action is filed;

B. institute legal proceedings to compel compliance with the Air Quality Control Act or any regulation of the environmental improvement board or the local board;

C. encourage and make every reasonable effort to obtain voluntary cooperation by the owner or occupants to preserve, restore or improve air purity;

D. consult with any person proposing to construct, install or otherwise acquire an air contaminant source, device, system or control mechanism concerning the efficiency of the device, system or mechanism or the air pollution problem that may be related to the source, device, system or mechanism; provided that consultation shall not relieve any person from compliance with the Air Quality Control Act, regulations in force pursuant to that act or any other provision of law;

E. establish a small business stationary source technical and environmental compliance assistance program, consistent with the provisions of Section 507 of the federal act;

F. accept, receive and administer grants or other funds or gifts from public and private agencies, including the federal government, or from any person;

G. classify and record air contaminant sources that, in its judgment, may cause or contribute to air pollution, according to levels and types of emissions and other characteristics that relate to air pollution; provided, classifications may be for application to the entire geographical area of the department's responsibility or the local authority's responsibility or to any designated portion of that area and shall be made with special reference to the effects on health, economic and social factors and physical effects on property; and

H. develop and present to the environmental improvement board or the local board a plan for the regulation, control, prevention or abatement of air pollution, recognizing the differences, needs, requirements and conditions in the different portions of the geographical area of the department's responsibility or the local authority's responsibility.

74-2-5.2. State air pollution control agency; specific duties and powers of the department.

The department is the state air pollution control agency for all purposes under federal legislation relating to air pollution. The department shall:

A. take all action necessary to secure for the state and its political subdivisions the benefits of federal legislation;

B. advise, consult, contract with and cooperate with local authorities, other states, the federal government and other interested persons or groups in regard to matters of common interest in the field of air quality control and initiate cooperative action between a local authority and the department, between one local authority and another or among any combination of local authorities and the department for control of air pollution in areas having related air pollution problems that overlap the boundaries of political subdivisions; and

C. enter into agreements and compacts with adjoining states and Indian tribes, where appropriate.

74-2-5.3. Duties and powers of environmental improvement board and local board for attainment and maintenance of national ambient air quality standards for ozone.

A. If the environmental improvement board or the local board determines that emissions from sources within its jurisdiction cause or contribute to ozone concentrations in excess of ninety-five percent of a national ambient air quality standard for ozone, it shall adopt a plan, including regulations, to control emissions of oxides of nitrogen and volatile organic compounds to provide for attainment and maintenance of the standard. Regulations adopted pursuant to this section shall be limited to sources of emissions within the area of the state where the ozone concentrations exceed ninety-five percent of the national ambient air quality standard.

B. Notwithstanding the limitations in Section 74-2-5 NMSA 1978, the environmental improvement board or the local board may adopt standards of performance for sources of emissions for which no federal standard of performance has been adopted and may adopt standards of performance more stringent than federal standards of performance for sources for which a federal standard of performance has been adopted. The standards of performance shall reflect the degree of emission limitation achievable through the application of control technology that is reasonably available considering technological and economic feasibility. The standards of performance may be more stringent than applicable federal standards of performance if the board determines that the federal standards of performance do not reflect the degree of emission limitation achievable through the application of control technology that is reasonably available, considering technological and economic feasibility, and that methods to further reduce emissions are commercially available and will result in substantially greater reductions in emissions than the federal standards for such sources.

C. In adopting regulations, the environmental improvement board or the local board shall consider the following:

(1) the public interest, including the social and economic value of the sources of emissions and subjects of air contaminants;

(2) previous experience with equipment and methods available to control the air contaminants involved;

(3) energy, environmental and economic impacts and other social costs;

(4) efforts by sources of emissions to reduce emissions prior to the effective date of regulations adopted under this section; and

(5) for existing sources of emissions, the remaining useful life of any existing source to which the regulation would apply.

D. No regulation adopted pursuant to this section shall require emission reductions for sources that between March 25, 2004 and January 1, 2009:

(1) implemented and are operating reasonable control measures, considering technological and economic feasibility, that result in quantifiable reductions for emission of oxides of nitrogen or volatile organic compounds; or

(2) are mandated by other requirements enforceable by the department or the local authority to implement reductions in emissions of oxides of nitrogen or volatile organic compounds.

74-2-6. Adoption of regulations; notice and hearings.

A. Any person may recommend or propose regulations to the environmental improvement board or the local board for adoption. The environmental improvement board or the local board shall determine whether to hold a hearing within sixty days of submission of a proposed regulation.

B. No regulations or emission control requirement shall be adopted until after a public hearing by the environmental improvement board or the local board. As used in this section, "regulation" includes any amendment or repeal thereof. Hearings on regulations of nonstatewide application shall be held within that area that is substantially affected by the regulation. Hearings on regulations of statewide application may be held in Santa Fe or within any area of the state substantially affected by the regulation.

C. Notice of the hearing shall be given at least thirty days prior to the hearing date and shall state the subject, the time and the place of the hearing and the manner in which interested persons may present their views. The notice shall also state where interested persons may secure copies of any proposed regulation or air quality standard. The notice shall be published in a newspaper of general circulation in the area affected. Reasonable effort shall be made to give notice to all persons who have made a written request to the environmental improvement board or the local board for advance notice of its hearings.

D. At the hearing, the environmental improvement board or the local board shall allow all interested persons reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. Any person heard or represented at the hearing shall be given written notice of the action of the environmental improvement board or the local board.

E. The environmental improvement board or the local board may designate a hearing officer to take evidence in the hearing.

F. No regulations or emission control requirement adopted by the environmental improvement board or the local board shall become effective until thirty days after its filing under the State Rules Act [Chapter 14, Article 4 NMSA 1978].

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; and

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

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

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

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

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

(b) one hundred eighty days after the application is determined to be administratively complete, if the application is subject to requirements for prevention of significant deterioration, unless the secretary or the director grants an extension not to exceed ninety days for good cause, including the need to have public hearings;

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

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

(5) specification of the public notice, comment period and public hearing, if any, required prior to the issuance of a permit; provided the permit regulations adopted:

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

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

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

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

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

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

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

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

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

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

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

(11) for an operating permit only:

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

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

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

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

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

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

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

(c) will violate any other provision of the Air Quality Control Act [74-2-1 NMSA 1978] or the federal act; and

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

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

(1) for a construction permit:

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

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

(c) compliance with applicable federal standards of performance;

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

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

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

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

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

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

H. A person who participated in a permitting action before the department or the local agency and who is adversely affected by such permitting action may file a petition for hearing before the environmental improvement board or the local board. The petition shall be made in writing to the environmental improvement board or the local board within thirty days from the date notice is given of the department's or the local agency's action. Unless a timely petition for hearing is made, the decision of the department or the local agency shall be final.

I. If a timely petition for hearing is made, the environmental improvement board or the local board shall hold a hearing within sixty days after receipt of the petition. The environmental improvement board or the local board shall notify the petitioner and the applicant or permittee, if other than the petitioner, by certified mail of the date, time and place of the hearing. If the subject of the petition is a permitting action deemed by the environmental improvement board or the local board to substantially affect the public interest, the environmental improvement board or the local board shall ensure that the public receives notice of the date, time and place of the hearing. The public in such circumstances shall also be given a reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing. Any person submitting data, views or arguments orally or in writing shall be subject to examination at the hearing.

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

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

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

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

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

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

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

O. The department may not deny an application for a construction permit for a cotton gin if the applicant proposes use of the best system of emissions reduction currently in use by cotton gins in the United States, as specified by regulation of the environmental improvement board, and the cotton gin has a potential emission rate, considering the use of the proposed emissions reduction system and the proposed hours of operation, of not more than fifty tons per year of any regulated air contaminant for which there is a national ambient air quality standard. The construction permit shall require that the applicant use the proposed emission reduction system and limit the hours of operation to the hours specified in the application. For purposes of this subsection, "best system of emissions reduction" for cotton gins means a system that will result in emissions reduction equal to or greater than that obtained by the use of condenser screens, seventy-mesh screen or equivalent on low-pressure exhausts and high-efficiency cyclone dust collectors on high-pressure exhausts.

74-2-7.1. Local governing body authority; construction permits; electric generation facilities.

A. A local governing body may receive a construction permit for a gas-fired electric generation facility with a one hundred megawatt or less generating capacity in accordance with the Air Quality Control Act and may transfer the permit to the owner or operator of a facility that meets the specifications of the permit.

B. A facility that receives a construction permit transferred from a local governing body shall notify the department within thirty days of receiving the transferred construction permit. The permit shall be effective for that facility when the department receives notification of the transfer. The local governing body that transfers the construction permit shall notify the owner or operator of the local electric distribution company and the public regulation commission of the permitted project, including its net capacity rating and intended date of service.

C. As used in this section, "local governing body" means the council or other executive body charged with governing a municipality or county.

D. The department may cooperate with and lend assistance to any Indian nation, tribe or pueblo located in the state in developing permitting procedures that fulfill federal environmental protection agency standards and that parallel the state permitting procedures described in Subsections A and B of this section.

74-2-8. Variances.

A. The environmental improvement board or the local board may grant an individual variance from the limitations prescribed under the Air Quality Control Act [Chapter 74, Article 2 NMSA 1978], any regulation of the environmental improvement board or the local board or any permit condition imposed by the department or the local agency whenever it is found, upon presentation of adequate proof:

(1) that compliance with any part of that act, any regulation of the environmental improvement board or the local board or any permit condition will:

(a) result in an arbitrary and unreasonable taking of property; or

(b) impose an undue economic burden upon any lawful business, occupation or activity; and

(2) that the granting of the variance will not:

(a) result in a condition injurious to health or safety; or

(b) cause or contribute to an air contaminant level in excess of any primary national ambient air quality standards.

B. No variance shall be granted pursuant to this section until the environmental improvement board or the local board has considered the relative interests of the applicant, other owners of property likely to be affected by the discharges and the general public.

C. Any variance or renewal thereof shall be granted within the requirements of Subsection A of this section and for time periods and under conditions consistent with the reasons therefor and within the following limitations:

(1) if the variance is granted on the ground that there are no practicable means known or available for the adequate prevention, abatement or control of the air pollution involved, it shall be only until the necessary means for prevention, abatement or control become known and available;

(2) if the variance is granted on the ground that compliance with the particular requirement from which variance is sought will necessitate the taking of measures that because of their extent or cost, must be spread over a considerable period of time, it shall be for a period not to exceed such reasonable time as, in the view of the environmental improvement board or the local board, is requisite for the taking of the necessary measures. A variance granted on the ground specified in this paragraph shall contain a timetable for the taking of action in an expeditious manner and shall be conditioned on adherence to the timetable; or

(3) if the variance is granted on the ground that it is justified to relieve or prevent hardship of a kind other than that provided for in Paragraphs (1) and (2) of this subsection, it shall be for not more than one year.

D. Any person seeking a variance shall do so by filing a petition for variance with the secretary or the director charged with implementation of the Air Quality Control Act at the site where the variance will apply. The secretary or the director shall promptly investigate the petition and make recommendation to his respective board as to the disposition of the petition.

E. Upon receiving the recommendation of the secretary or the director on the variance, the environmental improvement board or the local board shall:

(1) if the secretary or the director favors a variance, hold a public hearing prior to the granting of any variance; and

(2) if the secretary or the director is opposed to the granting of the variance, hold a hearing only upon the request of the petitioner.

F. In the hearing, the burden of proof shall be upon the petitioner.

74-2-9. Judicial review; administrative actions.

A. Any person adversely affected by an administrative action taken by the environmental improvement board, the local board, the secretary or the director may appeal to the court of appeals. All appeals shall be upon the record made at the hearing and shall be taken to the court of appeals within thirty days following the date of the action.

B. For appeals of regulations, the date of the action shall be the date of the filing of the regulation by the environmental improvement board or the local board pursuant to the State Rules Act [Chapter 14, Article 4 NMSA 1978].

C. Upon appeal, the court of appeals shall set aside the action only if found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by substantial evidence in the record; or

(3) otherwise not in accordance with law.

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

(1) by the environmental improvement board, the local board, the department or the local agency, whichever took the action being appealed; or

(2) by the court of appeals if the environmental improvement board, the local board, the department or the local agency denies a stay or fails to act upon an application for a stay within sixty days after receipt of the application.

74-2-10. Emergency powers of the secretary and the director.

A. Notwithstanding any other provision of the Air Quality Control Act [Chapter 74, Article 2 NMSA 1978], if the secretary or the director determines that a source or combination of sources presents an imminent and substantial endangerment to the public health or welfare or to the environment, he may bring suit in the district court for the county in which the source is located to restrain immediately any person causing or contributing to the alleged air pollution to stop the emission of air contaminants causing or contributing to such air pollution or to take such other action as may be necessary.

B. If it is not practicable to assure prompt protection of the public health or welfare or the environment by commencement of a civil action, the secretary or the director may issue orders necessary to protect the public health or welfare or the environment. An order shall be effective for a period of not more than twenty-four hours, unless the secretary or the director brings a civil action before the expiration of twenty-four hours. If the secretary or the director brings an action within that time, the order shall be effective thereafter for forty-eight hours or for such longer period as may be authorized by the court pending litigation.

74-2-11. Confidential information.

A. Any records, reports or information obtained under the Air Quality Control Act [Chapter 74, Article 2 NMSA 1978] by the department, the environmental improvement board, the local board or the local agency shall be available to the public, except that upon a satisfactory showing to the secretary, the director, the environmental improvement board, the local board or the local agency, as applicable, by any person that records, reports or information, or particular parts thereof, except emission data, to which the department, the local agency, the environmental improvement board or the local board has access under the Air Quality Control Act, if made public, would divulge confidential business records or methods or processes entitled to protection as trade secrets of that person, the secretary, the director, the environmental improvement board or the local board, as applicable, shall consider such record, report or information, or particular portion thereof, confidential in accordance with the provisions of Section 14-2-1 NMSA 1978 and 18 U.S.C. Section 1905, except that such record, report or other information may be disclosed:

(1) to other officers, employees or authorized representatives of the department, the local agency, the environmental improvement board or the local board concerned with carrying out the Air Quality Control Act;

(2) to officers, employees or authorized representatives of the United States environmental protection agency concerned with carrying out the federal act; or

(3) when relevant, in any proceeding under the Air Quality Control Act or the federal act.

B. The environmental improvement board or the local board shall adopt regulations to implement this section, including regulations specifying those business records entitled to treatment as confidential records.

74-2-11.1. Limitations on regulations.

The Air Quality Control Act [Chapter 74, Article 2 NMSA 1978] does not:

A. authorize the environmental improvement board or the local board to make any regulation with respect to any condition or quality of the outdoor atmosphere if the condition or air quality level and its effect are confined entirely within the boundaries of the industrial or manufacturing property within which the air contaminants are or may be emitted and public access is restricted within such boundaries;

B. grant to the environmental improvement board or the local board any jurisdiction or authority affecting the relation between employers and employees with respect to or arising out of any condition of air quality; or

C. supersede or limit the applicability of any law relating to industrial health, safety or sanitation.

74-2-12. Enforcement; compliance orders; field citations.

A. When, on the basis of any information, the secretary or the director determines that a person has violated or is violating a requirement or prohibition of the Air Quality Control Act, a regulation promulgated pursuant to that act or a condition of a permit issued under that act, the secretary or the director may:

(1) issue a compliance order within one year after the violation becomes known by the department or the local agency stating with reasonable specificity the nature of the violation and requiring compliance immediately or within a specified time period or assessing a civil penalty for a past or current violation, or both; or

(2) commence a civil action in district court for appropriate relief, including a temporary or permanent injunction.

B. An order issued pursuant to Subsection A of this section may include a suspension or revocation of the permit or portion thereof issued by the secretary or the director that is alleged to have been

violated. Any penalty assessed in the order shall not exceed fifteen thousand dollars ($15,000) per day of noncompliance for each violation.

C. An order issued pursuant to Subsection A of this section shall become final unless, no later than thirty days after the order is served, the person named therein submits a written request to the secretary or the director for a public hearing. Upon such request, the secretary or the director shall promptly conduct a public hearing. The secretary or the director shall appoint an independent hearing officer to preside over the public hearing. The hearing officer shall make and preserve a complete record of the proceedings and forward the hearing officer's recommendation based thereon to the secretary or the director, who shall make the final decision.

D. The environmental improvement board or the local board may implement a field citation program through regulations establishing appropriate minor violations for which field citations assessing civil penalties not to exceed one thousand dollars ($1,000) per day of violation may be issued by officers or employees of the department or the local agency as designated by the secretary or the director.

E. A person to whom a field citation is issued pursuant to Subsection D of this section may, within a reasonable time as prescribed by regulation by the environmental improvement board or the local board, elect to pay the penalty assessment or to request a hearing by the issuing agency on the field citation. If a request for hearing is not made within the time specified in the regulation, the penalty assessment in the field citation shall be final.

F. Payment of a civil penalty required by a field citation issued pursuant to Subsection D of this section shall not be a defense to further enforcement by the department or the local agency to correct a violation or to assess the maximum statutory penalty pursuant to other authorities in the Air Quality Control Act if the violation continues.

G. In determining the amount of a penalty to be assessed pursuant to this section, the secretary, the director or the person issuing a field citation shall take into account the seriousness of the violation, any good-faith efforts to comply with the applicable requirements and other relevant factors.

H. In connection with a proceeding under this section, the secretary or the director may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books and documents and may adopt rules for discovery procedures.

I. If a person fails to comply with an administrative order, the secretary or director may initiate an action to suspend or revoke the permit, or portion thereof, alleged to have been violated or to commence a civil action in district court to enforce the order, or to suspend or revoke the permit, or both.

J. If a person fails to pay an assessment of a civil penalty, the secretary or director may commence a civil action in district court to collect the civil penalties assessed in the order.

K. Penalties collected pursuant to this section shall be deposited in the:

(1) municipal or county general fund, as applicable, if the administrative order or field citation was directed to a source located within a local authority; or

(2) state general fund if the administrative order or field citation was directed to any other source.

74-2-12.1. Civil penalty; representation of department or local authority; limitation of actions.

A. A person who violates a provision of the Air Quality Control Act or a regulation, permit condition or emergency order adopted or issued pursuant to that act may be assessed a civil penalty not to exceed fifteen thousand dollars ($15,000) for each day during any portion of which a violation occurs.

B. A person who fails to comply with an administrative order issued pursuant to Section 74-2-12 NMSA 1978 may be assessed, pursuant to a court order, a civil penalty of not more than twenty-five thousand dollars ($25,000) for each day of noncompliance with the order.

C. In an action to enforce the provisions of the Air Quality Control Act or an ordinance, regulation, permit condition or order, adopted, imposed or issued pursuant to that act:

(1) the department shall be represented by the attorney general;

(2) a local authority that is a municipality shall be represented by the attorney of the municipality; and

(3) a local authority that is a county shall be represented by the district attorney within whose judicial district the county lies.

D. No action for civil penalty shall be commenced more than five years from the date the violation was known by the department or the local agency.

74-2-13. Inspection.

The secretary or the director or an authorized representative of either, upon presentation of his credentials:

A. shall have a right of entry to, upon or through any premises on which an emission source is located or on which any records required to be maintained by regulations of the environmental improvement board, the local board or by any permit condition are located; and

B. may at reasonable times:

(1) have access to and copy any records required to be established and maintained by regulations of the environmental improvement board or the local board or any permit condition;

(2) inspect any monitoring equipment and method required by regulations of the environmental improvement board, the local board or by any permit condition; and

(3) sample any emissions that are required to be sampled pursuant to regulation of the environmental improvement board, the local board or any permit condition.

74-2-14. Criminal penalties.

A. Notwithstanding any other provision of the Air Quality Control Act [Chapter 74, Article 2 NMSA 1978], a local authority may prescribe penalties for violations of an ordinance:

(1) regulating open-fire burning or residential incineration; or

(2) prohibiting the removal of motor vehicle emission control devices installed as required by law and requiring the maintenance of such devices in operating condition.

B. Notwithstanding any other provision of the Air Quality Control Act, it is a petty misdemeanor to violate any regulations of the environmental improvement board:

(1) regulating open-fire burning or residential incineration; or

(2) prohibiting the removal of motor vehicle emission control devices installed as required by law or requiring the maintenance of such devices in operating condition.

C. Except as provided in Subsection D of this section, any person who knowingly commits any of the following acts is guilty of a fourth degree felony and shall be sentenced in accordance with the provisions of Section 31-18-15 NMSA 1978:

(1) violation of any regulation relating to commercial or industrial incineration;

(2) violation of any regulation adopting any federal standard of performance;

(3) violation of any regulation relating to control of hazardous air pollutants; or

(4) violation of any regulation relating to control of toxic air pollutants.

D. At any source required to have an operating permit pursuant to Section 502 of the federal act, any person who knowingly commits any violation of any applicable standard, regulation or requirement under the Air Quality Control Act or the federal act, any term or condition of an operating permit or any emission fee or filing requirement in any operating permit regulation of the environmental improvement board or the local board is guilty of a fourth degree felony and shall, upon conviction, be punished by a fine of not more than ten thousand dollars ($10,000) per day per violation or by imprisonment of not more than eighteen months, or both.

E. Any person who knowingly commits any violation of a regulation of the environmental improvement board or the local board not listed in Subsection B, C or D of this section is guilty of a misdemeanor and shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

F. Any person who knowingly:

(1) makes any false statement, representation or certification in any application, record, report, plan or other document filed or required to be maintained under the Air Quality Control Act, any permit issued pursuant to the Air Quality Control Act or any regulation adopted pursuant to that Act; or

(2) falsifies, tampers with or knowingly renders inaccurate any monitoring device or method required to be maintained under the Air Quality Control Act, any permit issued pursuant to the Air Quality Control Act or any ordinance or regulation adopted pursuant to that act is guilty of a misdemeanor and shall, upon conviction, be punished by a fine of not more than ten thousand dollars ($10,000) per day per violation or by imprisonment for not more than twelve months, or by both.

G. Any person who knowingly releases into the ambient air any hazardous air pollutant or extremely hazardous substance listed pursuant to Section 302(a)(2) of the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 1102(a)(2) that is not listed in Section 112 of the federal act and who knows at the time of the release that he creates a substantial danger of death or serious bodily injury to another person is guilty of a second degree felony and, upon conviction, shall be sentenced to a term of imprisonment not to exceed nine years or a fine not to exceed one hundred thousand dollars ($100,000), or both. Any person, other than an individual or a governmental entity, who commits such violation is guilty of a second degree felony and shall be fined in an amount not to exceed two hundred fifty thousand dollars ($250,000). If a conviction of any person under this subsection is for a second or subsequent violation, the maximum punishment shall be doubled with respect to both the fine and the imprisonment.

74-2-15. State air quality permit fund.

A. There is created in the state treasury the "state air quality permit fund" to be administered by the department. All fees collected by the department pursuant to Section 74-2-7 NMSA 1978 shall be deposited in the state air quality permit fund.

B. Money in the state air quality permit fund is appropriated to the department for the purpose of paying the reasonable costs of:

(1) reviewing and acting upon any application for a permit;

(2) if the owner or operator receives a permit, implementing and enforcing the terms and conditions of such permit not including any court costs or other costs associated with any enforcement action;

(3) emissions and ambient monitoring;

(4) preparing generally applicable regulations or guidance;

(5) modeling, analysis and demonstrations; and

(6) preparing inventories and tracking emissions.

74-2-15.1. Repealed.

Repeals. — Laws 1992, ch. 20, § 21 repeals 74-2-15.1 NMSA 1978, as enacted by Laws 1979, ch. 393, § 10, relating to primary nonferrous smelter orders, effective March 5, 1992. For provisions of former section, see 1990 Replacement Pamphlet.

74-2-16. Municipal or county air quality permit fund.

A. A local authority shall create within the municipal or county treasury a fund to be known as the "_____

(name of municipality or county)

air quality permit fund". All fees collected by a municipality or county pursuant to Section 74-2-7 NMSA 1978 shall be deposited in the fund created pursuant to this section.

B. Money in the fund created pursuant to this section shall be used by the municipality or county only for the purpose of paying the reasonable costs of:

(1) appealing, reviewing and acting upon any application for a permit;

(2) if the owner or operator receives a permit, implementing and enforcing the terms and conditions of such permit, not including any court costs or other costs associated with any enforcement action;

(3) emissions and ambient monitoring;

(4) preparing generally applicable regulations or guidance;

(5) modeling, analysis and demonstrations; and

(6) preparing inventories and tracking emissions.

74-2-17. Continuing effect of existing laws, rules and regulations.

A. The Air Quality Control Act [Chapter 74, Article 2 NMSA 1978] is supplementary to other legislation and does not repeal any laws but takes precedence over any law that conflicts with the provisions of that act.

B. All county and municipal ordinances and all state, county and municipal regulations relating to air quality and air pollution are continued in effect until revised or repealed by the governmental body or administrative agency having jurisdiction; provided that copies of each ordinance and regulation:

(1) were filed under the State Rules Act [Chapter 14, Article 4 NMSA 1978] on or before May 3, 1967; or

(2) if adopted after May 3, 1967:

(a) were adopted by a governmental body or administrative agency having jurisdiction to do so under the Air Quality Control Act as in effect at the time of such adoption; and

(b) if required by the Air Quality Control Act as in effect at the time of such adoption, have been filed under the State Rules Act.

74-2-18 to 74-2-22. Repealed.

Repeals. — Laws 1981, ch. 373, § 7, repeals 74-2-18 to 74-2-22 NMSA 1978, relating to interstate cooperation concerning air pollution, effective April 10, 1981.

ARTICLE 2A

Wood Burning Stoves and Fireplaces

Sec.

74-2A-1. Wood burning stoves and fireplaces; findings; county and municipal wood burning laws; exemption for indigents.

74-2A-1. Wood burning stoves and fireplaces; findings; county and municipal wood burning laws; exemption for indigents.

A. The legislature finds that many persons have acquired wood burning stoves to heat their homes. The legislature further finds that wood burning stoves have been encouraged as a means of reducing our country's dependence on foreign oil and are therefore in the public interest. The legislature further finds that many of the poorer citizens of our state have acquired wood burning stoves or residences with fireplaces as a means of providing cost efficient heating for their families.

B. The legislature further finds that counties and municipalities have adopted and may continue to adopt wood burning laws to prevent or reduce serious pollution problems associated with wood burning. The legislature further finds that while these laws are in the public interest, it is also in the public interest to protect the poor in our society who have wood burning stoves or fireplaces to provide cost efficient heating for their families.

C. Any county or municipality which adopts a wood burning law to prohibit burning from occurring at certain times or in certain locations shall provide an exemption procedure for indigent families who need wood burning as an essential form of cost-efficient heating for their families. The exemption procedure shall include a standard for determining when a family is considered indigent for purposes of the exemption.