

BEFORE THE SECRETARY OF THE
NEW MEXICO ENVIRONMENT DEPARTMENT



In the Matter of the Repeal of the
New Mexico Environment Department
Permit Procedure and the adoption of
New Permit Procedures

No. _____

**THE NEW MEXICO ENVIRONMENT DEPARTMENT'S
RESPONSE TO PUBLIC COMMENTS REGARDING 20 NMAC 1.4**

I. INTRODUCTION

At the close of the hearing on July 22, 1997, the Hearing Officer allowed the record to remain open for the submittal of post-hearing comments. Specifically, the Hearing Officer directed the New Mexico Environment Department (NMED) to submit on or before August 5, 1997, Exhibits F and G reflecting (in legislative format and a clean copy) the changes it had proposed at the hearing to 20 NMAC 1.4. Transcript, pp. 207-209. The Hearing Officer left the record open until August 22, 1997 for non-NMED parties to submit post-hearing comments specifically limited to NMED's proposed revisions identified in post-hearing submittals Exhibits F and G. The Hearing Officer granted NMED's Motion for an Extension, and provided NMED until September 19, 1997 to respond to comments.

II. SUMMARY OF PROPOSAL

At the public hearing, NMED presented substantial testimony and evidence supported by numerous entities to revise 20 NMAC 1.4 in order to establish a uniform set for permitting procedures applicable to NMED's major permitting programs. As stated at the hearing, the primary reasons for this rulemaking were as follows: (1) the existing rule (adopted in 1995) was used exclusively for permit hearings under the Solid Waste Act (SWA) and as drafted, would violate provisions of the Hazardous Waste Act (HWA), Water Quality Act and Air Quality Control Act (AQCA)(collectively referred to as the "Acts"); (2) NMED staff and the current NMED Hearing Officer recognized substantial problems with the regulations (even as applied to permit hearings under the SWA) and determined that they had substantial problems; and (3) it would be a better use of resources and time to create one set of uniform permitting rules applicable to all programs, rather than undertake four separate rulemakings for permit hearings to correct the problems with 20 NMAC 1.4. Transcript, pp. 19-25.

NMED's proposal was drafted by four NMED attorneys (including the current NMED Hearing Officer), and based upon NMED's expertise in environmental law and past experience.



The following is a summary of the substantive changes: (1) the rights of "interested participants" under the existing regulation and "parties" have been rolled into once status, thereby providing for participation that is consistent with the Acts, eliminating serious procedural problems and with little practical difference in the actual rights of public participation; (2) elimination of unnecessary and irrelevant procedure (such as discovery) for some programs; and (3) tightening procedural requirements for parties presenting testimony to avoid surprise at the hearing and unnecessary delay. NMED's proposal was strongly supported by the majority of the entites participating at the hearing and is intended to result in a significantly improved procedure for permit hearings.

III. NMED'S RESPONSE TO COMMENTS

1. DOE/WID.

A. THE HEARING OFFICER AND NMED DID NOT DENY DOE/WID AN OPPORTUNITY TO COMMENT AND DUE PROCESS.

In its post-hearing comments, the Department of Energy and Westinghouse (collectively DOE/WID) assert that the Hearing Officer and NMED effectively denied hearing participants due process because it had no opportunity to comment on the proposed revisions made by NMED at the hearing. DOE/WID's post-hearing comments, pp. 1-2. To "cure this defect," DOE/WID determined to submit "additional" substantial post-hearing comments which consist of 15 pages of material (single space). As described below, DOE/WID's argument is meritless. DOE/WID improperly used this process to submit post-hearing comments outside the scope of the Hearing Officer's order and as a result, have created further delay in this procedure.

Procedural due process requires an identification of the issues to be considered and an opportunity to be heard. Joab, Inc. v. Espanola, 116 N.M. 554, 865 P.2d 1198 (1993). DOE/WID offer no legal or factual support for its assertion that it was "denied due process" because it had no "opportunity" to comment upon NMED's proposed revisions set forth in Exhibit A. DOE/WID's post-hearing comments address the issue of "party" and "standing," an issue which it has been on "notice" of since at least May 22, 1997. In fact, most of DOE/WID's testimony at the public hearing concerned the definition of party and standing. Transcript, pp. 56-65. DOE/WID's argument that it was denied due process is not well-grounded in fact or law. Furthermore, the proposed changes in Exhibit A did not vary from NMED's original proposal with respect to the definition of "party" or the issue of standing. Under these circumstances, there is no colorable argument that DOE/WID was deprived of due process; instead, they have determined to use this process to harrass and create further unnecessary delay.

In addition, DOE/WID misconstrued the clear orders of the Hearing Officer to limit post-hearing comments to "simply very short, concise suggestions" regarding NMED's changes as proposed at the hearing and submitted on August 5, 1997; DOE/WID's post-hearing comments do not even address these proposed changes. See Transcript, pp. 207-209. No other party similarly misconstrued the Hearing Officer's explicit order in such a blatant and extreme manner.

Nevertheless, NMED is compelled to respond to DOE/WID's post-hearing comments to address the numerous inaccuracies and to provide the Hearing Officer with additional information upon which to base his decision.

B. DOE/WID's PROPOSAL TO LIMIT PUBLIC PARTICIPATION TO THOSE PEOPLE WHO CAN DEMONSTRATE "STANDING" IS UNREASONABLE AND IN VIOLATION OF THE BROAD PUBLIC PARTICIPATION PROVISIONS OF NEW MEXICO'S ENVIRONMENTAL STATUTES.

1. WID/DOE Provide No Legal Support For Its Proposal.

In its post-hearing comments, DOE/WID argues that the Hearing Officer should recommend that the Secretary adopt a provision requiring that a person meet the narrow judicial standard for "intervention" under Rule 24 of the New Mexico Rules of Civil Procedure as a legal requirement of public participation as a party in an administrative proceeding under the HWA. As grounds, DOE/WID provided the following: At the hearing, the attorney representing WID testified that she "*could not point to any particular provision in the statute [hazardous waste act] imposing a standing requirement.*" Ms. Barnes, transcript, pp. 74-75. Further, WID testified that an intervention standard is required as a "*constitutional*" matter. *Id.* However, on cross-examination, the same attorney admitted that there is nothing in the constitution that prohibits NMED from providing for participation by people who do not have standing in a constitutional sense. *Id.* at 77. The attorney for DOE stated that he would recommend that "standing" to participate as a party under Rule 24 at an administrative hearing on the WIPP permit be limited to "*anyone living within the convenient vicinity of the [WIPP] facility.*" Mr. Wayman, transcript pg. 74.

DOE/WID provided no legal support whatsoever for its position but rather, assert that a "standing" provision would foster an ability to limit public participation during the WIPP permit proceedings and avoid unnecessary delay. To the contrary, DOE/WID's position would create substantial delay (of a year or more) and is flat out in violation of each of the environmental statutes at issue. No non-federal facility attorney supported DOE/WID's position. See Section II.1.B.2. Further, as discussed below, there are no significant substantive differences regarding public participation rights under NMED's proposed definition of "party" and the current rights of parties and "interested participants" under existing 20 NMAC 1.4. See Section II.1.D.

First, DOE/WID argued that NMED "misapprehends" the issue before [the hearing officer] when at the hearing in cited the court in EMCEE, Inc. v. FERC., 645 F.2D 339 (5th Cir. 1981). To the contrary, it is DOE/WID that "misapprehend" the legal issue here: whether any of the Acts at issue here provide a legal basis for imposing a narrow judicial standing requirement under Rule 24. The Court in EMCEE reviewed the legal issue of whether a protestor met the requirement under the federal APA of an "interested person" who under the APA, would be allowed to appear before an agency for presentation of an adjustment, or determination of an issue, request, or controversy in a proceeding...." *Id.* at 350. The Court stated:

“administrative adjudications, are not an Article III proceeding to which either a case or controversy or prudential standing requirements apply; within their legislative mandates, agencies are free to hear actions brought by parties who might be without standing if the same issues happened to be before a federal court. (Citations omitted).

645 F.2d 339 (emphasis added).

The court held that it was “not reasonable” for FERC to require a protestor to demonstrate standing when a protest is made to satisfy the “interested person” test under the federal APA. Id. 350 (other citations omitted). Thus, even courts interpreting the term “interested person” under the federal APA do not support DOE/WID.

DOE/WID’s reliance upon Tenneco Oil Co. v. New Mexico Water Quality Control Commission, 105 N.M. 708, 736 P.2d 986 (Ct. App. 1986) does not support its position. The issue presented to the Court in Tenneco concerned the right of a person to obtain a judicial stay from the Court of Appeals from a regulation adopted by the Water Quality Control Commission (WQCC). The court established a four-prong test to address the legal standard applicable for a court to grant a stay from the operation of an administrative order or regulation. Tenneco does not support DOE/WID or address the rights of the public to participate in an administrative hearing.

Second, DOE/WID’s assertion that WQCC and EIB regulations support its position is similarly misplaced and inaccurate. The “standard for appeal to the EIB and WQCC” is not, as asserted by DOE/WID, based upon a showing of meeting the elements under a Rule 24 standard. The standard for appeal of NMED permitting decisions under the WQA is set forth in Section 74-6-5.N. The WQCC has defined the term “interested participant” under 20 NMAC 6.2.M for purposes of appeal under Section 74-6-5.N. to be “*any person who testifies at the hearing or submits a written statement for the record.*” Therefore, under the WQA a person may have a right to appeal NMED’s permitting decision; but, would not qualify as a “party” under Rule 24 under DOE/WID’s proposal. Surely, the Legislature did not intend such a bizarre result: to provide a standard for appeal of permitting decisions which is broader than the right of a person to participate at the public hearing. Transcript, pp. 22-23.

Finally, NMED’s proposal is entirely consistent with USEPA’s broad public participation procedures for permit proceedings which provide no standing requirement but simply state that “any person may submit oral or written statements and data concerning a draft permit....” 40 CFR 124.12 (attached). USEPA does not recognize distinctions between “parties”, “interested participants” and/or “interested persons” for purposes of permitting actions. USEPA’s procedures are consistent with federal environmental statutes which similarly mandate broad public participation requirements for permit hearings. Further, USEPA does not follow the federal Administrative Procedures Act (APA). The same is true for NMED. NMED has not adopted the New Mexico APA precisely because it is inconsistent with the broad federal and state statutory mandates for public participation for permit hearing: without a legislative change,

NMED could not simply adopt the New Mexico APA.

2. DOE/WID's Position Violates Each Environmental Statute at Issue And Is Not Supported by Substantial Evidence.

As amply demonstrated by testimony and case support at the hearing, DOE/WID's proposal would violate the broad statutory provisions for public participation under each Act. "The administrative standing analysis always begins with the language of the statute and regulations that provide for an administrative hearing." ECEE, 645 P.2d at 350 (citations omitted). "The agencies responsibility for implementing the statutory purposes justifies a wider discretion, in determining what actions to entertain, than is allowed by courts by either the Constitution or the common law." Id. The statutes at issues here do not support the imposition of a narrow standing provision and to the contrary, provide for broad public participation. See Exhibit D. The relevant legal standard for public participation under each statute as set forth in Exhibit D provide for broad, not narrow, public participation. There are no requirements supportive of a judicial intervention standing. DOE/WID did not even address the issue of whether requiring intervention to be met is consistent with any of the other environmental statutes at issue.

Further, DOE/WID's statement that NMED's position is in the "minority" is similarly inaccurate. PHC, pg. 9. The administrative record demonstrates that no attorney representing a non-federal facility testified that a judicial standing is required or appropriate under the H.A. . The only entities in the record supportive of a judicial intervention standard under the H.A. were simply DOE/WID and arguably, LANL. DOE/WID's statement regarding Mr. Burkhalter are inaccurate. Mr. Burkhalter construed the HWA as providing for "fairly broad public participation rights" and expressly did not express an opinion regarding whether intervention was mandated under the HWA. PHC, pg. 3. Mr. Virtue, representing Waste Management of New Mexico, did not testify that he supported the adoption of a Rule 24 standard under the HWA. Transcript, at pg. 121 ("we're not proposing to adopt a Rule 24 standard....") Further, Mr. Virtue testified that his comments were "limited to proceedings under the SWA." Transcript, pg. 145.

On the other hand, there is substantial and credible testimony and/or written comments supporting NMED's proposed revisions: at least four public entities represented by counsel with substantial administrative law experience do not support DOE/WID's position: Mr. Doug Meikejohn, New Mexico Environmental Law Center, Mr. Bill Brancard, Assistant Commissioner of the New Mexico Public Lands, Mr. Lindsey Lovejoy, the New Mexico Attorney General's Officer and four attorneys (including the current NMED hearing officer) representing the New Mexico Environment Department. The "minority" position is that of DOE/WID.

Finally, imposing a judiciable interest standard for a public permit hearing is inconsistent with prior Department practice and the very tenant of administrative law under state and federal environmental statutes. As stated at the hearing, providing broad public participation is entirely consistent with USEPA's practice and the purpose of an administrative permit proceeding under

environmental statutes: to elicit all facts and testimony necessary to promote good-decision making and aid the decision-maker in reaching a decision.” Testimony, pp. 20-21.

C. DOE/WID’S PROPOSAL IS UNWORKABLE AND WOULD CREATE SUBSTANTIAL DELAY IN PERMITTING THE WIPP FACILITY.

DOE/WID’s proposal is unworkable and would **create**, not “**avoid**” any delay at a future hearing on the WIPP draft permit and application. First, based upon this administrative record, there is no question that if DOE/WID’s position were adopted and applied to a WIPP permit proceeding, there would be an appeal or other legal challenge regarding the validity of imposing a narrow judicial standard under the broad public participation mandates of the HWA. An appeal of the Secretary’s decision would result in at least a one year or more delay of the permitting proceeding.

Second, DOE/WID provides no mechanism in which the Secretary can “adjudicate” each persons “interest.” As pointed out at the hearing, if a standing provision is required, then the Secretary can expect a “flood” of 100s of potential intervenors especially in controversial matters; the Secretary would have to “adjudicate” and “decide” the merits of person’s “interest.” Any such determination could be appealed; if the Secretary misapplied the law or facts, then the result would be a new public hearing allowing participation consistent with the HWA. Finally, a requirement to prove “standing” provides very little benefit. It is unbelievable that DOE/WID actually believe that requiring a showing of judicial standing would not delay the process, especially given this administrative record where the vast majority of administrative law attorneys support NMED’s position and not a single non-federal facility attorney was supportive of the position taken by DOE/WID. Further, as noted by the New Mexico Attorney General’s Office, NMED’s proposal is more sound [than DOE/WID’s] because under DOE/WID’s proposal “we’re all going to be spending a lot more time litigating the requirements of standing.....” Transcript, pg. 156. In short, DOE/WID’s proposal is unworkable and poses significant risks to the efficiency of the permitting process. NMED’s proposal avoids this significant risk entirely and in a manner consistent with the law and Department practice.

D. THERE IS VERY LITTLE PRACTICAL DIFFERENCE BETWEEN THE RIGHTS OF PERSONS AS “INTERESTED PARTICIPANTS” UNDER THE EXISTING 20 NMAC 1.4 AND PERSONS AS “PARTIES” UNDER THE PROPOSED 20 NMAC 1.4.

DOE/WID submitted a chart regarding the rights of persons under the proposed rule, existing rule and DOE/WID’s proposals. As an initial matter, the chart does not appear to be entirely accurate. For example, “interested participants” have a right under 20 NMAC 1.4 to present rebuttal testimony and to enter exhibits. See 20 NMAC 1.4.400.B and 1.4.301.B As stated at the hearing, the proposed participation requirements pose very little practical differences and reflect NMED practice; they are either “virtually identical” to current practice under the or the functional equivalent. Transcript at pp. 29-30. The practical differences are that under the

proposed change, all parties can file motions and service of any such motion would be required.

Based upon NMED's experience and expertise, it has determined that the benefits far outweigh any potential for harm. The potential for harm raised by some parties related the a fear that people may abuse the process as a "party." However, as pointed out at the hearing and recognized by many parties this fear is unjustified and more importantly, the potential for 100s of people abusing the process exists under the current regulations as well. Yet, "we don't see huge numbers of people coming forward to be interested participants, and I don't think that's going to change" Transcript pg. 31-33. Further, the purpose of this rulemaking is to address the real problems that exist under the current procedures as noted by the parties at the hearing.

E. DOE/WID'S OTHER COMMENTS

In its post-hearing comments, DOE/WID state that "NMED did not address any of DOE/WID's other comments," presumably meaning DOE/WID's July 3, 1997 Comments 4,8-13, 16-18, and 20-34. The following constitutes NMED's responses to these comments:

1. Section 111.A.2 (DOE/WID Comment No. 4, 7/3/97)

DOE/WID's suggestion regarding the "administrative record" revisions is not supportable. Permit applicants are required to provide NMED "all" materials (including materials it considers confidential) which it proposes as part of an application to be included in the permit, including materials incorporated by reference and which NMED uses to evaluate the application. The applicant can request that application materials be withheld from the public on the ground that they are confidential. See e.g. 40 CFR 270.12. Obviously, the Department must review such information to determine whether to approve, approve with conditions or deny a permit. NMED is perplexed that DOE/WID believes that these materials should not be provided to the State. DOE/WID's request would additionally delete the term "public." NMED is required under the Inspection for Public Records Act to disclose all "public" documents. For these reasons, NMED would recommend that the Hearing Officer not adopt DOE/WID's proposal.

2. Section 111.A.17 (DOE/WID Comment No.5, 7/3/97)

NMED and all the other parties at the hearing addressed the issue of "standing" and the definition of "party." For the reasons stated at the hearing and in post-hearing comments, NMED requests the Hearing Officer to reject a standing provision related to requiring a showing of substantial interest in the outcome of the proceeding or another judicial intervention standard under Rule 24 to be imposed for "parties" or "interested persons."

3. Section 111.25, 26 and 27 (DOE/WID Comment No.10)

NMED does not agree that a definitions for "technical witness" is necessary because this term is not used in these regulations. However, the term "technical written statement" is used in

Subpart 300; a person can present either technical testimony (oral) or written technical statements. In either case, any such person would have to comply with the pre-filing requirements under that Section. To avoid any confusion, NMED has suggested modifying the term “technical testimony” to include the language set forth in Exhibit 1.

4. Section 112.B (DOE/WID Comment No.11)

DOE/WID as well as one other party has suggested that this sentence be reinstated. NMED believes it is redundant; however, to the extent it will aid the public in understanding the role of a hearing officer, NMED does not object and has included such language in Exhibit 1.

5. Section 112.B (DOE/WID Comment No.12)

NMED does not believe that the addition of “pre- and post-hearing motions” is necessary or helpful. The state and federal rules of civil procedure do not recognize this distinction; the distinction could imply that the hearing officer could not rule on a motion that arises at the hearing.

6. Section 112.A (DOE/WID Comment No.13)

NMED does not recommend defining the term “financial interest.” This term is consistent with the judicial conflict rules; determinations of what constitutes a “financial interest” is best made on a case-by-case basis, based upon applicable case law and in the discretion of the hearing officer.

7. Section 115 (DOE/WID Comment No. 16)

NMED does not agree with DOE/WID’s suggested change. The relevancy of Section 115.3 relates to the calculation of deadlines for filing, not whether the agency is open or not. Consistent with state and federal rules of civil procedure, NMED believes it best to calculate the date of filing to not include legal holidays, state or federal. Further, there is a potential for confusion. For example, President’s Day is recognized as a federal holiday on February 17th, the State, however, recognizes it on November 28, 1997. This fact, however does not appear “officially” upon any calendars and “officially” President’s Day is not November 28th. Therefore, it is entirely possible that a person relying upon the official state calendar of holidays would under DOE/WID’s proposal include November 28th for filing purposes. To avoid potential confusion, and to provide all parties the benefit of the doubt, NMED has construed this term consistent with state and federal courts to include all state and federal holidays. If a document is received on a dated NMED is open, whether or not technically a “holiday,” it will be accepted for filing.

8. Section 115.C.2 (DOE/WID Comment No.17)

NMED proposed striking this paragraph because it is unnecessary. Documents are

required to be certified under Section 115.B.3); the contents of the certification are contained in Section 116. However, NMED has provided suggested changes to the certification form adding the phone number and address, as shown in the attached Exhibit 1.

9. Section 115.E/201.B (DOE/WID Comment Nos. 18 and 20)

DOE/WID misconstrues this requirement. The administrative record is defined as “public” records which are always available for public review at any time. The requirement to forward the administrative record to the hearing clerk prior to the hearing is an added requirement upon the Department, and it would be physically and administratively impossible to forward the record upon the filing of a Hearing Determination as suggested by DOE/WID. NMED receives materials which are part of the “administrative record” up until the date before the public hearing. There is no violation of due process; the administrative record is always subject to review at any time even if it has not been transferred to the hearing clerk at the time of filing. To avoid any confusion on this issue and to address this concern, NMED has provided a revision stating that the “administrative record” is “available for public review at any time after submittal of a permit application.” This revision is set forth in Section 201.B. See Exhibit 1.

10. Section 202 (DOE/WID’s Comment No.21)

DOE/WID’s misconstrues this procedure; the Notice of Docketing is required only after a “completeness determination” or “Hearing Determination.” As repeatedly stated at the hearing, and obvious from review of these procedures, the term “completeness determination” is relevant only for permitting under the Solid Waste Act. By definition, these procedures do not apply to “Acts” unless a hearing is required. See Sections 102, 111.5. If an “Act” does not require a hearing prior to the issuance of a permit, then these procedures do not apply.

11. Section 203.B.2.e (DOE/WID’s Comment No.22)

NMED’s permit procedures, defining three separate types of records, is not unnecessary and has been proposed to avoid confusion based upon past experience. The definition of “administrative record” is necessary because these are the public documents the Department uses to evaluate a permit. See Exhibit B and testimony. The definition of “record proper” is necessary because these are defined as the administrative record and all documents filed with the hearing clerk (e.g exhibits, motions, findings of fact etc.). The “hearing record” on the other hand is the “record proper” and written transcript or recorded tape; it is the basis for any appeal and is a legal term of art. As pointed out at the hearing, these are distinct types of documents needed to satisfy distinct requirements. The suggested change, however, as used in this context makes sense; NMED has proposed making this change for clarification. See Exhibit 1.

12. Section 203.D (DOE/WID’s Comment No.23)

NMED does not support this revision because it would be inconsistent with current

regulations. The Hazardous Waste Management Regulations, 20 NMAC 4.1.901.A provide that “hearings shall be in Santa Fe or within any area of the state substantially affected by the proceedings as specified by the Secretary.” The EIB has adopted these regulations, and as such, this is the law. Further, 40 CFR 124.1(e) and 40 CFR 271.14 do not require a State to impose such a narrow requirement. See attached relevant regulatory provisions. NMED’s proposed language allows for public hearings to be held in locations consistent with the various statutory and/or regulatory mandates. Section 203 provides the Secretary with discretion to determine that a public hearing be held in Santa Fe or “in the area affected by the facility which is the subject of the proceeding.” This is consistent with 20 NMAC 4.1.

13. Section 204 (DOE/WID Comment No. 24)

NMED does not agree that a party has a “right” to a hearing; the hearing officer should have discretion to determine whether a motion “hearing” is necessary or not. As drafted the hearing officer has this discretion, a party which believes oral argument is necessary can always request in the motion that a “hearing” be held.

14. Section 301.A. (DOE/WID Comment Nos. 25 and 26)

NMED rejected DOE/WID’s proposal for all the reasons stated at the hearing and above in this post-hearing comments. DOE/WID’s definition of “interested person” is inconsistent with the law, other environmental statutes and not supported by other participants at the hearing. Further, DOE/WID’s proposal would create an additional, unnecessary level of participation which would necessitate numerous other changes.

15. Section 401.B (DOE/WID Comment No. 27)

DOE/WID’s proposed changes are unnecessary. The point is clear. Order of testimony: (1) “**Testimony by, and examination of, the Applicant or Petitioner.**” The Applicant is required to file a Notice of Intent identifying all of its witnesses (technical and non-technical). It is obvious that the applicant can only testify through its witnesses. There is no requirement that they present testimony in four different phases of the hearing! The applicant is required to present testimony first and may, if desired, present rebuttal testimony. DOE/WID’s proposal, on the other hand, is problematic and would leave the door open to argument; are applicants required to present a non-technical witness first? NMED does not believe the other proposed changes are necessary or serve any useful purpose at all.

16. Section 402.B. (DOE/WID Comment No. 28)

DOE/WID’s proposal to limit cross-examination to narrow persons who prove that they have a stake in the outcome of the permit proceeding would violate each of the environmental statutes at issue for the reasons stated at the hearing and in this post-hearing comments. No other non-Doe attorney at the hearing supported DOE/WID’S suggestion that the HWA supports such

a narrow requirement.

17. Section 402.B. (DOE/WID Comments No. 29)

NMED has included this revision in the attached Exhibit 1.

18. Section 402.B. (DOE/WID Comment No. 30)

NMED disagrees with DOE/WID's suggestion. A person who files an entry of appearance, but not a timely notice of intent to present technical testimony, is precluded from presenting technical testimony.

19. Section 502 (DOE/WID Comment No. 32)

A proposed deadline of 30 days, unless otherwise ordered by the Hearing Officer, to file proposed findings of fact is based upon prior agency practice and in most all instances, insufficient time. DOE/WID's proposal of 15 days is absurd and must be based on lack of experience and/or familiarity with administrative practice. It would be difficult to imagine any support for this provision by the other parties or persons who have routinely filed post-hearing submittals in controversial matters.

20. Section 502 (DOE/WID Comment No. 33)

NMED does not believe this language is necessary or useful. The provision disallowing new evidence is all encompassing.

21. Section 503.C. (DOE/WID Comment No. 34)

If the Secretary or Hearing Officer allow oral argument, the deadline should be extended at the discretion of the Secretary and unless otherwise required by law.

2. **HUNTER BURKHALTER**

A. Sections 111, 301 and 402.

In his post-hearing comments, Mr. Burkhalter suggests bifurcating the process by providing public participation procedures that differ for permitting actions under the SWA and the AQCA than those required under the "broader" provisions of the HWA and WQCA. Mr. Burkhalter "acknowledges, that the standing threshold is typically broader in the administrative context than it is in the judicial context" and suggests that a standing provision for SWA and AQCA permit proceedings be adopted based upon a showing that a person "will be substantially and specifically affected by the facility at issue in the proceeding." PHC, pp.2-5. As grounds, Mr. Burkhalter states that the level of public participation mandated by the SWA and AQCA varies

‘significantly’ from the standards under the HWA and WQA; and that the HWA and WQA contain “fairly broad requirements for public participation.” Id.

NMED agrees with Mr. Burkhalter’s position that the public participation required under the HWA and WQA are broad. A review of the statutory mandates under the SWA and AQCA, however, do not support any “significant” difference or support the imposition of a narrow “standing” provision for public participation; they do, allow NMED to impose requirements upon the public that allow for reasonable participation. This is precisely what NMED has proposed to do. The SWA provides that “a reasonable opportunity for all persons desiring to be heard on a ... permit action to be heard without making the hearing process unreasonably lengthy or cumbersome or burdening the record with unnecessary repetition.” NMSA 1978, 74-9-29.A(4). The AQCA provides that the EIB shall adopt regulations specifying the public notice, comment period and public hearing, if any required prior to the issuance of a permit...” For the reasons stated previously, a standing provision is inconsistent with the statutory mandates of the Acts, Department practice and USEPA administrative practice. Further, as previously stated, the practical and administrative difficulties of imposing such a requirement are enormous. See discussion at Section II.1.C. In addition, as most of the parties acknowledged at the hearing, there is very little practical difference between the rights of public participation between “interested participants” and “parties.” NMED believes that one set of uniform permitting procedures will result in a more consistent and better process for all of its permitting programs.

B. Section 111 - technical testimony

NMED does not support this provision because it would appear to preclude members of the public from providing testimony regarding how a facility has impacted their health. As pointed out at the hearing, this type of information is important and the type of testimony the Acts are intended to elicit at a public hearing. The issue of how a proposed facility will impact public health is often the issue at permit hearings; to require the public to hire “experts” to testify regarding their health would be unprecedented and in violation of each of the Acts broad public participation procedures. See also Transcript pp. 105-108; 168-171.

C. Section 112.B

NMED has incorporated this revision in the attached Exhibit 1.

D. Section 203.B.2.

NMED does not support this revision because it would not include state and federal agencies which may be affected such as the New Mexico Public Lands Office. Further, although ten miles may be adequate under the SWA, it may not be adequate or even an applicable standard under other environmental acts such as the WQA. Therefore, NMED determined it best to leave this flexible and broad to accommodate the various concerns.

3. **THE NEW MEXICO ENVIRONMENTAL LAW CENTER**

A. **Sections 106 And 108.**

NMED agrees with the New Mexico Environmental Law Center's (NMLC) proposed changes and has included them in Exhibit 1. These changes further clarify the stated intended purposes.

B. **Section 111.A.**

NMED disagrees with NMLC's proposed changes. The term "public" record cannot be struck because NMED is required to disclose all "public records" as defined under the Inspection of Public Records Act; the operative legal standards are contained in that Act and are broader than NMLC's proposal. For example, non-public records would not be part of an administrative record. NMLC's additional change relating to the term "party" is unnecessary. The administrative record is what the Department uses to form its permitting decision; the record is formed prior to permitting action and there are no "parties" during this stage of the process. The administrative record will include all public records submitted to the Department and used in evaluating an application regardless of who sends it (applicant, public group, state agency....).

C. **Section 111.A.16 (materials definition)**

NMED believes this is unnecessary. A physical object that is "considered in proceedings" should be introduced as an exhibit by the appropriate person. NMED believes that the regulations provide for admission of any such evidence.

D. **Section 111.A.17 and 112.C.1.**

NMED agrees with these proposals and has included them in Exhibit 1.

E. **Section 111.A.18**

The term "record" is undefined and if used should track the term "public record" as defined in the Public Records Act.

F. **Section 114**

NMED agrees in part with NMLC's suggested changes. The prohibition should begin to apply on the date that the Secretary or Division makes a completeness determination, because the Division will make a completeness determination under the SWA. However, the provision "whichever is earlier" should not be adopted because the two actions under these procedures are mutually exclusive; there cannot be a completeness determination under the SWA and hearing determination. NMED's revisions are attached in Exhibit 1.

G. Section 115.

NMED believes this is unnecessary and an issue which is properly in the hearing officer's discretion.

H. Section 201.

This provision is unnecessary because the administrative record is defined as public records which by law are available for public review.

I. Section 201.C

NMED disagrees with this proposed change. The contents of an application and/or variance are permitting issues and governed under the applicable permitting regulation, and should not be part of a procedural hearing rule.

J. Section 203.B.2.a and 205A

NMED has provided more time for public notice (60 days) and not 30 days. NMED believes that NMLC is confused in this regard and would not suggest shortening the time period to 30 days to provide public notice for the reasons stated by NMLC: insufficient time. Further, NMLC's comment with regard to the contents of the notice of hearing under 203.B.2. is covered under 203.B.1.e.

K. Section 301, 302.A

NMED disagrees with NMLC's proposed change to these sections. A waiver provision would undercut the entire purpose of requiring pre-filing; the requirement of filing a notice of appearance is simple. If a person intends to present technical testimony, that person should be able to timely file a notice of appearance and/or notice of intent. If not, then these procedures do not preclude presentation of non-technical testimony by any person.

L. Section 302.A.

NMED strongly disagrees with NMLC's proposal. The entire purpose of this requirement is to avoid surprise at a public hearing and to require disclosure of technical testimony and technical materials. If deleted, then there is no requirement to pre-file technical written statements to aid the parties in avoiding surprise tactics at the hearing by any person.

M. Section 401.A.

NMED strongly disagrees with NMLC's proposal which places the burden upon the Department for any challenged condition even by a third party! The Department should not bear the burden of proof for a condition which is challenged, regardless of who proposes the condition.

N. Section 205.B.2 and 401.B

NMED has incorporated these changes in Exhibit 1.

4. WASTE MANAGEMENT, INC. (WMI) - MR. RICHARD VIRTUE

A. Section 110 (PHC, 8/22/97)

NMED has incorporated these changes into Exhibit 1.

B. Section 111.A.17 (PHC, 8/22/97)

At the public hearing and its pre-hearing submittal, WMI supported NMED's proposed procedure with the "difference" being the inclusion of a process to allow for persons to "object" to an entry of appearance. "The difference between our proposal and [NMED] is there would be a right to object...we're not proposing adopting the Rule 24 standard." See WMI's 7/8/97 submittal and testimony pp.120-121. In its post-hearing comments, WID urges that the Hearing Officer adopt a Rule 24 standard or a standard based upon procedures utilized by the New Mexico Public Service Commission. With regard to Rule 24, WMI's position is not credible or supportable. WMI provides no legal analysis whatsoever supportive of this standard and NMED provided substantial support for this Hearing Officer to reject such an intervention standard and any other standard based upon showing substantial outcome. With regard to the NMPUC, WMI provides no statutory support for its position. The environmental acts at issue here are vastly different than the relevant statutory provisions applicable to the NMPUC. USEPA's permitting procedures, imposing no standing provision, provide far more relevant guidance. Further, unlike the NMPUC, there are vastly different policy reasons for mandating broad public participation under state and federal environmental statutes. See discussion above. NMED seriously doubts that four public entities in support of its proposal would have no "concern" with WMI's proposal. For all the reasons stated previously, NMED would encourage the Hearing Officer to reject WMI's proposal.

C. Cross-examination (WMI's PHC, pg. 7-8; 7/8/97 comments)

WMI's proposal to include a new category of notices and require the public to "pre-file" a notice of intent to examine a witness is inconsistent with Department practice, unprecedented and in violation of the broad statutory provisions regarding public participation. The Acts do not limit the public's right to examine a witness. In fact, the public hearings are to afford the public a right to ask questions about a proposed facility in the community. WMI's proposal may make sense in a trial setting, but not a public hearing. NMED does not believe that this is "reasonable" and would strongly object.

D. WID's July 8, 1997 comments

1. Section 301.A.

NMED disagrees that a procedure should be established which requires the Secretary of Hearing Officer to adjudicate whether a person has “sufficient interest.” WMI provides no such procedure and this suggestion would result in substantial delay associated with potentially 100s of minitrials on whether a person has a “sufficient interest.” For the reasons previously stated, NMED would also not support WMI’s suggestion that parties be allowed to “object” to an entry of appearance. If a party wanted to object, the current procedures do not prohibit any party from filing a motion with the Hearing Officer. Therefore, this change is unnecessary and in conflict with NMED’s proposal.

2. Section 301.B. and 302.B

NMED is uncertain about the intent of WMI. The failure to timely file results in preclusion of presentation of technical testimony and/or becoming a party. There is no requirement a person pre-file simply to present non-technical general public comment. WMI’s proposal assumes that this is a requirement and therefore the regulations would have to be redrafted in other areas as well to incorporate this concern. The Acts are intended to allow public participation. If this language were adopted any person could raise due process violations to exclude the the public rights to participate in a permitting action.

WMI’s proposal to require a 30 day pre-filing requirement for *general non-technical testimony* is unprecedented in Department history and contrary and inconsistent with the statutory mandates of the Acts. The Acts at issue expressly allow for broad public participation. The SWA provides all persons the right to present views at a permit hearing. Further, NMED’s federal primacy under each Act is based upon providing public participation consistent with the federal regulations which similarly provide for broad public participation. See Testimony by Mr. Meikljohn at pp. 170-172.

3. Section 302.B.1 (7/8/97)

NMED’s original proposal at the hearing incorporated these suggested changes.

4. Section 302.A (7/8/97)

NMED’s proposal allows flexibility in establishing the pre-filing date for submittals of technical testimony and imposes only a minimum requirement of 14 days; NMED agrees with WMI that 14 days may be insufficient time in all instances. Therefore, this determination can be made on a case-by-case basis and set in the Notice of Hearing. NMED would not recommend a thirty days requirement because it may violate procedural requirements under some of the Acts. Transcript, pp. 136-137.

5. Section 401.

NMED’s proposal allows the Hearing Officer to allow rebuttal, as appropriate. The right of a party to have rebuttal depends upon the issue and burden. There are numerous instances in which the Department, for example, would preserve rebuttal for purposes of a condition which

the applicant challenges on direct. WMI's proposal may unduly limit other parties rebuttal rights.

6. Section 402.B.

See discussion above at Section III.4.C (page 18).

5. **THE ATTORNEY GENERAL OF NEW MEXICO**

A. Section 201.B.

The Attorney Generals Office (AGO) has suggested that the administrative record be available for public review at least 60 days prior to the hearing. As previously stated, the administrative record is always available for public review at any time. Any person can familiarize themselves with the record at any time. For these reasons, NMED does not believe that the AGO's proposal is appropriate. However, to clarify this issue NMED would not object to a provision stating that the "administrative record" is available for public review at any time after submittal of a permit application. This revision is attached in Exhibit 1.

B. Section 203.B.

NMED's proposal currently states that the Notice of Hearing be published at least 60 days prior to the hearing.

C. Section 302.A.1. f & g.

NMED agrees with the AGO's suggested revisions. See Exhibit 1.

D. Section 203.B [new section]

NMED objects to the AGO's proposal on the ground that it is inappropriate as a rule and inconsistent with the HWA, NMED's authority, prior practice and excessively burdensome. Under the HWA and regulations, the Secretary has the legal authority to set a time, date and location of the hearing. 20 NMAC 4.1.901.E. The AGO's proposal effectively delegates the Secretary's authority to the public in violation of these regulations. Further, it would be virtually impossible for the Secretary to seek public comment and actually accommodate the "public's" interest with regard to time, date and place of hearing and contents of the statements of intent. There is no doubt that every person will have a different interest. Any such requirement would be a disaster, unduly burdensome and excessive.

IV. CONCLUSION

NMED has reviewed and responded to the public comments raised in submittals and at the public hearing. For all of the reasons stated previously, NMED respectfully requests that the Hearing Officer adopt NMED's proposed new permit procedures, as outlined in the attached Exhibit 1.

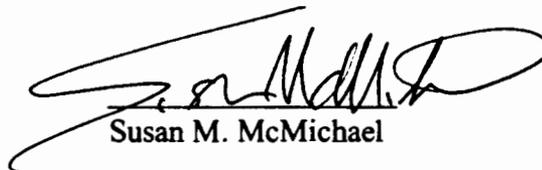
Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Response to Comments* was mailed to the parties at the following addresses on the attached list on September 19, 1997.



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