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COURT OF APPEALS OF NEW MEXICO
FILED
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Patricia C. Monzanares

IN THE COURT OF APPEALS

FOR THE

STATE OF NEW MEXICO

UNITED STATES OF AMERICA,
DEPARTMENT OF THE AIR FORCE
APPELLANT

v. No. 12,550

STATE OF NEW MEXICO
HEALTH AND ENVIRONMENT DEPARTMENT,
ENVIRONMENT IMPROVEMENT DIVISION
APPELLEE

DOCKETING STATEMENT

Appeal from the award of a Hazardous Waste Operating Permit by the New Mexico Environmental Improvement Division.

FOR APPELLANT

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INTRODUCTION

COMES NOW the Appellant, the United States of America, Department of the Air Force, and submits this docketing statement in support of its appeal of the Hazardous Waste Facility Permit issued to Kirtland Air Force Base by the New Mexico Health and Environment Department, Environmental Improvement Division, dated July 24th, 1990. Notice of appeal was filed in this matter on August 22nd 1990, and this docketing statement is filed in accordance with the provisions of SCRA 12-208 and 12-601.

NATURE OF PROCEEDINGS

This appeal is the result of a Hazardous Waste Facility Permit (Part B permit) issued to the United States Air Force, Kirtland Air Force Base, by the New Mexico Health and Environment Department, Environmental Improvement Divison. During 1988 Kirtland Air Force Base (hereinafter KAFB) initiated proceedings under the application process for a hazardous waste storage permit for KAFB. Prior to and during the application process KAFB was operating a hazardous waste storage facility under the provisions of an interim (Part A) permit in accordance with the regulations of the New Mexico Hazardous Waste Act and the Environmental Protection Agency.

Located on KAFB are three primary hazardous waste storage areas. KAFB is the owner of the facility; however, the operator of the hazardous waste storage facilities is the Defense Reutilization and Marketing Region (DRMR) located in Ogden, Utah, with its local operating agency the Defense Reutilization and Marketing Office (DRMO).

On or about February 28, 1989, KAFB was notified by the New Mexico Environmental Improvement Division (NMEID) the application process and information from KAFB was complete. Thereafter on or about June 30, 1989, NMEID issued a draft Part B permit to KAFB. In accordance with the provisions of the New Mexico Hazardous Waste Act, NMSA §74-4-1 et seq., a period of public input and hearings was begun. Written public input and comments with regard to the draft Part B permit were allowed until October 16, 1989. Input included comments from the public at large as well as KAFB, DRMR, and the Environmental Protection Agency. A public hearing was held on the draft permit October 24, 1989.

On July 24, 1990, the NMEID issued to KAFB a Hazardous Waste Facility Permit (Exhibit A hereto) which included the Hazardous Waste Operating Permit (Exhibit B hereto) which were effective for a period of ten years. Pursuant to SCRA 12-601, Notice of Appeal was filed with this court and NMEID on August 22, 1990.

APPEAL TIMELY FILED

This is the appeal of an administrative agency decision pursuant to SCRA 12-601. The date of the issuance of the Kirtland Air Force Base Operating permit, No. NM 9570024423-1, is July 24, 1990, by NMEID. The Notice of Appeal was filed on August 22, 1990, within 30 days of the issuance of the permit and in accordance with the provisions of NMSA Section 74-4-4.2g.

STATEMENT OF FACTS

KAFB is a large, multi-agency, federal facility located in the southeast quadrant of Albuquerque, New Mexico. Units from all armed services plus the Department of Energy, Sandia Laboratories, and other federal agencies maintain offices or operating sites on KAFB. The Department of the Air Force is the "host" organization and as such is the owner or manager of the real property located on KAFB.

Located within the confines of KAFB are three hazardous waste storage facilities operated by DRMR through its local DRMO. The operation of the waste storage facilities is in cooperation with KAFB and is the designated arrangement under the Department of the Defense for storage and disposal of hazardous waste.

The operation of the hazardous waste storage facilities is

and Recovery Act (RCRA) 42 USC 6901 et seq., which is incorporated in the New Mexico Hazardous Waste Act, NMSA §74-4-1 thorugh 74-4-13. The implementation and enforcement of RCRA on the federal level is through regulations established by the Environmental Protection Agency as set out in the Code of Federal Regulations. The NMEID has adopted the Environmental Protection Agency regulations without substantial change and designated the regulations the Hazardous Waste Management Regulations (HWMR).

Under RCRA and the federal regulations, states may establish their own set of environmental protection regulations which are in compliance with federal regulations. Federal agencies will comply with state regulations which meet the requirements of RCRA and federal regulations. Accordingly, KAFB did proceed to apply with the State of New Mexico and NMEID for a state permit for storage of hazardous waste at KAFB. On May 10, 1989, KAFB paid the permit fee established by the State of New Mexico in the amount of $27,000.00 and otherwise cooperated with NMEID in the application procedure for the Part B permit.

STATEMENT OF ISSUES PRESENTED

Pursuant to NMSA §74-4-4A, the NMEID shall establish regulations for the management of hazardous waste storage equivalent to, but not more stringent than, federal regulations established by RCRA and the Environmental Protection Agency. It is well established in New Mexico law that NMEID may not

promulgate regulations more restrictive than federal law. Public Service Company v. NM Environmental Improvement Board, 89 NM 223, 549 P.2d, 638 (Ct. App. 1976).

It is submitted by the appellant, that NMEID in the issuance of the Part B permit to KAFB exceeded its authority at law and that the Part B permit is more restrictive and more stringent than federal regulations; imposes arbitrary and capricious time limits; establishes classes or categories of waste and/or materials not supported by substantial evidence; attempts to regulate materials by arbitarily redefining materials as waste; and generally as drafted the Part B permit is confusing and inconsistent so as to provide no effective notice to KAFB as to which activities are acceptable and which are prohibited.

Specifically, appellant raises the following issues related to the permit:

a. Whether the inclusion of Sections III.M. and III.N. in the permit is more restrictive than federal regulation, is arbitrary and not supported by substantial evidence?

In the final draft of the Part B permit, NMEID has added Sections III.M., Contingency Planning for Building 1024 and III.N, Notification of Albuquerque Fire Department, page III-6 as additional requirements of KAFB. The requirements established by

Section III.M. require KAFB to cooperate and coordinate with the local emergency planning committee provided for by Title III of the Superfund Amendment and Reauthorization Act of 1986 (SARA). By the definitions contained in 40 CFR 355.20, Title III SARA Emergency Planning and Notification Requirements do not include facilities owned and operated by the federal government or an agency thereof. This position is further reiterated by the Environmental Protection Agency in its publication entitled, "Federal Facilities Compliance Strategy," dated November 1988. Therefore, the additions as contained in Section III.M by NMEID exceed the authority of NMEID, are not otherwise in accordance with the law, and represent an abuse of discretion on the part of NMEID.

Section III.N requires notification of the Albuquerque Fire Department, medical, retirement and convalescent facilities within one-quarter mile of the storage facility in the event of a "massive" release or fire at Building 1024. Once again, this appears to be a requirement drawn from Title III of SARA and as noted above would not apply to the federal government. Therefore, it is a requirement not otherwise in accordance with the law.

KAFB supports the concept of community cooperation in emergency situations and will voluntarily notify the Albuquerque Fire Department in the event of a fire or spill, but this is an unauthorized requirement of a hazardous waste storage permit.

Further, the requirement is confusing, ill-defined, and not supported by substantial evidence on the record. The requirement purports to direct the permitee (KAFB) to make the contact with the various designated agencies. However, KAFB does not operate the facility and would not necessarily have immediate knowledge of any spill or fire at the facility. This requirement is better directed at DRMO.

Finally, without any standard, criteria or evidence on the record, NMEID has required the reporting of any "massive" release or fire at Building 1024. The term "massive" without some objective criteria is without meaning and therefore an arbitrary and capricious definition and not supported by substantial evidence on the record.

b. Whether the inclusion of a 90-day automatic reclassification of materials as waste is not otherwise in accordance with the law, is arbitrary and capricious and not supported by the evidence?

At page PA II-2, p.2 the last two sentences of the second paragraph, NMEID has added the following:

> If these attempts are unsuccessful, the material is designated a waste and enters the hazardous waste management system. Any hazardous material held by DRMO for more than 90 days after turn-in will automatically be classified as a hazardous waste.

It is the obligation and directive of DRMO to find alternate users for hazardous materials which may be acquired or generated at a facility. The definition and distinctions between hazardous waste and materials are contained in 40 CFR 261 et seq. There is absolutely no authority in 40 CFR 261 which establishes that after 90 days materials automatically become hazardous waste. The NMEID and the New Mexico Hazardous Waste Act do not control nor apply to materials. By arbitrarily defining materials as hazardous waste after 90 days and without any supporting facts on the record, NMEID has exceeded its authority, violated §74-4-4A and generally acted in an arbitrary and capricious manner.

c. Whether the inclusion of annual waste stream verifications required by NMEID was arbitrary, capricious and not supported by evidence on the record?

Under Section II.C, General Waste Analysis, at the first line of page II-2, NMEID has required that each waste stream shall be verified annually as a part of the quality assurance program.

This requirement is further reiterated at page PA II-2, p.6 line 7 wherein KAFB is required to annually update the waste profile sheet for each continuous waste stream or whenever a waste stream changes. KAFB submits that this requirement for annual sampling and analysis is overly burdensome, more stringent than the requirements contained in 40 CFR 264.13(a)(1) and there

is no evidence on the record to support the need, rationale, or justification for annual sampling requirements. The requirements of 40 CFR 264.13 are that analysis and sampling will be conducted when the owner or operator is notified or has reason to believe the process or operation generating hazardous waste has changed or the source of hazardous waste has changed. It is submitted that the requirements for annual sampling and analysis exceed the requirements of the federal regulations and there are no facts on the record to support the arbitrary establishment of annual sampling requirements.

d. Whether by the creations of Group I and Group II waste the NMEID has exceeded its authority and imposed restrictions more stringent than federal regulations?

By its definitions found in paragraph 3, page PA II-2, p.2 NMEID has created two categories of hazardous waste referred to as Group I - waste which are contained in their original containers and Group II - all other waste. By its classification and subsequent additional handling requirements specific to each group of waste NMEID has exceeded the authority and definitions as contained in 40 CFR 261.2 and 261.3. Therefore, NMEID has created requirements more stringent than federal regulations, is in violation of §74-4-4A and as such the definitions are not otherwise in accordance with the law.

Without citing each additional reference to Group I or Group II waste, appellant submits that the provisions of the permit from Section C-1, page PA II-2, p.2, through Section C-3(c)(4), page PA II-2, p.8 are more stringent and restrictive than federal regulation; therefore, not otherwise in accordance with the law.

e. Whether the requirement of specific tests on all waste exceeds federal regulations and thus is more stringent than federal regulations?

In addition to classifying waste as Group I or Group II waste, NMEID at page PA II-2, p.5 lines 10-15 has attempted to designate which tests will be run on hazardous waste. By the specification of which tests will be required on all waste, NMEID has exceeded the authority and requirement for testing in accordance with 40 CFR 264.13 and the manner of testing as contained in 40 CFR 260 Appendices 2 and 3. The manner in which tests are to be conducted is specified by 40 CFR Part 260, however, the type of test to be run or the appropriateness of certain tests is to be determined by the nature of the waste and the knowledge and experience of the waste generator. The addition of the required tests exceeds the authority of NMEID, is unsupported on the record, represents a more stringent requirement than that of federal regulations, and represents an arbitrary and unsupported burden on KAFB.

f. Whether the training requirements of the permit exceed federal regulation, are unsupported on the record, and are otherwise unsupported at law?

NMEID in Section L-1(c)(1) of the permit at page PA II-5, p.7 has required that all generation point personnel undergo essentially the type of training required of storage facility personnel. Storage facility personnel are the individuals responsible for the operation of the hazardous waste storage facility. Generation point personnel are those individuals at various work sites where hazardous waste are produced and transported to the hazardous waste sotrage facility. Under the provisions of 40 CFR 262.34(c)(1) a generator or satelite accumulation point may accumulate as much as 55 gallons of hazardous waste at or near any point of generation without a permit or even an interim status permit and therefore is not subject to the training requirements of 40 CFR 264.16. By its attempt to extend training requirements to satelite accumulation points, the NMEID has exceeded its authority, established a permanent requirement more stringent than federal regulation, and therefore is in violation of NMSA §74-4-4A.

Further, at Section L-1C, page PA II-5, p.7 the NMEID has established in the permit that the training director is Mrs Carol Givens. While the information on Mrs Givens is currently correct, to establish in the Part B permit the name of an

individual to serve as training director for a permit which is to last for ten years is inappropriate, tends to imply the government must retain only Mrs Givens as the training director, and therefore is an abuse of discretion on the part of NMEID.

g. Throughout the permit the use of the words "permitee", "owner", and "operator" appear to be used interchangeably and in an inconsistent manner, thus making it unclear as to which requirements are applicable to the permitee and owner--KAFB or the operator--DRMO or both. The Part B permit therefore should be redrafted to make clear the intended application of the requirements and/or to include a definition section setting forth clearly the intent of the NMEID as to permitee, operator, and owner. Without such clarification, the permit appears to be arbitrary, confusing, and unenforceable.

LIST OF AUTHORITIES AND RELATED APPEALS

The specific authorities relied on with regard to each of the issues raised for appeal have been incorporated in the discussion of issues raised on appeal. However, in summary form, the authorities are as follows:

Public Service Company v New Mexico Environmental Improvement Board, 89 NM 223, 549 P.2d 638 (Ct. App. 1976) which stands for the proposition that the Environmental Improvement Division may

not promulgate regulations more stringent or restrictive than federal law.

Matter of proposed Revocation of Food and Drink, etc., 102 NM 63, 691 P.2d 64 (Ct. Appeals 1984) wherein the court ruled that administrative bodies are creatures of statute and can only act on those matters which are within the scope of the authority delegated to them. An agency may not enlarge its authority or modify statutory provisions through rules or regulations.

Duke City Lumber Company v NM Environmental Improvement Board, 101 NM 291, 681 P.2d 717 (1984) holds an agency decision may be set aside if it is found to be arbitrary, capricious, not supported by substantial evidence of record or otherwise not in accordance with the law.

NMSA §74-1-1 et seq. which are the general provisions, duties, powers, and purposes of the Environmental Improvement Act.

NMSA §74-4-1 et seq. the New Mexico Hazardous Waste Act and in particular the following:

a. §74-4-4A which limits the authority of the NMEID board from adopting regulations more stringent than federal

regulations adopted by the Federal Environmental Protection Agency pursuant to the Resource Conservation and Recovery Act;

b. §74-4-4.2 concerning the issuance of hazardous waste permits and the method of appeal for such permits.

The New Mexico Hazardous Waste Management Regulations (HWMR) which are the State adoption of the Code of Federal Regulations established by Environmental Protection Agency under RCRA.

42 USC 6901 et seq., the Resource Conservation Recovery Act (RCRA) which is the basic authority established by Congress for the control and management of hazardous waste.

42 USC 9601 et seq., the Comprehensive and Environmental Response, Compensation, and Liability Act (CERCLA) which includes the provisions of the 1986 Superfund Amendments and Reauthorization Act (SARA) concerning obligations of facilities and states to prepare emergency response plans and reporting requirements.

42 USC 11001 et seq., which contains the Emergency Planning and Community Right to Know Act (SARA, Title III) and imposes certain requirements on states and nonfederally owned facilities for emergency planning and notification procedures and information to the community concerning potential hazardous waste located at such facilities.

40 CFR Part 260 et seq., which are the federally promulgated regulations by the Environmental Protection Agency for the implementation of RCRA.

40 CFR Part 355 which contains the federal regulations promulgated by the Environmental Protection Agency for the implementation of the CERCLA and which contains the exemption of federal facilities from the reporting and emergency planning provisions of Title III of SARA.

"The Federal Facilities Compliance Strategy," published November 1988, by the Environmental Protection Agency which further reiterates federal agencies are not legally obligated to comply with the requirements of SARA, Title III.

While appellant is unaware of any other appeals directly related to this case, on information and belief, there is pending before the Court of Appeals for the State of New Mexico the case of United States of America v State of New Mexico, Case No. 12233 and 12190 consol. involving the appeal of a Part B permit issued to the Los Alamos National Laboratory.

RECORDED PROCEEDINGS

The proceedings during the public hearing on this matter held October 24, 1989, were not tape recorded but rather recorded by a

certified court reporter, by a stenographic recording, from the firm of Howard Henry Court Reporting Company. The transcript has been transcribed and will be part of the record on appeal. There were no other hearings in this matter.

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