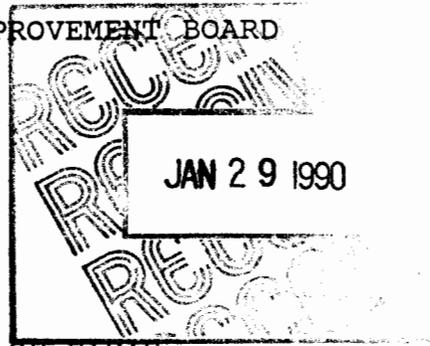


BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

IN THE MATTER OF APPEALS OF
HAZARDOUS WASTE FACILITY PERMIT
NO. 0890010515-1 ISSUED TO
LOS ALAMOS NATIONAL LABORATORY



MEMORANDUM IN SUPPORT OF EID'S
MOTION TO DISMISS APPEALS FOR LACK OF JURISDICTION

I. INTRODUCTION

The United States Department of Energy ("DOE") and the Regents of the University of California ("the University") on December 20, 1989 filed a Petition For Limited Review with the Environmental Improvement Board ("EIB"). Ms. Barbara Jaramillo on December 12, 1989, and Ms. Joan Berde on December 8, 1989 also filed appeals. The EIB directed all parties who participated in the hearing below to file their responses to the appeals by January 29, 1990. The Environmental Improvement Division ("EID") has filed a Motion to Dismiss Appeals For Lack of Jurisdiction ("Motion to Dismiss"). This Memorandum supports EID's Motion to Dismiss. EID this same date has filed a separate response to the DOE's, the University's, Ms. Barbara Jaramillo's and Ms. Joan Berde's appeals.

**II. THE EIB DOES NOT HAVE JURISDICTION TO HEAR HAZARDOUS WASTE
PERMIT APPEALS**

1. Powers and Duties of Administrative Agencies.

Administrative agencies have only those powers that the legislature gives them, and can act only on matters within the scope of the authority delegated to them. Public Serv. Co. of N.M. v. New Mexico Envir. Imp. Bd., 89 N.M. 223, 549 P.2d 638 (Ct.App.

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1976). An administrative agency has both the powers expressly delegated to it, and all powers that may be fairly implied from the statutory grant of power. Wimberly v. N.M. State Police Bd., 83 N.M. 737, 497 P.2d 968 (1972). An agency may not, however, enlarge its authority through rules and regulations, nor, through regulations, modify the statutory provisions. Matter of Prop. Revoc. of Food & Drink, Etc., 102 N.M. 63, 691 P.2d 64 (Ct. App. 1984). An agency has no power to create a rule or regulation that is not in harmony with its statutory authority. Rivas v. Board of Cosmetologists, 101 N.M. 592, 686 P.2d 934 (1984).

The right of appeal is a matter of substantive law and outside of rule-making power. In the judicial setting, a court is powerless to create a substantive right of appeal by adopting a rule providing a procedure for appeals. Hillhaven Corp. v. State of New Mexico, Human Services Dept., No. 11,102 (Ct.App. filed April 6, 1989) (Vol. 28, No. 19, May 11, 1989 Bulletin), citing State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947), Eastern Indem. Co. v. Heller, 102 N.M. 144, 692 P.2d 530 (Ct.App. 1984).

Administrative bodies cannot delegate power, authority and functions which under the law may be exercised only by them, and which are quasi-judicial in character or which require the exercise of judgment. Kerr-McGee Nuclear Corp. v. New Mexico Env'tl. Imp. Bd., 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981).

2. Legislative Delegation of Powers and Duties In the Hazardous Waste Act.

The Hazardous Waste Act, §§74-4-1 et seq. ("HWA"), §74-4-

4.A.(6) authorizes the EIB to promulgate regulations requiring hazardous waste management permits:

The board shall adopt regulations ... requiring each person owning and operating an existing facility ... to have a permit issued pursuant to requirements established by the board ...

HWA, §74-4-4.A(7) authorizes the EIB to promulgate regulations establishing the procedure for issuance, suspension and revocation of such permits:

... establishing procedures for the issuance, suspension and revocation of permits issued under Paragraph (6) of this subsection, which regulations shall provide for prior notice and an opportunity for a hearing prior to the issuance, suspension or revocation of the permit unless otherwise provided in the Hazardous Waste Act;

HWA, §74-4-2.C. authorizes EID to review permit application and issue such permits:

... Upon a determination by the director that the applicant has met the requirements adopted pursuant to Section 74-4-4 NMSA 1978, the director may issue a permit or a permit subject to any conditions necessary to protect human health and the environment (emphasis added)

Finally, HWA, §74-4-2.G. and H. provide that appeals from permit decisions are from decisions by the EID Director and not from the EIB:

G. Any person adversely affected by a decision of the director concerning the issuance ... of a permit may appeal the decision by filing a notice of appeal with the court of appeals within thirty days after the date the decision is made (emphasis added)

H. Upon appeal, the court of appeals shall set aside the decision of the director (emphasis added)

Contrast the structure the legislature established in the HWA with the structure it established in the Air Quality Control Act, §§ 74-2-1 et seq. ("AQCA"). AQCA, §74-2-7.A. authorized the EIB to promulgate regulations requiring air permits:

By regulation the board may require persons ... to obtain a permit

AQCA, §74-2-7.C. authorizes the EIB to promulgate regulations establishing the procedure for processing applications of such permits:

The board shall adopt such regulations as are necessary to implement this section, including regulation governing the deadlines for processing permit applications and the public notice, comment period and public hearing, if any, required prior to the issuance of a permit. ...

AQCA, §74-2-7.E.-G. authorizes EID to review permit applications and issue such permits. AQCA, §74-2-7.K authorizes permit applicants to request a hearing before the EIB if applicants are dissatisfied with the EID Director's permit decision:

If the applicant is dissatisfied with the action taken by [EID], he may request a hearing before the board. ... (emphasis added).

AQCA, §74-2-7.M provides that appeals to the Court of Appeals are appeals from decisions by the EIB and not from the EID Director:

An applicant may appeal the decision of the board by filing with the court of appeals Upon appeal, the court of appeals shall set aside the decision of the board ... (emphasis added).

Contrast, too, the structure the legislature established in the Occupational Health and Safety Act, §§50-9-1 to 50-9-25 NMSA 1978 ("OHSA"). OHSA, §50-9-7 authorizes the EIB to promulgate regulations. OHSA, §50-9-9 establishes the Occupational Health and Safety Review Commission ("OHSRC"). OHSA, §50-9-17.E authorizes employers to request a hearing before the OHSRC for review of certain EID actions:

... If the matter is not successfully resolved at the informal administrative review, the petition may request a hearing

before the occupational health and safety review commission after the administrative review. ...

OHSA, §50-9-17.G. provides that appeals to the district court are from orders of the OHSRC and not from decisions of the EID Director:

Any person adversely affected by an order of the commission ... may, after exhausting his administrative remedies, obtain a review thereof in the district court Upon appeal, the court may set aside the action of the commission

3. Statutory Construction.

The standard for statutory construction as recently stated by the Court of Appeals is:

In construing the meaning of a particular statute, a reviewing court's central concern is to determine and give effect to the intention of the legislature. State ex rel. Kline v. Blackhurst, 106 N.M. 732, 749 P.2d 1111 (1988). In determining this intent, we look primarily to the language of the act and the meaning of the words, and when they are free from ambiguity, we will not resort to any other means of interpretation. See State v. Pitts, 103 N.M. 778, 714 P.2d 582 (1986); New Mexico Beverage Co. v. Blything, 102 N.M. 533, 697 P.2d 952 (1985).

Montez v. J & B Radiator, Inc. and Mountain States Mutual Casualty Co., No. 10,744 (Ct. App. filed 7/20/89) (Vol. 28, No. 38, 9.21.89) quoting Security Escrow Corp. v. State Taxation & Revenue Department, 197 N.M. 540, 543, 760 P.2d 1306, 1309 (Ct.App. 1988).

Where words used in a statute are free from ambiguity and doubt, and express plainly, clearly, and distinctly the intent of the legislature, there is no need to construe the statute. Absent clear intent to the contrary, statutory words are given their ordinary and usual meaning; words and phrases ordinarily are construed according to context and approved usage of the language. Matter of Prop. Revoc. of Food & Drink, Etc., 102 N.M. 63, 691 P.2d

64 (Ct. App. 1984).

Courts assume "that the Legislature is well-informed as to existing statutory ... law ... and that it does not intend to enact useless statutes" (citation omitted) State ex rel. Bird v. Apodaca, 91 N.M. 279, 284, 573 P.2d 213, 218 (1977). And, "[a]ll statutes are presumed to be enacted by the legislature with full knowledge of all other statutes" New Mexico Municipal League, Inc., 88 N.M. 201, 206, 539 P.2d 221, 226 (Ct. App. 1975).

4. Argument.

The EIB's regulation purporting to authorize the EIB to, upon appeal, review the EID Director's permit decisions and substitute the EIB's legal and factual conclusions for the EID Director's in a permit action is ultra vires. Like in the judicial setting, an administrative body is powerless to create a right of appeal where that purported right exceeds the grant of authority from the legislature, and purports to take that right away from the agency that the legislature delegated the decision authority to.

The legislature in enacting the Hazardous Waste Act expressly required the following: (1) that the EID Director make permit decisions; (2) that the EIB establish regulations about the procedure by which the EID Director makes the permit decisions; and (3) that appeals of the EID Director's permit decisions be taken to the court of appeals.

The EIB has the authority to promulgate the procedure by which the EID Director makes the permit decision, such as by a public hearing, with a hearing officer, and on a transcribed record; the

EIB does not have the authority, however, to give itself the power to substitute its legal and factual conclusions for EID's, i.e., the power to change the EID Director's permit decision. That is an abrogation of EID's authority and responsibility under the Hazardous Waste Act.

It is contrary to what the legislature unambiguously required in the statute. If the legislature had wanted to give affected parties the substantive right to appeal the EID Director's permit decisions to the EIB, and if it wanted the court of appeals to review the EIB's legal and factual conclusions instead of the EID Director's conclusions, it could easily have so specified. Since it did not, the statute can only be construed to conclude that the EIB is not authorized to review the EID Director's permit decisions, and substitute its legal and factual conclusions for the EID Director's. The legislature intended only that the EIB establish regulations of general applicability pertaining to permit applications, and that the EID Director evaluate and make the final decisions on particular applications.

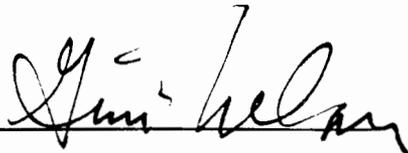
Looking at other statutes, it is even clearer that the legislature did not intend for the EIB to review the EID Director's permit decisions. The Air Quality Control Act and the Occupational Health and Safety Act set up very different regulatory schemes, demonstrating that the legislature knows how to do so.

III. CONCLUSION

For the reasons set forth above, EID respectfully requests that the EIB enter an order dismissing DOE's, the University's, Ms.

Jaramillo's and Ms. Berde's appeals for lack of jurisdiction.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Gini Nelson", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF EID'S MOTION TO DISMISS APPEALS FOR LACK OF JURISDICTION was mailed on this 29TH day of January, 1990, to the following:

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