



BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

NO. 098890890

In Re: HAZARDOUS WASTE)
FACILITY PERMIT NO:)
N.M. 08900105515-1 ISSUED BY)
THE ENVIRONMENTAL IMPROVEMENT)
DIVISION, New Mexico Health)
and Environment Department.)

*response to motion to
dismiss
(EID lacks jurisdiction
to hear appeals)*

PETITIONERS' REPLY TO EID'S MOTION TO DISMISS

The United States Department of Energy ("DOE") and The Regents of the University of California (the "University") oppose the Environmental Improvement Division's ("EID") Motion to Dismiss for Lack of Jurisdiction (hereafter "Motion to Dismiss" or "Motion"). EID's Motion challenges the Environmental Improvement Board's ("Board") jurisdiction to review the Petition for Limited Review ("Petition") filed by DOE and the University (collectively referred to in prior pleadings and herein as the "Permittees").

The Permittees filed a petition with the Board on February 7, 1990 asking the Board to strike EID's Motion

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to Dismiss from the administrative record. Without prejudice to the Permittees' position, the Permittees hereby address the substantive merits of EID's Motion.

The Permittees assert that the Motion is not well taken for the following reasons:

I. EID is estopped from taking the position that the Board has no jurisdiction to review the Permittees' Petition for Limited Review which was filed in accordance with Sections 902.F and 902.G of the Hazardous Waste Management Regulations ("HWMR-5" or the "Regulations") and pursuant to EID's instruction.

II. EID has waived its statutory right under HWA 74-1-9(H) to challenge Sections 902.F and 902.G of the Regulations.

III. The New Mexico Environmental Improvement Act Sections 74-1-1 et seq., NMSA 1978 (1989 Rplmt.), which created the Board, empowers the Board to promulgate regulations concerning the issuance of hazardous waste facility permits.

IV. The Board's promulgation of a regulation providing for administrative review of the Director's issuance of a hazardous waste permit is within the Board's statutory authority.

I

EID IS ESTOPPED FROM ASSERTING THAT THE
BOARD LACKS JURISDICTION.

New Mexico law provides that the doctrine of estoppel may be applied against a state agency when "right and justice demand it." Bien Mur Indian Market Center, Inc. v. New Mexico Taxation and Revenue Department, 108 N.M. 355, 358 P.2d 885, 888 (Ct. App. 1988); Peltz v. New Mexico Dept. of Health and Social Services, 89 N.M. 276, 551 P.2d 100 (Ct. App. 1976); United States v. Bureau of Revenue, 87 N.M. 164, 531 P.2d 212 (Ct. App. 1975); Silver City Consol. Sch. Dist. No.1 v, Board of Regents, 75 N.M. 106, 401 P.2d 95 (1965).

A. To establish the right to estop an agency, the party claiming estoppel must show the following elements as related to the agency to be estopped:

- 1) Conduct which amounts to a false representation or concealment of material facts, or at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;
- 2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and
- 3) knowledge, actual or constructive, of the real facts.

National Advertising Company v. New Mexico State Highway Commission, 91 N.M. 191, 193, 571 P.2d 1194 (1977).

These three elements are easily met. First, the record is replete with written and oral assertions from EID and the EID Director that the proper procedure for a person adversely affected by the decision of the Director is to submit a petition for review to the Board. See Permittees' Proposed Findings Nos. 2.0-2.7; EID's November 20, 1989 transmittal letter to DOE; and the EID Director's November 8, 1989 letter to DOE. In addition, the Hazardous Waste Facility Permit No. 0890010515-1 issued to the Permittees expressly refers to HWMR-5 Part IX, Sections 902.F and 902.G as the proper avenue for review. Second, EID clearly expected that the public would act upon its misrepresentations. The Permittees, Ms. Joan Berde, Ms. Barbara Jaramillo and others who wrote the Board acted upon EID's consistent representations and direction from EID's attorney, the Director and other EID personnel.¹ Third, there is a legal presumption

¹Permittees are not abandoning the position taken in their Findings 5.0-5.5 and Conclusion No. 7. These letters do not factually or legally represent Petitions. The fact they wrote the Board, rather than appealing to the Court of Appeals, is evidence they also relied on the EID's representations.

that the policies committed to an agency by the legislature will be carried out if the agency's settled rules are adhered to, and a legal presumption that the agency is aware of its own rules and regulations and abides by them. Niglio v. New Jersey Racing Comm'n, 385 A.2d 295 (N.J. 1978). 73 C.J.S. Public Administrative Law and Procedure, § 96 Effect of Rules and Regulations, pg. 625 note 34 (1983).

B. The essential elements of estoppel as they relate to the party claiming the estoppel are:

- 1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question;
- 2) reliance upon the conduct of the party estopped; and
- 3) action based thereon of such character as to change his position prejudicially.

National Advertising Company v. New Mexico State Highway Commission, 91 N.M. 191, 193, 571 P.2d 1194, 1196 (1977).

The Permittees lacked the knowledge and the means of knowledge that EID would change its position. In addition, it has not been established that the Regulations are invalid. The Permittees acknowledge that the Hazardous Waste Act refers to an appeal to the court of appeals from the "decision of the Director"; however, as discussed in Parts III and IV below, ample facts and legal

authority exist which support the Board's authority to clarify undefined statutory terms. In addition, EID's conduct led the Permittees to believe that EID would adhere to the Board's Regulations. See Niglio v. New Jersey Racing Comm'n, supra. Further, any question which might arise should be resolved in favor of following the written and oral instructions from EID.

Without a doubt the Permittees, as well as members of public and public interest groups, relied on the representations of EID. In addition, EID itself has represented the validity of Section 902 of the Regulations in the past. See Permittees' Proposed Findings Nos. 2.1-2.7.

Finally, and most importantly, the Permittees have been prejudiced by EID's present position regarding the Regulations and the Board's jurisdiction. EID did not assert its present position at the early stages of this administrative review process, but waited until well after the expiration of the thirty-day period allowed for adversely affected parties to petition the Board for review. EID's delay in raising this issue has committed the Permittees to an administrative review which is now bogged down in technicalities orchestrated by EID. The Permittees have been prejudiced because they have expended

considerable time, effort, and expense in pursuing what EID now claims is a fruitless review - the same review procedure which EID promoted and instructed the Permittees to pursue.

Furthermore, Permittees are prejudiced because they now find themselves defending the jurisdiction of the Board in order to support their right to administrative review. The Permittees and the public should not be placed in the position where they must expend their own time, effort and resources to defend the validity of a state agency's regulations. Once this matter is resolved, and the decision of the Director is final, an appeal to the court of appeals will necessarily involve issues which have nothing to do with the merits of the permit or the Permittees' challenge to the jurisdiction of the Director to regulate radioactivity.

II

EID HAS WAIVED ITS STATUTORY RIGHT TO CHALLENGE THE REGULATION.

The Regulations providing for the Board's review of the decision of the Director were promulgated in March 1983. Pursuant to the Environmental Improvement Act, the term "person" is defined to include "the state or any agency ... thereof" Section 74-1-3(C).

Section 74-1-9(H) of the Environmental Improvement Act, provides that any

person who is or may be affected by a regulation adopted by the board, may appeal to the court of appeals for further relief ... within thirty days after filing of the regulation under the State Rules Act.

Nearly seven years after promulgation of the March 1983 regulation, EID now claims that it is affected by this regulation because it illegally permits the Board, in the course of administrative review, to substitute its judgment for that of EID Director. (EID's Memorandum in Support of EID's Motion to Dismiss Appeals for Lack of Jurisdiction ("Memorandum") at page 7.)

EID has waived its right to challenge the validity of Section 902.G. because it failed to do so within 30 days of its filing under the States Rules Act.

It is a general rule of law that any agency must comply with its own regulations. Regulations exist for the benefit of the agency and the public, and the agency must be held to the terms of its regulations. Tew v. City of Topeka Police & Fire Civil Service Comm., 697 P.2d 1279 (Kan. 1985). The regulation at issue is presumptively valid and is binding on the Board until it is properly repealed or a court declares it invalid. Neither the

Board nor EID can, through the challenge now posed by EID, avoid the consequences of their own regulation. State Ex. Rel. Nevada Tax Com'n v. Saveway, 668 P.2d 291 (Nev. 1983); Burke v. Children Services Div., 607 P.2d 141 (Or. 1980); and Ritter v. Board of Com'rs of Adams County Public Hospital District No. 1, 637 P.2d 503 (Wash. 981).

III

THE BOARD HAS THE POWER TO PROMULGATE
REGULATIONS ADDRESSING PROCEDURES,
REVIEWS, AND DECISIONS.

The New Mexico Environmental Improvement Act, Sections 74-1-1 et seq. NMSA 1978 (1989 Rplmt.) creates two administrative bodies: The Board, whose duties include the promulgation of regulations and standards, HWA 74-4-4 and 74-1-8; and EID, whose duties include enforcement of "the rules, regulations and orders promulgated by the board." HWA 74-1-6. In simple terms, the Board makes the rules and EID enforces them.

The New Mexico Legislature delegated broad authority to the Board to adopt regulations "for the management of hazardous waste." HWA 74-4-4(A). The Hazardous Waste Act in Section 74-4-4(A) requires the Board to adopt regulations

(6) requiring each person owning and operating an existing facility or planning to construct a new facility

... to have a permit issued pursuant to
requirements established by the board;
(Emphasis added.)

as well as regulations

(7) establishing procedures for the
issuance [of permits] ...

Subsections (6) and (7), quoted above, make it clear that the legislature requires the Board to regulate the method and means under which a Hazardous Waste Act permit is issued.

While it is the Director who prepares, signs and mails the permit, it is the Board which determines the procedure under which the permit is issued. The Director has no rulemaking authority. The Director is bound by, and must enforce, the Regulations promulgated by the Board.

The legislature empowered the Board, not the EID Director, with the authority to establish procedures for the issuance of permits. These procedures include the right to a hearing prior to issuance of a Hazardous Waste Act permit. The regulations provide an administrative review of the decision of the Director as part of the procedure of issuing a permit.

EID asks the Board to contrast the Hazardous Waste Act to the Air Quality Control Act, Sections 74-2-1 et seq. NMSA 1978 (1989 Rplmt.) ("AQCA"), and tries to draw a distinction between the two. A distinction cannot

be drawn because the two were enacted from different legislative perspectives.

The Environmental Improvement Act makes a clear distinction between the AQCA regulations and the Hazardous Waste Act regulations. The standards which apply to the Hazardous Waste Act are not the same standards which apply to promulgation of regulations under the AQCA. In relevant part, Section 74-1-9(C) of the Environmental Improvement Act states:

The standards for regulations set forth in Subsection A [Subsection B] of this section, do not apply to the promulgation of regulations under the Air Quality Control Act. (Emphasis added.)

It is apparent from a study of the AQCA and the Hazardous Waste Act that the legislature chose to impose greater legislative control over the rulemaking authority of the Board in the area of air quality. AQCA defines many specific duties, including the avenue for an administrative appeal.

The legislative control in the Hazardous Waste Act stands in contrast to the legislative control in the AQCA. The legislature granted broader authority in Sections 74-4-4(A)(6) and (7) of the Hazardous Waste Act than in the AQCA.

The Board's authority is not limited to those powers expressly granted to the Board by the Hazardous Waste Act, but the authority is also derived from the Environmental Improvement Act. This authority includes all powers that may be fairly implied from the statute. Kerr McGee Nuclear Corp. v. NM. Environmental Improvement Board, 97 N.M. 88, 637 P.2d 38 (Ct. App. 1981). The Board has exercised this implied authority in promulgating regulations concerning the requirements and procedures for issuance of a permit. These requirements and procedures include an administrative review by the Board.

IV

THE BOARD'S PROMULGATION OF A
REGULATION PROVIDING FOR ADMINISTRATIVE
REVIEW OF THE DIRECTOR'S ISSUANCE OF A
HAZARDOUS WASTE PERMIT IS WITHIN ITS
STATUTORY AUTHORITY.

EID argues that the Board's promulgation of Sections 902.F and 902.G of the Regulations authorizes the Board to entertain appeals of the decision of the Director concerning the issuance of a hazardous waste permit, and that these regulations are ultra vires. (EID's Memorandum, p. 6). EID's position is incorrect. These regulations do not provide for an appeal; they provide for an administrative review. The Regulations clarify the undefined term "decision of the director" for purposes of

taking an appeal. The Regulations do not circumvent the appeal provisions of HWA 74-4-4.2(G).

EID ignores the fact that the Hazardous Waste Act does not define the term "decision of the director." EID further fails to recognize that the Board has the authority to clarify undefined terms.

Rules and regulations enacted by an agency are presumed valid and will be upheld if reasonably consistent with the statutes that they implement. A party challenging a rule adopted by an administrative agency has the burden of showing the invalidity of the rule or regulation. Tenneco Oil Company v. New Mexico Water Quality Control Commission, 107 N.M. 469, 760 P.2d 161 (Ct. App. 1987), cert. denied by Navajo Refining Co. v. New Mexico Water Quality Commission, 106 N.M. 714, 749 P.2d 99 (1988). The regulations clarifying what constitutes a Director's decision are consistent with the Hazardous Waste Act. EID has failed to meet its burden of proof.

The Board's issuance of 902.F HWMR-5 defining what constitutes a decision of the Director for purposes of appeal is consistent with the general policy of providing an administrative review of decisions made by agencies. Without review by the Board, the public is

deprived of a review by a group of people designated by the Governor, with the advice and consent of the New Mexico Senate, to be responsible for environmental management and consumer protection.

EID's position that the Board's review of the Director's decision is an abrogation of EID's authority is not in the public interest. Without an administrative review, the public will be deprived of the right to comment on the Director's decision and the Board will be denied the opportunity to review the decision and place its opinion in the record. As a consequence, the New Mexico Court of Appeals will be unable to determine from the record the Board's position concerning the scope and application of the Board's own Regulations.

CONCLUSION

EID has waived its right to challenge the regulations and is estopped from asserting its jurisdictional attack with respect to the permit issued to the Permittees. The Board's regulations are legally enforceable and EID cannot attack the regulations that by law EID is required to enforce. The legislature has delegated to the Board a broad scope of authority in which to promulgate regulations and to establish procedures for the issuance of hazardous waste permits. The Board has

lawfully created an administrative review of the Director's decisions through defining an undefined term contained in the Hazardous Waste Act. For these reasons the Motion to Dismiss is without substantive merit and should be dismissed.

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We hereby certify that we have delivered a copy of the foregoing pleading to counsel for the Environmental Improvement Division and counsel for the Environmental Improvement Board this 8th day of February, 1990.

SUTIN, THAYER & BROWNE
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