

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

4859

REGENTS OF THE UNIVERSITY OF)
CALIFORNIA,)
))
Appellant,)
))
v.)
))
THE ENVIRONMENTAL IMPROVEMENT)
DIVISION OF THE NEW MEXICO)
HEALTH AND ENVIRONMENT)
DEPARTMENT; RICHARD)
MITZELFELT, Director,)
Environmental Improvement)
Division, and THE)
ENVIRONMENTAL IMPROVEMENT)
BOARD,)
))
Appellees.)

NO. 12190

COURT OF APPEALS OF NEW MEXICO
FILED
APR 11 1990

Patricia C. Margarinos

Appeal From The Decision of the Director
of the Environmental Improvement Division
of the New Mexico Health and Environment Department

DOCKETING STATEMENT

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In accordance with SCRA 1986 12-208, Appellant, The Regents of the University of California (the "University"), hereby submit the following Docketing Statement:

Nature Of Proceeding

This is an appeal from the decision of the Director of the Environmental Improvement Division ("EID") to place certain conditions upon Hazardous Waste Facility Permit No. NM 0890010515-1 (the "Permit") issued to the United States Department of Energy ("DOE") as owner of the Los Alamos National Laboratory ("LANL") and the University as operator of the LANL facility (hereinafter jointly referred to as the "Permittee").

Date Of Order And Notice Of Appeal

The Environmental Improvement Board (the "Board") executed a general order establishing February 19, 1990 as the date of the final decision of the Director of EID (the "Director") for purposes of appeal to the New Mexico Court of Appeals. On March 12, 1990, the Appellant timely filed a Notice of Appeal with the New Mexico Court of Appeals.

Statement Of The Case

Pursuant to the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of

1976 ("RCRA"), as amended 42 U.S.C. § 6926, the State of New Mexico is authorized by the Environmental Protection Agency ("EPA") to issue and enforce hazardous waste facility permits. Pursuant to NMSA 1978 § 74-4-4 (1989 Repl. Pamp.) of the New Mexico Hazardous Waste Act (the "Hazardous Waste Act"), the Board issued the New Mexico Hazardous Waste Management Regulations, EIB/HWMR-5, amended July 9, 1989 ("HWMR-5").

"Hazardous waste" is regulated by Subtitle C of RCRA and the Hazardous Waste Act and is defined as a type of "solid waste." Solid waste is also a defined term and specifically excludes "source, special nuclear, or byproduct material" defined and regulated by the Atomic Energy Act of 1954, as amended 42 U.S.C.A. 2011 et seq. Thus, substances which are not "solid waste" cannot be "hazardous waste" and are not subject to RCRA or the Hazardous Waste Act.

In 1985, the Permittee submitted an application for a hazardous waste permit in accordance with RCRA and the Hazardous Waste Act. The Director held public hearings on July 18-19, 1989 on the proposed Draft Permit in accordance with Section 74-4-4.2 of the Hazardous Waste Act and HWMR-5 Section 902.A. EID provided both a written

statement and oral testimony at the hearings stating that EID has no authority to regulate radioactive waste under RCRA or the Hazardous Waste Act. In addition, EID's representatives testified that the permit at issue could not regulate radioactive waste in any way.

On November 20, 1989, the Director issued a corrected Permit to DOE and the University as operator of the DOE-owned LANL facility pursuant to RCRA and the Hazardous Waste Act. The Permit expressly provided it would become effective in accordance with HWMR-5, Part IX, Sections 902.F and 902.G.

The Permit contains approximately 400 pages of conditions and terms of operating procedures with which the Permittee must comply. Failure to comply with any of these terms and conditions may subject the Permittee to enforcement action and substantial fines and penalties. This appeal arises out of the decision of the Director to impose the following three specific conditions upon the Permit regulating radioactive waste:

- (1) Module V, Section E (10) of the Permit requires continuous monitoring of radioactivity from the exhaust stack of the controlled air incinerator;

- (2) Module V, Section F (9) establishes emission limitations for radioactivity contained in the exhaust gas; and
- (3) Module V, Section C (3) requires the survey of each batch of waste to be incinerated to determine its radionuclide content.

After issuing the Permit, the Director, pursuant to HWMR-5, Section 902.A.8, issued a "Response to Comments on the Draft Hazardous Waste Permit for Los Alamos National Laboratory" ("Response to Comments"). The Response to Comments stated that radioactive wastes are not subject to regulation by RCRA or the Hazardous Waste Act. Nevertheless, without legal justification the Director imposed Permit conditions regulating radioactive waste.

The decision of the Director to issue the Permit containing the conditions upon radioactive waste became final and subject to appeal in accordance with Section 902.F HWMR-5 and pursuant to the general order executed by the Board on February 19, 1990.

Issues Presented

1. Whether the decision of the Director to impose the three conditions on the Permit regulating radioactive waste was in accordance with the law.

1.1 Whether EID and its Director have the jurisdiction or authority under RCRA or the Hazardous Waste Act to regulate radioactive waste through permit conditions which impose monitoring requirements on radioactivity and establish standards for exhaust gas radioactivity.

1.2 Whether the Atomic Energy Act of 1954, as amended, preempts the State of New Mexico from controlling activities under the Permit in matters relating to radioactive waste at federal facilities.

2. Whether the decision of the Director to impose the three conditions on the Permit regulating radioactive waste was arbitrary, capricious or an abuse of discretion.

3. Whether the decision of the Director to impose the three conditions on the Permit regulating radioactive waste was supported by substantial evidence.

List Of Authorities

The following authorities are either supportive of or contrary to the contentions raised herein:

Statutes and Regulations

RCRA, 42 U.S.C. § 6926 (1976) (Authorizes the Environmental Protection Agency to authorize the State of

New Mexico to issue and enforce hazardous waste facility permits).

RCRA 42 U.S.C. § 6905(a) (1976) (RCRA does not apply to, or authorize any state to apply RCRA to any activity or substance which is subject to the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 et seq. except to the extent that such regulation is not inconsistent with the requirements of the Atomic Energy Act of 1954).

N.M.S.A. § 74-4-3.1 (The New Mexico Hazardous Waste Act does not apply to any activity or substance which is subject to the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 et seq. except to the extent that such regulation is not inconsistent with the requirements of the Atomic Energy Act of 1954).

N.M.S.A. § 74-4-4.A (1989 Repl. Pamp.) (Requires that the regulations governing the issuance of hazardous waste facility permits be no more stringent than federal regulations adopted by the Environmental Protection Agency pursuant to RCRA).

RCRA, 42 U.S.C. § 6903(5) (1976) (Defines the term "hazardous waste").

40 CFR 261 (D) (Establishes a list of identified "hazardous wastes").

N.M.S.A. § 74-4-3.I. (1989 Repl.Pamp.) (Defines the term "hazardous waste").

RCRA, 42 U.S.C. § 6903(27) (1976) (Defines the term "solid waste").

40 CFR 261.4(a)(4) (Defines the term "solid waste").

40 CFR 261 (C) (Identifies characteristics that if exhibited by a solid waste will establish the waste as a "hazardous waste" unless the waste is specifically excluded from regulation).

N.M.S.A. § 74-4-3.M. (1989 Repl.Pamp.) (Defines the term "solid waste").

HWMR-5 Section 201 (Adopts 40 C.F.R. 261 through July 1, 1988 in its entirety and incorporates the federal regulations into the New Mexico Hazardous Waste Management Regulations).

Atomic Energy Act of 1954, as amended (68 Stat. 923), 42 U.S.C.A. § 2014(z) (Defines the term "source material").

Atomic Energy Act of 1954, as amended (68 Stat. 923), 42 U.S.C.A. § 2014(aa) (Defines the term "special nuclear material").

Atomic Energy Act of 1954, as amended (68 Stat. 923), 42 U.S.C.A. § 2014(e) (Supp.1989) (Defines the term "byproduct material").

10 C.F.R 962 (The term byproduct material as it applies to DOE-owned wastes refers only to the actual radionuclides dispersed or suspended in the waste substance. The nonradioactive hazardous component of the waste substance will be subject to regulation under RCRA).

52 Fed. Reg. 159371 (May 1, 1987) (The term byproduct material as it applies to DOE-owned wastes refers only to the actual radionuclides dispersed or suspended in the waste substance).

51 Fed. Reg. 24504 (July 3, 1986) (The hazardous component of "mixed waste" is regulated by RCRA and the radioactive component is regulated either by the Nuclear Regulatory Commission or DOE).

DOE Order 5400.1 (November 9, 1988) (Standards established by DOE to meet its responsibilities under the Atomic Energy Act of 1954 for radioactive materials not regulated under the Clean Air Act).

53 Fed. Reg. 37045 (September 23, 1988) (Clarification of Interim Status Qualification Requirements for the Hazardous Components of Radioactive Mixed Waste).

RCRA 42 U.S.C. § 6925(c)(3) (1976) (Hazardous waste facility permits issued under 42 U.S.C. § 6925 shall contain such terms and conditions as the administrator of the EPA (or the state) determines necessary to protect human health and the environment).

N.M.S.A. § 74-4-4.2.C. (1989 Repl. Pamp.) (Authorizes the Director of EID to issue hazardous waste facility permits subject to any conditions necessary to protect human health and the environment for the facility).

40 CFR 270.32(b)(2) (Permits issued under 42 U.S.C. § 6925 shall contain terms and conditions as the Administrator or State Director determine necessary to protect health and the environment).

N.M.S.A. § 74-4-4.2.G (1989 Repl. Pamp.) (Persons adversely affected by the decision of the Director concerning issuance of a hazardous waste facility permit may appeal Director's decision to the New Mexico Court of Appeals).

HWMR-5 Section 902.F (The Director's decision to issue a hazardous waste facility permit is not made until the Board renders its decision either sustaining or revising the Director. For purposes of appeal to the New Mexico Court of Appeals the Director's decision must be a final decision under this section).

N.M.S.A. § 74-4-4.2.H (1989 Repl. Pamp.) (Establishes the standard of review for the New Mexico Court of Appeals to set aside the decision of the Director of EID. The Court shall set aside the decision of the Director only if found to be: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law).

HWMR-5 Sections 101, 201, 301, 401, 501, 601, 801, 901 (Incorporates EPA's RCRA regulations at 40 C.F.R. Parts 260-266, 268, 270).

HWMR-5 Part IX (The hazardous waste permit program).

Case Law

Goodyear Atomic Corporation v. Miller, 486 U.S. 174 (1988)

(The activities of federally owned facilities operated by a private party under contract with the United States are shielded by the Supremacy Clause from direct state regulation unless Congress provides clear and unambiguous authorization for such regulation).

Legal Environmental Assistance Foundation, Inc., et al. v. Hodel, 586 F. Supp. 1163 (E.D. Tenn. 1984)

(The most reasonable reconciliation of RCRA and the AEA is that AEA facilities are subject to RCRA except as to those wastes which are expressly regulated by the AEA, i.e. nuclear and radioactive materials).

People of the State of Illinois v. Kerr-McGee Chemical Corp., 677 F.2d 571 (1982), cert. denied, 459 U.S. 1049 (1982).

(The Atomic Energy Act of 1954, as amended, has expressly and impliedly preempted regulation by the state of the radiation hazards associated with nuclear materials. Regulation of non-radiation hazards by the state or their political subdivisions has not, however been preempted).

Northern California Ass'n to Preserve Bodega Head & Harbor, Inc. v. Public Utilities, 61 Cal. 2d 126, 37 Cal. Rptr. 432, 390 P.2d 200 (1964)

(Under subsection (k) of 42 U.S.C. § 2021, the state is empowered to regulate nuclear facilities with respect to matters other than radiation hazards).

Marshall v. Consumers Power Co., 65 Mich. App. 237, 237 N.W.2d 266, 82 A.L.R.3d 729 (1975)

(State of Michigan preempted from regulating matters in the complaint dealing with dangerous radioactive hazards, but it was not prevented from regulating nonradiological hazards).

Matter of Proposed Revocation of Food and Drink, Etc., 102 N.M. 63, 691 P.2d 64 (Ct.App. 1984)

(Administrative bodies are creatures of statute and can act only on those matters which are within the scope of authority delegated to them. An agency may not enlarge its authority or modify statutory provisions through rules and regulations).

Public Service Company of New Mexico v. New Mexico Environmental Improvement Board, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976)

(Administrative bodies are creatures of statute and can act only on those matters which are within the scope of authority delegated to them).

Rivas v. Board of Cosmetologists, 101 N.M. 592, 686 P.2d 934 (1984)

(Action taken by a governmental agency must conform to some statutory standard and a court may reverse the agencies action if it is in excess of its statutory authority or jurisdiction).

Llano, Inc. v. Southern Union Gas Co., 75 N.M. 7, 399 P.2d 646 (1964)

(Questions to be answered by courts on appeals from administrative bodies are questions of law and are restricted to whether the administrative body acted fraudulently, arbitrarily or capriciously; whether the agencies action was supported by substantial evidence; and, generally, whether the action of the administrative body was within the scope of its authority).

Duke City Lumber Co. v. N.M. Environmental Improvement Board, 101 N.M. 291, 681 P.2d 717 (1984)

(An agency decision may be set aside if it is found to be arbitrary, capricious, not supported by substantial evidence in the record or otherwise not in accordance with law. The substantial evidence standard requires that the court review the "whole record" to determine whether there is substantial evidence to support the decision made by an administrative agency).

Viking Petroleum, Inc. v. Oil Conservation Commission, 100 N.M. 451, 672 P.2d 280 (1983)

(Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion).

Perkins v. Dept. of Human Services, 106 N.M. 651, 748 P.2d 24 (Ct. App. 1987)

(Arbitrary and capricious action by an administrative agency consists of a ruling or conduct which, when viewed in light of the whole record, is unreasonable or does not have a rational basis. An abuse of discretion is established if the agency has not proceeded in the manner required by law or the decision is not supported by the evidence).

Garcia v. New Mexico Human Services Dept., 94 N.M. 178, 608 P.2d 154 (Ct. App. 1979) rev'd on other grounds, 94 N.M. 175, 608 P.2d 151 (1980)

(Arbitrary and capricious action by an administrative agency consists of a ruling or conduct which, when viewed in lights of the whole record, is unreasonable or does not have a rational basis).

Wimberly v. N.M. State Police Bd., 83 N.M. 757, 497 P.2d 968 (1972)

(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).

Whether The Proceedings Were Tape Recorded

The proceedings before the Board from which the February 19, 1990 general order was executed were tape recorded. The public hearings which preceded the issuance of the Permit were transcribed.

Related Or Prior Appeals

The United States of America on behalf of DOE filed a notice of appeal with the New Mexico Court of Appeals on March 20, 1990 and its Docketing Statement on

April 6, 1990. The cause number assigned to the United States' appeal is 12233.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of
this Notice of Appeal have been mailed to:

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this 11th day of April, 1990.

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