Apr. 30, 1990

Duplicate

DOI/DOE

docketing statement for appeal

IN THE NEW MEXICO COURT OF APPEALS

UNITED STATES OF AMERICA, Appellant, v. STATE OF NEW MEXICO; and HEALTH AND ENVIRONMENT DEPARTMENT, Environmental Improvement Division, Appellees.	No. DOCKETING STATEMENT

Appellant, the United States of America, on behalf of the United States Department of Energy ("DOE"), in accordance with Rules of Appellate Procedure, SCRA 1986, 12-208, files its Docketing Statement as follows:

(1) Statement of the Nature of the Proceeding

The United States appeals the February 19, 1990, General Order of the New Mexico Environmental Improvement Board ("the Board"), attached hereto. The Order is appealed to the extent it upholds the decision by the Director of the Environmental Improvement Division ("the Director") to issue to DOE hazardous waste facility permit number 089 0010515-1 which contains three conditions regulating radioactive waste. The permit is issued to the Los Alamos National Laboratory pursuant to the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901-6992k, and the New Mexico Hazardous Waste Act ("HWA"), N.M. Stat. Ann. 1978, ch. 74, art. 4, §§ 74-4-1 to 74-4-13 (Michie 1989 Repl.).

15065

(2) Date of Order To Be Reviewed

The General Order under appeal was dated February 19, 1990. This appeal was timely filed on March 20, 1990, within 30 days of the date of such order in accordance with SCRA 1986, 12-601.

(3) Statement of Facts Material To Consideration of Issues

In November 1989, the New Mexico Environmental Improvement Division ("EID") issued hazardous waste facility permit NM 0890010515-1 to the Los Alamos National Laboratory, pursuant to both RCRA and the New Mexico HWA. The permit allows operation of various units, including an incinerator, for the treatment, storage and disposal of hazardous waste at the Los Alamos facility. The permit, among other things, imposes three conditions requiring DOE to: (1) survey each batch of waste treated under the permit to determine its radionuclide content (Permit Condition V.C.3); (2) continuously monitor radioactivity from the exhaust stack during any hazardous waste burn (Permit Condition V.E.10); and (3) assure that the exhaust gas radioactivity measured during operation under the permit does not exceed the background level by fifty percent at any time or by ten percent for more than one minute (Permit Condition V.F.9).

DOE appealed the three permit conditions imposed by the Director to the Board for the purpose of challenging the Director's attempt to regulate the radioactive component of the waste stream through the permit. In response, EID filed a motion to dismiss DOE's appeal, alleging that section 902(G). of the Hazardous Waste Management Regulations ("the Regulations") is

ultra vires and that the Board therefore had no jurisdiction to hear DOE's appeal. Section 902(G). provides that a party who is affected by a decision of the Director may appeal that decision to the Board. After hearing the arguments of interested parties on February 9, 1990, the Board issued a General Order on February 19, 1990, ruling that Section 902(G). of the Regulations is ultra vires. The Order also provides that, pursuant to Section 902(F). of the Regulations, the Order is the final decision of the Director for purposes of appeal to the New Mexico Court of Appeals.

(4) Statement of Issues On Appeal

The issues presented herein arose as set forth in Paragraphs 2 and 3 above.

1. Whether the permit conditions imposed by EID are within RCRA's limited waiver of sovereign immunity for federal facilities, 42 U.S.C. § 6961, since New Mexico has attempted to regulate solely radioactive waste which is not within either RCRA's or HWA's definition of "solid waste."

2. Whether the permit conditions imposed by EID are within RCRA's limited waiver of sovereign immunity for federal facilities, 42 U.S.C. § 6961, since neither the New Mexico Hazardous Waste Act nor the Hazardous Waste Management Regulations impose any "requirements" regulating the treatment, storage or disposal of radioactive waste.

(5) List of Authorities

Cases:

1. Library of Congress v. Shaw, 478 U.S. 310 (1986) (waivers of sovereign immunity strictly construed).

2. Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983) (waivers of sovereign immunity strictly construed).

3. EPA v. California State Water Resources Control Board, 426 U.S. 200 (1976) ("requirements" in waiver of sovereign immunity refer to objective, ascertainable standards and regulations).

4. New York v. United States, 620 F. Supp. 374 (E.D.N.Y. 1985) ("requirements" in waiver of sovereign immunity relate to objective, administratively pre-determined standards or limitations).

5. Legal Environmental Assistance Foundation, Inc. v. Hodel, 586 F. Supp. 1163 (E.D. Tenn. 1984) (§ 6961 clarifies congressional intent to exclude nuclear waste from RCRA coverage).

6. Florida Dept. of Envtl. Regulation. v. Silvex Corp., 606 F. Supp. 159 (M.D. Fla. 1985) (term "requirements" in waiver of sovereign immunity mean specific, precise standards).

7. McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182 (E.D. Cal. 1988) (waivers of sovereign immunity do not allow enforcement against federal facilities of state laws that require ad hoc establishment of standards of conduct by judiciary).

8. Kelly v. United States, 618 F. Supp. 1103 (W.D. Mich. 1985) ("requirements" means objective, quantifiable standards subject to uniform application).

Statutes and Regulations:

42 U.S.C. §§ 6903(27) (RCRA definition of "solid waste").

42 U.S.C. § 6961 (RCRA waiver of sovereign immunity).

42 U.S.C. § 6905(a) (prohibiting state regulation of any activity or substance subject to the Atomic Energy Act except to extent that such regulation is not inconsistent with requirements of Atomic Energy Act).

42 U.S.C. § 2014(e) (Atomic Energy Act definition of "byproduct material").

10 C.F.R. Part 962 (Department of Energy regulation defining "byproduct material").

New Mexico Hazardous Waste Act § 74-4-3(I) (definition of "hazardous waste").

New Mexico Hazardous Waste Act § 74-4-3(M) (definition of "solid waste").

New Mexico Hazardous Waste Act § 74-4-4(A) (Board cannot adopt regulations more stringent that those adopted by EPA pursuant to RCRA).

Hazardous Waste Management Regulations 101, 201, 301, 401, 501, 601, 701, 801, 901 (incorporating EPA's RCRA regulations at 40 C.F.R. Parts 260-266, 268, 270).

(6) Tape Recordings

The February 9, 1990, hearing before the Board was tape recorded.

(7) Prior or related appeal

There is no prior or related appeal. However, the United States, pursuant to 28 U.S.C. § 1345, and the federal question statute, 28 U.S.C. § 1331, has filed a complaint in the United States District Court for the District of New Mexico raising identical issues to those raised herein.

Respectfully submitted,

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BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

STATE OF NEW MEXICO

IN THE MATTER OF
HAZARDOUS WASTE PERMIT
REVIEW PURSUANT TO HAZARDOUS
WASTE MANAGEMENT REGULATION
902(G)

GENERAL ORDER

THIS MATTER came before the New Mexico Environmental Improvement Board (the Board) on February 9, 1990, upon the Board's own motion. On or about July 9, 1989, the Environmental Improvement Board adopted the current Hazardous Waste Management Regulations (HWMR-5). Section 902 of HWMR-5 relates to procedures for granting hazardous waste permits. Section 902(G) is of particular concern to the Board. Section 902(G) provides in relevant part:

> Any person adversely affected by the decision of the Director concerning the issuance, suspension, modification or revocation of a permit may submit a petition for review of the Director's decision by the Environmental Improvement Board.

After hearing the argument of various interested parties and being otherwise fully advised in the matter the board FINDS:

1. That Section 74-4-4(A)(7) NMSA, 1978, requires the Board to adopt regulations establishing procedures for the issuance suspension and revocation of permits, subject to any other provisions of the Hazardous Waste Act.

ATTACHMENT

2. That HWMR-5, Section 902(G) was adopted by the Board pursuant to its authority under Section 74-4-4(A)(7) NMSA 1978.

3. That Section 74-4-4.2(G) NMSA 1978 provides in relevant part:

> Any person adversely affected by a decision of the director concerning the issuance, modification suspension on revocation 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....

4. That as an administrative agency, the Board has only those powers and can only act on those matters which are within the scope of the authority granted to it.

5. That the Board may not create a rule or regulation that is not in harmony with its statutory authority nor may it enlarge or modify its authority by enacting rules and/or regulations.

6. That HWMR-5, Section 902(G), is in apparent conflict with Section 74-4-4.2(G) NMSA 1978 Comp.

7. That the enactment of HWMR-5, Section 902(G) was an exercise in excess of the Board's authority pursuant to Section 74-4-4(A)(7) NMSA 1978, and is otherwise ultra vires.

IT IS THEREFORE ORDERED:

1. That all future petitions for review of the Director's decision be commenced in accordance with Section 74-4-4.2(G) NMSA 1978.

2. That all pending petitions for review be and are hereby dismissed by the Board.

3. That this Order of the Board is a final decision of Director, pursuant to HWMR-5, Section 902(F) and for purposes of appealing to the New Mexico Court of Appeals.

Dated: Feb 19th 1990

Travis Dollar
TRAVIS DOLLAR
Chairman

CERTIFICATE OF SERVICE

I hereby certify that a copy of appellant United States Docketing Statement was served this 5th day of April 1990, by overnight delivery on the following counsel of record:

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