

Director of the Environmental Improvement Division was, in fact, made for purposes of triggering the 30-day appeal requirement. As set forth below, the United States' appeal of the three challenged permit conditions was filed within 30 days of the final decision of the Director of the Environmental Improvement Division ("EID") as required by the New Mexico Hazardous Waste Act ("HWA"), N.M. Stat. Ann. 1978, ch. 74, art. 4, § 74-4-4.2(G), and SCRA 1986, 12-601(A).¹

ARGUMENT

Under the Hazardous Waste Act, "[a]ny person adversely affected by a decision of the [EID] director concerning the issuance, modification, suspension or revocation of a [hazardous waste] 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." NMSA § 74-4-4.2(G) (emphasis added). The HWA does not define what constitutes a "decision of the director" or when such decision is made for purposes of triggering the time for an appeal.²

¹ Prior to filing the notice of appeal herein, the United States filed a complaint, pursuant to 28 U.S.C. §§ 1331 and 1345, against the State of New Mexico and EID in the United States District Court for the District of New Mexico. Because of the important federal questions raised and the significant federal interests implicated by its complaint, the United States believes not only that jurisdiction is proper in the federal district court, but that this dispute is more appropriately resolved by the federal court. Nevertheless, as a purely protective matter, the United States filed a notice appealing the three challenged permit conditions to this Court.

² For this reason, the two cases cited by the Court in its Notice, James v. New Mexico Human Services Dep't Income Support (continued...)

The New Mexico Hazardous Waste Management Regulations ("HWMR") do, however, explicitly identify when the Director's "decision" is made. In Part IX, Section 902.F., entitled "Director's Decision," the regulations state that the Director's decision is not made until it becomes final under Section 902.G. or until the Board renders its decision under 902.F. either sustaining or reversing the Director's decision.³

In this case, therefore, there was no "decision of the director" for purposes of triggering the 30-day appeal time until the Board issued its February 19, 1990, General Order dismissing, among others, DOE's appeal of the LANL permit conditions. In fact, the Board's February 19, 1990 Order specifically states, that "this Order of the Board is a final decision of the Director, pursuant to HWMR-5, Section 902(F) and for purposes of appealing to the New Mexico Court of Appeals."⁴ (See General Order ¶ 3). As a result, a decision of the Director, as required

²(...continued)
Div., 106 N.M. 318, 742 P.2d 530 (Ct. App. 1987), and Lowe v. Bloom, ___ N.M. ___, ___ P.2d ___ (No. 18799, June 20, 1990), are inapposite. Both concern the appropriate forum in which to file a timely notice of appeal not, as here, when the right to appeal is triggered.

³ Regulations promulgated by the agency charged with administering a statute are presumed valid and will be upheld if reasonable and consistent with the statutes they implement. Tenneco Oil Co. v. New Mexico Water Quality Control Commission, 107 N.M. 469, 473, 760 P.2d 161 (Ct. App. 1987) (citing Hi-Starr, Inc. v. Washington State Liquor Control Bd., 106 Wash. 2d 455, 722 P.2d 808 (1986)). Here, the Board has the authority to adopt regulations establishing the procedures for the issuance of hazardous waste facility permits. N.M.S.A. § 74-4-4.A(7).

⁴ HWMR 902.F has not been held to be ultra vires nor has its validity been questioned.

by NMSA § 74-4-4.2(G), was not made until February 19, 1990, and that was the date triggering the 30-day appeal period. Accordingly, the United States' notice of appeal -- which was filed on the 29th day following the Director's decision -- was timely filed.

This result is consistent with well established law which requires the existence of final agency action as a prerequisite for judicial review. See FTC v. Standard Oil Co., 449 U.S. 232, 239-40 (1980) (general principles of administrative law require finality of decision); Acorn v. Tulsa, 835 F.2d 735, 739-40 (10th Cir. 1987) ("[F]actors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue . . .") (citations omitted); Bartlett v. Schweiker, 710 F.2d 1059, 1060 (10th Cir. 1983) ("The final decision requirement is 'central to the grant of subject matter jurisdiction.'") (citation omitted); Franks v. Nimmo, 683 F.2d 1290, 1294 (10th Cir. 1982) ("judicial review is limited to final decisions following the agency's application of its expertise and its steps to correct its own errors in making a proper record, all of which are within the agency's independent administrative process.").

Indeed, this Court specifically has noted that "an appellate court will not review the proceedings of an administrative agency until the agency has taken final action." Harris v. Revenue Div. of the Taxation and Revenue Dep't, 105 N.M. 721, 737 P.2d 80, 81 (Ct. App. 1987) (citations omitted). See also Hillhaven Corp. v.

Human Services Dep't, 108 N.M. 372, 772 P.2d 902, 904 (Ct. App. 1989) (quasi-judicial actions must have reached degree of finality from which an appeal can be taken).⁵ Thus, there simply was no final "decision of the Director," as required by the governing statute, NMSA § 74-4-4.2(G), for purposes of judicial review until the Board's February 19, 1990 Order. Since the United States' notice of appeal was filed within 30 days of that Order, on March 20, 1990, it was timely filed and this Court, accordingly, has jurisdiction to hear the appeal.

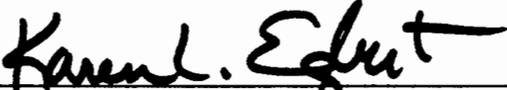
CONCLUSION

For the reasons set forth above, this Court properly has jurisdiction to address the merits of the United States' appeal herein and such appeal should not be summarily dismissed.

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Respectfully submitted,

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⁵ The reasons for such judicial restraint are clear: it gives the agency an opportunity to perfect the administrative record and allows it to exert its regulatory expertise to resolve the issues raised. See New Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 850 (10th Cir. 1982).

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing "MEMORANDUM
IN OPPOSITION TO PROPOSED DISMISSAL OF APPEAL" was served this 10
day of August 1990, by first class mail, postage pre-paid, on
the following:

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