

FILED

AUG 13 1990

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

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 ENVIRONMENTAL)
IMPROVEMENT BOARD,)

Appellees.)

Patricia C. Mangano

No. 12190
Consolidated with
No. 12233

REGENTS OF THE UNIVERSITY OF CALIFORNIA'S
MEMORANDUM IN OPPOSITION TO PROPOSED DISPOSITION

The Regents of the University of California (the "University") oppose the Court's proposed summary dismissal of the University's appeal, Appeal No. 12190.

I.

INTRODUCTION

The Court proposes dismissal of the University's appeal for lack of jurisdiction. Apparently, the Court considers the Director of the New Mexico Environmental Improvement Division's ("EID") November 1989 letters as

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constituting a "final" decision "ripe" for judicial review. As a consequence, the Court considers the March 12, 1990 filing of the University's appeal to be untimely.

The University respectfully maintains that the actions taken by the Director of EID in November 1989 did not constitute a "final decision" of the Director as defined and required under Section 902.F of the New Mexico Hazardous Waste Management Regulations, HWMR-5 (amended 1989) and New Mexico law. Consequently, the Director's actions did not constitute a "final" decision capable of judicial review because it was not "ripe" until the Board entered its February 19, 1990 General Order. (See Exhibit 1)

The Court's Calendar Notice proposing summary dismissal raises the following issue:

1. Was the University's right to judicial review triggered by the Director's transmittal of the Permit in November 1989, or by the February 19, 1990 General Order of the Board?

The University contends that:

1. A decision by an administrative agency official must be "final" in nature before the Court has appellate jurisdiction under SCRA 1986 12-601(A);

2. HWMR-5 Section 902.F defines what constitutes a "decision of the Director" for purposes of appeal to the Court;
3. The Board's February 19, 1990 General Order constituted the "decision of the Director" concerning the issuance of the Permit and triggered the University's right to appellate review;
4. The University timely filed its Notice of Appeal with the Court, and;
5. This Court has jurisdiction to entertain the University's appeal.

II.

PROCEDURAL BACKGROUND

The University's appeal involves a complex administrative process that began in May 1985 when the University and DOE submitted an application for a RCRA/HWA hazardous waste facility permit (the "Permit"). The administrative process involved extensive interaction between the University, DOE and EID which culminated in Draft Permit No. 0890010515 (the "Draft Permit").

In July 1989, EID held public hearings on the Draft Permit in accordance with HWMR-5 Section 902. After receiving public comments, the Director of EID mailed the Permit to DOE on November 8, 1989, (See Exhibit 2, which includes the facesheet of the Permit), and later sent a corrected copy of the Permit on November 20, 1989. (See Exhibit 3) The Permit allows the University and DOE,

collectively referred to as "Permittees," to operate various storage and treatment units, including a hazardous waste incinerator.

EID advised the Permittees and the public during the July public hearings, in its written statements to the public, and in subsequent communications to DOE, that the Permit would become effective and the Director's decision final in accordance with HWMR-5 Section 902.F and G. EID consistently instructed the Permittees and the public that any review of the Director's decision regarding the Permit should be made to the Board in accordance with HWMR-5 Section 902.G. EID further instructed that once the "final decision" concerning the issuance of the Permit was made in accordance with HWMR-5 Section 902.F, that final decision "could then be appealed to the real courts, the judicial court."¹

¹The University and DOE, in accordance with HWMR-5, 902.G, submitted Proposed Findings of Fact and Conclusions of Law to the Board. Attached as Exhibit 4 is a copy of the Summary of the Proposed Findings and the Permittees' Proposed Findings of Fact and Conclusions of Law. Each Proposed Finding is supported in the record. The quote preceding the footnote is found in Proposed Finding 2.4.3.

In compliance with the express terms of the Permit, HWMR-5 Section 902 and EID's instructions, the Permittees attempted to exhaust their administrative remedies by filing a Petition for Limited Review to the Board on December 20, 1989. Members of the public also sought administrative review before the Board in accordance with HWMR-5 Section 902.G. Ms. Dorothy Jaramillo, Ms. Joan Berde, and two attorneys acting on behalf of Concerned Citizens for Nuclear Safety sought administrative review by the Board.

In compliance with HWMR-5 Section 902.G.2 the Permittees filed Proposed Findings of Fact and Conclusions of Law and a Summary of Findings with the Board. (See Exhibit 4, Note Findings 1.11-1.20 and 2.0-2.7) Thirty-nine days after the University petitioned the Board for an administrative review, EID changed its position by filing a Motion to Dismiss the Petition for Limited Review. EID challenged the Board's jurisdiction to entertain petitions for administrative review. EID took the position that HWMR-5 Section 902.G was ultra vires and therefore void. On February 8, 1990, the Permittees filed a response in opposition to EID's motion to dismiss.

On February 19, 1990, the Board entered the General Order referred to in the Court's Calendar Notice.

(See Exhibit 1)² When the Board entered its General Order, the University's administrative remedies were exhausted and it filed an appeal with the Court in accordance with HWMR-5 Section 902.F, § 74-4-4.2.G NMSA 1978 (1989 Repl.) and SCRA 1986 12-601(A).

III.

THE CASES CITED BY THE COURT IN ITS
PROPOSED SUMMARY DISMISSAL ARE NOT
CONTROLLING OF THE ISSUE BEFORE THE
COURT

In support of dismissal of the University's appeal, the Court cites James v. New Mexico Human Services

²The University vigorously resisted the Director's motion to dismiss the Petition for Limited Review. Undersigned counsel for the University appeared at the February 9, 1990, meeting of the Board at which time the decision evidenced by the General Order was discussed. During the Board's discussion, two board members specifically asked the Board's counsel, Randal Van Vleck, and EID's counsel, Gini Nelson, whether dismissal of the University's Petition for Limited Review would adversely affect Ms. Jaramillo's, Ms. Berde's, or the University's right to take a judicial appeal. As evidence of the fact that no state agency personnel believed the issues were yet ripe for a judicial appeal, both government attorneys assured the Board that an appeal would be available to all concerned citizens. The University did not include the issue of dismissal in its Docketing Statement because the issue of finality or ripeness had never been raised as an issue during the course of the administrative process. The University reserves the right to amend, pursuant to SCRA 12-209(C), its Docketing Statement, if the Court deems it necessary to address the issue of the dismissal of the Petition for Limited Review.

Dep't, Income Support Div., 106 N.M. 318, 742 P.2d 530 (Ct. App. 1987) (James) and Lowe v. Bloom, ____ N.M. ____, ____ P.2d ____ (1990) (No. 18799, June 20, 1990) (Lowe). These cases hold that the failure to timely file a notice of appeal, (James), in the appropriate court, (Lowe), creates a jurisdictional error. Neither of the cited cases address the jurisdictional issue of when the University's right to judicial review was triggered.

James addressed a conflict between SCRA 1986 12-601(A) and specific statutory language concerning the length of time for an appeal. Unlike James, the 30-day requirement for a timely appeal of a "decision" by the Director are identical under § 74-4-4.2.G NMSA 1978 (1989 Repl.) and SCRA 12-601(A). Thus, James is not controlling.

Lowe examined the issue of whether the filing of an appeal in an inappropriate forum properly invokes an appellate court's jurisdiction. Unlike Lowe, the University's Petition for Limited Review was filed in the proper forum, in order to exhaust the University's administrative remedies as a prerequisite to filing an appeal for judicial review of the final decision of the Director under HWMR-5 Section 902.F. The University's appeal to the Court is properly docketed. Thus, Lowe does not address the issue before the Court and is not controlling.

IV.

THE DIRECTOR'S ISSUANCE OF THE PERMIT
IN NOVEMBER 1989 WAS NOT A FINAL
DECISION CONCERNING THE ISSUANCE OF THE
PERMIT FOR THE PURPOSE OF APPELLATE
REVIEW

- A. The appeal to the Court must be from a
"final" decision of the Director of EID.

In general, an appellate court will not review the proceedings of an administrative agency until the agency has taken final action. Harris v. Revenue Division of Taxation and Revenue Department, 105 N.M. 721, 722, 737 P.2d 80, 81 (Ct. App. 1987); Hillhaven Corporation v. Human Services Department, 108 N.M. 372, 772 P.2d 902 (Ct. App. 1989). Long standing public policy also dictates that in order to discourage piecemeal litigation, appeals should only be taken from final judgments or orders which substantially dispose of the merits. Floyd v. Towndrow, 48 N.M. 444, 152 P.2d 391 (1944); Burns v. Fleming, 48 N.M. 40, 145 P.2d 861 (1944).

Nor is a statute's failure to refer to a "final" decision controlling. It is unnecessary that a statute contain the word "final" because the qualities of administrative finality in an agency determination are essential to the invocation of judicial review. Public Service Co. of Nevada v. Community Cable TV, 91 Nev. 32, 530 P.2d 1392 (1975); Bienz v. City of Dayton, 29 Or.App. 761, 566 P.2d 904 (Ct. App. 1977).

There is no requirement of finality of an agency official's decision if the statute permitting judicial review clearly states that any decision may be appealed. In Re Application of Angel Fire Corp., 96 N.M. 651, 634 P.2d 202 (1981). The statute in Angel Fire Corp. stated:

Any applicant or other party dissatisfied with any decision, act or refusal to act of the state engineer may be appealed... (Emphasis added.)

Id. at 652. Unless the statute indicates otherwise, the general rule of finality is a prerequisite to seeking judicial review of an administrative decision.

The New Mexico Hazardous Waste Act ("HWA"), §§ 74-4-1 to 74-4-13 NMSA 1978 (1989 Repl.) lacks the degree of precision and clarity found in the legislation which triggered the appeals found in James, supra, and in Angel Fire Corp., supra. In the instant case, the HWA and the appellate rules use nearly identical language:

Any person 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.)

§ 74-4-4.2.G of the HWA.

Notwithstanding any other provision of law, direct appeals from orders, decisions, ... of ... administrative agencies or officials shall be taken by filing a notice of appeal ... with the appellate court clerk ... within thirty

(30) days from the date of the order,
decision or action appealed from.
(Emphasis added.)

SCRA 1986 12-601(A).

The HWA and the appellate rule stand in contrast to the statutory language relied upon by the Court in Angel Fire Corp.; neither the HWA nor the appellate rule allow an appeal from any decision. In addition, neither the HWA nor the appellate rules define the term "decision" or clarify when such a decision is made for purposes of judicial review. Thus, the general rule requiring finality as a prerequisite to judicial review of an agency decision is controlling.

In recognition of the ambiguity of the isolated use of the word "decision" and the need to clarify when a decision is final and ripe for judicial review, the Board, in accordance with § 74-4-4(7) of the HWA, promulgated HWMR-5 Section 902.F defining when the Director's decision concerning the issuance of a permit is made:

For purposes of these regulations, the Director's decision is not made until it becomes final under 902.G or until the Board renders its decision under 902.F either sustaining or reversing the Director. Immediately upon receiving the Board's decision the Director shall enter the Director's decision in accord with the Board's decision, which shall be considered the Director's decision for purposes of appeal to the Court of Appeals.
(Emphasis added.)

Thus, for purposes of judicial review under § 74-4-4.2.G of the HWA and appellate rules, the Director's decision is not "made" until the Board renders its decision under HWMR-5 Section 902.F.

The Board is empowered to adopt regulations establishing the procedures for the issuance of hazardous waste facility permits. § 74-4-4.A(7) NMSA 1978 (1989 Repl.). Regulations enacted by an agency are presumed valid and will be upheld if reasonably consistent with the statutes they implement. Tenneco Oil Company v. New Mexico Water Quality Control Commission, 107 N.M. 469, 473, 760 P.2d 161 (Ct. App. 1987) cert. denied, Navajo Refining Co. v. New Mexico Water Quality Control Com'n, 106 N.M. 714, 749 P.2d 99 (1988), citing, Hi-Starr, Inc. v. Washington State Liquor Control Bd., 106 Wash.2d 455, 722 P.2d 808 (1986). The determination of "when" a decision of the Director is made and final for purposes of judicial review is a procedural component of the issuance of a hazardous waste facility permit that is clearly within the Board's statutory grant of authority.

A reviewing court should, where appropriate, accord substantial weight to an interpretation given a regulation by the body charged with administering the regulation. State ex. rel. Battershell v. City of Albuquerque, 108 N.M. 658, 660, 777 P.2d 386, 390 (Ct. App. 1989) citing, Tsosie v. Califano, 651 F.2d 719 (10th

Cir. 1981). The Board considers Section 902.F a valid regulation as evidenced by the terms of its February 19, 1990 General Order. (See Exhibit 1) The Order relied on Section 902.F in providing that all future petitions for review be commenced in accordance with § 74-4-4.2.G NMSA 1978 and, for purposes of the University's appeal, the Order constituted a final decision of the Director. (See Part V below.)

In addition, this Court has relied upon Section 902.F in its Calendar Notice by proposing affirmance of the Board's General Order.

Furthermore, not every "decision" by the Director of EID can, as a matter of law or public policy, constitute the basis for appeal. Over the course of past five years, numerous decisions have been made by the Director of EID concerning the Permit: (1) the decision to require revisions to the application; (2) the issuance of the Draft Permit; (3) the decision to require revisions to the Draft Permit; (4) the decision to hold public hearings in Santa Fe, New Mexico; (5) the decision to hold public hearings in July 1989; (6) the decision concerning the facility at which the public hearings were held; and other numerous actions or decisions.

If every letter from every agency of state government which arrives on a lawyer's desk must be scrutinized to determine if it contains an appealable

order, indeed a burden of considerable magnitude will have been created by fiction.

Lee v. Jacobs, 81 Wash.2d 937, 506 P.2d 308, 310 (1973).

If every decision by the Director concerning the issuance of a hazardous waste facility permit created the right to an appeal to the Court of Appeals, the administrative and judicial process would quickly grind to a halt.

B. The November 1989 actions of the Director did not constitute a decision of the Director concerning the issuance of the Permit for purposes of judicial review.

As discussed above, HWMR-5 Section 902.F specifies when a decision of the Director is made and is considered "final" and thus "ripe" for purposes of judicial review. Furthermore, courts require that an agency formalize its decision and that the effects of the decision be felt in a concrete manner by the party seeking judicial review before the agency's decision is considered "ripe." Abbott Laboratories v. Gardner, 387 U.S. 136, 148 (1967).

In Abbott Laboratories the Supreme Court set forth a two-part test to determine whether an agency decision is "ripe" for judicial review. First, a court must examine the "fitness of the issues for judicial decision." Id. at 149. Whether an issue is "fit" for judicial review is determined by examining whether the issues involve purely legal questions and whether the

issues arise out of a "final agency action." Id. Second, the "hardship to the parties of withholding court consideration" should be considered. Id. This second part of the test involves an examination of the direct and immediate impact or hardship on the party seeking review and whether litigation will expedite a resolution rather than delay or impede effective administrative enforcement. Id. at 152-154.

The University urges the Court to examine the November 1989 actions of the Director in accordance with HWMR-5 Section 902.F, the doctrine of finality and the two-part test of Abbott Laboratories.

On November 8, 1989, the Director of EID mailed the Permit to DOE and enclosed a transmittal letter. (See Exhibit 2). The facesheet of the Permit states:

This permit shall become effective in accordance with HWMR-5, Part IX, sections 902.F. and 902.G. and shall run for a period of ten years.

This permit is based on the provisions of HWMR-5.

In relevant part, the transmittal letter stated:

You have the right to appeal this decision to the Environmental Improvement Board in accordance with the New Mexico Hazardous Waste Management Regulations (HWMR-5), as amended 1989, section 902.G. Otherwise, the permit will become effective in accordance with HWMR-5,

Part IX, sections 902.F and 902.G.
Briefly, the effective date will be
30 days from your receipt of this
permit unless the decision is appealed
to the Environmental Improvement
Board. (Emphasis added.)

The Director's transmittal of the Permit on
November 8, 1989 does not constitute an appealable
decision because the decision to issue the Permit was not
"final" and the Permit was not enforceable until the Board
rendered a decision under HWMR-5 Section 902.F. The
transmittal letter clearly states that if DOE contested
portions of the Permit, the Permit was subject to further
administrative review.

Under Abbott Laboratories, the Director's
November 8, 1989 action concerning the issuance of the
Permit was not "ripe" for the following reasons:
1) numerous factual questions concerning the completeness
and accuracy of the Permit remained as evidenced by the
subsequent questions and issuance of corrected portions of
the Permit on November 20, 1989; 2) as noted above, the
Director's decision was not "final" and would only become
final with the Permit's effectiveness in accordance with
HWMR-5; 3) the Permittees were instructed to seek
administrative review with the Board and thus exhaust
their administrative remedies; and 4) the Director's
actions had no immediate impact or hardship on the
University because the Permit was not yet effective, and

would not be effective until the Director's decision was "final" under the HWMR-5.

Corrections to the Permit were mailed to DOE on November 20, 1989. (See Exhibit 3) In relevant part, the transmittal letter accompanying the corrections stated:

For your information, the response-to-comments letter was mailed to the public on November 17, 1989 and the 30-day time period for petitioning the Environmental Improvement Board by the public begins today, November 20, 1989, and ends December 20, 1989 at 5 p.m.

Under the "ripeness" test of Abbott Laboratories, the November 20, 1989 letter was not "ripe" for judicial review. Although the issues remaining after November 20, 1989 are "legal" issues, the Director's decision was not "final." EID directed the University to petition the Board, and modified the time period in which administrative review could be sought. Nor was there an immediate impact or hardship on the University because the Permit would not be effective until the Director's decision became final under HWMR-5 Section 902.F. The November 20, 1989 corrections to the Permit do not constitute a decision of the Director capable of judicial review in accordance with HWMR-5 Section 902.F.

A factor to consider in determining the finality of an agency's decision is the notice sent to the party

seeking judicial review. In Valley View Industrial Park v. City of Redmond, 107 Wash.2d 621, 733 P.2d 182, (1987), the court focused on a letter sent by the City to an applicant for a building permit. The court held that the letter was not sufficient to qualify as a final action or decision because the letter was not written so as to be clearly understandable as a final determination of rights. The court held:

[D]oubts as to the finality of such communications must be resolved in favor of the citizen. ... A letter from an agency will constitute a final order only if the letter clearly fixes a legal relationship as a consummation of the administrative process. (Emphasis added.)

Id. at 189-190.

The November letters to DOE clearly establish that the Director's decision was not a final decision concerning the issuance of the Permit. The letters do not state that the Director's decision is final, nor do the letters refer to the University's right to judicial review. EID did not consider the Director's decision to be capable of judicial review and instructed the Permittees to seek administrative review to the Board. Under Valley View any doubt as to the finality of the Director's decision should be resolved in favor of the University.

Another important factor in determining whether an agency's action is "final" is the official expression in public statements and records that the agency's actions are final. Phillips Petroleum Co. v. Federal Energy Administration, 435 F. Supp. 1239, 1246 (D. Del. 1977). The appellate record is replete with EID statements that the Permit would become effective in accordance with HWMR-5 Section 902.G and F. (See Exhibits 2 and 3; Exhibit 4, Proposed Findings 2.2-2.5) These statements reflect EID's understanding that the Director's decision concerning the issuance of the Permit was not a final decision capable of judicial review in November 1989.

C. The University was required to exhaust its administrative remedies as a prerequisite to filing its Notice of Appeal with the Court of Appeals.

Bralley v. City of Albuquerque, 102 N.M. 715, 699 P.2d 646 (Ct. App. 1985) affirms the legal doctrine that judicial review of an administrative decision will be dismissed if the party seeking review has failed to exhaust its administrative remedies. The University exhausted its administrative remedies by petitioning the Board for administrative review under HWMR-5 Section 902.G.

Given EID's express instructions to seek administrative review with the Board, any appeal to the Court in November or December 1989 would have been challenged on the grounds that the agency's administrative

process was not complete, that the University had not exhausted its administrative remedies, and that the appeal was not "ripe" for appellate review.

In November and December 1989, EID interpreted HWMR-5 Section 902.G as a valid regulation requiring an administrative review by the Board before the Director's decision was made for purposes of judicial review. In light of the fact that New Mexico law holds that regulations enacted by an agency are presumed valid, Tenneco Oil, supra, and that an agency's interpretation of its own regulation will be given great weight, Battershell, supra, it is probable that the University's appeal would have been considered premature or "unripe" for review and dismissed under the doctrine requiring an appellant to exhaust its administrative remedies.

V.

THE BOARD'S FEBRUARY 19, 1990 GENERAL ORDER CONSTITUTED THE DIRECTOR'S DECISION TO ISSUE THE PERMIT AND TRIGGERED THE UNIVERSITY'S RIGHT TO APPEAL

On February 19, 1990, the Board issued its General Order concerning administrative review of hazardous waste facility permits pursuant to HWMR-5 Section 902.G. The Court has proposed summary affirmance of the Board's General Order.

The General Order finds HWMR-5 Section 902.G to be ultra vires and orders:

1. That all future petitions for review of the Director's decision be commenced in accordance with § 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 purpose of appealing to the New Mexico Court of Appeals.

The purpose of the Board's order was to address the jurisdiction of the Board to conduct an administrative review under HWMR-5 Section 902.G, and more importantly, to protect the right of interested parties to seek judicial review by establishing with specificity the date from which interested parties could timely submit an appeal to the Court of Appeals under § 74-4-4.2.G NMSA 1978 (1989 Repl.) and SCRA 1986 12-601(A).

The Board specifically relies on HWMR-5 Section 902.F and states that the Order is a "final decision of Director" for purposes of appellate review. The Board's Order is the "final decision of the Director." Consequently, the Director's decision to issue

the Permit as it was corrected on November 20, 1989, was "made" and became final on February 19, 1990.

Pursuant to the General Order, the University's petition was dismissed and the University's judicial appeal should be considered a "future petition" commenced in accordance with § 74-4-4.2.G NMSA 1978 (1989 Repl.).

VI.

A DECISION TO DISMISS THE UNIVERSITY'S
APPEAL WILL COMPEL PARTIES DEALING WITH
ADMINISTRATIVE AGENCIES TO SEEK
JUDICIAL REVIEW AFTER ANY ACTION OR
DECISION BY AN ADMINISTRATIVE OFFICIAL

Without question, § 74-4-4.2.G NMSA 1978 (1989 Repl.) creates the right of judicial review. The issue before the Court is whether the statutory term "a decision" will be interpreted to mean "any decision" under the reasoning of Angel Fire Corp., or whether HWMR-5 Section 902.F defining when a decision is made for purposes of judicial review and the legal doctrines of "finality" and "ripeness" will be presumed valid and upheld. Tenneco Oil Company. If the Board's regulations and the doctrines of finality and ripeness are followed, the Court has jurisdiction to entertain the University's appeal.

This court recognizes that when:

[t]here are two possible interpretations relating to the right to an appeal, that interpretation which

permits a review on the merits rather than rigidly restricting appellate review should be favored.

Matter of Application No. 0436-A into 3941, 101 N.M. 579, 581, 686 P.2d 269, 271 (Ct. App. 1984) (other citations omitted). Thus, under Matter of Application, the Court should favor an interpretation of the statute and regulations which allows HWMR-5 to define undefined statutory terms and permits judicial review of the University's appeal.

Another reason the Court should find that the University timely filed its appeal is contained in HWMR-5 Section 1002. Section 1002 states:

Construction. The Hazardous Waste Management Regulations shall be liberally construed to effectuate the purpose of the Act [the HWA].

The HWA has multiple purposes, See § 74-4-2 NMSA 1978 (1989 Repl.). Implicit in the purpose of the HWA, and explicit in § 74-4-4.2.G NMSA 1978 (1989 Repl.) is a citizen's right to judicial review. HWMR-5 Section 1002 requires the Court to construe Section 902.F to effectuate the University's right to judicial review.

A decision that the University's appeal was untimely necessarily instructs the University to ignore the legal doctrines of "finality" and "ripeness," the

requirement that administrative remedies be exhausted before judicial review and the validity and meaning of HWMR-5 Section 902.F. Most importantly, such a decision will instruct parties dealing with EID or other administrative agencies to seek judicial review of any decision of an agency official.

In addition, a decision to dismiss the University's appeal implicitly requires parties dealing with administrative agencies to possess clairvoyant skills enabling them to predict that the right to judicial review may be cut off after consistent instructions and regulations to the contrary. Such second-guessing of the validity of an agency's regulations years after the regulation was adopted will lead parties to file multiple actions in every conceivable forum to protect their right to judicial review.

CONCLUSION

For the reasons set forth above, the University respectfully requests the Court to retain jurisdiction over this appeal, to issue a new Calendar Notice, and to enter an Order staying Appeal Nos. 12190 and 12233 pending resolution of the federal lawsuit filed by the United States of America.

Should the Court disagree with the University's position contained herein, the University requests the Court to define with particularity the Court's position concerning the issue of the finality of the Director's decision concerning the issuance of the Permit.

Respectfully submitted,

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