

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

TODD N. ROCKEFELLER,)
)
Appellant.)
)
v.)
)
STATE OF NEW MEXICO, NEW)
MEXICO ENVIRONMENT)
DEPARTMENT, and PETER MAGGIORE)
in his official capacity as Secretary of the)
New Mexico Environment Department,)
)
Appellees.)
)

Ct. App. No. 20980
HRM 98-04(P)

COURT OF APPEALS OF NEW MEXICO

FILED

AUG 14 2000

Patricia R. Williams

APPELLEES' MOTION TO DISMISS.

Pursuant to SCRA 1986, 12-309, the State of New Mexico, New Mexico Environment Department ("Appellees") respectfully request that the Court dismiss this appeal for lack of jurisdiction. In support of this motion, appellees state as follows:

1. On October 27, 1999, the Secretary of the New Mexico Environment Department ("NMED") issued a final permit to the Department of Energy and Westinghouse Electric Co., Waste Isolation Division for the storage and disposal of transuranic waste at the Waste Isolation Pilot Plant ("WIPP") pursuant to Section 74-4-4.2.C of New Mexico Hazardous Waste Act ("HWA").
2. Appellant filed a notice of appeal and docketing statement challenging the Secretary's decision and request this Court to revoke the WIPP permit under Section 74-4-14 of the HWA.
3. In his docketing statement, appellant raises the following issues: (1)

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alleged criminal violations by DOE due to alleged false statements and perjury; (2) alleged violations committed by NMED; (3) the DOE's federal district court complaint challenging certain permit provisions. ("Complaint, CIV 99-1280."); and (4) DOE Financial Assurance for WIPP. Docketing Statement, ¶¶ 4.A -H.

4. Under the HWA, this Court may review an appeal from any person "*who is or may be affected by any final administrative action of ... the secretary.*" NMSA 1978, § 74-4-14.A (emphasis added)(1993). Standing requires that "the claimant must have a personal stake in the outcome of a case; the claimant must allege both injury in fact and a traceable connection between the claimed injury and the challenged conduct." Key v. Chrysler Motors Corp., 121 N.M. 764, 768, 918 P.2d 350, 354 (1996)(citing 12 James W. Moore, Moore's Federal Practice, ¶ 300.02[2 -3], at 1-13 to 1-14). See also Hawthorne v. City of Santa Fe, 88 N.M. 123, 124, 537 P.2d 1385, 1286 (1975)(citing De Vargas Savings & Loan Assoc. v. Campbell, 87 N.M. 469, 535 P.2d 1320 (1975)).

5. Appellant fails to demonstrate that he has standing for this Court to review each of the issues in his appeal as a person who "is or may be affected" by "a [final] decision of the Secretary" as required under Section 74-4-14 of the HWA.

6. Appellant has no standing under the HWA for this Court to review his challenge to the Secretary's final order on the basis of alleged criminal violations by DOE under various federal criminal statutes. See Docketing Statement, ¶ 4, A.B.C and ¶ 5.B .C and .D (pp. 2 - 3). Appellant's allegations are outside the scope of the HWA and this Court's jurisdiction. Appellant cannot demonstrate that he is "affected" or otherwise injured by "any final decision" related to the Secretary's final order to issue the WIPP permit on these grounds.

7. Appellant has no standing under the HWA for this Court to review NMED's alleged violations as stated in his docketing statement. For each of these alleged violations, appellant cannot show injury or harm with a traceable connection to the Secretary's final order as a result of each of the alleged errors. Key, 121 N.M. 764, 768; Hawthorne, 88 N.M. 123, 124. The alleged failure of NMED to enforce the WIPP permit and allegations of criminal activity engaged in by the agency are plainly outside the jurisdiction of this Court and the HWA. Appellant cannot show any harm or injury as a result of any alleged procedural error. Further, appellant failed to raise these issues below and cannot now claim to be a person affected by the Secretary's decision. 15A Wright & Miller, Fed. Practice and Procedure, ¶ 3902 (*citing In re Baker & Getty Fin. Serv. Inc. v. National Union Fire Ins. Co.*, 954 F.2d 1169, 1174 (6th Cir. 1992)(a party must be aggrieved by a court order to have standing to appeal it; a party is not aggrieved where the issue was not raised below and cannot be raised on appeal); Woolwine v. Furr's Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987)(an argument not presented to fact finder below will not be considered on appeal).

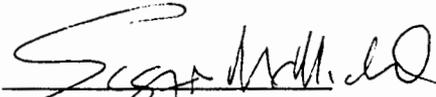
8. Appellant does not challenge the Secretary's decision to require financial assurance in the WIPP permit or demonstrate any injury or harm to him as a result of these requirements. As a result, appellant is not a person who is "affected" by the Secretary's final order under the HWA.

9. The undersigned counsel attempted to contact Mr. Rockefeller regarding this Motion as required under SCRA 1986, 12-309.C.

10. Appellees contemporaneously submit herewith their Memorandum in Support of this Motion to Dismiss.

WHEREFORE, appellees respectfully request this court to grant it's motion to dismiss.

Respectfully submitted this 14th day of August, 2000



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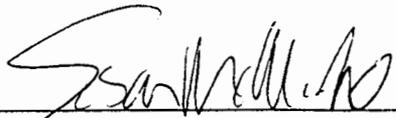
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ATTORNEYS FOR APPELLEES, THE STATE OF NEW MEXICO, NEW
MEXICO ENVIRONMENT DEPARTMENT.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August, 2000, a true and correct copy of the foregoing *Appellees' Motion to Dismiss* was served upon the following, by first class mail, postage prepaid:

Tod N. Rockefeller
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Susan M. McMichael

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MEMORANDUM IN SUPPORT OF APPELLEES'
MOTION TO DISMISS

This Memorandum is submitted by the State of New Mexico, New Mexico Environment Department ("Appellees") in support of their Motion to Dismiss.

FACTS

On October 27, 1999, the Secretary of the New Mexico Environment Department ("NMED") issued a final permit under Section 74-4-4.2 of the Hazardous Waste Act ("HWA") authorizing the U.S. Department of Energy ("DOE") and the Waste Isolation Division of Westinghouse Electric Co. ("WID") (Permittees) to store and dispose transuranic waste at Waste Isolation Pilot Plant ("WIPP"). Prior to issuing a final permit, the Secretary accepted written and oral comment at a public hearing conducted from February 22, 1999 through March 26, 1999. See 20.4.1.901.A,.C and .D NMAC and Hearing Officer's Report at ¶¶ 29, 32 and 38 attached hereto as Exhibit A. Appellant is a member of the public who participated during the public

hearing by providing oral technical comment.¹ See Hearing Officer's Report, at ¶¶ 34, 39. After the close of the public comment period, the Hearing Officer issued a report containing a recommended decision and proposed final order as required pursuant to 20.4.1.901.A (9) NMAC. *Id.* Based upon the Hearing Officer's report, the Secretary issued a final order and decision. See Final Order, attached hereto as Exhibit B.

Appellant filed on notice of appeal on November 29, 1999. On December 27, 1999, appellant filed his docketing statement.² In his docketing statement, appellant raises the following issues:

1. Alleged criminal violations by DOE due to alleged false statements and perjury. Docketing Statement, ¶¶ 4.A.B. and C (pg. 2).
2. Alleged violations committed by NMED. *Id.* at ¶¶ B - F.
3. The DOE's federal district court complaint challenging certain permit provisions. ("Complaint, CIV 99-1280."); *Id.* at ¶ G; and
4. DOE Financial Assurance for WIPP. *Id.* at H.

ARGUMENT

I. The Appeal Should Be Dismissed For Lack Of Jurisdiction.

A. Appellant Has No Standing Under the HWA To Bring His Appeal.

This Court's jurisdiction to review decisions of administrative agencies is as provided by law. N.M. Const. Art. VI, 29. Taos Ski Valley, Etc. v. N.M. Water Quality Control Comm'n, 91 N.M. 203, 572 P.2d 550 (Ct. App. 1977). Under the HWA, this Court may review an appeal from any person "*who is or may be affected by any final administrative action of ... the*

¹ Under NMED's public participation rules, any person may file a "notice of intent" to testify and participate as a "party" during the public hearing. See 20 NMAC 1.4 and Hearing Officer's Report at ¶34. Appellant filed a notice of intent and was considered a "party" for purposes of participation during the public hearing. *Id.*

secretary." NMSA 1978, §7 4-4-14.A (1993)(emphasis added)(1993). Standing requires that "the claimant must have a personal stake in the outcome of a case; the claimant must allege both injury in fact and a traceable connection between the claimed injury and the challenged conduct." Key v. Chrysler Motors Corp., 121 N.M. 764, 768, 918 P.2d 350, 354 (1996)(citing 12 James W. Moore, Moore's Federal Practice, ¶ 300.02 [2 -3], at 1-13 to 1-14). See also Hawthorne v. City of Santa Fe, 88 N.M. 123, 124, 537 P.2d 1385, 1286 (1975)(citing De Vargas Savings & Loan Assoc. v. Campbell, 87 N.M. 469, 535 P.2d 1320 (1975))("To attain standing in a suit arguing the unlawfulness of government action, the complainant must allege that he is injured in fact or is imminently threatened with injury, economically or otherwise). "To gain standing, [a party] must identify some agency action that affects it; it is judicial review 'thereof to which the [party] is entitled." Chemical Serv. Inc. v. Envtl. Monitoring Sys. and USEPA, 12 F.3d 1256, 1262 (3rd Cir. 1993)(citing Lujan v. National Wildlife Federation, 497 U.S. 871, 882 (1990)).

Appellant fails to demonstrate that he has standing and is a person who "is or may be affected" by "a decision of the Secretary" as required under the HWA. Appellant's notice of appeal and docketing statement do not demonstrate that he was injured in fact as a result of any decision made by the Secretary in issuing the WIPP permit. Instead, appellant's challenges are directed at issues unrelated to and far removed from the Secretary's final decision. Further, the fact he participated during the administrative public hearing does not equate to judicial standing. "[T]he fact that a person is a party in agency proceedings does not require that he be allowed to seek judicial review of the agency's action; he must still satisfy judicial standing requirements." See also City of Orrville, Ohio v. FERC, 147 F.3d 979, 982 (D.C. Cir. 1998). In Envirocare of Utah, Inc. v. NRC, 194 F.3d 72 (D.C.Cir. 1999), the Court stated:

² Appellant has filed numerous motions which this Court has either denied or ruled will be held in abeyance pending calendaring.

As Judge Friendly observed, '... the differences between statutes and agency rules controlling intervention and statutes controlling judicial review; and the differing characters of administrative and judicial proceedings -- all of these negate any general rule linking a person's standing to seek judicial review to the fact that he has been allowed to intervene before the agency.'

Id. at 74 fn. 1 (*citing* Henry J. Friendly, Federal Jurisdiction: A General View pg. 118 (1973) and 3 Kenneth Culp Davis, Administrative Law Treatise, ¶ 22.08 at p. 241 (1958)).

1. DOE's Alleged Criminal Violations Do Not Relate To The Secretary's Final Order.

Appellant alleges that this Court should "revoke" or "deny" the WIPP permit due to alleged criminal violations by DOE under various federal criminal statutes. See Docketing Statement, ¶ 4, A.B.C and ¶ 5.B .C and .D (pp. 2 - 3). Section 74-4-4.2 of the HWA provides the Secretary discretion, under specific circumstances, to "deny any permit application or modify, suspend or revoke any permit issued under the Act."³ Appellant also alleges that a federal court action filed by the DOE is a "knowingly false statement" and may result in undefined criminal violations. Id. at ¶ 5.G.

Appellant's challenge on its face does not relate to the Secretary's decision to issue a final WIPP permit, but instead concerns alleged federal criminal violations outside the scope of the HWA and jurisdiction of both the Secretary and this Court. Further, the permit proceeding considered the issuance of the WIPP permit, and not, as suggested by appellant the revocation or denial of a permit for "noncompliance."⁴ Id. at ¶ 5.D, pg. 3. Appellant cannot demonstrate injury that results to him from unverified allegations of criminal activity unrelated to the Secretary's final decision. Key, 121 N.M. 764, 768. Appellant is not a person who "is or may be affected by a final decision of the Secretary" under the HWA.

³ The circumstances in which the Secretary "may" deny a permit application include, among other things, where the applicant has "been convicted in court" within ten years immediately preceding the date of submission of the permit application for certain crimes or has exhibited a willful disregard for environmental laws of any state...." NMSA 1978, § 74-4-4.2.D (3) and (4)(1993).

Further, appellant does not appear to have argued below that the WIPP permit should be denied or revoked based upon allegations of criminal activity. A party must be aggrieved by a court order to have standing to appeal it; a party is not aggrieved where, as here, the issue was not raised below and cannot be raised on appeal. See 15A Wright & Miller, Fed. Practice and Procedure, ¶ 3902 (citing In re Baker & Getty Fin. Serv. Inc. v. National Union Fire Ins. Co., 954 F.2d 1169, 1174 (6th Cir. 1992)(“the ordinary procedural requirements that issues be raised” below to be considered on appeal “may be translated into standing terms); Woolwine v. Furr's Inc., 106 N.M. 492, 496, 745 P.2d 717, 721 (Ct. App. 1987)(where an argument was not presented to fact finder below, it will not be considered on appeal).

2. Appellant Is Not Harmed By And Can Show No Causal Connection Between NMED's Alleged Violations And The Secretary's Final Order.

Appellant challenges NMED action on the following grounds: (1) NMED alleged violations of federal and state criminal law; Docketing Statement, ¶¶ 4.B - C, F. and 5.C, .E and .F; (2) NMED's failure to deny the permit; Id. at ¶¶ 4.D and 5.D; (3) NMED's failure to enforce the WIPP permit; Id. ¶¶ 4.E and 5..E and .F, and (4) alleged procedural errors in issuing the WIPP permit.¶ 4.F and F.I. As shown below, appellant has failed to demonstrate standing requisite for this Court to review these issues.

First, appellant alleges that there is "evidence" to support the conclusion that "NMED" engaged in criminal activity,"knowing endangerment" and other violations. Id. ¶ 4.B.C and 5.B. Appellant has no standing in this appeal to challenge the Secretary's final decision on this ground. Appellant's unfounded allegations regarding agency criminal violations are clearly outside the jurisdiction of the HWA and plainly do not relate to the Secretary's decision to issue WIPP a permit. Again, appellant's challenge on its face does not demonstrate any injury in fact

⁴ The HWA requires evidence of criminal convictions and willful disregard, not mere allegations, to support the

"causally related" to the Secretary's decision. Key, 121 N.M. 764, 768. Additionally, appellant did not raise this issue below and cannot now claim to have standing as an aggrieved or affected person. See Woolwine, 106 N.M. 492, 496; 15A Wright & Miller, Fed. Practice and Procedure, ¶ 3902 (citing In re Baker & Getty Fin. Serv. Inc., 954 F.2d 1169, 1174).

Second, appellant's challenge to NMED for failing to enforce the permit is similarly outside the scope of this permit appeal. Docketing Statement, ¶ 4.D and ¶ 5.E - F. The alleged failure of the Secretary to "enforce" the WIPP permit may not be brought by appeal to this Court under the HWA, particularly under the guise of a permit appeal. Appellant's challenge on its face does not relate to the Secretary's final order. Appellant does not demonstrate that he is affected or injury in fact as a result of any decision made by the Secretary related to issuance of the WIPP permit under the HWA, and as such, has no standing to raise this issue on appeal.

Third, appellant appears to challenge the procedural process in which the WIPP permit was issued alleging that the Secretary did not respond to his public comment and other broad allegations. Docketing Statement, ¶ 5.F.I, pg. 4. Contrary to appellant's suggestions, NMED fully responded to his public comment in its response to comments. See NMED's Response To Comments (Rockefeller), attached hereto as Exhibit C. Further, the Secretary properly issued a final order containing a response to comments as provided for under 20.4.1.901.A (9) NMAC. See Exhibits A and B. Notwithstanding these facts, appellant cannot show that he was injured in fact or otherwise prejudice in any manner by any alleged procedural err as a result of the Secretary's final order. Hawthorne, 88 N.M. 123. Additionally, appellant did not raise this issue below and cannot now claim to be affected by any alleged procedural err. See e.g. Woolwine, 106 N.M. 492, 296.

Secretary's denial of an applicant's permit application. NMSA 1978, § 74-4-4.2.D(3)(4) (1993).

3. Financial Assurance.

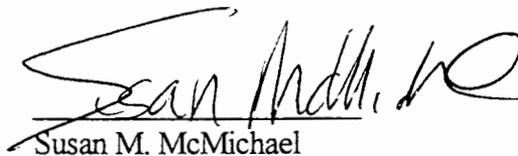
Appellant identifies "financial assurance" in his docketing statement as an issue in this appeal. Docketing Statement, ¶ 4.H, pg. 2. Appellant does not challenge this permit condition, however, much less demonstrate any harm or injury to him as result of financial assurance requirements.⁵ Appellant states that "NMED's requirement for financial assurance" is "quite warranted with the DOE, and is invaluable in providing a powerful incentive to the DOE to ensure that safe operations only are conducted." *Id.* ¶ 5.H, pg. 5. Appellant concludes that "[t]he NMED Secretary is authorized by law, cited above, to require financial assurance." *Id.* Finally, there is no indication that appellant challenged financial assurance below and therefore, he cannot raise an issue for the first time upon appeal. Woolwine, 106 N.M. 492, 496. As such, appellant cannot demonstrate that he is affected in any manner by the Secretary's decision. See also 15A Wright & Miller, Fed. Practice and Procedure, ¶ 3902.

CONCLUSION

For all of the foregoing reasons, appellees respectfully request the Court to dismiss this appeal.

DATED THIS 14th day of August, 2000.

Respectfully submitted,



Susan M. McMichael
Assistant General Counsel
Special Assistant General Counsel
New Mexico Environment Department

⁵ Appellant also raises arguments on behalf of third persons who are not party to this appeal such as SRIC and CCNS. See Docketing Statement ¶5.E at pg.4. However, there is no indication that appellant has meet any of the criteria necessary to bring claims on behalf of third persons and has suffered an "injury in fact;," have a close relationship to the third person; and there must exist some obstacle to the third person's ability to protect his or her own interest. See New Mexico Right To Choose, et al. v. Johnson, 126 N.M. 788, 975 P.2d 841 (1999-NMSC-005).

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ATTORNEYS FOR THE STATE OF NEW MEXICO, NEW MEXICO ENVIRONMENT
DEPARTMENT.

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of August, 2000, a true and correct copy of the foregoing *Memorandum in Support of Appellees' Motion to Dismiss* was served upon the following, by first class mail, postage prepaid:

Tod N. Rockefeller
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APPELLEES' LIST OF EXHIBITS
SUPPORTING MOTION TO DISMISS

EXHIBIT A:

**WIPP Hearing Officer's Report
dated September 9, 1999**

EXHIBIT B:

**Final Order of the Secretary of the
New Mexico Environment Department
dated October 27, 1999**

EXHIBIT C:

NMED's Response to Comments (Rockefeller)