

Opinion No. 77-15

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TO: Mr. Kenneth G. Brown, Chairman, Environmental Improvement Board, P.O. Box 2348, Santa Fe, New Mexico 87501

AUTHORITY OF ENVIRONMENTAL IMPROVEMENT BOARD (EIB) TO ENACT POLLUTION EMISSION REGULATIONS.-EIB may enact new pollution emission regulations when presented with persuasive evidence that totality of present and reasonably anticipated future emissions would result in violation of ambient air standards.

QUESTIONS

May the Environmental Improvement Board adopt emission regulations for existing stationary sources which would take into consideration air contaminant emissions for reasonably anticipated future growth in the area?

CONCLUSIONS

Yes. See Analysis.

FACTS

On August 27, 28 and 29, 1974, the Environmental Improvement Board conducted a public hearing to consider amendments to Air Quality Control Regulation No. 602(B). These proposed amendments, which required significantly increased control over sulfur dioxide emissions, were eventually adopted by the board on December 13, 1974.

The adoption of these amendments was challenged in a consolidated appeal to the Court of Appeals. Appellants alleged three separate points of error, and the Court of Appeals based its decision on the second, that enactment of the amendments to the regulations fell outside the scope of the board's statutory authority. See *Public Service Company of New Mexico v. New Mexico Environmental Improvement Board*, 89 N.M. 223, 549 P.2d 638 (Ct. App. 1976); cert. denied 1976.

Subsequently, several major new stationary sources of pollution have applied for and have received construction permits under Section 12-14-7, supra: 1) two 500 megawatt units at the San Juan Plant, which are presently under construction; and 2) a pilot coal gasification plant for El Paso Natural Gas Company. Wesco, Inc., has recently reapplied for a construction permit for Unit No. 1 at its planned coal gasification plant. In addition,

three more Wesco plants and three more El Paso plants have had environmental impact statements prepared by the Department of Interior, although no application for construction permits has been made with the board on any of these six proposed coal gasification plants. These are just some of the projects planned for the four corners area of New Mexico.

Based on these developments, the board is now considering adoption of new regulations to deal with the problem of increased emissions.

ANALYSIS

Under the Air Quality Control Act, *supra*, the Environmental Improvement Board has certain powers and duties, including the duty to "adopt, promulgate, publish, amend and repeal regulations consistent with the Air Quality Control Act to prevent or abate air pollution." See Section 12-14-5(A) and (B), *supra*. "Air pollution" is defined as:

the emission, except as such emission occurs in nature, into the outdoor atmosphere of one or more air contaminants in such quantities and durations as may with reasonable probability injure human health, animal or plant life, or may unreasonably interfere with the public welfare, visibility or the reasonable use of property. Section 12-14-2(B), *supra*.

OPINION

The scope of the board's authority under the Air Quality Control Act to prevent or abate air pollution and to promulgate emission regulations was further defined by the interpretation of the Court of Appeals in *Public Service Company of New Mexico v. New Mexico Environmental Improvement Board*, *supra*.

In that portion of the decision relevant to this opinion, the court examined the board's reasons for adopting the amendments to Regulation No. 602, placing great emphasis on reason "A", which reads as follows:

To require 65% and 85%, and later in 1979, 90% sulfur dioxide control on existing smaller and larger coal burning equipment, respectively, will protect welfare, property, and the public interest by reducing the significance of air quality as a limiting factor to economic growth. By reducing the amount of sulfur dioxide permitted in the air from existing sources, more room will be made available, up to the state sulfur dioxide standard, for new industry in the Four Corners area. [Emphasis added.] 549 P.2d at 641.

In regard to administrative bodies in general, the court stated that they are creatures of statute, with no common law or inherent powers, and can act only as to those matters which are within the scope of the authority delegated to them. With this principle in mind, the court attacked reason "A" of the board, stating:

There is nothing in the board's mandate that gives it the authority to plan for the industrial development of the area or any other area in the State. We recognize that the standards and regulations promulgated by the board will have an impact on the industrial development; but such an impact should be as a consequence not by design. 549 P.2d at 642.

{*120} The court reasoned that the board had the authority to prevent or abate air pollution, which the court defined as Ambient Air Quality Standard § 201. Emission regulations adopted by the board must be for the purpose of preventing or abating the violation of this standard. Having set this standard, the board was bound by it. According to the court:

There is no evidence in this record of any present need or a reasonably anticipated future need, to warrant the adoption of § 602(B)(2) and § 602(B)(3) to prevent or abate violation of the ambient air quality standard § 201. [Emphasis added.] 549 P.2d at 644.

In essence, the court strictly construed the power of the board, reasoning that: 1) the board had the authority to prevent or abate air pollution, 2) air pollution was defined by the applicable ambient air standard; 3) regulations explaining or implementing such standard must be for the purpose of preventing or abating emissions which would result in the standard being exceeded; and 4) there was no evidence in the record of present or reasonably anticipated future need for a new regulation to prevent a violation of the standard.

According to the court, although the board does not have the authority to plan generally for the industrial development of the state, new emission regulations may be adopted by the board if there is substantial evidence in the record of a present or reasonably anticipated future need for a stricter regulation in order to prevent air pollution in excess of the standard. Thus, if the board can demonstrate that reasonably anticipated future growth in the area will, as a factual matter, result in pollution emissions which exceed present ambient air standard, the board may enact stricter regulations for both existing and proposed sources.

Although this results in an affirmative answer to the question presented, the question of what exactly is "evidence of reasonably anticipated future need" remains to be considered.

It would appear likely that a plant with a construction permit which has already commenced construction would qualify as "reasonably anticipated." Perhaps those proposed plants which have their permits, but have not yet begun construction, would also qualify. However, as we proceed further down the line, it becomes increasingly speculative to conclude that a proposed plant will eventually go into operation, and thus, that it is "reasonably anticipated." The language employed by the court simply is not conducive of a definite test.

In any event, we are of the opinion that the board need not wait to adjust its regulations until new sources of emissions are in fact operational. The board may act "to prevent or abate air pollution" when presented with persuasive evidence that emission sources are growing in number and that the totality of new and existing emissions will, if left at presently regulated rates, *{*121}* exceed the Ambient Air Quality Standard. Assuming the proper set of facts and circumstances, the board may alter its regulations "as a consequence" of new threats to the standard.

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