

Opinion 08-03

OPINION OF: GARY K. KING Attorney General

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BY: Zachary Shandler, Assistant Attorney General

TO: The Honorable Teresa Zanetti, New Mexico State Representative, 1611 Francisca Rd. NW, Albuquerque, NM 87107

QUESTIONS:

1. May the Albuquerque-Bernalillo County Air Quality Control Board (“Board”) promulgate regulations that incorporate environmental justice principles?
2. May the Board adopt directives requiring staff to incorporate environmental justice principles into their work?

CONCLUSIONS:

1. Yes. The Board has authority to promulgate regulations that incorporate environmental justice principles.
2. Yes. The Board has authority to adopt directives requiring that environmental justice principles be incorporated into staff work, but those directives do not have a binding effect on the parties in the permitting process.

ANALYSIS:

Environmental justice principles center on the concept that a government agency should notify the public, and factor in public testimony regarding a company’s environmental impact on the community, particularly in a minority or impoverished community, prior to issuing a permit to that company.[1] The Board defines environmental justice principles to mean: “the fair treatment of all residents (in the City of Albuquerque - Bernalillo County), including communities of color and low income communities, and their meaningful involvement in the development, implementation and enforcement of environmental laws, regulations and policies regardless of race, color, ethnicity, religion, income or education level.” Albuquerque- Bernalillo County Air Quality Control Board, Environmental Justice Objectives of the Environmental Justice Task Force (July 11, 2007).

The New Mexico Supreme Court has provided a roadmap on how, and when, a government agency may incorporate environmental justice principles into its regulations. See Colonias Dev. Council v. Rhino Environmental Services Inc., 138 N.M. 133, 117 P.3d 939 (2005) (“Rhino”). The promulgation of regulations, and not directives

or instructions, is central because “[o]nce lawfully adopted, the regulations ... [have] the force of law and ... [are] binding upon the parties to the hearing.” Brininstool v. New Mexico State Bd. of Ed., 81 N.M. 319, 322, 466 P.2d 885 (Ct. App. 1970). The Court’s roadmap[2] has three steps:

1. Is there a statute that provides for a public hearing?
2. Is there a statute that provides for authority to enact a rule regarding the protection of public health and welfare?
3. Has a rule been promulgated?

In approximately 2001, Rhino Environmental Services applied for a permit to operate a solid waste facility in Chaparral, New Mexico. Pursuant to the New Mexico Solid Waste Act, the New Mexico Environment Department held a public hearing in Chaparral. Many citizens expressed their opposition to the proposed permit on grounds that there were several solid waste landfills already “near the community ... [and] the cumulative effect of putting another landfill two miles from Chaparral would create a perception of being ‘dumped on.’” Rhino, 138 N.M. at 137. The hearing officer, however, told the citizens that this “issue was not one of the factors involved in the decision to issue a permit” because the Solid Waste Act only granted the Department the authority to deny a permit on technical grounds. Id. at 136. A citizen exclaimed: “I mean, what are we doing here? ... I mean, those of us who are nontechnical experts or we’re not scientists, why have we been invited here to express our opinions if it’s irrelevant?”

Id. at 137. After the conclusion of the hearing, the New Mexico Environment Department granted the permit and the citizens appealed the decision to the Court of Appeals. The Court of Appeals affirmed the Department’s action on grounds that “[The Department] cannot reasonably be expected to weigh sociological concerns, which it has no expertise in doing. Its role is to pass judgment on the technical aspects of a solid waste site, a subject within its expertise and which it was designed to do.” Id. at 138 (quoting from Colonias Dev. Council v. Rhino Environmental Services Inc., 134 N.M. 637, 642, 81 P.3d 580).

The citizens sought certiorari to the state Supreme Court. The Court reversed the Court of Appeals for the following reasons: (1) the Solid Waste Act provided a public hearing on permit applications; (2) provided authority for the promulgation of regulations regarding the protection of public health and welfare; and (3) and the state Environmental Improvement Board had promulgated such regulations.

The Court noted that the Act “is replete with references to public input....” Rhino, 138 N.M. at 139. “Our courts have previously emphasized that legislative policy favors the public’s ability to participate meaningfully in the landfill permitting process.” Id. It added: “Members of the public generally are not technical experts. The Legislature did not require scientific evidence in opposition to a landfill permit, but instead envisioned that

ordinary concerns about a community's quality of life could influence the decision to issue a landfill permit." Id.

This begged the question of what was the proper weight of the public testimony. The Court ruled that a citizen's simple recital of the phrase "environmental justice" in public testimony was not sufficient grounds for the Department to deny the permit. This was because the Board's regulations did not set "a specific criterion [for this term] under the state permitting procedures." Id. at 142, fn. 4. Instead, the Court stated: "Although we hold that the Department must allow testimony regarding the impact of a landfill on a community's quality of life, we agree with the Department that its authority to address such concerns requires a nexus to a regulation." Id. at 140.

The Court examined the Solid Waste Act to see if the legislature had authorized the State Environmental Improvement Board to promulgate regulations to allow for the consideration of public health and welfare issues in permit hearings.[3] The Court found several statutes: "[T]he Board is required [to promulgate regulations] 'to assure that the relative interests of the applicant, other owners of property likely to be affected and the general public will be considered prior to the issuance of a permit for a solid waste facility.' Section 74-9-8(A)." Id. at 138. In addition, "One purpose of the act is to 'plan for and regulate, in the most economically feasible ... and environmentally safe manner, the ... disposal of solid waste.' Section 74-2-9(D). Another important purpose is to 'enhance the beauty and quality of the environment ... and protect the public health, safety and welfare.' Section 74-9-2(C)." Id.

The Court then examined the accompanying regulations. It found a regulation on-point:

The regulations regarding permit issuance direct the [Department] Secretary to issue a permit if the applicant fulfills the technical requirements and "the solid waste facility application demonstrates that neither a hazard to public health, welfare, or the environment nor undue risk to property will result."
20.9.1.200.L(10) NMAC; see also 20.9.1.200(L)(16)(c) (providing that a specific cause for denying a permit application is a determination that the permitted activity endangers public health, welfare or the environment).

Id. at 141. The Court also noted that: "[t]he regulations also require all solid waste facilities to be *located* and operated 'in a manner that does not cause a public nuisance or create a potential hazard to public health, welfare or the environment.'
20.9.1.400.A(2)(a) NMAC." Id.

Therefore, if the legislature has granted citizens the right to provide testimony at a public hearing, then the Department has to listen to this testimony. If the public testimony has a nexus to alleged "violations of the Solid Waste Act and its regulations" then the Department has the authority to assign weight to this testimony and consider it in determining whether to grant or deny the permit. See Rhino, 138 N.M. at 140; see also NMSA 1978, § 74-9-24(A) (1993) (Department may deny a permit if "granting the permit would be contradictory to or in violation of the Solid Waste Act or any regulation

adopted under it.”). Further, if there is a regulation in place that provides that a company cannot create a potential hazard to public health and welfare, then there is a nexus between testimony regarding environmental justice principles and an alleged violation of the regulations and the Department may assign weight to this testimony.

The Board is a creature of the New Mexico Air Quality Control Act. That Act provides that the State has jurisdiction over regulating the air quality of New Mexico, but that: “[a] county or municipality [meeting certain qualifications] ... may assume jurisdiction as a local authority by adopting an ordinance providing for the local administration and enforcement of the Air Quality Control Act.” See NMSA 1978, § 74-2-4 (A) (1995). It is our understanding that in 2007 the Board formed a task force to study how to provide instructions and whether to promulgate regulations regarding environment justice. The Task Force's objective is “to identify opportunities to integrate environmental justice into all programs, policies, and regulations of the City and County.” Albuquerque- Bernalillo County Air Quality Control Board, Environmental Justice Objectives of the Environmental Justice Task Force (July 11, 2007).

The Air Quality Control Act, like the Solid Waste Act, is replete with references to public input in permitting matters. For example, there must be “specification of the public notice, comment period and public hearing, if any, required prior to the issuance of a permit...” NMSA 1978, § 74-2-7(B)(5) (2001). In addition, “Any person who participated in a permitting action before the ... local agency shall be notified by ...the local agency of the action taken and the reasons for the action.” NMSA 1978, § 74-2-7(G) (2001).

The Air Quality Control Act also provides sufficient statutory authorization, like the Solid Waste Act, for the promulgation of regulations involving the consideration of public health and welfare in permit hearings. For example, “[t]he environmental improvement board or the local board shall adopt a plan for the regulation ... prevention of air pollution, recognizing the differences, needs, requirements and conditions within the geographic area...” NMSA 1978, § 74-2-5(B)(2) (2007). “In making its regulations ... the local board shall give weight it deems appropriate to all facts and circumstances, including but not limited to: character and degree of injury to or interference with health, welfare, visibility and property; the public interest...” NMSA 1978, § 74-2-5(E)(1)(2) (2007). Finally, “the local agency for their respective jurisdictions shall: classify and record air contaminant sources that, in its judgment, may cause or contribute to air pollution ... and shall be made with special reference to the effects on health, economic and social factors....” NMSA 1978, § 74-2-5.1(G) (1992).

Therefore, pursuant to the Rhino roadmap, the Board has the authority to promulgate air quality permit regulations similar to the solid waste regulations. The promulgation of these regulations will allow Board staff, in the future, to assign weight to public testimony regarding environmental justice principles. This will also allow Board staff the authority to factor in this testimony in determining whether to grant or deny a permit application. See NMSA 1978, § 74-2-7(C)(1), (2)(c) (2007) (local agency may deny a permit application if the construction or operation of a facility will not meet requirements of the Act or regulations).

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[1] “[It] is based on the idea that there are some poor or minority communities whose overall health suffers because of their proximity to polluting industries.” Juan-Carlos Rodriguez, “Panel to Study Air Justice”, Albuquerque Journal On-Line (Aug. 7, 2007).

[2] New Mexico statutes do not use the term “environmental justice” and therefore the Court’s roadmap is the best guidance on this matter. Cf. Cal Government Code § 65040.12 (1999) (creating a coordinating agency in state government for environmental justice programs with the power to propose methods for ensuring that industrial facilities will be placed away from schools and residential dwellings).

[3] The Court was “not persuaded that the [section of the statute that proclaims the] general purposes of the Environmental Improvement Act and Solid Waste Act ... provide authority for requiring the Secretary to deny a landfill permit based on public opposition.” Rhino, 138 N.M. at 141.