

MEMORANDUM

To: Albuquerque – Bernalillo County Air Quality Control Board

From: Bill Grantham, Counsel to the Board

Date: December 5, 2008

Re: Analysis of legal issues regarding environmental justice proposals

Introduction

At the November 12, 2008, I was tasked with analyzing the legal issues raised by Member Campen's compilation of Board members' recommendations regarding environmental justice¹ ("September 10 Recommendations") and by the Air Quality Division's response to those recommendations² ("November 12 Response"). I was further directed by Chairman Minturn to use my professional judgment to prioritize among potential issues.

The September 10 Recommendations are grouped into three major categories: (I) Incorporation of Environmental Justice Principles into Policy, (II) Improved Communication with Vulnerable Affected Communities, and (III) Assessment of Environmental Justice Opportunities. While the second two categories may entail legal issues at the periphery, legal issues are at the very heart of category (I).

Category I contains three recommendations: A. Adding Environmental Justice to regulations and bylaws, B. Assessment of Permit Impact on Vulnerable Populations, and C. Enhancing Performance Measures. Recommendation (A) is a general call for the incorporation of Environmental Justice principles into future regulations. As such it is generally not controversial, though the devil will most certainly be in the details. Recommendation (C) primarily raises issues of resource availability and prioritization. Recommendation (B), on the other hand presents a concrete proposal for a particular way to add environmental justice principles into regulations: by requiring assessment of vulnerable populations in the permitting process. It is therefore susceptible to legal analysis.

Recommendation II.B.

This element of the summary calls for the development of a "consistent and simple tool, incorporating data readily abstracted from public databases, which offers the Division Staff and Board members a qualitative means of assessing potential infringements on

¹ "Recommendations for Incorporation of Environmental Justice Principles into the Albuquerque/Bernalillo County Air Quality Division Policies and Procedures: A Summary of Prioritized Objectives Submitted to the Division Staff for Feasibility Analysis."

² "Air Quality Division 11/12/08 Response to Member Campen's Second Summary of Air Board Recommendations for Incorporating Environmental Justice Principles."

vulnerable populations.” The purpose of the tool is also expressed as enabling assessment of “disproportionate impact on vulnerable communities.” The tool would “most likely take the form of a checklist that incorporates mapping of local schools, day cares, and community centers, along with indices of relative burden (described in the appendix of the task force report).” The relative burdens examined in that appendix include distributions, by race/ethnicity, income, poverty, education, job classification, and home ownership, of four burdens: releases of toxic chemicals, cancer risks from hazardous air pollutants, superfund sites, and facilities emitting criteria air pollutants.

This recommendation is presented as a “measure in the general permitting process” and an aid to “decision makers.” The discussion below therefore examines the Board’s authority to incorporate environmental justice considerations, such as this disparate impact assessment, into permitting regulations.

The *Rhino* Decision and Attorney General Opinion No. 08-03

The leading case on Environmental Justice in New Mexico is *Colonias Development Council v. Rhino Environmental Services, Inc.*, 138 N.M. 133, 117 P.3d 939 (2005) (“*Rhino*”). At issue in *Rhino* was whether the New Mexico Environment Department was required to consider certain quality of life concerns – variously described as “social impact,” “sociological concerns,” “social well-being,” and “environmental justice” – raised by opponents in the permitting proceedings for a proposed solid waste landfill. *Id.* at 141. In particular, opponents objected to alleged “adverse cumulative effects caused by the proliferation of landfills and other industrial sites.” *Id.* at 136.

After finding that the Solid Waste Act’s emphasis on public participation authorized the Department to consider non-technical testimony, *Id.* at 139, 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 141.

Examining the Solid Waste Regulations, the court found that nexus in provisions that:

- “direct the 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;” *Rhino* at 141.
- provide “that a specific cause for denying a permit application is a determination that the permitted activity endangers public health, welfare or the environment.” *Id.*, citing 20.9.1.200(L)(16)(c) NMAC; and
- “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.” *Id.* citing 20.9.1.400(A)(2)(a) NMAC (2001).

The key feature of these regulatory provisions is that each employs a qualitative, non-technical standard (hazard to public welfare, public nuisance, etc.) as a factor in the permitting process. Based on these provisions, the court found that “[t]he regulations do not limit the Secretary’s review to technical regulations, but clearly extend to the impact on public health or welfare resulting from the environmental effects of a proposed permit.” *Id.* at 141. Therefore, the Department was required “to consider whether the cumulative effects of pollution, exacerbated by the incidences of poverty, may rise to the level of a public nuisance or hazard to public health, welfare, or the environment.”

New Mexico Attorney General Opinion No. 08-03 summarizes the case by stating that in *Rhino* the “New Mexico Supreme Court has provided a roadmap on how, and when, a government agency may incorporate environmental justice provisions into its regulations The Court’s roadmap 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?”

There is an apparent contradiction between this “roadmap” and the question it purports to answer. Specifically, the final step on the roadmap is “Has a rule been promulgated?” The question presented, however, as noted earlier in the Opinion, was “May the Albuquerque-Bernalillo County Air Quality Control Board (“Board”) promulgate regulations that incorporate environmental justice principles?” (Emphasis added). Obviously, prior promulgation of a rule cannot logically be a precondition to the rule’s promulgation.

Despite this contradiction, the “roadmap” approach in Opinion No. 08-03 essentially correctly frames the issue. The three step analysis is applicable when, as in the *Rhino* case, the question before the decision maker is whether allegations of “environmental justice,” “quality of life,” “social impact,” or similar affects may be considered under *existing* regulations. The first two steps are also applicable where, as here, the question is whether the agency has authority to promulgate rules to address such concerns prospectively. Therefore this analysis will follow the first two steps of the “roadmap.”

1. *“Is there a statute that provides for a public hearing?”*

Opinion No. 08-03 states that the Air Quality Control Act (AQCA) is “replete with references to public input in permitting matters, and sites two examples: first, § 74-2-7(B)(5) mandates that regulations include “specification of the public notice, comment period and public hearing, if any, required prior to the issuance of a permit.” Second, § 74-2-7(G) provides that “a person who participated in a permitting action before the department or the local agency shall be notified by the department or the local agency of the action taken and the reasons for the action.”

In addition to these provisions cited in the Opinion, it may be noted that § 74-2-7(H)

provides that “[a] person who participated in a permitting action before the department or the local agency and who is adversely affected by such permitting action may file a petition for hearing before the environmental improvement board or the local board,” and § 74-2-7(I) provides “[i]f a timely petition for hearing is made, the environmental improvement board or the local board shall hold a hearing within sixty days after receipt of the petition.” Thus the opportunity for public participation in permit *appeals* is mandated, with the only prerequisites being “participating” in the permitting process and timely filing of a petition.

While the AQCA thus incorporates public participation into the permitting process, it is not as solicitous of public input as the Solid Waste Act, which requires a public hearing before issuance of *every* permit. *See* NMSA 1978, § 74-9-24(A). Arguably then, in the case of air quality, unlike solid waste, the legislature’s goal was not “to involve the public in the permitting process to the fullest extent possible. *Rhino* at 139.

Nonetheless, the public participation provisions of the AQCA no doubt demonstrate legislative intent to involve the public in the permitting process, at least to the extent necessary to proceed to the next step of the analysis – step two of the roadmap.

2. “Is there a statute that provides for authority to enact a rule regarding the protection of public health and welfare?”

As previously noted, Opinion No. 08-03 characterizes the second step of the roadmap as the following question: Is there a statute that provides for authority to enact a rule regarding the protection of public health and welfare?

If the word “regarding” in this question is read in its broadest sense, step two of the “roadmap” would authorize rules to incorporate environmental justice principles into permitting regulation anytime there is enabling legislation that makes the protection of public health and welfare one of the purposes of the act.

This would violate the holding in *Rhino* that words such as “public health, safety, and welfare,” when included as goals in enabling acts, “are designed to invoke the general police power of the state,” and do not, without more “create a standard for protecting ‘public health, safety,’ or a “statutory mandate to respond to issues that fit ever so loosely under the umbrella of ‘sociological concerns.’” *Id.* at 141.

Therefore second step of the roadmap should be stated more precisely as: “Is there a statute that provides for authority to enact a rule that *directly incorporates the protection of health and welfare as a standard in the agency’s decision making process.*”

The crux of the issue is whether the Board has the authority to adopt regulations that, similarly to the solid waste regulations, would incorporate standards such as “hazard to public welfare” or “public nuisance” into the permitting process. If so, then “disparate impacts” or other “environmental justice” considerations could properly be considered in permitting decisions.

In *Rhino*, the court was able to point to express authority for the Environmental Improvement Board (EIB) to incorporate concepts of public interests into solid waste permitting regulations:

“The Solid Waste Act delegates authority to the Board to adopt regulations to administer “the cost-effective and environmentally-safe siting” and operation of solid waste facilities. Section 74-9-8. In issuing those regulations, the Board is required 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).” *Rhino* at 138. (Emphasis added)

Nothing in the AQCA provides such a broad delegation to the Air Board with respect to its permitting rules. The Air Board’s rulemaking authority with respect to permit requirements are provided at NMSA 1978, § 74-2-7 (A) – (O). The minimum contents of the permit regulations are provided in §§ 74-2-7 (B)(1) – (11), and include provisions for the timetable of permit processing, public notice requirements, permit fees, accelerated permit processing, permit duration, and certain requirements for operating permits. The allowable bases of denial for construction and operating permits are provided in § 74-2-7(C), and the allowable type of permit conditions are specified in § 74-2-7(D). Nowhere in any of these provisions, or in the remainder of § 74-2-7, is there any language that delegates to the Board the authority to balance public and private interests in crafting permitting rules in a manner similar to the that under the Solid Waste Act. Therefore, in this respect, a regulation promulgated by the Board that incorporates considerations of non-technical public interests into the permitting process would be less securely anchored in statutory authority.

However, Opinion No. 08-03 points to other provisions of the AQCA for authority, as follows:

- “The environmental improvement board or 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 the 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)
- “[T]he local agency for their respective jurisdiction 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).” Opinion No. 08-03 at 4 (ellipses as in original)

Each of these provisions is discussed in turn below:

AQCA § 74-2-5(B)(2)

As noted above, this provision allows the Air Board to consider “differences, needs, requirements, and conditions” when adopting a plan for regulation. Arguably, these terms allow for the consideration of a variety of non-technical factors, including those under the “environmental justice” umbrella. However, to put this provision in context, it is helpful to consider the section 74-2-5(B) in its entirety:

B. The environmental improvement board or the local board shall:

(1) adopt, promulgate, publish, amend and repeal regulations consistent with the Air Quality Control Act to attain and maintain national ambient air quality standards and prevent or abate air pollution, including regulations prescribing air standards, within the geographic area of the environmental improvement board's jurisdiction or the local board's jurisdiction, or any part thereof; and

(2) adopt a plan for the regulation, control, prevention or abatement of air pollution, recognizing the differences, needs, requirements and conditions within the geographic area of the environmental improvement board's jurisdiction or the local board's jurisdiction or any part thereof.

Thus the section provides two separate authorities – one to promulgate regulations, and one to adopt a plan regulation. It is in the second category – planning for regulation rather actually adopting regulations – that the language appears regarding the differences, needs, requirements and conditions within geographic areas. Therefore, a tenable legal argument could be made that the Board may consider these factors only when adopting a plan to regulate, *not* when actually adopting permitting regulations. Under this argument, § 74-2-5(B)(2) would not provide authority to incorporate public interest and welfare into permit regulations. However, because the next statutory provision is more directly on point, the possible implications of the distinction between regulating and planning to regulate are not pursued further here.

AQCA § 74-2-5(E)

AQCA section 74-2-5(E) provides, in its entirety:

E. In making its regulations, the environmental improvement board or the local board shall give weight it deems appropriate to all facts and circumstances, including but not limited to:

(1) character and degree of injury to or interference with health, welfare, visibility and property;

(2) the public interest, including the social and economic value of the sources and subjects of air contaminants; and

At first blush, this provision appears to provide an irrefutable basis for the argument that the Board is authorized to incorporate non-technical provisions regarding public interest and welfare into its permitting regulations. However, closer examination reveals that the effect of this provision is not quite so clear.

The Air Quality Division in its November 12 Response correctly notes that the factors listed in this section do not come into play until the Board's rulemaking authority has been established under another provision of the Act. The Division further asserts that the potential regulation must be authorized by section 74-2-5(B), (C) or (D). November 12 Response at 6. However, as discussed above, the Act provides the Board with additional rulemaking authority, specifically for permitting rules, at § 74-2-7. Therefore, the board arguably has the authority to consider the above factors in promulgating regulations governing permits.

However, the authority to *consider* ("give weight to") factors in the course of rule making is not necessarily the authority to incorporate those factors into the regulations, for future application by the agency. In other words, the fact that the Board is authorized to consider the public interest (for example) in promulgating its permitting regulations does not necessarily mean that the Board may issue regulations that allow the Division to employ the "public interest" as a criterion in a particular permitting action.

In fact, the New Mexico Court of Appeals construed very narrowly the permissible uses of such factors, in the case discussed below.

Public Service Company of New Mexico v. New Mexico Environmental Improvement Board

In *Public Service Company of New Mexico v. New Mexico Environmental Improvement Board*, 89 N.M. 223, 549 P.2d 638 (1976). ("*PNM*"), industry challenged a rule promulgated by the EIB imposing certain sulfur dioxide emission limits on coal burning equipment. The rule would have employed a phased approach under which control requirements would be 65% to 85% in 1977, depending on facility size, and increase to 90% in 1979. *Id.* at 225. Among the reasons the EIB gave for adopting the rule was that it would:

“[P]rotect 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.”

Id. at 226. Thus the rule would have required more emission reductions than necessary to comply with the Ambient Air Quality Standard for sulfur dioxide.

The provision of the AQCA in effect at the time governing EIB rulemaking contained

language that is similar to § 74-2-5(E) in the present Act:

Section 12-14-5(A)-The board shall prevent or abate air pollution. (B) The board shall: (1) Adopt, promulgate, publish, amend and repeal regulations consistent with the Air Quality Control Act . . . to prevent or abate air pollution, including regulations prescribing air standards within the geographic area of the board's jurisdiction, or any part thereof. . . . *In making its regulations, the board shall give weight it deems appropriate to all facts and circumstances, including but not limited to: (a) character and degree of injury to or interference with health, welfare, visibility and property; (b) the public interest, including the social and economic value of the sources and subjects of air contaminants; . . .*

Id. at 225 (emphasis added). In dissent, Judge Lopez would have upheld the board's rationale as authorized by the provision quoted above: "The 'public interest' is a broad enough concept to permit the Board to weigh how the public will best be served: by permitting the first plants in the area to 'use up' the clean air, or by weighing the hardship to these appellants against the 'social and economic value' of the new industries which the area expects to attract. *Id.* at 233.

The majority, however, disagreed, holding that "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 of the state." *Id.* at 227. In the majority's view, although the board admittedly was governed by the factors contained in Section 12-14-5(A) in setting the ambient air quality standards, once the standards were set, the "board may not set a new standard or adopt regulations implementing or explaining it for any reason other than to prevent or abate air pollution." *Id.* at 230. Thus, the objective of creating "room" under the ambient standard for future industrial growth represented an invalid attempt by the board to "enlarge its authority under the guise of making rules and regulations." *Id.* at 227. For the same reason, the majority rejected as invalid the board's additional reasons of maintaining regulatory primacy by being at least as stringent as federal requirements, *Id.*

As the Division notes in its November 12 response, in reaching the holdings described above the court in *PNM* cited the axiom that "Administrative bodies are the creatures of statutes. As such they have 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." *Id.* The court then declared: "The legislative mandated is expressed in simple and direct language: the board shall prevent or abate air pollution." *Id.* at 228. In the majority's view, the board is to consider the statutory factors in defining air pollution by setting the ambient standard. Once that is done, the only valid justification for a regulation promulgated by the board is that it is necessary to "abate air pollution" – that is, to meet the ambient air quality standard, but no more.

As the dissenting opinion in *PNM* demonstrates, the AQCA *could* have been read to delegate to the board the authority to issue regulations that required reductions in air pollution beyond what was necessary to meet ambient standards, based on the statutory factors including the public interest. However, for better or worse, that reading of the Act

did not prevail in *PNM*, and the case has not been overturned in the years since.

Under *PNM*, § 74-2-5(E) does not provide the board with the discretion to promulgate permitting regulations that would require anything more than what is necessary to meet applicable technical standards – that is, to abate air pollution. Thus, the Board is not authorized to establish a public interest or welfare based permitting criteria, under which environmental justice factors could be considered in accordance with Rhino.

In the context of the history of the Clean Air Act, *PNM* is an early case, and air quality regulation has evolved considerably since the case was decided. The reasoning of the court is, in my opinion, unduly narrow. There are valid and perhaps compelling arguments that *PNM*'s interpretation of the authority conferred to agencies by the Act's public interest language should be overturned or distinguished in future cases. Nonetheless, *PNM* remains valid law. Therefore, any regulations promulgated by the Board that incorporate "public interest" considerations into the permitting process would invite nearly certain litigation, notwithstanding the Attorney General's opinion.³

AQCA § 74-2-5.1(G)

Finally, Opinion No. 08-03 cites § 74-2-5.1(G), which provides:

The department and the local agency for their respective jurisdictions shall

* * *

G. classify and record air contaminant sources that, in its judgment, may cause or contribute to air pollution, according to levels and types of emissions and other characteristics that relate to air pollution; provided, classifications may be for application to the entire geographical area of the department's responsibility or the local authority's responsibility or to any designated portion of that area and shall be made with special reference to the effects on health, economic and social factors and physical effects on property;

Section 74-2-5.1 as a whole addresses "duties and powers of the department and the local agency." It does not confer any rulemaking authority upon the Board. Rather, after classifying and recording air contaminant sources, the department or local agency is to: "develop and present to the environmental improvement board or the local board a plan for the regulation, control, prevention or abatement of air pollution, recognizing the differences, needs, requirements and conditions in the different portions of the geographical area of the department's responsibility or the local authority's responsibility. § 74-2-5.1(H).

³ Court's are not bound by Attorney General Opinions. *See State v. C.W. Creswell*, 125 N.M. 276, 285, 960 P.2d 818, 827 (N.M. Ct. App. 1998) ("We are not bound by them [Attorney General opinions] in any event, giving them such weight only as we deem they merit and no more. If we think them right, we follow and approve, and if convinced they are wrong, *** we reject and decline to feel ourselves bound. "). (Citation and internal quotations omitted)

Once the local agency (i.e., the Division) presents its plan for regulation to the Board, any rules promulgated by the Board are subject to *the Board's* authority under §§ 74-2-5 & 74-2-7. Therefore, whatever § 74-2-5.1 may mean with respect to the *Division's* authority to consider environmental justice factors in classifying sources and developing a plan to regulate, it neither adds to nor subtracts from the *Board's* authority.

Therefore, for the purpose of this analysis of the Board's authority to incorporate environmental justice consideration in permitting regulations, § 74-2-5.1 has no effect.

Permit Denial

Assuming *arguendo* that under *Rhino*, and notwithstanding the potential barrier represented by *PNM*, the Board is authorized to “enact a rule regarding the protection of public health and welfare,” the next question presented is to what extent may public health and welfare considerations be used in the permitting decision. More specifically, may the permit be denied based on “environmental justice” factors?

Recommendation II.B of the September 10 Recommendations is silent on the question of whether results of applying the recommended assessment tool should be made a potential basis for permit application denial. Nonetheless, the issue of permit denial is on the table⁴ because Opinion No. 08-03 puts it there, as it concludes by stating:

“[T]he 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 allow board staff the authority to factor in this testimony in determining whether to grant or deny or a permit application.” AG. Op. No. 08-03 at 5. (Emphasis added).

The statutorily permissible grounds for permit denial are found in the AQCA at § 74-2-7 C:

Except as provided in Subsection O [provisions specific to cotton gins] of this section, the department or the local agency may deny any application for:

⁴ Moreover, as the *Rhino* case demonstrates, there is a natural presumption on the part of the public that if information is admissible in a permitting proceeding, it is relevant to the decision to issue or deny a permit. As noted in the Attorney General's Opinion no. 08-03, the New Mexico Supreme Court took note of the reaction of a permit opponent, who when told that her testimony on the social impacts of the proposed facility was not relevant to the decision to grant the permit, deny it, or grant it with conditions, exclaimed “I mean what are we doing here? I mean, those of us who are non-technical experts, why have we been invited here to express our opinions if it's irrelevant.” *Rhino* at 137.

Were the Board to require the Division to compile data and information on disparate impacts or relative burdens, participants in the hearing process will no doubt similarly expect the information to be used in the decision to grant or deny the permit.

- (1) a construction permit if it appears that the construction or modification:
 - (a) will not meet applicable standards, rules or requirements of the Air Quality Control Act or the federal act;
 - (b) will cause or contribute to air contaminant levels in excess of a national or state standard or, within the boundaries of a local authority, applicable local ambient air quality standards; or
 - (c) will violate any other provision of the Air Quality Control Act or the federal act; and
- (2) an operating permit if the source will not meet the applicable standards, rules or requirements pursuant to the Air Quality Control Act or the federal act.

Thus, because as previously noted administrative agencies have only those authorities delegated by the legislature, the only way that a permit could be denied based on “environmental justice” considerations is under a rule duly promulgated under the authority of the AQCA. Therefore, the question of permit denial is synonymous with the question of the Board’s authority to enact rules incorporating public interest considerations as standards. If, and only if, such regulations are authorized by the Act, as discussed above, *and* if such regulations provide for permit denial, then denial would be authorized under § 74-2-7 C (1)(a) or § 74-2-7 C (2).

The Division’s November 12 response raises the prospect of other bases of denial: “because a substantial number of people object to the proposed facility” or “because residents have expressed generalized concerns about a proposed facility.”⁵ Any regulation that provided for permit denial based solely on generalized public opposition, as opposed to the merits of the opposition, would be constitutionally suspect. *See e.g. Geo-Tech Reclamation Industries, Inc. v. Hamrick*, 886 F.2d 662, 30 ERC 1468, 58 USLW 2195, 20 Env’tl. L. Rep. 20,182C.A.4 (W.Va.),1989. (Overturning regulation providing for permit denial where a solid waste facility “is significantly adverse to the public sentiment,” because in the absence of any standard for the agency to evaluate adverse public sentiment, the regulation bore no rational relation to the legitimate goal of protecting civic pride and general communal welfare)

Permit Conditions

Another potential use of “environmental justice” factors might be in the crafting of permit conditions. The AQCA limits the Division’s authority to condition permits in § 74-2-7 as follows:

⁵ A third potential basis raised by the Division, “because the facility may contribute to potential infringements on vulnerable populations,” goes to the merits of the opponent’s concerns, rather than the mere existence of opposition, and is thus addressed by the analysis of the Board’s authority to regulate based on “environmental justice” considerations.

D. The department or the local agency may specify conditions to any permit granted under this section, including:

(1) for a construction permit:

(a) a requirement that such source install and operate control technology, determined on a case-by-case basis, sufficient to meet the standards, rules and requirements of the Air Quality Control Act and the federal act;

(b) individual emission limits, determined on a case-by-case basis, but only as restrictive as necessary to meet the requirements of the Air Quality Control Act and the federal act or the emission rate specified in the permit application, whichever is more stringent;

(c) compliance with applicable federal standards of performance;

(d) reasonable restrictions and limitations not relating to emission limits or emission rates; or

(e) any combination of the conditions listed in this paragraph; and

(2) for an operating permit, terms and conditions sufficient to ensure compliance with the applicable standards, rules and requirements pursuant to the Air Quality Control Act and the federal act.

Thus, as with permit denial promulgation of rule requiring consideration of environmental justice factors could provide a basis for imposing conditions on construction and operating permits, if the Division were found to have the authority to promulgate such rules in spite of the *PNM* decision.

In addition, with respect to construction permits only, § 74-2-7(D)(1)(d) may provide limited authority to address environmental justice concerns, through its authorization of reasonable restrictions or limitations not related to emission limits or emission rates. Such restrictions or limitations would have to be consistent with the purposes of the AQCA. The contours of such conditions are beyond the scope of this analysis.

Conclusion

Notwithstanding Attorney General Opinion No. 08-03, an interpretation of the AQCA as authorizing the inclusion of environmental justice considerations (such as disproportionate impacts) into permitting regulations is inconsistent with the holding of *PNM*. While there may be compelling arguments for a changing the law established in that case, only a court or the legislature may do so. Promulgation of regulations requiring analysis of disproportionate impact in the permitting process would therefore be accompanied by a very high risk of litigation.