



City of Albuquerque

Legal Department

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INTER OFFICE MEMO

DATE: February 4, 2008

TO: RPAC Part 20 Subcommittee

FROM: Donna Griffin,
Assistant City Attorney

SUBJECT: Response to United States Forest Service Comment in its January 28, 2008
Comments on the Proposed Changes to the Fugitive Dust Regulations.
(20.11.20 NMAC)

SUMMARY

The United States Forest Service (USFS) and the City of Albuquerque's Air Quality Division (AQD) have had written and verbal discussion regarding the impact and/or applicability of the proposed regulatory changes to Cibola National Forest. The AQD is the local authority acting as the regulatory agency under the Clean Air Act, and the Cibola National Forest lies within the jurisdiction of the AQD. A number of USFS concerns have been resolved; however, the USFS continues to assert that there are areas of the Clean Air Act (CAA) that cannot be enforced against USFS because of its immunity as a federal agency. In contrast, it is the AQD position that the waiver from sovereign immunity provided in the CAA is expansive and far-reaching, and there are no portions of the AQD air quality program that are not applicable to the USFS.

ANALYSIS

The USFS continues to maintain in its comments that it is required to comply only with the local "requirements" and that court cases limit the definition of requirements to objective numerical or narrative requirements. Conversely, AQD found, both by statute and by

court decision, that Congress intended a complete waiver of sovereign immunity when it promulgated the federal facilities language in the CAA. The statutory language is clear on its face:

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, and each officer, agent, or employee thereof, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any nongovernmental entity. The preceding sentence shall apply:

- (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement whatsoever),
- (B) to any requirement to pay a fee or charge imposed by any State or local agency to defray the costs of its air pollution regulatory program,
- (C) to the exercise of any Federal, State, or local administrative authority, and
- (D) to any process and sanction, whether enforced in Federal, State, or local courts, or in any other manner.....

In addition to the “plain meaning” of the above CAA language, both Congressional reports and federal courts have made it clear that Congress intended a far-reaching waiver of sovereign immunity in the CAA relating to state and local clean air regulatory programs. In *United States v. Tennessee Air Pollution Control Bd.*, 185 F.3d 529, the Court held that the CAA federal facilities and citizen suit provisions waived sovereign immunity from state law punitive civil penalties imposed to force an army facility to comply with state standards. Additionally, in its discussion on sovereign immunity, the Court in *United States v. Tennessee Air Pollution Control Bd.* refers to a Congressional House Report that stated the 1977 amendments to the CAA expressly waive sovereign immunity and that Congress wanted “to express with sufficient clarity, the committee’s desire to subject Federal facilities to all Federal, State and local requirements – procedural, substantive, or otherwise – process and sanctions.” (*United States v. Tennessee Air Pollution Control Bd.*, 967 F.Supp. 975 (M.D.Tenn.1997) at 979, citing H.R.Rep. No. 294, 95th Cong., 1st Sess. 199, reprinted in 1977 U.S.C.C.A.N. 1077, 1278). Additionally, the Court found that through Congress’s repeated use of inclusive language, such as “any and “all” Congress sought to affect a far-reaching waiver of sovereign immunity and that “[t]he plain language of the [CAA] reveals its expansiveness.” *United States v. Tennessee Air Pollution Control Bd.* citing *United States v. South Coast Air Quality Management Dist.*, 748 F.Supp. 732 (C.D. Cal 1990). Therefore, it is clear that the CAA mandates that a local air quality program can exert regulatory control over federal entities to affect a comprehensive regulatory program to abate and control air pollution within its jurisdiction.

cc: Adelia Kearney
Deputy City Attorney