

Appendix F

Court of Appeals Decision Relating to the
Water Quality Control Commission Regulations

File - Regulations (9 re) Jan 14, 1981 Hearing

1 IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

2 KERR-MCGEE NUCLEAR CORPORATION,
3 HOMESTAKE MINING COMPANY,
4 PHILLIPS URANIUM CORPORATION,
5 and UNITED NUCLEAR CORPORATION,

6 Appellants,

7 v.

No. 5232

8 NEW MEXICO WATER QUALITY
9 CONTROL COMMISSION,

10 Appellee.

COURT OF APPEALS OF NEW MEXICO
FILED

JAN 19 1982

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11 ADMINISTRATIVE APPEAL

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O P I N I O N

HENDLEY, Judge.

On October 14, 1980, the New Mexico Water Quality Control Commission (Commission) approved the Environmental Improvement Division's (EID) request to hold a public hearing on proposed regulations concerning toxic water pollutants. The public hearings, conducted by a hearing officer pursuant to § 74-6-6, N.M.S.A. 1978 (Repl. 1981), were held on January 14 and 15, 1981. The Commission adopted the following regulation setting forth a new definition of toxic pollutants (Water Quality Control Commission Regulation 1-101.X), and amended several other regulations (Regulations 1-101.N, 3-105.A, 3-106, 3-109.C, 3-312. B):

X. "toxic pollutant" means a water contaminant or combination of water contaminants in concentration(s) which, upon exposure, ingestion, or assimilation either directly from the environment or indirectly by ingestion through food chains, will unreasonably threaten to injure human health, or the health of animals or plants which are commonly hatched, bred, cultivated or protected for use by man for food or economic benefit. As used in this definition injuries to health include death, histiopathologic change, clinical symptoms of disease, behavioral abnormalities, genetic mutation, physiological malfunctions or physical deformations in such organisms or their offspring. In order to be considered a toxic pollutant a contaminant must be one of the potential toxic pollutants listed below and be at a concentration shown by scientific information currently available to the public to have potential for causing one or more of the effects listed above.

Any water contaminant or combination of the water contaminants in the list below creating a lifetime risk of more than one cancer per 1,000,000 exposed persons is a toxic pollutant.

acrolein
acrylonitrile
aldrin
benzene
.....

1 Regulation 1-101.X and the other amended regulations were
2 filed with the State Records Center on June 2, 1981, and with
3 the Supreme Court Law Librarian on June 4, 1981. Kerr-McGee,
4 Homestake, Phillips, and United Nuclear (the Companies) appeal
5 these regulations pursuant to § 74-6-7, N.M.S.A. 1978 (Repl.
6 1981), which permits an appeal to this Court by "[a]ny person
7 who is or may be affected by a regulation". The issues on
8 appeal are: 1) whether Regulation 1-101.X is constitutional;
9 2) whether the second paragraph of Regulation 1-101.X is
10 supported by substantial evidence and is in accordance with
11 law; 3) whether the appellant Companies received a fair and
12 impartial hearing; and 4) whether the Commission unlawfully
13 delegated its authority and functions to the EID.

14 We hold the regulations are constitutional, the second
15 paragraph of Regulation 1-101.X is supported by substantial
16 evidence, the Companies received a fair hearing, and the
17 Commission did not unlawfully delegate its authority.

18 Constitutionality of
19 the Regulations

20 Section 74-6-7(C), N.M.S.A. 1978 (Repl. 1981), states:

21 Upon appeal, the court of appeals
22 shall set aside . . . [a regulation
23 adopted by the commission] only if
24 found to be:

25 (1) arbitrary, capricious or an
26 abuse of discretion;

27 (2) not supported by substantial
28 evidence in the record or reasonably
29 related to the prevention or abatement
30 of water pollution; or

31 (3) otherwise not in accordance
32 with law.

The Companies contend Regulation 1-101.X defining toxic
pollutants and all other regulations making reference to that
definition are unconstitutionally vague and, therefore, arbitrary,
capricious, an abuse of discretion, and not in accordance with

1 Law. The gist of the Companies' argument is that the regulation
2 is so uncertain that they do not have fair notice of what con-
3 centration of compounds falls within the definition of toxic
4 pollutants. The Companies state that they will incur penalties
5 for discharging compounds that they, in good faith, believe are
6 not toxic.

7 The Companies also claim the regulation is an ex post facto
8 law and, therefore, unconstitutional because the determination
9 by the Director of the EID of what is a toxic pollutant will be
10 made after a discharger is already discharging.

11 Both of the Companies' constitutional arguments are based
12 on a misperception of the regulations and how they are applied.
13 The Companies interpret the regulations as placing the burden on
14 them to determine whether the discharge contains toxic pollutants
15 and, therefore, whether they need a discharge plan. They contend
16 there are many unknowns in this area: such as, whether to
17 extrapolate the data from animal experiments to humans; whether
18 the linear, non-threshold hypothesis should be applied;¹ how
19 sensitive a population to use to determine standards; and, the
20 Companies do not know what standards to use. They assert if
21 they incorrectly determine whether a toxic pollutant is present,
22 they will later be punished. This is an incorrect interpretation
23 of the procedures provided in the regulations. The following is
24 a summary of the applicable procedures.

25 Any person intending to make a new water contaminant dis-
26 charge or intending to alter the character or location of an
27 existing one must file a notice with the EID. The notice must
28 contain the name and address of the discharger, the quantity
29

30 1

31 This theory states that if adverse effects occur at high con-
32 centrations, adverse effects will also occur at lower concen-
trations, in a linear proportion.

1 and location of the discharge, and an estimate of the concen-
2 tration of water contaminants present in the discharge.

3 Regulation 1-201.

4 Regulation 3-104 is entitled "Discharge Plan Required" and
5 describes those dischargers who must have a plan approved by the
6 Director of the EID (Director). Any person causing or allowing
7 effluent² or leachate³ to be discharged directly or indirectly
8 into ground water must have a discharge plan approved by the
9 Director. The next regulation, 3-105, describes "Exemptions
10 From Discharge Plan Requirement". In thirteen different
11 instances set out in this regulation, no discharge plan will be
12 required. The Companies assume they have the authority to deter-
13 mine that they are exempt under this regulation and that they,
14 therefore, need not apply for a discharge plan every time they
15 come to the conclusion that they are exempt. It is upon this
16 assumption that they base part of their constitutional attack
17 on the regulations. For example, Regulation 3-105.A provides
18 that a discharger is exempt if the discharge is composed of
19 "[e]ffluent or leachate which conforms to all the listed numer-
20 ical standards of Section 3-103 and has a total nitrogen con-
21 centration of 10 mg/l or less, and does not contain any toxic
22 pollutant." The Companies contend they might, in good faith,
23 determine they are exempt under this section, but the Director
24 might later decide one of the compounds they are discharging
25 is at a concentration that brings it within the definition of
26 toxic pollutant. The Companies would, therefore, be fined for
27 discharging a toxic pollutant.

29 2
30 Defined as liquid discharged as waste. Webster's Third Inter-
national Dictionary (1961).

31 3
32 Defined as liquid that has percolated through soil or other
medium. Id.

1 The flaw in this argument stems from the fact that nowhere
2 in the regulations is the discharger himself given the authority
3 to decide whether he is exempt and to act accordingly. The
4 regulations state that it is the Director who makes that deter-
5 mination. It is the Director who informs the discharger whether
6 he qualifies for an exemption under Regulation 3-105. The
7 language of the regulations supports this conclusion. "To
8 determine conformance [to Regulation 3-103 and the toxic pollu-
9 tant standards], samples may be taken by the agency [EID] before
10 the effluent or leachate is discharged If for any
11 reason the agency [EID] does not have access to obtain the
12 appropriate samples, this exemption shall not apply." Regulation
13 3-105.A. (Emphasis added.) "If the director determines that
14 a discharger is not exempt from filing a discharge plan pursuant
15 to Section 3-105, or that the material to be discharged contains
16 any toxic pollutant as defined in Section 1-101.X., which is not
17 included in the numerical standards of 3-103, the discharger may
18 appeal such determination" Regulation 3-112.B.
19 (Emphasis added.)

20 The procedure for applying for approval of a discharge plan
21 under certain circumstances is set out in Regulation 3-106.
22 Anyone who was already discharging before or within 120 days
23 of the effective date of the regulations will be notified by the
24 Director if a discharge plan is required. Even if the Director
25 notifies the discharger that he needs to submit a plan, he may
26 discharge up to 240 days without a plan, or longer if the
27 Director allows. Regulation 3-106. If a person plans to begin
28 discharging a contaminant listed in Regulation 3-103 or a toxic
29 pollutant more than 120 days after the effective date of the
30 regulations, he must inform the Director of his name and address,
31 the location and quantity of the discharge, and an estimate of
32 the concentration of water contaminants in the discharge. (This

1 as the same information all dischargers submit to the EID under
2 Regulation 1-201.) The Director must then notify the person
3 if a discharge plan is required. If a plan is required, a
4 proposed plan must be submitted, and it must include the informa-
5 tion set out in Regulation 3-106.C. Within 30 days of the
6 submission of a proposed plan, the Director must notify the
7 public, any affected government agencies, and anyone else who
8 has requested notification. Regulation 3-108. During the 30
9 days following public notice, comments may be made, a public
10 hearing may be requested and shall be held if the Director
11 determines there is significant public interest. Regulation
12 3-108.

13 If no public hearing is held, the Director must either
14 approve or disapprove the proposed plan within 60 days after the
15 necessary information was made available to him. Regulation
16 3-109.A. If a hearing was held, the Director must either
17 approve or disapprove the plan within 60 days of the hearing,
18 or the time the necessary information was made available to him,
19 whichever is later. Regulation 3-109.B. Regulation 3-109.C
20 sets out the criteria the Director must use in determining
21 whether to approve or disapprove a discharge plan. If the
22 Director disapproves a proposed discharge plan or approves a
23 plan subject to condition, the discharger has the right to a
24 hearing de novo by the Commission. Regulation 3-112. The
25 Commission's decisions may be appealed to the Court of Appeals.
26 Regulation 3-113; see generally, § 74-6-5, N.M.S.A. 1978 (Repl.
27 1981).

28 A statute or regulation is unconstitutional if it defines
29 a prohibited act in terms so vague that men of common intelligence
30 must guess at the meaning and would differ in its application.
31 Bokum Resources v. N.M. Water Quality Cont., 93 N.M. 546, 603
32 P.2d 285 (1979). We hold this regulation is not unconstitutionally

1 vague under the above definition. The regulations describe the
2 process each discharger must undertake before it discharges.
3 Once the discharger decides when, where, what, and how much it
4 will discharge, it must submit that information to the EID. It
5 must then apply for a discharge plan, no matter what the content
6 of the discharge. If a toxic pollutant is present, the Director
7 will inform the discharger. If the exemption statute applies,
8 the Director will inform the discharger. The only way the dis-
9 charger can be fined is if he discharges without a plan in
10 violation of the Director's determination that one is required,
11 or where he discharges in violation of an existing approved plan.
12 This is not vague. Each step is set out in the regulations and
13 each regulation is clearly labeled. Although there are no
14 numerical standards in the regulations for what concentration of
15 compounds triggers the label "toxic pollutant," this is not
16 detrimental to the dischargers. The Director will make those
17 determinations before a discharge plan is approved or disapproved,
18 and the discharger will be notified.⁴ The lack of numerical
19 standards is, therefore, not a basis for finding the statute
20 unconstitutional.

21 In *State v. Dority*, 55 N.M. 12, 225 P.2d 1007 (1950), our
22 Supreme Court stated: "Legislative enactments may be declared
23 void for uncertainty if their meaning is so uncertain that the
24 court is unable, by the application of known and accepted rules
25 of construction, to determine what the legislature intended with
26 any reasonable degree of certainty. But absolute or mathematical
27 certainty is not required in the framing of a statute." In

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29 ⁴ Although the Supreme Court in *Eokum, supra*, stated that the dis-
30 charge of a toxic pollutant is a criminal act, we do not believe
31 that is what they meant. We believe they meant essentially
32 what we have described above, that is, that the discharge of a
toxic pollutant in violation of a discharge plan is the
prohibited act.

1 deciding whether a regulation is void for vagueness, the same
2 standards are used as for statutes. See, Bokum, supra. Since
3 we are able to interpret the regulations in question with
4 reasonable certainty, and for the reasons set out above, we
5 hold the regulations are constitutional.

6 Substantial Evidence

7 The Companies contend that the second paragraph of the
8 definition of toxic pollutant in Regulation 1-101.X is not
9 supported by substantial evidence in the record, as required
10 by § 74-6-7(C), N.M.S.A. 1978 (Repl. 1981). That part of the
11 definition provides: "Any water contaminant or combination of
12 the water contaminants in the list below creating a lifetime
13 risk of more than one cancer per 1,000,000 exposed persons is
14 a toxic pollutant.

15 acrolein
16 acrylonitrile
17"

18 We find there was substantial evidence in the record to
19 support the adoption of the above paragraph of Regulation 1-101.
20 x.⁵ One of the exhibits offered by the ETD at the hearing was
21 a summary of Ambient Water Quality Criteria for the protection
22 of human health published by the Environmental Protection Agency
23 (EPA) in 1980. For potential carcinogens (cancer producing
24 agents), a water concentration of zero was recommended by the
25 EPA. However, if a zero level is not obtainable, the EPA
26 recommended three other concentrations, one of which is the one
27 in 1,000,000 level incorporated into the second paragraph of

28 ⁵
29 The standard to be used here is the same as for findings by a
30 court: If there is substantial evidence, the finding or
31 regulation must be upheld. In determining whether there is
32 substantial evidence, this Court must view the evidence in the
most favorable light to support the finding, and only favorable
inferences will be drawn. United Veterans Org. v. New Mexico
Prop. App. Dept., 84 N.M. 114, 500 P.2d 199 (Ct.App. 1972).

1 Regulation 1-101.X. This exhibit is substantial evidence for
2 the adoption of the cancer standard in Regulation 1-101.X.

3 Fair Hearing

4 The Companies rely on Kerr-McGee Nuclear Corporation v.
5 New Mexico Environmental Improvement Board, 20 N.M. St. B. Bull.
6 316 (Ct.App. 1981) (Wood, Specially Concurring), for their
7 argument that the regulations are invalid because the Companies
8 were not given a fair and impartial hearing. We hold the
9 hearing was fair and impartial.

10 In Kerr-McGee, supra, regulations adopted by the Environ-
11 mental Improvement Board (Board) were held to be invalid because
12 the EID participated in drafting the regulations, counseled the
13 Board, and also acted as an interested party at the regulation
14 hearings. These factors were held to be indicative of an unfair
15 hearing vis-a-vis the Companies. The Companies here contend
16 that the statutes for Commission hearings are identical to those
17 in the Kerr-McGee, supra, case and, since the EID prepared the
18 regulations in this case and then acted as an interested party,
19 the regulations are invalid.

20 This case differs from Kerr-McGee, supra, in one major
21 aspect. Unlike the Environmental Improvement Board, the Water
22 Quality Control Commission is comprised of members of eight
23 environmental or other state agencies, plus a representative
24 of the public. Section 74-6-3, N.M.S.A. 1978 (Repl. 1981),
25 provides that the members of the Commission shall be the director
26 of the environmental improvement division, the director of the
27 New Mexico department of game and fish, the state engineer, the
28 secretary of the oil conservation commission, the director of
29 state park and recreation, the director of the department of
30 agriculture, executive secretary of the state natural resource
31 conservation commission, the director of the bureau of mines,
32 and a representative of the public appointed by the governor.

1 Each agency head may then designate a member of his staff to
2 represent him if desired. Section 74-6-3, supra. This serves
3 the purpose of having expertise on the Commission which deals
4 with highly technical and complicated matters. See, § 74-6-4,
5 N.M.S.A. 1978 (Repl. 1981). The agency members of the Commission
6 are also the same as the constituent agencies. Section 74-6-2(J)
7 N.M.S.A. 1978 (Repl. 1981). These constituent agencies are
8 granted certain powers (§ 74-6-9, N.M.S.A. 1978 (Repl. 1981)),
9 among which is to recommend regulations for adoption by the
10 Commission. It is not difficult to see the wisdom behind this
11 section. Agencies which deal with certain technical aspects of
12 water quality and quantity are better able to keep a continuing
13 study of their particular duties as are charged by law. They
14 have the expertise. By contrast, the New Mexico Environmental
15 Improvement Board consists simply of "five members appointed by
16 the governor". Section 74-1-4, N.M.S.A. 1978 (Repl. 1981). In
17 light of the fact that the Legislature has seen fit to have the
18 Director of the EID sit as a member of the Commission, we decline
19 to hold that because the EID proposed regulations to the Commis-
20 sion and then acted as an interested party at the hearings, that
21 the Companies were denied a fair and impartial hearing. The
22 legislative scheme does not support the Companies' position.

23 Delegation of Authority

24 The Companies contend the Commission, in adopting the
25 regulations in question, unlawfully delegated its authority
26 and functions to the EID and the Director. They argue it is
27 unlawful delegation for two reasons. First, the Director is
28 allowed to determine at what concentration a compound constitutes
29 a toxic pollutant. Second, the preparation of the regulations
30 was delegated to the EID, which also appeared as an interested
31 party at the hearings. The Commission responds that there is no
32 delegation and, even if there were, it is lawful.

1 Section 74-6-4(D), supra, provides the Commission "shall
2 adopt, promulgate and publish regulations to prevent or abate
3 water pollution in the state"

4 Under the regulations, there has been no delegation. The
5 Commission set the standards when it adopted the regulations
6 pursuant to § 74-6-4(D), supra. The Director merely applies
7 those standards, as allowed in § 74-6-8, N.M.S.A. 1978 (Repl.
8 1981): "Each constituent agency shall administer regulations
9 adopted pursuant to . . . [74-6-4, N.M.S.A. 1978], responsibility
10 for the administration of which has been assigned to it by the
11 commission." Since the Commission gave the EID the authority
12 to administer certain regulations, we hold there has been no
13 delegation.

14 Even if there were delegation of authority in this instance,
15 it would be lawful. In National Labor Relations Bd. v. Duval
16 Jewelry Co., 357 U.S. 1, 78 S.Ct. 1024, 2 L.Ed.2d 1097 (1958),
17 the United States Supreme Court held where the ultimate decision
18 on the merits of the issue does not rest with the delegate, the
19 delegation is permissible. In that case, the National Labor
20 Relations Board delegated its statutory power to issue and revoke
21 subpoenas to hearing officers. Rulings of the hearing officer
22 could be appealed to the National Labor Relations Board if special
23 permission was granted. The court, expressing sympathy for an
24 administrative agency's need for assistance in matters of this
25 sort, held "[w]hile there is delegation here, the ultimate
26 decision on a motion to revoke is reserved to the Board [NLRB],
27 not to a subordinate. All that the Board has delegated is the
28 preliminary ruling on the motion to revoke. It retains the
29 final decision on the merits. . . . The fact that special
30 permission of the Board is required for the appeal is not
31 important."

32 Under Duval, supra, any delegation of authority from the

1 Commission to the EID is lawful. Instead of an appeal from the
2 decisions of the Director of the EID, § 74-6-6(L) and (M),
3 N.M.S.A. 1978 (Repl. 1981), provide for a de novo hearing before
4 the Commission. The petitioner may submit evidence orally or in
5 writing. The fact that the burden of proof is on the petitioner
6 at the hearing does not invalidate the delegation as suggested
7 by the Companies. Since the appellant has the burden where the
8 only recourse is a traditional appeal, and that did not invalidate
9 the procedures in Duval, supra, we cannot hold that the regulations
10 in the case at bar are invalid because the discharger has the
11 burden of proof at the trial de novo. Accordingly, any reliance
12 by appellants on Kerr-McGee Nuclear Corporation, supra, is mis-
13 placed.

14 We hold the Commission's regulations are valid.

15 IT IS SO ORDERED.

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17

William R Hendley
Judge

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WE CONCUR:

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Robert J. [Signature] J.

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Thomas A. Donnelly J.

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