KAFB 91

ENTERED

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

**UNITED STATES OF AMERICA,**
**DEPARTMENT OF THE AIR FORCE,**
**Appellant**

**vs.** **No. 12,550**

**STATE OF NEW MEXICO,**
**ENVIRONMENTAL IMPROVEMENT DIVISION**
**OF THE HEALTH AND ENVIRONMENT DEPARTMENT,**
**Appellee.**

# APPELLEE'S BRIEF
# OPPOSING STAY OF ADMINISTRATIVE ORDER

TRACY M. HUGHES
SPECIAL ASSISTANT ATTORNEY GENERAL
ASSISTANT GENERAL COUNSEL
HEALTH AND ENVIRONMENT DEPARTMENT
1190 ST. FRANCIS DRIVE
SANTA FE, NEW MEXICO 87503
(505) 827-2900

COUNSEL FOR APPELLEE

## Table of Contents

## Table of Authorities

CASES:

New Mexico:



Other Jurisdictions:



STATUTES:

Other Authorities

## INTRODUCTION

On July 24, 1990, the Environmental Improvement Division of the Health and Environment Department ("Division") issued a Hazardous Waste Facility Permit to the United States Air Force, Kirtland Air Force Base ("KAFB"). RP-1272. The permit contains conditions for the storage of hazardous waste in containers at buildings 1024, 28009 and 615 at KAFB. Prior to the issuance of the permit, buildings 28009 and 615 stored hazardous waste without a permit from the Division under interim status. Interim status is the minimum national standard acceptable for the management of hazardous waste until a facility is permitted or closed. See §74-4-9 NMSA 1978 (Repl.Pamp.1990) and 40 C.F.R. §265.1 (1988)[1]

Hazardous waste facilities already in existence when the Resource Conservation and Recovery Act ("RCRA") permitting regulations became effective in 1980 were required to submit to the Division a Part A application consisting of general information about the facility, the types of wastes generated, handled, stored and/or disposed of. 40 C.F.R §270.1(a)(3) After the federal regulations became effective, facilities have been directed by the Division to submit a much more specific Part B permit application,

---

[1] 40 C.F.R. §§260 - 270 (1988) has been adopted by reference, with few exceptions, by the Environmental Improvement Board pursuant to §74-4-4.D NMSA 1978 (Repl.Pamp.1990) and the Hazardous Waste Management Regulations - 5, Amendment #1. This Brief will cite directly to the 1988 revision of the C.F.R.

which KAFB did on May 10, 1984. RP-352. Kirtland subsequently submitted revised Part B permit applications in May 1985, May 1988 and June 1989. RP-469, 645 and 914. From these applications and the accompanying correspondence, the Division wrote the draft RCRA Part B permit. RP-994. This draft permit was sent to KAFB on June 30, 1989. RP-266. It was noticed on July 17, 1989 and the Division requested public comments until September 1, 1989. RP-271. The Division held public meetings on August 22, 1989 and September 21, 1989. RP-272, 318 The public comment period was extended until October 16, 1989 and a public hearing was held on October 24, 1989. RP-318 The Division summarized and responded to all public comments. RP-332. The draft permit was revised by the Division as stated in the responses to public comments and issued as a Final Operating Permit on July 24, 1990. RP-1272.

KAFB appealed the Final Operating Permit on August 22, 1990. The Docketing Statement, filed on September 19, 1990, raised seven issues. On January 2, 1991, KAFB filed a Motion for Stay of Permit, which asks this Court to grant a stay of the entire Hazardous Waste Facility Permit, NM9570024423-1. The Division now files this Brief opposing the granting of that stay.

ARGUMENT

This is an appeal filed under §74-4-4.2.G NMSA 1978 (Repl.Pamp.1990). The statute does not specifically provide for

a stay of the permit pending appeal; but this Court has previously decided, in construing §74-6-7 NMSA 1978 (Repl.Pamp.1990) (providing for appeals from regulations of the Water Quality Control Commission), that "[i]mplicit in the statute is the power to grant a stay from the operation of an administrative order or regulation, after due notice and opportunity for hearing." Tenneco Oil Co. v. New Mexico Water Quality Control Commission, 105 N.M. 708, 709, 736 P.2d 986, 987 (Ct.App.1986). The Court established certain requirements for granting of a stay on appeal, including exhaustion of administrative remedies and a four-pronged test for obtaining a stay. KAFB has not met the Tenneco requirements and is not entitled to a stay of the hazardous waste facility permit.

I. KAFB FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES, AS REQUIRED BY TENNECO.

In Tenneco, this Court held:

> In cases where a stay is sought of agency action during the pendency of an administrative appeal, in accord with the general rule requiring a party to exhaust his administrative remedies, the party seeking the stay should first apply for a stay from the agency involved.

105 N.M. at 710, 736 P.2d at 988.

There are good reasons for requiring exhaustion. As noted by the Oregon Court of Appeals in Von Weidlein International, Inc. v.

Young, 16 Or. App. 81, 514 P.2d 560 (1973) (en banc), cited by this Court in Tenneco, 105 N.M. at 710, 736 P.2d at 988:

> There are numerous advantages to requiring applications for stay to first be presented to the agency involved. The agency will, of course, be much more familiar with the facts. The agency can bring its expertise to bear on questions raised by a motion for a stay, just as the agency brings its expertise to bear on other questions it must decide. Should the agency deny a stay, its order to that effect "may be accompanied by an opinion," . . . which could make further consideration of the question of a stay pending judicial review . . . more meaningful. Finally, . . . while a motion for a stay would be addressed to the sound discretion of the agency, we should not assume that its discretion will be abused.

514 P.2d at 561-62. This is in accord with the general rule in New Mexico that "[b]efore he can apply to the courts for relief, [one] must exhaust his administrative remedies." State Racing Commission v. McManus, 82 N.M. 108, 111, 476 P.2d 767, 770 (1970).

While the authorities are somewhat conflicting as to exactly what constitutes exhaustion of administrative remedies, see 2 Am. Jur. 2d Administrative Law §608 (1962), it is at least clear that the person seeking a stay must first request it "from the agency involved." Tenneco, 105 N.M. at 710, 736 P.2d at 988 (emphasis added). KAFB has not requested that the Division stay the permit.

For a September 1990 inspection, KAFB asked the Division whether the inspection was under permitted or interim status. See

Motion for Stay of Permit, paragraph 5. The Division was not asked to stay the permit nor to make a record of its decision. No administrative record on the Tenneco requirements has been developed for this Court's review. This Court does not have the expert agency's thinking on the Tenneco requirements, i.e., the possibility of harm to the public interest, to the environment and to the Division if a stay were granted. Without the Division's evaluation, this Court is left to fend for itself. That result is precisely what the exhaustion requirement in Tenneco was designed to avoid. KAFB's Motion for Stay of Permit should be denied.

II. KAFB FAILED TO MEET THE FOUR-PRONGED TENNECO TEST FOR OBTAINING A STAY OF THE HAZARDOUS WASTE PERMIT.

Having decided, in Tenneco, that it has implicit authority to grant a stay of administrative action, this Court further held that such a stay would be granted only upon

> a showing of (1) a likelihood that applicant will prevail on the merits of the appeal; (2) a showing of irreparable harm to applicant unless the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest.

105 N.M. at 710, 736 P.2d at 988. The Court emphasized that

> [t]he mere fact that an administrative regulation or order may cause injury or inconvenience to applicant is insufficient to warrant suspension of an agency regulation by the granting of a stay. . . . An administrative order or regulation will not be stayed pending appeal where the applicant has

> not made the showing of each of the factors required to grant the stay.

(Emphasis added). Id.

Under Tenneco, KAFB is not entitled to a stay as a matter of right; this Court has the discretion to grant a stay upon a sufficient showing by KAFB of the four factors listed above. KAFB bears the burden of proof as to each of the four factors. Tenneco, 105 N.M. at 710, 736 P.2d at 988. KAFB has not made the required showing as to each of the factors set forth in Tenneco.

A. KAFB is Unlikely to Prevail on the Merits of the Appeal.

Section 74-4-4.4.A NMSA 1978 (Repl.Pamp.1990) gives the Environmental Improvement Board authority to "adopt regulations for the management of hazardous waste [that are] equivalent to, and no more stringent than, federal regulations." See also, §74-4-4.4.D NMSA 1978 (Repl.Pamp.1990). The Board adopted the Hazardous Waste Management Regulations which incorporate the federal regulations, 40 C.F.R. §§260-270, with a few exceptions, by reference. Section 74-4-4.4.A(5) NMSA 1978 (Repl.Pamp.1990) specifically authorizes the Board to establish standards as may be necessary to protect human health and the environment applicable to owners and operators of facilities for the treatment, storage and disposal of hazardous waste. Additionally, 40 C.F.R. §270.32(b)(2) establishes that each hazardous waste permit issued shall contain terms and conditions

as the Environmental Protection Agency Administrator or the State Director determines necessary to protect human health and the environment. "Courts defer to the interpretation of a regulation by the agency to which it is addressed unless such interpretation is plainly erroneous or inconsistent with the regulation." EID v. Bloomfield Irrigation District, 108 N.M. 691, 694, 778 P.2d 438, 441 (Ct.App.1989). The permit terms and conditions are site specific and do not mirror the regulations. The permit conditions may be as stringent as is necessary to protect human health and the environment.

The standard for review in this Court is a whole record review. Duke City Lumber Company v. NMEIB, 101 N.M. 291, 681 P.2d 717 (1984). The Court must look at all the evidence and "then decide whether, on balance, the agency's decision was supported by substantial evidence." Tenneco Oil Company v. NMWQCC, 107 N.M. 469, 477, 760 P.2d 161, 169 (Ct.App.1987).

In the Docketing Statement, Appellants raise seven issues for appeal. Docketing Statement p.4-12. Issues a. and f. were settled pursuant to Settlement Week, November 26-30, 1990 and will not be addressed in this Brief. See Stipulated Agreement filed January 3, 1991.

1. Inclusion of 90-day Automatic Reclassification of Material as Waste.

In addition to hazardous waste, a generator at KAFB may "turn-in", for storage and disposal, hazardous materials that are in the original container and have not been used. This is material that KAFB no longer wants and has decided to deliver to the hazardous waste storage units. KAFB's permit allows the Defense Reutilization and Marketing Office ("DRMO") to attempt to find a user for the material. DRMO is an agency within the Department of Defense, as is the Department of the Air Force, and is the actual operator of KAFB's hazardous waste storage facilities.

If DRMO is unsuccessful in attempts to transfer, donate or sell the material, the material becomes a waste and it enters the hazardous waste management system. RP-1295. The permit states that "[a]ny hazardous material held by DRMO for more than 90 days after turn-in will automatically be classified as a hazardous waste." RP-1295. In fact, it is arguable that the material discarded by the generator becomes a waste for purposes of regulation at the time it is sent to the storage facilities.[2] The Division encourages the recycling of material over disposing of it

[2] 40 C.F.R. §261.2(a)(2) states that a solid waste is any discarded material which is disposed of. A solid waste is a hazardous waste if it has hazardous characteristics or is otherwise hazardous under the regulations. 40 C.F.R. §261.3(a).

as a waste. Under the regulations, 90 days is the amount of time hazardous waste is allowed to be stored by a generator without a permit. 40 C.F.R. §262.34(a). It is analogous that 90 days be a permit condition as the amount of time the material can be stored before it is regulated by the permit.

The Division received a comment at the public hearing stating that the definition of when a hazardous material becomes a waste is sufficiently unclear as to allow KAFB to avoid regulation by designating a waste as a material. RP-340. The 90 day provision was added after the public hearing. Rather than allow KAFB to hold discarded hazardous material for indefinite amounts of time, the Division put the condition in the permit that limits DRMO to 90 days to find a user.

90 days is a reasonable amount of time to find a user for the material. KAFB has brought forth no evidence to indicate that 90 days is unreasonable for storing material before it is designated a waste. Inclusion of this condition in the permit is reasoned and not arbitrary and capricious. The 90 day provision is within the authority given to the Director under 40 C.F.R. §270.32(b)(2) to include terms and conditions in the permit that are protective of public health and the environment. The permitted facility is for temporary storage until hazardous wastes are transported for disposal. It is not meant for the storage of hazardous materials

that may never enter the permitted system. In the absence of the 90 day limit, the material could be stored for so long as to constitute disposal. The storage buildings are not disposal sites. The permit condition is protective of public health and should be upheld on the merits.

2. Inclusion of Annual Waste Stream Analysis.

The permit requires KAFB to verify the analysis of each waste stream annually as part of its quality assurance program. RP-1284, 1285. KAFB states that this requirement is overly burdensome and more stringent than the regulations. Docketing Statement p. 8. 40 C.F.R. §264.13(a)(3) requires that analysis must be repeated as necessary to ensure that it is accurate and up to date. 40 C.F.R. §264.13(a)(3)(1) sets forth the minimum requirement for all facilities, but discretion is left to the permitting authority to determine the frequency deemed sufficient to ensure accuracy at a specific facility. In its Response to Comments, the Division supported this requirement by stating that "given the rate of turnover of base personnel, the rate of change in processes and products used by the base generators, and the infancy of Kirtland's waste stream identification program, an annual reverification is appropriate." RP-343. When the agency's decision is supported by substantial evidence, the reviewing court does not reweigh the

evidence. Tenneco Oil Company v. NMWQCC, 107 N.M. 469, 760 P.2d 161 (Ct.App.1987).

The annual analysis will insure that KAFB has an accurate list of the waste that is being handled and stored. RP-1298. This is the driving force for the permit. Accurate waste characterization is needed for proper handling, and the containment and mitigation of releases. There is substantial evidence to support this condition in the permit and it should be upheld on the merits.

3. Group I and Group II Waste.

The permit has two classification of hazardous waste that will be stored in the three buildings. Group I wastes are in their original containers, and Group II waste are all others. The two classifications were submitted to the Division by KAFB in the original application, in subsequent revisions and were in the draft permit. RP-365, 482, 672, 917, 1014. The classifications are KAFB's proposal. KAFB did not object to or comment on the classifications during the comment period or at the public hearing. KAFB requested that the definition of Group I and II wastes be part of the permit. RP-282, 343. KAFB was obligated to make its record of objection to the classifications before the Division. It did not. The challenge is waived. NMEID v. Thomas, 789 F.2d 825, 835 (10th Cir.1986).

In NMEID v. Thomas, the Environmental Protection Agency solicited comments on the very issue that EID appealed. The Tenth Circuit states:

> Neither EID nor anyone else advanced any dissatisfaction to the EPA through comments and documents in the record. Under these circumstances, we hold that such issue has been waived. If EID wished that the EPA consider a different formula which required EPA to study other information, it had a responsibility to place such information in the record.
>
> EID was obligated to make its record before the agency. It failed to do so. Thus, we decline to consider any inferences which EID urges upon us for the first time on appeal. (citation omitted).

NMEID v. Thomas, 789 F.2d at 835.

In the present appeal, the Division had no opportunity to apply its expertise and make a record because KAFB never raised the issue. The regulations do not specifically provide for dividing the waste into two groups, but the regulations do not preclude it. The classifications should be upheld on the merits.

4. Requirement of Specific Tests.

The permit specifies the tests to be performed on all Group II wastes stored at the facility. RP-1298, 1342, 1343. 40 C.F.R. §264.13(b)(2) states that the owner or operator must develop a waste analysis plan which must specify the test methods to be used to test for parameters in the plan. Through the applications, KAFB submitted the test methods to the Division. RP-377, 378, 493, 494, 922, 923. The Division incorporated KAFB's test methods into the

draft permit. RP-1057-1059, 1062-1063. KAFB's comment related to this issue at the public hearing was addressed and incorporated into the permit. RP-344-345.

The regulations require that the test methods be specified. The Division incorporated the test methods specified by KAFB. This condition of the permit is not arbitrary. It is not more stringent than the regulations. It is directly in compliance with 40 C.F.R. §264.13(b)(2).

5. The Permit is Not Unclear.

KAFB argues that throughout the permit the use of the words "permittee", "owner" and "operator" are used interchangeably and in an inconsistent manner, thus making it unclear as to which requirements are applicable to the permittee and owner and which to the operator or both. This is the first time KAFB has brought this issue to the Division's attention. The Division has not previously had the opportunity consider this issue. "The court will not entertain arguments which should have properly been made before the agency in the first instance." NMEID v. Thomas, 789 F.2d at 836. KAFB was obligated to raise the administrative technicalities of its jurisdictional entities with the Division in its applications for permit, during public comment or at the public hearing. KAFB failed to make a record and it is estopped from raising the issue here. NMEID v. Thomas, 789 F.2d at 835.

The regulations are clear that the permit applies to the owner and operator. 40 C.F.R. §270.1(b). As owner of the facility, KAFB is ultimately responsible.

B. There is No Irreparable Harm to KAFB if the Stay is Denied.

A showing of irreparable harm is a threshold requirement in any attempt by KAFB to obtain a stay. Tenneco, 105 N.M. at 710, 736 P.2d at 990. "Mere allegations of irreparable harm are not, of course, sufficient." Id. Absent a showing of irreparable harm, a stay cannot be granted.

KAFB states that the new building, Building 1024, is not being used during the pendency of the appeal. Motion for Stay of Permit, p. 2, paragraph 3. Because it is new, Building 1024 cannot be used without a permit. 40 C.F.R. §270.10(e)-(f). The interim status regulations do not apply to this building. Because KAFB states that it will not use Building 1024 while the permit is on appeal, the allegations of harm that KAFB raises on appeal can not affect this building. KAFB will not be affected by denial of the stay.

Instead, the permit expands KAFB's options to include lawful use of Building 1024. If the stay is denied, KAFB can chose to use the building, or not.

In the remaining two buildings, KAFB can avoid the permit conditions, i.e., the 90-day automatic reclassification of

hazardous materials and the Group I and II designation, simply by not allowing material that can be recycled to enter the hazardous waste storage buildings.

KAFB has to characterize its waste initially, regardless of whether it does so annually. 40 C.F.R. §264.13. The environmental and public protection afforded by this requirement offsets any money KAFB may have to spend on accurate waste characterization.

C. Substantial Harm Will Result to the Division if a Stay is Granted.

A stay would not harmless to the Division. KAFB's Motion is insufficient to meet the showing on this issue as established by Tenneco. 105 N.M. at 710.

KAFB bears the burden of showing substantial harm will not result to the Division and other interested parties. The Division and other interested parties do not bear a converse burden. Nevertheless, the Division submits that if a stay is granted, it should be limited to the specific provisions of the permit which KAFB has appealed, not the whole permit. More specifically, the permit should be stayed only as to those portions on which the Court finds both that there is a likelihood of success on the merits and that KAFB would be irreparably harmed if such provisions were not stayed. A stay to "maintain the status quo" would be inappropriate in that the "status quo is a condition not of rest

but of action." U.S. v. Price, 688 F.2d 204, 212 (3rd Cir.1982).

The permit is the mechanism by which the Division establishes the conditions each treatment, storage or disposal facility must meet in order to protect human health and the environment. 1 The Law of Hazardous Waste §5.03[1]. Each permit includes conditions which apply the regulations to an individual treatment, storage or disposal facility. 40 C.F.R. §270.32(a)-(b). Once a permit is issued, compliance with the permit represents compliance with the regulations. 40 C.F.R. §270(a). This permit is site-specific and is written for this particular facility. If the permit is stayed, KAFB will be regulated by the interim status regulations. 40 C.F.R. §265. The interim status regulations are minimum national standards which are not tailored and may not adequately protect the public at this site. Permitted status assures the Division and the public of tighter control over the unique hazardous wastes at KAFB. This ensures greater safety and is more protective of public health and the environment than the interim standards. For example, the permit is more specific for off-base notifications in case of a release. See Stipulation of Agreement, p.1.

KAFB has failed to meet its burden of showing that no substantial harm would result to the Division from a stay. The likelihood is that substantial harm would result to the Division and to the public from the granting of a stay.

D. The Granting of a Stay Will Result in Substantial Harm to the Public Interest.

Environmental damage by its nature is often permanent or of long duration. Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 545 (1987). KAFB has not met this fourth part of the Tenneco test because it has not established that the public will not suffer harm. Slackened protection for the public is harm to the public. See also C. Substantial Harm Will Result to the Division if a Stay is Granted, above.

CONCLUSION

Because the KAFB has failed to exhaust its administrative remedies, and because it has failed to make the required showing as to each of the Tenneco factors, this Court should deny the Motion for Stay of Permit.

Respectfully submitted,

TRACY M. HUGHES
Special Assistant Attorney General
Office of General Counsel
Health and Environment Department
1190 St. Francis Drive
Santa Fe, New Mexico 87503
(505) 827-2990

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellee's Brief Opposing Stay of Permit was mailed to the following counsel of record this 14th day of January, 1991:

For the Appellants:

John W. Zavitz
Assistant U.S. Attorney
P.O. Box 607
Albuquerque, NM 87103

William D. Benton, Lt Col, USAF
Staff Judge Advocate
1606 ABW/JA
Kirtland AFB, NM 87117

Tracy M. Hughes