Natural Resources, Energy and Environmental Law Section

State Bar of New Mexico

Vista

Spring 2007

Greetings from the Chair, Steve Hattenbach

I am proud to serve as Chair for the Section on Natural Resources, Energy and Environment for 2007. This year the Board has continued its active support of Section activities. Therefore I have a few news items to mention to Section Members, including a report on recent Section activities, the upcoming transition to an electronic newsletter, and a well deserved thank you to our departing Student Board Member, Amanda Wang.

I encourage you to attend the Section's CLE activities planned this year, described in another article from Marilyn O'Leary. I also suggest you attend this year's State Bar Annual Meeting in Mescalero, New Mexico on July 12-15. The courses will include a presentation by Felica Orth, Hearing Examiner for the New Mexico Environment Department, on environmental justice issues. Finally the Board expects to hold this year's Annual Meeting and Fall CLE at the State Bar on December 14, 2007. I anticipate this year's CLE to focus on natural resource issues in Indian Country.

The new and improved Section website has an entire page on useful resources for practitioners and students. Please visit by going to the State Bar's NREEL Section page and linking to the "Resources" page at: http://www.nmbar.org/Content/NavigationMenu/Divisions_Sections_Committees/Sections/Natural_Resources,_Energy_and_Environmental_Law/NREEL_Resources/NREEL_Resources.htm

In late 2006 the Section provided financial support to the UNM Law School Environmental Law Moot Court Team to assist the team's travel to national competitions. I personally judged a mock hearing with the team

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Environmental Justice Efforts at the State Level

Samantha M. Ruscavage-Barz

Environmental justice stands for the principle that "all people have the right to clean air, clean water, and clean land, and that those potentially affected by environmental decisions should have a meaningful say in the decision making process regardless of race, income, or ethnicity."[1] In 1994, President Clinton issued Executive Order 12898 requiring federal agencies to integrate environmental justice into their respective missions "by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States…"[2] Since that time, the Environmental Protection Agency (EPA) has made efforts to address environmental justice concerns by issuing guidance for incorporating environmental justice analyses into NEPA documents[3] and a toolkit for assessing environmental injustice.[4] The Office of General Counsel also issued a memorandum suggesting the scope of EPA's legal authority to address environmental justice issues in the permitting processes of the Clean Air Act, Clean Water Act, and the Resource Conservation and Recovery Act.[5] In spite of these efforts, a report from the Office of Inspector General evaluating the sufficiency of EPA's environmental justice reviews of its programs determined that the EPA had not adequately "performed environmental justice reviews in accordance with Executive Order 12898" and, as a result, "[could not] determine whether its programs cause disproportionately high and adverse human health or environmental effects on minority and low-income populations."[6]

While the EPA has been slow to implement consistent environmental justice policies and procedures, several states have taken it upon themselves to address environmental justice concerns through various policies, programs and regulations. According to the American Bar Association's *Fifty-State Survey of Legislation, Policies, and Initiatives*,[7] over 30 states have implemented environmental justice initiatives. Recently, New Mexico joined the ranks of states giving legal effect to environmental justice concerns by amending its Solid Waste Act to address environmental concerns related to permitting of landfills.

Environmental Justice in New Mexico

New Mexico's Environmental Justice Executive Order proclaims the state's commitment to its residents of "fair treatment and meaningful involvement in the development, implementation, and enforcement of environmental laws" and recognizes that some communities bear the disproportionate impacts of pollution that "could be mitigated by better siting decisions and processes."[8] The EO requires all cabinet-level departments "involved in decisions that may affect environmental quality and public health [to] provide meaningful opportunities for involvement to all people regardless of race, color, ethnicity, religion, income, or education level."[9] The EO also creates the Environmental Justice Task Force, an advisory body that makes recommendations to state agencies for appropriate action "to address environmental justice issues consistent with the agencies' existing statutory and regulatory authority."[10] The Task Force can also address environmental justice issues in specific communities that request it.

New Mexico has given legal effect to environmental justice concerns by amending its Solid Waste Act to include environmental justice provisions in the permitting of landfills. An applicant for a landfill permit must first determine if the facility is in a "vulnerable area," defined as "an area within a 4 mile radius from the geographic center of a facility" that "has a percentage of economically stressed households greater than the state percentage," a population of 50 or more people within any square mile of the 4 mile radius, and has 3 or more regulated facilities[k] already existing within the 4 mile radius.[11]

If the facility is sited in a vulnerable area and the area has not been previously zoned for the proposed use, the permit applicant must provide

the public with notice of its proposed plans, opportunity for a public meeting, and allow the public to file comments on the proposed project with the New Mexico Environment Department (NMED) after the public meeting.[12] If the NMED Secretary determines from the public comments that significant community opposition to the facility exists, the Secretary "shall require that the applicant prepare a community impact assessment (CIA) addressing a number of issues within the 4 mile radius of the proposed facility including the socioeconomic profile of community residents, public health and safety issues, cumulative impact of the proposed facility, and summary of mitigation measures for adverse impacts.[13]

The regulations require the NMED Secretary to consider the information in the applicant's CIA along with other information in the application when making a permitting decision.[14] The burden is on the permit applicant to demonstrate that the proposed facility or modifications "will not result in a disproportionate effect on the health and environment of a particular socioeconomic group in the vulnerable area and will not result in an unreasonable concentration of regulated facilities in the vulnerable area" that may be impacted by issuance of the permit.[15]

Environmental Justice Efforts in Other States

Environmental justice efforts at the state level range from policies and executive orders calling for attention to environmental justice to full-blown regulations requiring permittees to address potential disproportionate impacts of their facilities on low income and minority communities. Several states have also included environmental justice goals in their Performance Partnership Agreements with the EPA, which set joint goals, strategies, and priorities in federal/state environmental programs.

According to *Fifty-State Survey of Legislation, Policies, and Initiatives*, 18 states have environmental justice policies. Through an executive order, Oregon formed the Environmental Justice Advisory Board to provide recommendations to state agencies for preventing environmental discrimination including integrating cumulative impacts of siting and other permitting activities into the state's environmental regulations, and correlating pollution and other compliance violations with race and socioeconomic status to determine if bias exists in either permitting or enforcement.[16] Colorado has a policy that allows those who violate environmental regulations "to reduce the amount of their fines by funding an approved project benefiting the environment" as part of the violator's settlement with the state.[17] A greater penalty reduction is available for those projects that reduce environmental risks to low-income or minority populations that have been exposed to significantly more pollution that other communities.

Nineteen states have created formalized environmental justice programs. Arizona's Department of Environmental Quality has a full-time staff position dedicated to coordinating environmental justice concerns in the permitting process.[18] Texas has an Environmental Equity Program that addresses citizen concerns with proposed polluting facilities, ensures that agency programs with human health implications are not discriminatory, and promotes use of demographic information for areas surrounding proposed polluting facilities.[19] Washington's Environmental Justice Program produced an Environmental Justice Checklist for state Department of Energy staff identifying actions implicating environmental justice issues and directing staff to consider cumulative effects of pollution and human health implications.[20]

With respect to environmental justice regulations, 18 states have been successful with their efforts to give legal effect to environmental justice concerns. California is the leader in the statutory area, with the first environmental justice law passed in 1999 and eight subsequent laws emphasizing a multi-agency approach to environmental justice issues.[20] Senate Bill 115 directed CalEPA to develop environmental justice missions for various departments within the agency, and to design programs and regulations in accordance with environmental justice principles.[21] Senate Bill 89 created the Working Group on Environmental Justice to assess gaps in environmental laws and regulations with respect to environmental justice concerns and to provide strategies to fill these gaps.[22] Assembly Bill 1390 directs state air districts to target at least half of the funds appropriated for three diesel emissions reduction programs to environmental justice communities.[23] Finally, one statute specifically addresses preventing undue concentration of hazardous waste facilities in environmental justice communities by requiring the permit applicant to provide public notice of the application and allowing any party to appeal a land use decision allowing such a facility directly to the Governor.[24]

Conclusion

Over the last several years, states have successfully pursued environmental justice initiatives of various sorts in an effort to give effect to President Clinton's 1994 Executive Order in the absence of comprehensive federal standards or procedures. Environmental justice efforts at the state level are likely to continue as the attention of local governments is increasingly focused on the adverse health effects of low income and minority communities resulting from the concentration of polluting facilities in the vicinity of those communities. With the recent amendments to the Solid Waste Act incorporating environmental justice concerns in to the landfill permitting process, New Mexico is poised to become a leader in environmental justice efforts at the state level.

Endnotes

[1] Steven Bonorris (ed.), *Environmental Justice for All: A Fifty-State Survey of Legislation, Policies, and Initiatives*, American Bar Association and Public Law Research Institute Report (Jan. 2004).

[2] *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, Fed. Exec. Or. 12898 (Feb. 11, 1994) (available at http://www.epa.gov/compliance/resources/policies/ej/exec_order_12898.pdf)

[3] *Final Guidance For Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses* (April 1998) (available at http://www.epa.gov/compliance/resources/policies/ej).

[4] *Toolkit for Assessing Potential Allegations of Environmental Injustice* (Nov. 3, 2004) (available at http://www.epa.gov/compliance/resources/policies/ej).

[5] Office of General Counsel memo *EPA Statutory and Regulatory Authorities Under Which Environmental Justice Issues May Be Addressed in Permitting* (Dec. 1, 2000) (available at http://www.epa.gov/compliance/resources/policies/ej).

[6] *EPA Needs to Conduct Environmental Justice Reviews of Its Programs, Policies, and Activities* at 5, Report No. 2006-P-00034 (Sept. 18, 2006) (available at http://www.epa.gov/compliance/resources/policies/ej).

[6] *Supra*, note 1.

[7] *Environmental Justice Executive Order*, N.M. Exec. Or. 2005-056 (Nov. 18, 2005) (available at http://www.governor.state.nm.us/orders/2005/EO_2005_056.pdf)

[7] *Id.*

[8] *Id.*

[9] Regulated facilities include solid and hazardous waste facilities, sites listed on the National Priorities List, and facilities required to obtain Title V air quality permits. NMAC 20.9.1.7.R(6).

[10] NMAC 20.9.1.7.V(3).

[11] NMAC 20.9.1.201.D(1).

[12] NMAC 20.9.1.201.D(2).

[13] NMAC 20.9.1.211.B.

[14] NMAC 20.9.1.201.E.

[15] *Supra*, note 1 at 45.

[16] *Id.*, at 11.

[17] *Id.*, at 3.

[18] *Id.*, at 53-54.

[19] *Id.*, at 57.

[20] *Id.*, at 5-9.

[21] *Id.*, at 6.

[22] *Id.*

[23] *Id.*, at 7.

[24] *Id.*, at 9.

A rocky road to progress? Gravel Mining in a Growing New Mexico and the Velarde Gravel Cases

William Consuegra

New Mexico's population grew 20.06% between 1990 and 2000, and since 2000 the state has been near or in the top 10 fastest-growing states, 13th in growth from 2005 – 2006, increasing 1.49% to 1,954,599 New Mexicans. [a] Rio Rancho being named as one of the best places to live in the U.S., Los Alamos' "most Ph.Ds" and "most millionaires per capita" claims, and the increasing invasion of retiring Baby Boomers have created an extraordinary influx of new residents and demand for homes, roads and other developments. While most New Mexicans are aware of the myriad of issues surrounding water, most do not see stories in the news about sand and gravel mining. This type of mining creates economic benefit for municipalities and counties, presents environmental challenges to the state, and increasingly leads to legal protests from concerned residents. Located roughly halfway between Santa Fe and Taos, Velarde is well-known throughout the state for delicious apples, but in the past few years it has been in the news for three mining battles, two of them involving sand and gravel mining operations. Velarde is a microcosm of the challenges of public policy, economics, and political concerns surrounding the gravel industry, and the outcomes of the legal battles could have a major impact for the industry and the state as demand for sand and gravel continues to increase.

In the past 10 years the number of registered mines has increased by about 60, almost all in the industrial mineral category.[b] Today there are about 225 registered mines, 192 of them being sand and gravel operations.[c] The industry has seen increases in percentage of production and employment.[d] The expansion of densely populated areas has forced the industry to move many operations to less populated regions, where local zoning, environmental, and land development regulations are scarce or lenient. The industry has lobbied against stricter regulations by claiming they will increase transportation and manufacturing costs. In 2005 the industry scored a victory in the Legislature when a bill introduced by Representative Andy Nunez (D – Dona Ana) titled "HB194: Construction Materials Mining Act" did not make it out of committee.[e] Sand and gravel mining is exempted from the New Mexico Mining Act (1993), which has resulted in many under-regulated mines throughout the state, operating with few restrictions or responsibilities to repair damage done.

Velarde, located along highway 68, is about 4 miles long, but in those few miles there have been three controversial mining operations. The Oglebay Norton Company operated a mica plant for years, drawing ire of the community for its proximity to homes and because studies have shown that inhalation of mica dust can cause Pneumoconiosis (black lung). The mica plant closed in 2005 and was put it up for sale, but has not had any buyers. The two sand and gravel operations involve Espanola businessman Richard Cook, who has been the target of both protestors and penalties from the New Mexico Environment Department. The first is the gravel pit owned by the late Canuto Romero, whose son Jerome

began mining with Cook's Espanola Transit Mix company in the mid-1990s. This site has been the source of legal challenges over the past nine years.[f] It began with the passing of Rio Arriba County Ordinance 1996-01 (requiring owners wishing to expand, enlarge or extend their non-conforming use to get county approval), Rio Arriba County Ordinance 2000-01 (designating the county as an agricultural district, allowing only agriculture, single-family dwellings, public parks, and mobile homes, and forbidding the expansion of non-conforming use without compliance to strict ordinance requirements) and Rio Arriba County Ordinance 2000-02 (which authorized the county to promulgate regulations for existing and proposed gravel mines). In 1998 Romero and Espanola Transit Mix received permission to mine five acres of the designated 14.5 acre pit, but did not appeal the denial of the additional 9.5 acres.[g] Local residents organized to protest the decision[h], and in 2000 the county announced that Romero failed to meet the ordinance's requirements and had effectively abandoned his mine by failing to mine the remaining property in 2000. Romero's appeals to the district court and Court of Appeals have resulted in partial reversal and partial affirmation the County Board of Commissioners' decision.[i]

The Court of Appeals found that the Rio Arriba Board of County Commissioners decision that the Romero site had been abandoned was not supported by the evidence and was arbitrary and capricious, following the standard of review in *Sierra Club v. N.M. Mining Comm'n*. [j] The Court identified flaws in the ordinances, specifically the county's failure to define mining. Romero had not mined during the contested six month period in 2000**,** but rather allowed third parties to remove previously stockpiled materials from the mine and called that "mining." The Court remanded the case to district court with instructions to remand to the Board of County Commissioners for further proceedings. In a concurring opinion, Judge Sutin opined that the only real issue was whether adverse neighborhood impact would exist and could be proven. Whether community groups and residents that oppose the Romero mine can affect the County's decision is yet to be seen. But a recent decision by the NMED may signal a shift in opinions towards mining operations in Velarde, specifically a mining operation just one mile down the road from the Romero mine.

The other controversial gravel mine in Velarde is actually two joint pieces of property, one owned by Cook and the other leased by the State Land Office (SLO) to Coppola Mining, LLC. The controversy began in 2002 when Cook's mining created a dangerous high wall adjacent to state-owned land. The State Land Commissioner at the time, Ray Powell filed a civil suit against Cook. However, in June 2004, current Land Commissioner Pat Lyons dropped the case and announced the lease of 160 acres of state land adjacent to the Cook property to Coppola. Vecinos del Rio (a local citizens group) filed for a writ of mandamus in the 1st Judicial District Court, accusing the SLO of failing to follow the law in awarding the mining lease and failing to address reclamation of the dangerous 150 foot-high wall, but the writ was denied in October 2005. [k]In the summer of 2004, Lyons proposed relocating the Coppola mine to another piece of land in a meeting with Velarde residents. [l] The SLO has relocated mining sites, as was done in 2005 with a 640 acre mining site near Radium Springs, which was exchanged for other state land. But the exchange never materialized, and mining has continued, slowly reducing the slope of the high wall while removing millions of tons of sand and gravel. On March 28, 2007, Cook submitted an application to NMED for an air quality permit to establish a gravel screening plant at the Velarde site, hoping to save money by not having to haul unscreened sand and gravel

13 miles to his Espanola plant. On April 10, the Department denied the permit because it violated minimum distance requirements to homes, a violation of 20.2.72.220 C.3.b NMAC. [m] It is unclear whether Cook will appeal the decision to block his proposed plant.

These controversial mines demonstrate how the average New Mexican cannot use existing regulations and ordinances when trying to predict how gravel cases will be resolved. For example, the New Mexico Supreme Court will allow the state to consider sand and gravel a "mineral" in certain land grant and purchase cases,[n] but laws such as the New Mexico Mining Act exclude sand and gravel from regulations that affect other mineral mining.[o] County ordinances might establish procedures that affect mining, but a deficiency in defining key terms may allow mines to escape regulation. Yet these same mines may be stopped from expansion by NMED if they are new and close to homes, but only if they apply for an air or water permit. It creates the ironic situation where the Romero mine may be closer to homes than the Cook/Coppola sites and subject to certain reporting requirements, but the nature of Romero's mine allows him to escape from submitting Air Quality reports because he is not applying for a new permit (his five acres are grandfathered in by the county). Similarly the Cook/Coppola site may is not dealing with the prospect of the County closing it down due to "neighborhood impact" because it is operating on land leased by the State Land Office.

Sand and gravel operations enjoy an exemption from the Mining Act. All other mining operations must obtain a permit and submit a site assessment within a specified period.[p] Mining operators must preserve topsoil from "erosion … and assure that it is in a usable condition for sustaining vegetation when needed." Financial assurance (i.e., bonds) to ensure reclamation activities is required, and an environmental evaluation must be made before a permit for new operations is approved or denied. The Director must also "create an advisory committee, the membership of which shall balance the interests of ... the mining industry [and] environmental groups ...."[q] The sand and gravel industry is exempted from all of these important duties, and this unfortunately allows the Cook/Coppola and Romero mines to scar one of the most beautiful places in the state.

There are ways to solve these issues which threaten Velarde. One is to deny operating permits for new mines when inactive and abandoned mines are readily available. Another is to increase enforcement of existing mine air quality permits, which will require more personnel from NMED. Creative ideas like the use of recycled materials like "glassphalt," "plasphalt," and used tires to replace crushed rock, sand, and gravel in construction have also been recommended.[r] These ideas would decrease the need for new mines, and would force companies (like Cook's) to either switch business strategies or accept the prospect of making less money. Ordinances must be written to include all possible scenarios and adequately define all legal terms. A more cohesive relationship between all the Legislature, state agencies and county governments when creating regulations and ordinances concerning sand and gravel mining could minimize the impact of exemptions in the Mining Act. The most powerful force, the voice of the people, should be loud whenever a mine or plant is proposed, to prevent destruction similar to that in Velarde.

Endnotes

a United States. Bureau of the Census. New Mexico State and County QuickFacts. 12 Jan. 2007. 11 April 2007 <http://quickfacts.census.gov/qfd/states/35000.html>.

b Steven Blodgett, M.S., Center for Science in Public Participation, "Environmental Impacts of Aggregate and Stone Mining in New Mexico," January 2004.

c *Ibid* at ¶2.

d State of New Mexico. Energy, Minerals and Natural Resources Department. 2005 New Mexico Mineral Industry Statistics. 2005. 10 April 2007. http://www.emnrd.state.nm.us/mmd/MRRS/Prelim2005ProdData.htm.

e The "Construction Materials Mining Act of 2005" (HB.194), was proposed by Rep. Andy Nunez (Dona Ana) and was a proposal for the State to regulate construction materials mining not regulated under the Mining Act. Mines would have been required to obtain a permit from the State, which would include a reclamation plan and financial assurance. <http://legis.state.nm.us/lcs/_session.asp?year=05&chamber=H&number=194&type=++&w=com>

f *Romero v. Board of County Cmm'n Rio Arriba*, 2007-NMCA-004, ¶2.

g *Ibid* at ¶3.

h *Calabaza v. Rio Arriba Board of County Cmm'n*, No. D-0117-CV-0009801573. The *Calabaza* appeal was dismissed in October 1999.

i *Romero* at ¶9.

j *Ibid* at ¶19.

k Salazar, Martin. "Judge Dismisses Case Against Velarde Mine." Albuquerque Journal 8 Oct. 2005: A7.

l "Update on State Land Office Sand and Gravel Mine in Velarde", La Jicarita News. Nov. 2004. 10 April 2007. < http://www.lajicarita.org/04nov.htm#velardemine>.

m Stimmel, Jay. Letter to Espanola Transit Mix. 10 April 2007.

n *Bogle Farms Inc. v. Baca, 122 N.M. 422; 1996 NMSC 51; 925 P.2d 1184. Bogle,* a land grant case involving the sale of state land and rights to sand and gravel, briefly summarizes the history of sand and gravel litigation in New Mexico, specifically the various court cases and Attorney General opinions that attempted to define whether sand and gravel were considered a mineral. The court ruled that "the determination whether sand and gravel are included within a general mineral reservation must be done on a case-by-case basis…"

o 19.10.12 NMAC. <http://www.nmcpr.state.nm.us/nmac/_title19/T19C010.htm>

p *Ibid.*

q *Ibid* at Part 12.

r Blodgett, Steve, Center for Science in Public Participation "Environmental Impacts of Aggregate and Stone Mining - New Mexico Case Study". Jan. 2004. 12 April 2007. <http://www.csp2.org/>

Greetings from the Chair *continued from cover*

and was impressed by their skill and eagerness. The team reportedly performed well at the national competitions this year. The Board has been asked by UNM to continue to support the team in the future and the Board is considering this request.

Starting with the Fall 2007 edition, the semiannual newsletter will be delivered by e-mail distribution list instead of mailed hard copy. This decision was primarily based on the desire to avoid the high cost of mailing a hard copy of the newsletter. By delivering the newsletter via e-mail the Board expects to save as much as $750/issue. I also believe this was an excellent decision from an environmental perspective, as it will reduce the raw materials and resources we use to produce and distribute the newsletter. If you would still prefer a copy of the newsletter be delivered through a mailed hard copy, please contact Christine Morganti at the State Bar at cmorganti@nmbar.org or (505) 797-6028.

Finally, I want to give a warm send-off to Amanda Wang, our departing student board member. Amanda was a real asset to the Board and spearheaded several projects during her tenure on the board. Not only did she help to establish and strengthen our ties with the law school, but most recently she helped the Board update and revise our resources website, discussed above. Amanda will be graduating this year and on behalf of the board I would like to publicly acknowledge her hard work and wish her the best in her career.

United States Supreme Court Invalidates EPA's Inaction On Greenhouse Gas Emissions: Massachusetts v. EPA

*Charles de Saillan**

"A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related."[1] So states United States Supreme Court Justice John Paul Stevens, writing for the Court, in Commonwealth of Massachusetts v. U.S. Environmental Protection Agency, decided on April 2, 2007. In what is likely to be a very important decision on the control of greenhouse gas emissions, the Court held by a 5 to 4 vote that the Environmental Protection Agency (EPA) has the authority to regulate greenhouse gas emissions under the Clean Air Act, and that EPA's justification for not doing so was legally insufficient.

Background

The case began almost eight years ago as a rulemaking petition filed with EPA under the Clean Air Act. Nineteen environmental, public interest, and trade organizations, as diverse as the International Center for Technology Assessment, Greenpeace USA, and the New Mexico Solar Energy Association, filed the petition on October 20, 1999.[2] The petitioners asked EPA to issue a rule regulating "greenhouse gas emissions," namely carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons, from new motor vehicles under section 202(a)(1) of the Clean Air Act.[3] The petitioners maintained that greenhouse gases are "air pollutants" under the Act, and that the emission of greenhouse gases will endanger the public health and welfare. Therefore, EPA has a mandatory duty to issue regulations prescribing standards for such emissions under section 202(a)(1) of the Act.

On September 8, 2003, nearly four years after the petition had been filed, EPA denied the petition.[4] EPA concluded that it did not have the legal authority to regulate greenhouse gases under the Clean Air Act.[5] EPA further concluded that it had the discretion under the statute to decline to regulate greenhouse gas emissions.[6] Following EPA's denial, the petitioners appealed to the Court of Appeals for the District of Columbia Circuit. Twelve states, including New Mexico, one territory, and three cities joined the petitioners as interveners. Ten states and several trade associations intervened on behalf of EPA. The court of appeals affirmed EPA's denial of the petition,[7] and denied rehearing *en banc*.[8] The petitioners, led by Massachusetts, then sought review in the Supreme Court. The Court granted their petition for certiorari on June 26, 2006, [9] and it heard oral argument on November 29, 2006.

The Supreme Court Decision

On April 2, 2007, the Supreme Court reversed the court of appeals, and ruled that EPA had improperly denied the rulemaking petition. The Court's opinion was authored by Justice Stevens, and joined by Justices Kennedy, Souter, Ginsburg, and Breyer. Chief Justice Roberts filed a dissenting opinion, joined by Justices Scalia, Thomas, and Alito. Justice Scalia filed a separate dissenting opinion, joined by the Chief Justice and Justices Thomas and Alito. The Court addressed three issues in its decision.

The first issue is whether Massachusetts has standing to sue. To establish standing, a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent; that the injury is fairly traceable to the defendant; and that it is likely that a favorable decision will redress the injury.[10] The Court began by ruling, significantly, that a state acting as *parens patriae* and protecting its quasi-sovereign interests "is entitled to special solicitude in our standing analysis."[11] The Court went on to find that Massachusetts had suffered injury due to global warming in that rising sea levels are causing Massachusetts to lose some of its coastal land.[12] The Court then found that greenhouse gas emissions from new motor vehicles cause or contribute to the Commonwealth's injury.[13] Next, the Court found that there is a remedy for the injury, namely the regulation of motor vehicle emissions. While the remedy would not by itself reverse global warming, it would slow or reduce it.[14]

The Court then turned to the merits of the case, beginning with the question of EPA's authority under the Clean Air Act to regulate greenhouse gases. The Court had no trouble concluding that EPA had such authority. It found that greenhouse gases clearly fit within the "capacious definition of 'air pollutant'" in section 302(g) of the Act.[15]

The Court next considered whether EPA had properly exercised its discretion in declining to use that authority. The Court recognized that the agency "has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."[16] In responding to a petition for rulemaking, however, the agency's "reasons for action or inaction must conform to the authorizing statute."[17] The Court found that EPA had failed to justify its decision not to regulate greenhouse gas emissions in conformance with section 202(a)(1), and that its action was therefore "arbitrary, capricious, . . . or otherwise not in accordance with law.'"[18]

Conclusions

The Supreme Court's decision in Massachusetts v. EPA is highly significant, not only with respect to the case before the Court, but also with respect to future litigation over issues related to global warming. First, the Court clearly broke new ground in ruling that Massachusetts, when protecting its quasi-sovereign interests, is "entitled to special solicitude" in standing analysis. This holding will undoubtedly make it easier for states to establish standing in future actions to address global warming, or otherwise to protect the environment of their citizens. Second, the Court's finding that greenhouse gases fall within the Clean Air Act's definition of "air pollutant," though unremarkable, also sets useful precedent for future cases addressing greenhouse gases under the Act. Third, the Court's decision that EPA had not stated adequate reasons for denying the petition will make it more difficult for EPA to avoid addressing the global warming issue in the future.

Endnotes

* Charles de Saillan is Assistant General Counsel in the New Mexico Environment Department, where he handles matters involving air quality, surface and ground water quality, hazardous wastes, and site remediation. The views expressed in this review are his own.

[1] Massachusetts v. EPA, 127 S.Ct. 1438, 1446 (2007).

[2] Int'l Center for Tech. Assessment v. Browner, Petition for Rulemaking and Collateral Relief Seeking Regulation of Greenhouse Gas Emissions from New Motor Vehicles under § 202 of the Clean Air Act (filed Oct. 20, 1999).

[3] 42 U.S.C. § 7421(a)(1) (2000).

[4] 68 Fed. Reg. 52922 (Sept. 8, 2003).

[5] Id. at 52925-29.

[6] Id. at 52929.

[7] Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005).

[8] Massachusetts v. EPA, 433 F.3d 66 (D.C. Cir. 2005) (per curiam).

[9] 126 S.Ct. 2962 (2006) (mem.).

[10] Id. at 1453 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)).

[11] Id. at 1454-55.

[12] Id. at 1455-56.

[13] Id. at 1457-58.

[14] Id. at 1458.

[15] Id. at 1460, 1462 (citing Clean Air Act § 302(g), 42 U.S.C. § 7602(g))..

[16] Id. at 1459 (citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-45 (1984)).

[17] Id. at 1462.

[18] Id. at 1463 (citing Clean Air Act § 307(d)(9)(A), 42 U.S.C. § 7607(d)(9)(A)).

[1]Natural Resource Damage Liability of the U.S. Department of Energy

By Karen L. Reed[†]

Any party, including the United States, causing injury to, destruction of, or loss of natural resources that are within New Mexico, by releases or threatened releases of hazardous substances or by discharges or threatened discharges of oil, is strictly liable to the State, on behalf of its citizens, for the resulting damages. These damages include: (i) the reasonable costs of assessing the injury; (ii) the interim lost-use value of the natural resources from the time of injury to the time of restoration; and (iii) the costs of restoring, replacing or acquiring the equivalent of the injured natural resources.[2] This process is commonly known as natural resource damage assessment and restoration, or NRDAR.

In October 2005, the State of New Mexico contacted the U.S. Department of Energy (DOE) to request initiation of NRDAR activities at Los Alamos National Laboratory (LANL) and Sandia National Laboratories. In early 2006, the State and Pueblo de San Ildefonso partnered as natural resource trustees to assess natural resource injuries resulting from DOE operations at LANL. Although the parties have been in periodic communication with DOE since then, DOE has not provided funding for the LANL NRDAR process, and no assessment work has yet occurred.

Parties involved at the Hanford Nuclear Reservation located in south central Washington State have been attempting to address NRDAR issues for much longer, since the early 1990s. This article will discuss the Hanford NRDAR process, in particular a novel legal theory that has surfaced there recently, and its potential application to DOE sites in New Mexico. The Hanford Nuclear Reservation consists of 586 square miles that the United States formerly used to produce plutonium for nuclear weapons from 1943 until 1988. Hanford is now closed and environmental remediation efforts are underway to clean up the site.

It is important to understand that environmental response, removal and remediation activities are distinct from NRDAR activities. Remediation of hazardous waste can occur under CERCLA, 42 U.S.C. § 9601 *et seq.* (for closed facilities) or under the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.* (for operating facilities). The focus of remediation activities is mitigating unreasonable risks to human health and the environment through implementation of a remedy.

On the other hand, the NRDAR process is designed to restore natural resources to their baseline (or precontamination) condition. If such restoration is not feasible, then the public must be compensated through replacing or acquiring the equivalent of the injured natural resources. The focus is on restoring ecosystem functioning so the natural environment can return to providing its many benefits to the public. The federal government, the states and Indian nations and tribes have legally designated natural resource trustees, who are empowered to pursue compensation claims on behalf of their constituent publics.

Past practice was to wait until remediation was complete before commencing assessment of natural resource injuries, on the theory that, until a remedy is implemented, it cannot be determined how much the functioning of natural resources has been impaired. However, this approach was fraught with difficulties. Frequently, important NRDAR data, such as baseline conditions, were destroyed during the implementation of a remedy. In addition, this sequential approach prevented parties from coordinating and harmonizing remediation and restoration activities. For example, if the remedy required soil excavation and removal, and the restoration required construction of a pond in the area from which the soil was removed, it makes both economic and environmental sense to perform the work in concert.

The National Oceanic and Atmospheric Administration pioneered a new methodology, which has gained widespread acceptance, by which the remediation and NRDAR processes take place in tandem. Because NRDAR injuries are measured temporally, the sooner restoration occurs, the less the overall injury. Another keystone of this new process is its cooperative nature. Instead of initiating litigation to assess injuries, which is likely to create a substantial delay in the actual implementation of restoration projects, the potentially responsible party (PRP) and the legally designated natural resource trustees work together to attempt to resolve the NRDAR claims cooperatively. This cooperative approach makes particular sense when the United States is the PRP, since the United States is also by law a natural resources trustee, and thus sits on both sides of the table.

DOE has published policy documents supporting this cooperative, coordinated approach.[3] Unfortunately, DOE has been slow to implement these policies. In the case of Hanford, the Yakama Nation, the states of Oregon and Washington and the Nez Perce and Umatilla tribes have been trying unsuccessfully for many years to engage DOE in a cooperative NRDAR process. Although a trustee council was formed in 1993 for the purposes of pursuing a cooperative NRDAR injury assessment, DOE has not provided funding for the council to start assessment activities.[4]

The Yakama Nation, frustrated with the slow pace of progress, filed suit against DOE in 2002 to recover natural resource damages caused by operations at Hanford.[5] The U.S. Department of Justice has taken the position that the claim for natural resource damage is not yet ripe. In response, the Yakama Nation amended its complaint to add a new cause of action, which raises a matter of first impression in the federal courts. Last year, the Nez Perce and Umatilla tribes and the states of Oregon and Washington intervened in support of this novel legal theory.

This legal theory is based on an interpretation of CERCLA that would provide distinct causes of action both for recovery of natural resource damages and for a declaratory judgment on liability for natural resource injury assessment costs.[6] The operative language provides, "In any such action described in this subsection [entitled actions for recovery of costs], the court *shall* enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs of damages." 42 U.S.C. § 9601(g)(2) (emphasis added). As discussed above, response costs are not relevant to NRDAR actions, so the important term is *damages*. CERCLA provides that the term *damages* includes "damages for injury to, destruction of, or loss of natural resources, *including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release*." 42 U.S.C. § 9607(a)(4)(C) (emphasis added).

Thus, the Hanford plaintiffs and plaintiff-intervenors argue that they are entitled to a declaratory judgment on DOE's liability for the reasonable costs of assessing natural resource injuries at Hanford. As far as the Hanford parties could determine, federal courts have not addressed this particular issue in prior cases. The district court has set a hearing on the issue for April 26, 2007. As of the submission date of this article, this hearing has not yet occurred.

A ruling in favor of the plaintiffs and plaintiff-intervenors has the potential to fundamentally change the way NRDAR cases are handled. The most common reason that natural resource trustees do not pursue NRDAR claims is lack of financial resources. Judicial recognition of this new cause of action would enable trustees to be more proactive in their pursuit of compensation, because they could seek a determination of PRP liability for assessment costs prior to investing their limited resources in natural resource injury assessments and thereby could be assured of ultimate recoupment of these costs.

In an abrupt reversal of prior policy, DOE announced on April 3, 2007, that it would immediately commence a phased NRDAR process at Hanford.[7] However, DOE continues to insist that the NRDAR process does not require any additional funding beyond the amounts already earmarked for the remediation process.[8] Thus, the Yakima Nation has responded with cautious opti-

mism, noting, "the test will be what DOE actually does."[9]

Despite this policy reversal, the parties to the lawsuit have not reached agreement regarding the existence of a new cause of action for declaratory judgment on PRP liability for natural resource injury assessment costs. So, for the time being, the lawsuit will proceed. In this author's personal opinion, it would be a tremendous victory for the public, the environment and future generations if this new cause of action were recognized.

This outcome is particularly appropriate when the United States is the PRP. At DOE facilities, DOE is the PRP, the lead federal agency in charge of remediation and a natural resources trustee. Thus, DOE, unlike private polluters, exercises regulatory oversight and enforcement authority over its own remediation efforts. By controlling the timing of remediation, and then delaying NRDAR activities until after completion of the remedy, DOE can shift its NRDAR liability onto future federal administrations and generations of taxpayers. This ability to manipulate liability, whether or not it is exercised, is inconsistent with the express intent of Congress to make the federal government liable under CERCLA to the same extent as private parties.[10]

New Mexico can learn valuable lessons from the parties' experiences at Hanford, as we embark on the daunting task of assessing natural resource injuries from DOE's historic, current and future operations in New Mexico. The cooperative NRDAR approach has many benefits to offer, but DOE has been slow to realize these benefits. Depending on the outcome of the upcoming Hanford hearing, we may have a new tool in our toolkit to assist us in bringing DOE to the table to assure full, fair and timely compensation for the public.

Endnotes

[†] The author is an assistant attorney general for the State of New Mexico in the Office of Gary K. King, New Mexico Attorney General. In the course of her employment for the State, the author represents the New Mexico Natural Resources Trustee and the New Mexico Office of Natural Resources Trustee. The opinions expressed in this article are solely the author's, in her individual capacity, and are not attributable to any organization or other person, including any of these agencies or governmental officials.

[1] *See* Federal Water Pollution Control Act, commonly known as Clean Water Act, 33 U.S.C. § 1321(f); Oil Pollution Act of 1990, 33 U.S.C. § 2706; Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. §§ 9607(f), 9620; New Mexico Natural Resources Trustee Act NMSA 1978, §§ 75-7-1 to -5 (1993).

[2] *See Integrating Natural Resource Damage Assessment and Environmental Restoration Activities at DOE Facilities* (Oct. 1993), *available at* http://homer.ornl.gov/nuclearsafety/nsea/oepa/guidance/cercla/nrda3.pdf; Memorandum from Alvin L. Alm, Assistant Sec'y for Envtl. Mgmt., *Policy on Integration of Natural Resource Concerns into Response Actions* (Sept. 8, 1997) (on file with author).

[3] Even DOE admitted, as of mid-1997, "The Trustee Council's progress over the past four years has been careful And [sic] deliberate." http://www.hanford.gov/?page=295&parent=291 (last visited Apr. 23, 2007).

[4] *Confederated Tribes and Bands of Yakima Nation v. United States*, Case No. 2:02-cv-03105-LRS (E.D. Wash.).

[5] *Compare* 42 U.S.C. § 9601(g)(1) (providing action for natural resource damages) *with* 42 U.S.C. § 9601(g)(2) (providing actions for recovery of costs).

[6] Press Release, DOE, *DOE To Conduct Natural Resource Damage Assessment Process at Hanford* (Apr. 3, 2007), *available at* http://www.hanford.gov/communication/reporter/attachments/RL/2007/RL-07-0006.pdf.

[7] *Id.* ("DOE expects to carry out both the cleanup and the [NRDAR] process within its existing budget request.").

[8] Annette Cary, *DOE Agrees To Assess Plant, Animal Damage*, *Tri-City Herald*, Apr. 4, 2007 (quoting Philip Olney, Chairman of Yakama Nation's Radioactive Hazardous Waste Committee).

[9] *See* 42 U.S.C. § 9620(a)(1).

UNM School of Law's Environmental Law Society 2006-2007 Annual Report

Samantha Ruscavage-Barz

UNM School of Law's Environmental Law Society (ELS) was very busy this year. ELS sponsored an environmental law career panel, hosted two environmental justice speakers and co-hosted a panel on energy initiatives slated for the 2007 New Mexico Legislative Session with the Sierra Club. We also co-sponsored a "Difficult Dialogue" focusing on whether the Desert Rock coal fired power plant should be built on the Navajo Nation. As part of Albuquerque's Step It Up 2007! ELS members helped to pass out energy-saving compact fluorescent light bulbs donated by the City in exchange for incandescent bulbs. ELS members have been working throughout the school year in coordination with biologists and activists to research potential listings for New Mexico species under the Endangered Species Act. We look forward to another great year of activism and professional development, and to strengthening the relationship between ELS and the NREEL Section of the State Bar.

National Environmental Law Moot Court Competition

Patrick Redmond

With the help of a generous grant from the NREEL Section, the University of New Mexico School of Law was one of sixty five teams to attend the Nineteenth Annual National Environmental Law Moot Court Competition held February 22-24 at Pace Law School in White Plains, New York. Second-year students and ELS members, Kerry Cait Winkless-Hall, Dean Mangloña and Patrick Redmond represented UNM. In this year's problem, an Arctic village filed a federal nuisance suit against five American power companies for alleged harms suffered and anticipated due to global warming, and an administrative challenge against the EPA for failure to make an endangerment finding for carbon dioxide pollution. The team was coached by Professor Eileen Gauna. The team wrote their brief last fall and continued to hone their arguments and practice their advocacy skills this spring. The UNM team argued in three preliminary rounds; in the second round UNM's Patrick Redmond was awarded Best Oralist for his argument representing the EPA. Kerry Cait Winkless-Hall and Dean Mangloña also performed extremely well arguing for the village and the power companies, but the team drew very tough competition, facing eventual Finalists Memphis and Lewis & Clark in the first and third rounds. The Georgetown University Law Center team was the eventual 2007 winner. The 2007 team, ELS and many law students have pledged their support to building an enduring Environmental Law Moot Court tradition and look forward to helping to prepare our UNM 2008 team.

Message from the Outgoing Student Board Member

Mandy Wang

I'd like to thank the NREEL Board and Section for the chance to serve as the student board member for the section this past school year. I enjoyed the chance to serve as a liason between UNM School of Law and Section, the opportunity to get to know more attorneys with similar professional interests, and to learn more about how the Section and State Bar work. I look forward to being an active member of the NREEL Section after passing the Bar and hope to serve on the NREEL Board again in the future. –Mandy Wang

Fourth Annual Water Policy CLE Focus on the Utton Center Model Interstate Water Compact

Marilyn O'Leary, Utton Center Executive Director

On June 7 and 8, 2007, the Utton Transboundary Resources Center at the UNM School of Law will present its Fourth Annual Water Policy CLE, cosponsored by the New Mexico State Bar, Section on Natural Resources, Energy and Environment. The topic of this conference is: The Utton Center Model Interstate Water Compact: Why This Model Is Useful Whether or Not Your River Has a Compact – Advanced Management Principles for Interstate Rivers.

The Utton Center has developed a model interstate water compact to empower states to collaboratively manage their shared water resources. Key compact provisions include:

- a Commission structure that includes a Council, the Commission's basic policy making unit comprised of state, federal and Native American representatives, and a Division of Scientific Analysis, the unit of the Commission with responsibility for the development and evaluation of scientific and technical data needed or useful in administering the compact;
- interstate apportionment of surface and hydrologically connected groundwater;
- a base apportionment for (1) the maintenance of adequate stream flows for environmental purposes and (2) satisfaction of all state, federal and tribal water rights perfected under applicable law as of the effective date of the compact;
- supplemental appropriations of surplus water; and
- water resources management and water quality protection programs.

The conference will begin with a detailed discussion of the Model Compact creation and provisions. The first afternoon panel will apply the provisions of the compact through a case study of an uncompacted river, the Spokane, with presentations by key water rights holders. Thursday will close with a discussion of applying the Model Compact's principles to the Colorado River. Friday's half day program will include presentations on ethics and professionalism related to the role of politics in compact negotiations. The final panel will look at how flexible the Compact Clause is in applying the Model Compact's provisions to existing compacts. The Model Compact can be accessed on the Utton Center's website under Projects, or at http://uttoncenter.unm.edu/pdfs/Model_Compact.pdf.

The CLE will be held at the State Bar Building, 5121 Masthead, NE, Albuquerque, NM. The program can be found on the Utton Center website at http://uttoncenter.unm.edu/water_policy_conf.html.

State Bar of New Mexico

Natural Resources, Energy and Environmental Law Section

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