

Opinion No. 76-23

July 21, 1976

BY: OPINION OF TONEY ANAYA, Attorney General Thomas Patrick Whelan, Jr.,
Assistant Attorney General

TO: Roy S. Walker, Chairman, New Mexico Environmental Improvement Board, Post
Office Box 71, Clovis, New Mexico 88101

QUESTIONS

Facts

Kennecott Copper Corporation, Chino Mines Division, requested the Environmental Improvement Board to consider an amendment to New Mexico Air Quality Control Regulation No. 506. This regulation contains the air quality standards with which Kennecott must comply in the operation of its Silver City smelter. The amendment which Kennecott proposed to the Board would have relaxed the regulation's standards.

The Board agreed to consider Kennecott's proposed amendment, and it published notice that a public hearing would be held on the proposed amendment. The notice provided in pertinent part:

The New Mexico Environmental Improvement Board will hold a public hearing beginning at 9:00 A.M., March 11, 1976 in the Silver City High School Auditorium, Silver City, New Mexico. The hearing is to consider Kennecott Copper Corporation's proposed amendment to Air Quality Control Regulation No. 506 -- Non-Ferrous Smelters -- Particular Matter. Copies of Kennecott Copper Corporation's proposal may be obtained from the Legal Section, EIA, P.O. Box 2348, Rm. 515, P.E.R.A. Bldg., Santa Fe, New Mexico.

The notice was published in compliance with Section 12-14-6, NMSA, 1953, which is the statute that sets forth the procedures for the adoption and amendment of air quality regulations.

After the hearing, the Board voted to reject the proposed amendment. The Board approved instead a motion granting Kennecott a variance which excused it from compliance with the regulation's standards for two years. The variance was to contain a statement that the Board would hold another hearing to reconsider Kennecott's proposed amendment immediately before the expiration of the two year variance.

Question

1. May the Environmental Improvement Board issue a variance when the notice of hearing indicated only that the hearing was to consider a proposed regulatory amendment?
2. Does the Environmental Improvement Board have the authority to issue a variance when there was no written petition for variance?
3. May the Environmental Improvement Board grant a variance which, by its terms, requires no ultimate compliance with an air quality regulation?

OPINION

{*92} Analysis

The Environmental Improvement Board cannot grant a variance without first having given the public reasonable notice and a hearing on the contemplated variance. Since the notice of the hearing on Kennecott's proposed amendment contained no mention of a variance, the Board could not legally have granted a variance after that hearing. The order granting the variance is, therefore, void.

This conclusion is dictated by the decision of the New Mexico Supreme Court in **Groendyke Transport Inc. v. New Mexico State Corporation Commission**, 80 N.M. 509, 458 P.2d 584 (1969). In that case the State Corporation Commission had given notice of a hearing to consider an application to enlarge the territory covered by a certificate authorizing the transport of "oil, gas, and water." After the hearing, the commission granted the requested increase in territory, and it changed the description of the commodities authorized from "oil, gas, and water" to "petroleum and petroleum products."

The Court determined that "petroleum and petroleum products" was a broader term than "oil, gas, and water." The court then found that:

The notice, limited to the application for transportation of oil, gas and water, did not give notice of an application to alter or amend the Law certificate to authorize transportation of petroleum and petroleum products, and, accordingly, is as though the hearing and resulting alteration of the certificate had been without the notice required by Art. XI, § 8, New Mexico Constitution, and §§ 64-27-8, 64-27-13, NMSA, 1953. At 80 N.M. 511.

And it concluded, "that such noncompliance with the constitutional and statutory provisions renders the orders void." Ibid.

The Environmental Improvement Board was under a similar statutory duty to give notice and a hearing on its contemplated issuance of a variance. Section 12-14-8, NMSA, 1953, requires the Board to hold a public hearing before granting a variance. This requirement necessarily includes the requirement that reasonable notice of the hearing be given. It would be absurd to conclude that the statute required the Board to hold

public hearings but did not require it to notify the public of the hearings. The courts would interpret {*93} the public hearings requirement to include a requirement of reasonable notice in order to avoid this absurd result. See **Trujillo v. Romero**, 82 N.M. 301, 481 P. 2d 76 (1971).

The Board has expressly bound itself to a notice requirement in Air Quality Control Regulation No. 701E. That regulation provides:

At least seven (7) days prior to each hearing date, the director shall publish notice of the date, time, place and **subject of the variance hearing** in a newspaper of general circulation in the county in which the facility is located and in a newspaper of general circulation in the state. (Emphasis added).

Having established this procedure, for granting variances the Board was obligated to follow it when it granted Kennecott's variance. See **Pellman v. Heim**, 87 N.M. 410, 534 P.2d 1122 (1975).

The Board failed to observe both the statutory and its own regulatory requirements for giving notice of the contemplated issuance of a variance. By virtue of the decisions and rationales of the **Groendyke** and **Pellman** cases, an order granting a variance in these circumstances would be void.

We are not suggesting that the Board cannot legally accomplish the purpose of the proposed variance. We are merely stating that the means chosen to accomplish the purpose was legally ineffectual. The Board can, if it wishes, accomplish its purpose by amending or suspending Regulation 501 or by granting a variance, provided that it follows all statutory and regulatory procedures for these measures.

Your second and third questions relate to the manner of issuance and the substantive terms of the proposed variance. Since we have concluded that the proposed variance is void, these questions are moot, and we will not answer them at this time. We do stand ready, however, to address the legal issues raised by your questions should future proposed regulations cause you to ask them again.