

Opinion No. 78-12

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OPINION OF: Toney Anaya, Attorney General

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NOXIOUS ODORS; AIR POLLUTION; AIR QUALITY CONTROL ACT

Although not expressly included, a particular odor may fall within the definition of "air contaminants" in the Air Quality Control Act, § 12-14-1, **et seq.**, N.M.S.A. 1953 Comp., if it is shown that such odor is borne in the air by any substance included in the definition. Whether or not a particular odor constitutes "air pollution" as defined by the Act depends on a showing that the odor is borne by a substance and unreasonably interferes with the public welfare or the reasonable use of property.

FACTS

A meat packing plant in San Juan County is located near two residential subdivisions. The plant pumps slaughterhouse leavings into large open ponds which produce a noxious odor, causing discomfort to the nearby residents. The degree of odor is increased when the ponds are being agitated by pumps and aerators. Apparently, the ponds may be chemically treated to prevent or reduce the odor, but at present there is no such chemical treatment.

QUESTIONS

1. Does the definition of "air contaminant" in the Air Quality Control Act (Act), Sections 12-14-1 **et seq.**, include noxious odors?
2. If noxious odors are included within the definition of "air contaminant," does the situation reflected in the Facts stated above constitute "air pollution" as defined by the Act?

CONCLUSIONS

1. See Analysis.
2. See Analysis.

ANALYSIS

1. Section 12-14-2 of the Air Quality Control Act, **supra**, defines an "air contaminant" as:

". . . any substance, including but not limited to any particulate matters, fly ash, dust, fumes, gas, mist, smoke, vapor, micro-organisms, radioactive material, any combination thereof or any decay or reaction product thereof."

OPINION

Under this statutory language, an air contaminant is essentially defined as a "substance." An odor, however, is not a substance as such but rather "that characteristic of a substance which makes it perceptible to the sense of smell." See Webster's New World Dictionary, College Edition, 1966. Thus, an odor is necessarily borne in the air by some substance such as gas, fumes, vapor, or micro-organisms and that substance characterized by a noxious odor may be an air contaminant within the meaning of the Act.

Nevertheless, without necessary scientific data to establish a causal connection between a substance and a particular "noxious odor," we cannot say that odors per se or the odors described above are included in the definition of air contaminant.

To overcome this uncertainty, if it is thought desirable to bring odors specifically within the purview of the Air Quality Control Act, **supra**, consideration might be given to amending the Act to include odors in the definition of air contaminants in the same manner as other states. See, e.g., TEX. REV. CIV. STAT. ANN. art. 4477-5, § 1.03 (Vernon); ARIZ. REV. STAT. § 36-771; CAL. HEALTH & SAFETY CODE, § 49013 (West).

2. The Act defines "air pollution" at Section 12-14-2(B), **supra**, as:

". . . the emission, except as such emission occurs in nature, into the outdoor atmosphere of one or more air contaminants in such quantities and duration as may with reasonable probability injure human health, animal or plant life, or as may unreasonably interfere with the public welfare, visibility or the reasonable use of property."

If the proper relationship between a noxious odor and an air contaminant substance is established, then the emission into the air of that substance, characterized by the noxious odor, may indeed be considered air pollution, if the characteristic odor of the substance unreasonably interferes with the public welfare or the reasonable use of property of nearby residents.

Assuming a substance characterized by a particular noxious odor constitutes air pollution, the Environmental Improvement Board is statutorily mandated to prevent or abate air pollution by promulgating regulations and air quality standards. Section 12-14-5, N.M.S.A. 1953 Comp. Power to enforce the Air Quality Control Act, **supra**, and the regulations promulgated thereunder, is vested in the Environmental Improvement Division. Sections 12-12-9, 12-12-10, N.M.S.A. 1953 Comp.

Where, however, as with respect to the present situation, air quality standards or regulations have not been established as to what constitutes "air pollution" and thus no violation of the Act or regulations and standards is apparent, New Mexico's public nuisance law may provide an alternative means for the Environmental Improvement Division to abate noxious odors.

Section 40A-8-5, N.M.S.A. 1953 Comp., provides:

"A civil action to abate a public nuisance may be brought, by verified complaint in the name of the state without cost, by any **public officer** or private citizen, in the district court of the county where the public nuisance exists, against any person, corporation or association of persons who shall create, perform or maintain a public nuisance."
(Emphasis added.)

Section 40A-8-1, N.M.S.A. 1953 Comp., defines a public nuisance as:

"anything affecting any number of citizens without lawful authority which is either: A. injurious to public health, safety, morals or welfare; or B. interferes with the exercise and enjoyment of public rights, including the right to use public property."

Although the Legislature has clearly intended that the Environmental Improvement Division has primary jurisdiction over pollution control, **State ex rel. Norvell v. Arizona Public Service Co.**, 85 N.M. 165, 510 P.2d 98 (1973), if a determination is made that the San Juan County packing plant situation does not constitute "air pollution," noxious odors might still be considered a nuisance and the above public nuisance statute may also be used by private citizens to bring, without cost, a civil abatement action in the name of the State. Similarly, other private civil actions, such as a private nuisance action, may be available to private land owners affected by the packing plant.

ATTORNEY GENERAL

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