4. Unit 4 has been identified as Phase II in prior permit submittals to the Department and is planned for future development to the east of Camino Real's current operations.

GENERAL COMMENTS

The General Purpose of Landfill Regulation

The New Mexico legislature, as other legislatures have done in other states throughout the United States, made the basic policy decision several years ago that, although landfills, especially those accepting hazardous waste, potentially create significant dangers to the public and the environment, they are nonetheless a public necessity. It therefore enacted the Solid Waste Act and the Environmental Improvement Act to regulate the industry.

Under these two acts, the Department has the duty to promulgate regulations to protect the safety, health, welfare, and property of the public, as well as New Mexico's natural resources, from the public health hazards, environmental pollution, and economic loss that may result from improper and inadequate solid waste disposal while at the same time insuring the provision of solid waste disposal by private enterprise as needed by the public. The hearing held in this case is but one part of that process.

Environmental Justice

On November 18, 2005, Governor Bill Richardson signed Executive Order 2005-056 on Environmental Justice issues. The order cited the federal government's underscoring of Environmental Justice as an important national issue, President Bill Clinton's Executive Order 12898 on the subject, and the

creation of the National Environmental Justice Advisory Council to integrate Environmental Justice into federal policies and programs.

The Governor's order recognized that all residents of the state, regardless of race, ethnicity, income or education level, were entitled to fair treatment and meaningful involvement in the development, implementation, and enforcement of environmental laws and regulations. The order directed all cabinet level departments, boards, and commissions to provide meaningful opportunities for involvement to all people in the state, to use available environmental and public health data to address and determine impacts in communities of color or low-income communities in connection with siting and permitting of existing and proposed industrial and commercial facilities, and to disseminate environmental information to the public in languages other than English.

Only a few months prior to the issuance of that order, on July 18, 2005, the New Mexico Supreme Court, in *Colonias Development v. Rhino Environmental Services, Inc.*, 2005-NMSC-024, 117 P.3rd 939 (*Rhino*), held that in a hearing on a permit application to operate a landfill, (1) the Department must consider public opinion at the hearing; (2) the consideration of public testimony is not limited to technical issues but may be weighed and considered in determining the adverse impact, if any, on the community's quality of life; and (3) the impact of the proliferation of landfills on a community is relevant to the Department's review of a permit application under the Solid Waste Act and the regulations under it. The Court, in addressing (3) above, also held that the Act and regulations require the Department to consider whether evidence of the harmful

effects from such cumulative impact rises to the level of a public nuisance or potential hazard to public health, welfare or the environment.

Based on these holdings that allow for meaningful participation by the public and for consideration of the community's concerns in the final decision making process, our Supreme Court in *Rhino* remanded the case to the Department's hearing officer for a limited public hearing and additional public testimony on the impact of proliferation and to permit a line of cross-examination that had been disallowed. The Court also directed that the Cabinet Secretary for the Department, in reconsidering the public testimony, should he reject it, must explain the rationale for doing so.

In considering the impact of Environmental Justice concerns on this case, it is clear to me that in applying those concerns or factors, it is important to determine whether a disparate impact has been established on the citizens of Sunland Park, who the record and the evidence show clearly are largely Hispanic and generally of low income.

In this connection, it is important to understand that, although the City of Sunland Park argued, and a few witnesses testified, that Sunland Park is a Colonia, as that term is understood or used in New Mexico, the testimony and evidence, as reflected by the findings and conclusions, strongly indicate otherwise. This is so despite the fact that apparently several agencies have designated the City of Sunland Park as qualified to receive funding as a Colonia. The status of Sunland Park's infrastructure, or lack of it, as well as its citizens'

economic statuses, of course, are important in addressing Environmental Justice factors that come into play.

As noted by the Court in *Rhino*, Colonias are rural settlements along the US-Mexican border consisting of recent immigrants and typically lacking safe housing, potable water, wastewater treatment, drainage, electricity, and paved roads. Although there is some indication in the evidence that recent immigrants may exist in Sunland Park, the community is incorporated as a municipality with a duly elected mayor and council, does not lack infrastructure, has a wide assortment of paved roads, plenty of safe housing, potable water, drainage, electricity, and a wastewater treatment plant that is owned by the municipality. In addition, Sunland Park is home to a multi-million racetrack, as well as a privately owned amusement park and other commercial establishments and restaurants, including one that attracts its diners and customers from the neighboring cities of El Paso and Las Cruces.

Although the City of Sunland Park contends, and several of its witnesses maintained in their testimony, that a recently adopted and ambitious long-range plan for the municipality will be adversely affected by an extension of the permit to the Applicant, the evidence and therefore the findings and conclusions make clear that existence of the Landfill has not negatively affected commercial development. I am satisfied that operation of the Landfill has not in the past and will not in the future thwart the efforts of the municipality from its worthwhile long-range plan, which a well-known design and engineering firm drafted and developed.

Counsel for the City of Sunland Park suggested several times during his examination of witnesses that an interdisciplinary team of experts such as sociologists, social workers, and psychologists should have been organized to study the social impact of the Landfill on the community's citizens and to submit a report that could be used to assess any detrimental or adverse affect the Landfill would have on the community.

To me, this raises several important questions. How much should the Department be expected to do in performing its function under the Act and regulations? What else could be done by the Department, what other approach can be taken, other than that already taken by it in giving proper notices, holding various community meetings to solicit public input, and having its staff extensively investigate the Application and CRLF's operations and performance? More importantly, whose responsibility is it to take those additional steps?

Should it be the responsibility of the opponents to a facility's permit extension to counter the CIA or the Department's investigative work with a social impact assessment of their own? Is the Department required to take on this responsibility when considering *Rhino*'s discussion on social impact and the public's meaningful involvement? In my judgment, the answer is no to the latter question. All that *Rhino* and Environmental Justice require in that regard is that the public be permitted to be a part of the process in a meaningful manner, so that ultimately, any decision made does not ignore the important considerations under Environmental Justice.

There are two other important matters to consider in this connection. First, under recently adopted regulations by the Department, a written Community Impact Assessment must be prepared by the Applicant under certain circumstances. That is one of several steps the Department has taken to address the concerns expressed by our Supreme Court in *Rhino*. Although those recently adopted regulations do not apply to this case, the Applicant nevertheless paid for and submitted to the Department a CIA that was admitted into evidence and testified to by several witnesses. As its name suggests, the exhibit is generally an assessment of the impact CRLF has had and will have on the community of Sunland Park and the surrounding area.

Second, an unregulated dump and then another landfill, long before Camino Real bought the land, have existed for many years in the same location and were a part of the region for all those years. True, operation of prior landfills and of the Landfill have been expanded through the years, but with such expansions have come improvements that have lessened, not increased, potential problems that may adversely affect the people in the surrounding area. The majority of these improvements took place after Camino Real took over the operation of the prior landfill.

Based on these and other considerations, I have concluded that this is not a case in which the Applicant, in requesting a 10-year renewal of its permit, and the Department, in reviewing or approving the granting of the permit, have affected the area differently from other, unaffected communities within the state or within comparable areas. Although argued indirectly by the City of Sunland

Park and the Other Parties, there was no credible testimony or evidence that the health, income, or the general population are significantly different than other communities of similar size throughout the entire state.

I believe that the requirement under the Act and its regulations (that a permit not be granted if the Department determines that the landfill endangers the public health, safety, welfare, or the environment, or will cause undue risk or damage to property) incorporates an important element and concern of Environmental Justice. Many witnesses for the Applicant and the Department testified that the granting of the permit in this case meets that requirement. The question to be asked is whether there was any credible evidence, including testimony from the public, that reasonably refuted the Applicant's and the Department's witnesses in that regard.

To be sure, in the section below entitled "The Citizens of Sunland Park," I go into some detail about the number of citizens who testified of their fears and concerns regarding their physical health, as well as the safety of their homes, ground water, roads, and the injurious nature of air and noise pollution. However, as I have noted in that section, these fears are speculative and were not supported by credible evidence.

Based on what I have said here and elsewhere, one might be tempted to suggest that the citizens' concerns and fears are understandable and even reasonable and that, although the Landfill fulfils all of the Act's and the regulations' requirements, its location is just too close to the City of Sunland Park and should be moved elsewhere. That, of course, would require a denial of the

extension request, or if not a denial, that the extension grant be for a shorter period than 10 years.

The problem with such rationale (that based on the citizens' complaints, the location is not suitable and the Landfill should therefore be moved), however, is that, first, it has no support under the Act or its regulations, and second, outright denial or the grant of an extension for a lesser period than 10 years, under the facts of this case, could be reasonably argued to be outside the scope of the Cabinet Secretary's authority, both under the Act and the regulations and under the New Mexico Constitution.

I state that for two reasons.

First, I believe that if the Department finds that the Applicant has met all of the technical requirements, and it further finds that granting the renewal will not result in "a hazard to public health, welfare, or the environment" or create an "undue risk to property," the Department has no choice in my judgment but to grant the permit. These are the only two criteria under the Act and its regulations that must be met. This is true even if one considers Environmental Justice principles, as we must, as well as the mandate under *Rhino*. After all, as I previously suggested, Environmental Justice has a nexus, so to speak, in what I term the "anti-hazard" requirements under the Act and its regulations. If the two criteria I noted above are met, then denial is not an option.

The second reason is equally important. Denial of a permit if both criteria have been met or even a grant for a lesser period than 10 years could result in an unconstitutional regulatory taking under New Mexico's Constitution. N.M.

Const. Art II § 20. Camino Real has not only met, but in some cases, actually exceeded the requirements under the Act and its regulations. To grant the permit for any period less than ten years under these circumstances could easily be deemed as an abuse of authority or police power that could result in an unconstitutional taking of property without just compensation. See *Board of County Comm'rs v. Harris*, 69 N.M. 315, 318, 366 P.2d 710, 712 (1961).

I realize that the Department not only has a right to impose conditions to its grant of a permit and also has the right to grant the permit for a lesser period than ten years. I am concerned, however, in light of the circumstances of this case, where Camino Real has been shown to have exceeded the requirements under the Act, that what I consider to be unfounded fears, unsubstantiated and subjective concerns of the citizenry of Sunland Park, as well as speculative causes, cannot form the basis for granting the permit for a lesser period than ten years.

Additionally, under the facts of this case, it could be reasonably argued that Camino Real has through the years acquired a vested right in its permit, subject only to the requirements under the Act and the pertinent regulations. Any attempt to diminish that vested right by requiring it to apply in five years for an extension of its permit could be considered a taking of property without just compensation.

Finally, one should not ignore the fact that the Department has a right under the Act and regulations to step in at any time in the future, if the permit is granted for ten years, should the Department have reason to believe Camino

Real is not complying with the regulations or the conditions imposed on the permit. This is a sufficient safeguard. I see no reason to put the Applicant, the Department, and others to the expense of repeating this whole process within less than ten years.

Considering what I deem to be the high quality of the Department's staff that testified at the hearing, my recommended findings and conclusions strongly indicate that I have confidence that, should CRLF not perform as required under the regulations, and the staff believes the Landfill has created a hazard to the public health, welfare, and safety of the citizens of Sunland Park, the Department can then rise to the occasion at some later date to assure that the public is fully protected and that the problems are resolved or the facility is ordered closed and the permit terminated, if necessary.

In connection with the Application process in this case, I believe the Bureau's staff has performed its function admirably. More than that, one cannot ask for. For these reasons, as I note elsewhere in the report, I have recommended the granting of the permit for ten years.

In summary, I believe that the mandates of both the Governor's Executive Order and our Supreme Court's ruling in *Rhino* have been met in this case from its inception. In addition to what I have already noted in this discussion and in my recommended findings and conclusions, notices of all meetings and hearings were published in both English and Spanish for the benefit of the citizens of Sunland Park and the outlying areas, including El Paso and Juarez, Mexico. There was meaningful involvement and participation in the process, including