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THE COLONIA AND THE LANDFILL:
COLONIAS DEVELOPMENT COUNCIL v. RHINO ENVIRONMENTAL SERVICES, INC.

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I. INTRODUCTION

On July 18, 2005, the New Mexico Supreme Court handed down a groundbreaking decision in Colonias Development Council v. Rhino Environmental Services, Inc., requiring the New Mexico Environment Department (NMED) to take environmental justice criteria into consideration during solid waste facility permitting decisions.

The decision was a dramatic climax to a case already fraught with drama. It began when Rhino Environmental Services proposed to site a fourth landfill in Chaparral, New Mexico, the state’s largest colonia. The public hearing on the permit application took place amidst the national chaos and disruption of the terrorist attacks of September 11, 2001. During this hearing, the NMED Hearing Officer bluntly informed the community members in attendance that their concerns about the social impact of adding to the cumulative burden of Chaparral’s numerous waste and industrial sites were quite simply irrelevant to the permitting decision.

When the New Mexico Supreme Court overruled the agency and required it to consider the social impact and regional proliferation of waste sites in its Solid Waste Act permitting decisions, it signaled a substantial shift in the interpretation of New Mexico environmental law. Prior to the Rhino decision, the NMED had assumed that it lacked the authority to consider non-technical factors in its permitting decisions under the Solid Waste Act. However, in the aftermath of Rhino, the agency revised its Solid Waste Act regulations to require additional public notice and the completion of a Community Impact Analysis for waste sites proposed within a four-mile radius of a vulnerable community. Under the court’s reasoning, similar

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3 Id. at 944-45.
reforms could be required for permitting under other state environmental laws, including New Mexico’s Air Quality Control Act, Hazardous Waste Act, and Water Quality Act. Moreover, the court indicated that the Solid Waste Act and its regulations may prohibit the siting of new or expanded landfills in communities already disproportionately impacted by industrial sites if the cumulative harmful effects reach the level of a public nuisance or a hazard to public health, welfare, or the environment.

Rhino not only affects environmental law in New Mexico, but may also signal a shift toward greater receptiveness to environmental justice claims by state courts more generally. Prior to the decision, few state courts had interpreted state environmental laws to include such requirements; however, not long after Rhino, the Pennsylvania Supreme Court came to a similar conclusion as the New Mexico Supreme Court and upheld that state environment department’s decision to include environmental justice criteria in its permitting analysis despite the lack of any specific statutory mandate.

However, Rhino and the resulting revisions to New Mexico’s Solid Waste Act regulations also illuminate the daunting challenges that remain. The effectiveness of the new regulations is limited by their narrow demographic and geographic definition of a vulnerable community and their broad exception for areas zoned for industrial use. In addition, the Community Impact Analysis falls short of a comprehensive analysis of the environmental justice impacts of a solid waste facility. Ultimately, although both the Rhino decision and the revised regulations move New Mexico closer to achieving environmental justice, they are only the first steps on the long and difficult journey toward that goal.

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4 See infra Part IV.
5 See infra Part III.
7 See infra Part IV.
II. BACKGROUND

A. Waste Siting and the Origins of the Environmental Justice Movement

The environmental justice movement first coalesced as a response to inequalities in the siting of waste facilities. In 1982, national attention was drawn to a large protest over the siting of a PCB landfill in Warren County, North Carolina. The landfill was proposed to store 30,000 cubic yards of PCB-contaminated soil from across the state. At the time, Warren County was the poorest county in the state, with an annual per capita income of around $5,000 and a population that was 65% black. Most of the residents got their drinking water from shallow wells, as the water table was only 5-10 feet below the surface.

When they learned of the proposal to site the PCB landfill in their neighborhood, Warren County residents were outraged, and they organized a massive protest. More than 500 of the protestors were arrested, and national civil rights groups including the United Church of Christ Commission for Racial Justice, the Southern Christian Leadership Conference, and the Congressional Black Caucus joined the effort against the landfill. This event is now viewed as the catalyst for the emergence of the environmental justice movement as a force in its own right, dedicated to redressing racial, gender, and socioeconomic inequities in the distribution of environmental burdens and benefits, and ensuring a safe, healthy environment for all.

In response to the growing awareness of the disparities in environmental risks and burdens sparked by protests like that in Warren County, studies were conducted that examined

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10 Id.
11 Ken Geiser & Gerry Waneck, PCBs and Warren County, in Unequal Protection, supra note 9, at 50.
12 Id. at 51.
13 Liu, supra note 8.
14 Bullard, supra note 9.
15 Id. at 5; 22; Liu, supra note 8, at 2.
the distribution of landfills and hazardous waste sites, including the General Accounting Office’s report on the correlation of hazardous waste landfills with the racial and socioeconomic status of their host communities, and the well-known 1987 study by the United Church of Christ’s Commission for Racial Justice, titled *Toxic Wastes and Race in the United States*.\(^{16}\) Although the environmental justice movement has rapidly expanded to embrace issues of workplace safety, neighborhood infrastructure (or lack thereof), and control over traditional land bases and natural resources, the iconic environmental justice scenario still involves the siting of a toxic or hazardous waste facility in a low-income community of color.

**B. Chaparral, New Mexico**

Chaparral is an unincorporated *colonia*\(^ {17}\) located on the border between Doña Ana and Otero counties in southern New Mexico, just over 20 miles north of El Paso, Texas.\(^ {18}\) Twenty-two miles to the northwest, on the other side of the Franklin Mountains, the green ribbon of the Rio Grande winds through the thriving city of Las Cruces, New Mexico.\(^ {19}\) To the north and east lie the White Sands Missile Range and the Fort Bliss military reservation.\(^ {20}\)

Census Bureau data on Chaparral is spotty at best. Although the parts of the community located in Doña Ana County have been categorized as a Census Designated Place,\(^ {21}\) census counts have been hindered by the fact that the community actually spans two counties and

\(^{16}\) *See* Liu, *supra* note 8, at 2.

\(^{17}\) For a definition of *colonia*, see *supra* note 2.


\(^{19}\) *Id.*

\(^{20}\) *Id.* at 7.

\(^{21}\) A Census Designated Place is a “geographic entity that serves as the statistical counterpart of an incorporated place for the purpose of presenting census data for an area with a concentration of population, housing, and commercial structures that is identifiable by name, but is not within an incorporated place.” U.S. Census Bureau, Glossary of Basic Geographic and Related Terms, http://www.census.gov/geo/www/tiger/glossary.html#glossary (last visited Dec. 1, 2007).
contains a predominantly minority population, which tends to be undercounted in censuses. As a result, while the 2000 Census recorded 6,117 persons in the Doña Ana sections of Chaparral, an estimate based on water bill data puts the community’s actual population at around 20,000 as of 2006.

Despite these substantial flaws, the data recorded by the Census Bureau nevertheless provides a general indication of the social and demographic characteristics of Chaparral. Most of the developed area is contained within four Census Block Groups (CBGs), three in Doña Ana and one in Otero county. Within these four CBGs, the Census Bureau recorded a population that is 72% Hispanic, as compared to 63% in Doña Ana County, 32% in Otero County, and 42% statewide. Slightly more than 20% of the Chaparral population demonstrated Limited English Proficiency (speaking English “not well” or “not at all”). This is more than twice the rate of Doña Ana County overall, and four times the rate of Otero County and the state as a whole.

The median income across the four CBGs was $22,540, compared to the statewide average of $34,133. Poverty rates (measured by the percentage of the population living below the federal poverty line) for the four CBGs ranged from a high of 49% to a low of 24%, averaging 39% across the four groups. New Mexico’s statewide poverty rate was 18.4%, while Doña Ana and Otero counties reported 25% and 19% respectively. About a quarter of the population had completed high school, with 46% having less than a high school diploma.

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22 Studies indicate that Hispanics are undercounted in the census at a rate approximately seven times higher than that of non-Hispanic whites. Peter Skerry, Counting on the Census? Race, Group Identity, and the Evasion of Politics 82-83 (2000).
23 Hicks & Co., supra note 18, at 29.
24 Census Block Groups are the smallest geographic entities for which the 2000 census tabulated data; they usually contain 300-3,000 persons. U.S. Census Bureau, supra note 21.
26 Id. at C-1.
27 Id. at C-2.
28 Id.
29 Id. at C-7.
30 Id.
31 Id.
compared to 21% statewide. The CBGs containing Chaparral also reported a higher percentage of children (38% of the population counted was under 18, compared with 28% statewide).

Thus, the Census data paints a picture of a community that, compared to surrounding areas, is disproportionately young, low-income, and Hispanic, and whose residents are more likely than residents of surrounding areas to lack English proficiency or a high school education.

Of the four CBGs, the Otero County block group is the farthest east, and it contains the growing edge of the community. It is in this CBG that the site of the proposed Rhino landfill facility is located. As measured by the 2000 Census, the Otero County block group’s population was 82% Hispanic, and had the highest poverty rate (49%) and the lowest median income ($18,935) of the four groups.

To supplement the problematic Census data, the Colonias Development Council, a grassroots community group dedicated to improving the quality of life in southern New Mexico’s colonias, designed and undertook a community-driven survey from 2006-07. This cluster survey (which was also conducted in Sunland Park, a colonia located about 40 miles southeast of Chaparral) was designed to gather a wide variety of information relevant to community organizing efforts, and also to train and empower residents in gathering information about their communities. CDC volunteers visited 172 households throughout the community to complete the survey.

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32 Id. at C-4.
33 Id. at C-3.
34 Interview with Doug Meiklejohn, Executive Director, New Mexico Environmental Law Center, in Santa Fe, N.M. (Sept. 7, 2007).
35 HICKS & CO., supra note 18, at 30.
36 Id.
37 See infra next section for a more complete description of the CDC and its work.
39 Telephone interview with Dr. Diana Bustamante, Executive Director, Colonias Development Council (Sept. 25, 2007).
40 COLONIAS DEVELOPMENT COUNCIL, supra note 38, at 1.
The community survey revealed a deeper level of poverty than that recorded by the Census Bureau. While the Census reported a median income of $22,540, the CDC found that that 31% of the Chaparral residents surveyed reported annual incomes of less than $10,000, and 37% reported incomes between $10,000-19,999. Only 16% earned more than $30,000.

In addition, the community survey questioned Chaparral residents about their quality of life, including family health and access to infrastructure. Approximately 60% of the households surveyed had at least one member with a chronic illness: 19% reported at least one person with diabetes, and 13% reported at least one person with asthma. Other diseases included respiratory and skin allergies, gastrointestinal problems, and depression.

In terms of community infrastructure, the survey found that about 95% of Chaparral residents have running water and lights in their homes. Existing public facilities include six churches, three medical and one veterinary clinics, two elementary schools, two middle schools (a high school is also planned), a fire department, a multi-purpose center, a cemetery, and a park. There are also a handful of small businesses, primarily restaurants, convenience stores, and gas stations. However, only 19% of the residents surveyed have access to natural gas, 17% have streetlights outside their homes, and 8% have access to a city sewer. When asked whether they ever experienced strange or disagreeable odors in their homes, 24% of residents reported that they sometimes or frequently experienced such odors. A full 83% of the households surveyed felt that the community lacked basic city services.

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41 Id. at 20-21.
42 Id.
43 Id. at 7.
44 Id.
45 Id. at 8-9.
46 HICKS & CO., supra note 18, at 22.
47 Id. at 17.
48 COLONIAS DEVELOPMENT COUNCIL, supra note 38, at 8-9.
49 Id. at 10.
50 Id. at 18.
The CDC’s survey adds a community perspective to the more impersonal census data: not only is Chaparral a low-income community of color, but it is also one in which many residents are suffering from chronic health problems and are underserved by basic services like water treatment.

One thing Chaparral does not lack for is active industrial facilities. Four solid waste disposal sites, three industrial sites, and three other sites regulated by the New Mexico Environment Department (NMED) are located within a ten-mile radius of the community. These sites include a petroleum-contaminated soil remediation site operated by Rhino Environmental Services; the McCombs Municipal Landfill; the El Paso sewage sludge monofill; the Newman Power Plant; the Fred Hervey Water Reclamation Plant; an abandoned, illegal landfill containing primarily construction and demolition debris; the Chaparral Sand and Gravel Quarry, which doubles as a tire disposal site; Otero County Prison; White Sands Missile Range; and Rinchem Hazardous Waste Container Storage Facility.

Most of these facilities operate under air and/or water discharge permits from New Mexico, Texas, or the federal Environmental Protection Agency. Two of the sites, the El Paso Sludge Monofill and the McCombs Municipal Landfill, are located immediately adjacent to the main north-south artery serving the community, McCombs Drive. This is significant since the community survey indicated that 81% of the residents work outside of Chaparral, and are therefore frequently exposed to the environmental hazards along this route.

A major question in environmental justice disputes is whether proximity to hazardous sites actually increases exposure. While Chaparral residents are clearly living in close proximity

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52 Id.
53 Robinson, supra note 29, at 2.
54 Colonias Development Council, supra note 38, at 4.
to a number of polluting facilities, air monitoring by the NMED’s Air Quality Bureau indicates that their exposure to air pollutants periodically exceeds regulatory limits. The Chaparral air monitor found that the federal standard for ozone was exceeded 17 times (out of 8,637 measurements) between July 2005 and July 2006, and while particulate matter averaged under the federal limit, it spiked over that limit during periods of high winds.\textsuperscript{55} The highest spike was 6,006.8 \(\mu\)g/m\(^3\) – more than 40 times higher than the federal standard for any 24-hour period.\textsuperscript{56} In addition, the EPA’s environmental scorecards for Doña Ana and Otero counties reveal a pattern of low-income communities and communities of color bearing higher environmental burdens than the general population in those counties.\textsuperscript{57}

\begin{center}
\textbf{C. The Rhino Landfill Proposal}
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In January of 2001, Rhino Environmental Services applied for a permit from the New Mexico Environment Department (NMED) to open a landfill on the eastern edge of Chaparral. Rhino is a company that has engaged in “environmental construction, demolition, emergency response, site remediation, and waste management” in New Mexico and the El Paso area since 1989.\textsuperscript{58}

The landfill Rhino planned for Chaparral would accept municipal, construction, industrial, and special waste.\textsuperscript{59} Special waste includes petroleum-contaminated soils, sewage sludge, slaughterhouse offal, industrial solid waste, and treated formerly characteristic hazardous

\textsuperscript{55} HICKS & Co., \textit{supra} note 18, at 58.
\textsuperscript{56} \textit{Id.} at 59.
\textsuperscript{58} Rhino Environmental Services, Inc., http://rhinoservices.net/ (last visited Oct. 11, 2007).
\textsuperscript{59} Permit Application at ES-1, In re Application of Rhino Envtl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (Aug. 13, 2001).
waste, such as lead paint chips immobilized in concrete. The proposed development would cover 160 acres, with the landfill itself occupying 135. At the time the application was submitted, Rhino was already permitted to use the site for bioremediation of petroleum-contaminated soils, an activity that occupied approximately 50-60 acres of the site.

By the time the final, “completed, amended,” and revised proposal was submitted to NMED, the company and the agency had worked through many draft versions, and the application meticulously satisfied all of the requirements of the existing Solid Waste Act regulations. The final application filled two four-inch binders and was accompanied by sheaves of supplemental maps. Each divider within the binders corresponded to a different section of the regulations, including detailed operational, emergency, and closure plans; scientific analyses of all the technology to be employed in the facility (liner system, leachate collection, cover system, surface water management, and so on); financial assurance; operator certification; hydrological and geological surveys and maps; surveys of any wetlands, mines, mills, quarries, fault lines, water supply wells, airports, developed properties, historical and archeological sites, and threatened and endangered flora and fauna in the vicinity of the site.

Conspicuously absent from this seemingly exhaustive list of criteria that Rhino had investigated and documented was any information about the characteristics of the community into which this new landfill would be placed. As Rhino itself described the process in its informational PowerPoint presentation: “A study must be made of an area before it can be approved as a landfill site. This analysis examines the wildlife living in the area, as well as the condition of the underlying soil and bedrock. It must also be determined if the site has historical

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60 HICKS & CO., supra note 18, at 9.
61 Permit Application, supra note 59, at ES-2.
62 Id.
63 See N.M. CODE R. §§ 20.9.2 through 20.9.25.
64 Description based on the author’s examination of the permit application at the New Mexico Environment Department, Sept. 7, 2007.
or archeological value.”65 So although every archeological artifact, geological feature, and threatened plant was catalogued and mapped, the regulations and corresponding application contained no discussion of the living, breathing people occupying the community where this new environmental hazard was to be sited. Indeed, if all a person knew about Chaparral was what was contained in Rhino’s permit application, that person would have no idea that there were any human beings in the vicinity at all.

Despite its failure to consider or discuss any potential detrimental effects the landfill might have on the people of Chaparral, Rhino strongly emphasized the benefits its facility would provide to the community. In the presentation they prepared for the public hearing on their permit application, Rhino’s representatives explained how the landfill would create jobs (20 during the six months of construction, five thereafter),66 increase the community’s infrastructure and tax base, pay host fees ($0.10 per cubic yard of waste would be paid to Otero County), provide free waste disposal services during Community Clean-Up Days, and develop an additional water supply that would be made available to the fire department.67 High on the list of benefits was improved access to waste disposal for local municipal waste. Rhino pointed out that residents of southwestern New Mexico were paying $11 a cubic yard to dispose of construction waste, and $8 a cubic yard for municipal waste, compared to $6 and $4 respectively in central New Mexico.68 It stated that “local competition would decrease disposal rates and improve customer service,” as well as lowering transportation costs.69 Indeed, those residents who later

65 RHINO ENVIRONMENTAL SERVICES, POWERPOINT PRESENTATION: PROPOSED SUB-TITLE D LANDFILL (2001) [hereinafter RHINO POWERPOINT].
66 HICKS & CO., supra note 18, at 65.
67 RHINO POWERPOINT, supra note 65.
68 Id.
69 Id.
commented favorably about the proposed landfill generally based their support on the community’s need for a closer waste disposal facility.\textsuperscript{70}

However, Rhino’s plan for the facility indicated that this would be much more than a local landfill. The transportation plan projected 12-15 trucks of waste per day, with 20 tons of waste per truck, for a total of 250 tons of waste daily.\textsuperscript{71} According to the EPA, Americans produce an average of 4.5 pounds of solid waste a day, meaning a community the size of Chaparral would generate approximately 45 tons of waste each day.\textsuperscript{72} Presumably the other 205 tons going into the landfill on a daily basis would originate outside the community.

Importing this additional waste into Chaparral would exacerbate an existing trend. The NMED’s 2006 Solid Waste Annual Report identified Doña Ana County as accepting more out-of-state waste than any other county in New Mexico.\textsuperscript{73} While its residents produced 220,464 tons of municipal and 12,669 tons of construction waste in 2005, the county accepted an additional 422,047 tons of out-of-state waste for disposal in the county.\textsuperscript{74} On paper, of course, this new landfill would be sited several miles across the border in Otero County, which accepted only 14,784 tons of out-of-state waste in 2005.\textsuperscript{75} Although much less than Doña Ana County, this amount was nevertheless the third highest amount of out-of-state waste accepted by a New Mexico county (ranking only slightly behind San Juan County, which accepted 16,981 tons of out-of-state waste in 2005). In addition, Otero County accepted the second highest proportion of out-of-state waste relative to what it produced in 2005, accepting foreign waste equal to 25% of

\textsuperscript{70}HICKS & CO., supra note 18, at 52-53. 
\textsuperscript{71}RHINO POWERPOINT, supra note 65. 
\textsuperscript{73}SOLID WASTE BUREAU, NEW MEXICO ENVIRONMENT DEPARTMENT, 2006 NEW MEXICO SOLID WASTE ANNUAL REPORT 11 (2006). 
\textsuperscript{74}Id. 
\textsuperscript{75}Id. at 12.
what its residents produced, while San Juan County accepted 10%. The Rhino landfill would bring approximately 75,000 tons of out-of-state garbage each year into an area already receiving a heavily disproportionate share.

After Rhino’s permit application and accompanying technical documentation were submitted, the NMED scheduled a public hearing, as required by the Solid Waste Act regulations, in order to receive feedback from the community on the proposed landfill. The hearing was to begin at 6:00 p.m. on Tuesday, June 5, 2001 at the Catholic Church in Chaparral, and continue on subsequent evenings if necessary. At this hearing, technical experts and members of the public would have an opportunity to testify before the Hearing Officer, who would make a recommendation to the Secretary of the Environment regarding whether or not the permit should be granted. The public notice of the hearing stated that, “The Secretary, in making the final decision on the permit application, will consider public comment received during the public hearing.”

It was shortly after the public notice went out that the Colonias Development Council (CDC) became involved. The CDC is a nonprofit, community-based organization working to improve the quality of life in southern New Mexico’s colonias. It was originally founded in the early 1990s as a project of the Catholic Diocese of Las Cruces, and then evolved into an independent organization working to foster community organizing, advocacy, economic development, and child development in the colonias.

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76 Id.
77 N.M. CODE R. § 20.9.1.200 (L)(12).
78 Notice of Hearing at 1, In re Application of Rhino Envtl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (Apr. 25, 2001).
79 Id. at 1-2.
80 Id. at 1.
82 Id.
The CDC had come to Chaparral to provide organizing support to the Chaparral Community Health Council (CCHC), a community group working on environmental health issues in the community. During one of the leadership training sessions, a CCHC member expressed her distress over the proposal she had just learned about to open yet another landfill in Chaparral. As the community groups learned more about Rhino’s plan, their organizing efforts increasingly focused on protecting the community from this major new environmental burden.

Each group brought legal representation to the table. The CDC was represented by Albuquerque attorney Nancy Simmons, who had been the group’s attorney for 14 years, and had originally been employed by Texas Rural Legal Aid’s El Paso office. Southern New Mexico Legal Services represented Maria de Jesus Garcia, on behalf of Chaparral Community Health Council, because the low-income legal services organization could not represent an organizational client directly.

The CDC and CCHC fought the proposed landfill with everything they had. By early June, the groups had filed motions challenging the validity of the public notice (since it had only run in Doña Ana, not Otero County newspapers), and requesting reconsideration because amendments to the proposal had more than doubled the total amount of waste to be accepted and increased the proportion of “special waste” from that in the original permit application. Rhino responded by providing supplemental documents to shore up the completeness of its proposal.

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83 Telephone interview with Dr. Diana Bustamante, supra note 39.
84 Id.
86 Telephone interview with Dr. Diana Bustamante, supra note 39.
87 Motion to Cancel the Public Hearing Scheduled to Begin June 5, 2001, Due to Failure of the Applicant and/or Hearing Clerk’s Office to Properly Notice the Public, In re Application of Rhino Envtl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (June 3, 2001).
88 Motion to Require the Environment Department to Reconsider the Application of Rhino Environmental Services, In re Application of Rhino Envtl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (June 6, 2001).
89 Notice of Compliance with June 21 Order of the Hearing Officer and Request for Completeness Determination, In re Application of Rhino Envtl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (July 27, 2001).
and by challenging the technical evidence on environmental injustice that the community groups sought to introduce.\textsuperscript{90} Rhino did, however, concede that the notice had been deficient, and the hearing was rescheduled for the week of September 10, 2001.

\textbf{D. The Hearing}

The hearing convened at 5:48 p.m. on September 10, 2001 in Chaparral.\textsuperscript{91} The CCHC and CDC had organized a number of informational meetings leading up to the hearing to educate the community and encourage community members to attend and speak out, and had organized a press conference out in front of the hearing on the day it began.\textsuperscript{92}

That first day, the Hearing Officer took four hours of testimony on the proposal.\textsuperscript{93} The Rhino representatives spoke first. Accompanied by their illustrated PowerPoint presentation, they described the company’s operating history and its detailed plans for the landfill, which had been laid out in the permit application.\textsuperscript{94} They explained that they had chosen the site because they already owned the land, it was in an area historically used for industrial purposes, and their investigations had shown that it met all the siting criteria detailed in the Solid Waste Regulations (it was not located on a floodplain, it was 300 feet above the water table, there were no endangered species or archeological sites in the vicinity, and so on).\textsuperscript{95} They also described all the benefits the community could expect to receive from the landfill.\textsuperscript{96}

\textsuperscript{90} Objection to Certain Exhibits Filed by Mary de Jesus Garcia, In re Application of Rhino Envtl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (Sept. 5, 2001); Objection to Technical Testimony of Sister Diana Wauters, ACSW, In re Application of Rhino Envtl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (Sept. 5, 2001).

\textsuperscript{91} Transcript of Proceedings at 1, In re Application of Rhino Envtl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (Sept. 10, 2001).

\textsuperscript{92} Telephone interview with Dr. Diana Bustamante, supra note 39.

\textsuperscript{93} Transcript of Proceedings, supra note 91, at 1, 168.

\textsuperscript{94} Id. at 10; RHINO POWERPOINT, supra note 65.

\textsuperscript{95} Transcript of Proceedings, supra note 91, at 25-26.

\textsuperscript{96} Id. at 38-44.
About two hours into the hearing, the Hearing Officer opened the floor to public comment, and a number of people testified in opposition to the landfill. Doña Ana County Commissioner Paul Curry objected to the fact that the regional South Central Solid Waste Authority board had not been consulted even though Chaparral was within its jurisdiction. Jim See, assistant principal at the elementary school, and David Garcia, president of the school board, spoke about the poverty and education levels of the community and directly raised of question of whether this new landfill would constitute environmental injustice or racism. Many community members expressed their concerns arising from experiences with flies, odors and illnesses they attributed to the existing sites, and how this new landfill would further impact the community’s self-esteem and quality of life. Two residents, one accompanied by his daughter, expressed support for the landfill as a strategy to address the community’s trash problem, and because of the incentives Rhino was offering. Both took pointed questions and accusations from the crowd in response to their comments. The hearing recessed at 9:45 p.m. that night, and was to reconvene at 2:00 p.m. the following day.

The following day was September 11, 2001. Nearly 3,000 people were killed in the most devastating terrorist attack ever to occur on U.S. soil. The nation’s borders and military bases, including Fort Bliss and White Sands adjacent to Chaparral, were placed on the highest level of alert, and many government offices were closed. When the hearing reconvened at 2:05, Olga

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97 *Id.* at 74-97, 110-30, 163-64.  
98 *Id.* at 77-80.  
99 *Id.* at 90, 92-95.  
100 *Id.* at 110.  
101 *Id.* at 120.  
102 *Id.* at 128.  
103 *Id.* at 98, 136.  
104 *Id.* at 104-10, 139-56.  
105 *Id.* at 168.  
Pedroza, an attorney with Southern New Mexico Legal Services, which was representing the Chaparral Community Health Council, requested that the hearing not continue at that time.\textsuperscript{108} Only four members of the public were in the audience, and each indicated that they were not willing to stay.\textsuperscript{109} Although the Hearing Officer was initially reluctant, after some discussion it was agreed that the hearing would adjourn for the day.\textsuperscript{110}

The hearing reconvened at 2:00 p.m. the following day, and the Hearing Officer announced that then-New Mexico Governor Gary Johnson had instructed the state government to proceed with its normal functions.\textsuperscript{111} Attorney Maria Laverde with Southern New Mexico Legal Services presented a motion to vacate the hearing, which had been filed in court that morning, noting that while the room had been packed to capacity on Monday, no member of the public was currently present.\textsuperscript{112} The CDC’s attorney, Nancy Simmons, had returned to Albuquerque to take care of her family.\textsuperscript{113} In addition, the community group’s technical expert, who had been returning from Russia to testify at the hearing, was stranded in Ireland indefinitely as a result of the shutdown of air travel in response to the terrorist attacks.\textsuperscript{114} Ultimately, however, the Hearing Officer decided to continue to accept testimony, and between September 12th and 19th, approximately 60 members of the public spoke, and technical and community member testimony filled hundreds of pages of transcripts.\textsuperscript{115} The hearings proceeded late into the nights of September 12th, 13th, and 14th.

\textsuperscript{108} Transcript of Proceedings, \textit{supra} note 91, at 173.
\textsuperscript{109} \textit{id.} at 182.
\textsuperscript{110} \textit{id.} at 200.
\textsuperscript{111} \textit{id.} at 212.
\textsuperscript{112} \textit{id.} at 214-15.
\textsuperscript{113} \textit{id.} at 175, 213.
\textsuperscript{114} \textit{id.} at 214-15.
\textsuperscript{115} See \textit{id.} at 277-1530.
The community groups offered testimony from Sister Diana Wauters, who holds a Master’s Degree in social work,\textsuperscript{116} about the negative social impacts posed by the Rhino landfill.\textsuperscript{117} She explained that she opposed the landfill on the basis of the cumulative impacts it would impose on Chaparral, the state’s largest \textit{colonia}, which she noted lacked key infrastructure (including a wastewater system, paved roads, and a high school).\textsuperscript{118} Sister Wauters emphasized the negative social impact that an additional landfill would have on the community, including stigmatization, fear, stress, and harm to community morale and self-image.\textsuperscript{119}

Social and quality of life impacts were central to the CDC and CCHC’s opposition to the new landfill. However, neither the Hearing Officer nor NMED as an agency believed that they had the authority to consider these factors in their evaluation of permit requests.\textsuperscript{120} Their reasoning was that, since the Solid Waste regulations laid out the factors required for a permit in painstaking detail, and since social impact and environmental justice criteria were not among them, the agency was only authorized to consider the factors included in the regulations.\textsuperscript{121} As long as a permit applicant satisfied those requirements, the agency believed it had no choice but to approve the permit – with appropriate conditions to ensure the protection of public health and the environment.\textsuperscript{122}

This issue of social and community impacts came to a head during the CDC and CCHC cross-examination of the Rhino witnesses on September 13th. When Dr. Diana Bustamante questioned whether Rhino had performed any studies of the social impact the landfill would have

\textsuperscript{116} Id. at 368.
\textsuperscript{117} Id. at 368-382.
\textsuperscript{118} Id. at 369-70.
\textsuperscript{119} Id. at 372, 379-80.
\textsuperscript{121} Hearing Officer’s Report at 38, In re Application of Rhino Envtl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (Jan. 9, 2002).
\textsuperscript{122} Transcript of Proceedings, supra note 91, at 753.
on the community, Rhino’s counsel immediately objected that the issue was irrelevant, and the
Hearing Officer sustained the objection, explaining that social impact “is not one of the factors
taken into consideration in the decision on whether to grant the permit or deny the permit or
grant it with conditions under the Solid Waste Act or the Solid Waste Management
Regulations.”123 Bustamante noted that Rhino had performed studies of the archeology, soil,
flora, and fauna, but not of the community, and again the Hearing Officer reiterated that social
concerns were irrelevant.124

After Bustamante’s thwarted cross-examination, Sister Wauters raised the issue again,
asking, if social impact is irrelevant, “what are we doing here? I mean, those of us who are
nontechnical experts or we're not scientists, why have we been invited here to express our
opinions if it's irrelevant?”125 The Hearing Officer explained that the community’s concerns
could form the basis for conditions placed on the permit, but that under the current Solid Waste
Act and corresponding regulations, “if the permit application meets all of the legal grounds for
the permit to be met, [then] sociological concerns without a legal flaw”126 would not be
sufficient grounds on which to deny the permit.127

On January 9, 2002, the Hearing Officer issued her report recommending that the permit
be granted.128 The report summarized the technical and community testimony, and concluded
that, under the NMED’s interpretation of the Solid Waste Act and its accompanying regulations,
“the state permitting procedures provide the framework in which the permit application is to be
granted or denied, and they do not legally provide a basis for denying a permit based upon

123 Id. at 726.
124 Id. at 727.
125 Id. at 751-52.
126 Id. at 753.
127 Id.
128 Hearing Officer’s Report, In re Application of Rhino Envtl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03
 (P) (Jan. 9, 2002).
environmental justice concerns, or the sociological concerns.” The Hearing Officer’s Report went on to note that even if such factors could be the basis for a permit denial, the community groups had failed to prove disparate impact. The report reiterated that “testimony from lay witnesses is insufficient basis for a finding that a landfill endangers public health or welfare or the environment, and it does not provide sufficient grounds for denial of the permit,” and that the Hearing Officer did “not see in the applicable law or regulations that we can take into account in a permitting action a consideration of sociological factors or social impact.”

The CDC filed objections to the report, stating that the failure to consider the proliferation of waste sites in the region or the impact of the additional landfill on social welfare made the application incomplete as a matter of law. On January 30, 2002, the Director of NMED’s Water & Waste Management Division adopted the Hearing Officer’s proposed findings of fact and conclusions of law in a final order, approving the permit for a ten-year period, along with twenty conditions designed to ensure environmental protection and compliance.

Just before the deadline for filing appeals to the permit, the CDC appealed the final order to the New Mexico Court of Appeals.

129 Id. at 38.
130 Id.
131 Id. at 39.
132 Id. at 49.
133 Objections to Hearing Officer’s Report and Proposed Findings of Fact and Conclusions of Law, In re Application of Rhino Envtl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (Jan. 18, 2002).
134 Final Order, In re Application of Rhino Envtl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (Jan. 30, 2002).
135 Telephone interview with Dr. Diana Bustamante, supra note 39.
III. RHINO IN THE COURTS

A. The Initial Appeal

Although it was clear from the hundreds of community members who had participated in the hearing that the majority of the community was strongly opposed to the landfill, Southern New Mexico Legal Services lacked the resources to pursue an appeal on behalf of CCHC. The CDC was not optimistic about its chances in the courts, but felt strongly that the permitting process had not given adequate consideration to the community’s concerns. What was most upsetting to many of the community members was how lopsided the process appeared to them: the NMED had worked with Rhino for months to perfect its application, ensuring all technical requirements were met, so that by the time the proposal was presented to the community, the hearing seemed perfunctory. From the community members’ perspective, nothing they could say would impact the agency’s decision, which was a forgone conclusion once the technical aspects of the revised, amended application had been satisfactorily completed.

In its appeal, the CDC argued that NMED had incorrectly interpreted the Solid Waste Act as not permitting any consideration of regional proliferation of industrial waste sites or the social impact of new sites on the community. Because the CDC was challenging the agency’s statutory interpretation, the Court of Appeals reviewed the question de novo.

The CDC argued that two provisions of the Solid Waste Act required consideration of social impact: first, the Act’s statement of purpose, which includes the mandate to “protect the

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136 Id.
137 Id.
138 Id.
139 Id.
141 Id.
public health, safety, and welfare,”142 and second, the Act’s directive requiring the
Environmental Improvement Board to adopt regulations regulating waste siting, “including
requirements that assure that the relative interests of the applicant, other owners of property
likely to be affected and the general public will be considered prior to the issuance of a permit
for a solid waste facility.”143 Taken together, the CDC argued, these provisions indicated that the
legislature intended the NMED to consider the social impact of waste siting decisions.144

On October 3, 2003, the Court of Appeals issued its opinion rejecting the CDC’s
arguments, noting that “the Act never uses the phrase social impact,”145 and finding that the
language cited by the CDC was too general to imply such a requirement.146 The court’s primary
concern was that the CDC’s interpretation of the Solid Waste Act was overly broad, and would
“transform [the NMED] into a legislative body.”147 Unlike the technical, scientific factors, in
which the court noted NMED held a special expertise, social and public welfare concerns were
amorphous, and lacked adequate standards for an agency to apply.148 Ultimately, the court
believed that such concerns were “more appropriate for consideration by local political bodies
and the Legislature, not an administrative agency charged with a technical and scientific
oversight function.”149 The court held that if the legislature had intended to delegate such a

144 Colonias I, 81 P.3d at 584. The strategy of interpreting relatively broad statements of purpose in environmental
laws as providing agencies with the discretion, and even the mandate, to consider environmental justice criteria was
advocated in a 1999 article by Richard Lazarus and Stephanie Tai, in the context of federal environmental law.
Richard J. Lazarus & Stephanie Tai, Integrating Environmental Justice into EPA Permitting Authority, 26 ECOLOGY
L.Q. 617 (1999). Like Lazarus and Tai, the CDC argued that the legislature had granted NMED broad discretion to
consider social impact, and that the agency’s refusal to acknowledge or exercise that discretion was contrary to the
statutory mandate. Petitioner’s Brief-in-Chief on Certiorari at 14, Colonias Dev. Council v. Rhino Env'tl. Servs., Inc.,
No. 28,337 (Feb. 12, 2004).
145 Colonias I, 81 P.3d at 584.
146 Id.
147 Id. at 585.
148 Id.
149 Id.
broad, policy-making role to the NMED, then it would have made that intent clearer in the statute.\textsuperscript{150}

The court also rejected CDC’s arguments that the Hearing Officer’s failure to grant a continuance in response to the events of September 11th was reversible error,\textsuperscript{151} or that the Hearing Officer had demonstrated bias against the community groups.\textsuperscript{152}

Although disappointing, the decision of the New Mexico Court of Appeals did not come as a complete surprise to CDC.\textsuperscript{153} The group had proceeded with the appeal to put on the record their concerns and objections to what they felt was a “blatant process of exclusion” of community groups and community concerns from the permitting process,\textsuperscript{154} but they believed that the odds were stacked against them in the courts just as they had been in the permitting process itself. Nevertheless, the CDC appealed the decision to the New Mexico Supreme Court, which granted certiorari and agreed to hear the case.\textsuperscript{155}

To prevail before the New Mexico Supreme Court, the CDC faced an even more difficult challenge than it had before the Court of Appeals. This time around, the standard of review was much stricter: rather than \textit{de novo}, the Supreme Court would only overturn the final order if it found it to be arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the record, or otherwise not in accordance with law.\textsuperscript{156} Accompanying the CDC in its final appeal were three groups joining as \textit{amicus curiae}: the Diocese of Las Cruces, the South Valley Coalition of Neighborhood Associations, and the New Mexico Environmental Law Center.\textsuperscript{157}

\begin{itemize}
\item \textsuperscript{150} Id.
\item \textsuperscript{151} Id. at 588.
\item \textsuperscript{152} Id. at 589-91.
\item \textsuperscript{153} Telephone interview with Dr. Diana Bustamante, supra note 39.
\item \textsuperscript{154} Id.
\item \textsuperscript{156} Colonias II, 2005-NMSC-024, 117 P.3d 939, 943 (2005).
\item \textsuperscript{157} Id.
\end{itemize}
B. The Supreme Court’s Decision

In its brief-in-chief to the Supreme Court, the CDC emphasized not only the public welfare language of the statute, but also the two-step nature of the permitting process itself. The first step involves the submission of technical and scientific information by the applicant in its application to the NMED. The second step is the public hearing, where non-technical, non-expert testimony is presented for consideration by the decision-makers. As CDC framed the question (echoing Sister Wauters), “what is the purpose of the solicitation of public comment, if not to factor such evidence and comment into the decisionmaking?” The interpretation embraced by the Court of Appeals, CDC argued, telescoped the two steps into one, and thereby failed to give effect to the legislature’s intent in mandating a public hearing.

After carefully parsing the Solid Waste Act and regulations, the Supreme Court agreed, ruling that “[t]he Department’s review must include consideration of public testimony about the proposed landfill’s adverse impact on a community’s quality of life.”

In a groundbreaking opinion, the New Mexico Supreme Court overruled the NMED’s approach to environmental justice in solid waste permitting. The Supreme Court was persuaded by much of CDC’s argument, and its opinion focused in particular on the implications arising from the requirement of a public hearing. The Court noted that the Solid Waste Act is “replete with references to public input and education,” and that prior court precedent had upheld and promoted a substantial role for the public in NMED permitting decisions. By contrast, “the

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159 See N.M. STAT. § 74-9-23 (1978). The Solid Waste Act states that a permit may be denied “on the basis of information in the application or evidence presented at the hearing, or both.” N.M. STAT. § 74-9-24 (1978).
160 See N.M. STAT. § 74-9-23 (1978).
161 Petitioner’s Brief-in-Chief on Certiorari, supra note 144, at 26.
162 Id.
163 Colonias II, 117 P.3d at 941.
164 Id. at 945. New Mexico’s Solid Waste Act requires that “all persons desiring to be heard” on permitting actions must be given “a reasonable opportunity…to be heard.” N.M. STAT. § 74-9-29A(4) (1978).
165 Colonias II, 117 P.3d at 945.
Court of Appeals’ view of the Department’s role is too narrow and has the potential to chill
public participation in the permitting process contrary to legislative intent.”166 As a result, the
Court held that the agency had abused its discretion by failing to consider the important policies
served by the statutory requirement.167

On the other hand, the Supreme Court did agree with the Court of Appeals that the public
welfare language in the Act’s statement of purpose was a “general expression of the legislative
police power,”168 which was too broad and nonspecific to grant the NMED authority to deny a
permit based solely on the opposition of the community.169 Such an interpretation would indeed
delegate too much policy-making power to the agency, the court held.170 Nevertheless, the
Supreme Court found that the existing Solid Waste Act regulations did require a consideration of
quality of life and proliferation issues.171 The provision the court focused on had been
emphasized by the NM Environmental Law Center in its amicus brief.172 It states that: “The
Secretary shall issue a permit if the applicant demonstrates that the other requirements of this
Part are met and the solid waste facility application demonstrates that neither a hazard to public
health, welfare, or the environment nor undue risk to property will result.”173

The Court noted that while the first factor focused on the sufficiency of the technical
aspects of the application on which the Hearing Officer (and ultimately the NMED) had based
the permitting decision, the second requirement expanded the agency’s duties beyond “mere

166 Id.
167 Id. at 946.
168 Id. at 947.
169 Id.
170 Id.
171 Id.
172 Amicus Curiae Brief of the New Mexico Environmental Law Center at 15, Colonias Dev. Council v. Rhino Envtl.
    Servs., Inc., No. 28,337 (Feb. 12, 2004) [hereinafter NMELC Brief].
173 Colonias II, 117 P.3d at 944 (emphasis in original). For the version of this regulation currently in effect, see N.M.
    Code R. § 20.9.3.18.
technical oversight.”174 Whether a hazardous site is located in close proximity to other such sites has a direct impact on whether the new site poses a risk to health or the environment, the court noted.175 Therefore, the court held, the department must hear and consider testimony about the proliferation of landfills: “the Secretary must evaluate whether the impact of an additional landfill on a community’s quality of life creates a public nuisance or hazard to public health, welfare, or the environment.”176 If the location of a new landfill in proximity to numerous existing industrial sites resulted in cumulative harmful effects that reaches the level of a public nuisance or hazard to public health, welfare, or the environment, then the regulations direct the department to deny the permit.177

Because the NMED had failed to consider the important and relevant factors of social impact and proliferation of landfills around Chaparral, the New Mexico Supreme Court set aside the order granting the permit as arbitrary and capricious, and remanded the issue to the Department for a rehearing.178 The Court concluded that “we do require, as the Act itself requires, that the community be given a voice, and the concerns of the community be considered in the final decision making.”179 For the moment, at least, CDC had prevailed.

174 Colonias II, 117 P.3d at 947.
175 Id. at 947-48.
176 Id. at 948.
177 Id. at 947.
178 Id. at 949-50.
179 Id. at 950.
IV. THE SIGNIFICANCE OF THE RHINO DECISION

A. New Mexico Sets a High Bar for Other States

Although it directly affected only the small community of Chaparral, the implications of the Rhino decision are far-reaching. The decision represents one of the most favorable holdings for environmental justice advocates reached by a state court to date.180

For the most part, state courts have been reluctant to find environmental justice requirements in statutes that do not explicitly include them.181 Where statutes specifically require consideration of environmental justice or environmental equity, state courts have generally been willing to enforce those requirements;182 however, even in these instances they are quick to defer to agency interpretations of how extensive the considerations must be,183 and to adopt relatively narrow interpretations of the statutory mandates.184 On the whole, state judiciaries have been

181 See, e.g., Ten Residents of Boston v. Boston Redevelopment Auth., No. 05-0109-BLS2, 2006 WL 2440043 at n.9 (Mass. Super. Ct., Aug. 2, 2006) (stating, “This Court is cognizant of the complaints of poor and minority communities that governments tend to place in their communities the projects that wealthier communities do not want, perhaps because wealthier communities possess greater political clout or know better how to delay and burden these projects. This issue of fairness is not a sufficient basis for the Secretary to direct a proponent to consider alternative sites, because alternative sites should be considered only if they may have a different environmental impact than the proposed site.”); Pine Bluff for Safe Disposal v. Ark. Pollution Control & Ecology Comm’n, 354 Ark. 563, 127 S.W.3d 509, 521-22 (2003) (stating “Appellants charged that the Pine Bluff Facility will create new, and exacerbate existing, disproportionate pollution impacts on minority and low-income populations…. Given that there is substantial evidence to support the AHO's conclusion that the permits will adequately protect the public health and environment and that no adverse health effects to any persons will result from the Facility's emissions, it logically follows that there will be no adverse impact on minorities and low-income persons.”).
extremely hesitant to find or enforce strict environmental justice requirements, due at least in part to the lack of precedent for doing so in their own and sister state jurisdictions. In this context, *Rhino* represents an instance of judicial leadership on environmental justice enforcement that may serve as a model for other state courts.

Interestingly, three months after the *Rhino* decision was handed down, the Supreme Court of Pennsylvania reached a similar result in *Eagle Environmental II v. Commonwealth of Pennsylvania*. In that case, a landfill applicant challenged the state Environmental Quality Board’s regulations, which required permit applicants to “demonstrate that the benefits of the project to the public clearly outweigh the known and potential environmental harms.” The regulations specifically called for consideration of social and economic harms and benefits as well as environmental impacts.

Like Rhino, Eagle Environmental argued that this requirement exceeded the agency’s statutory authority. Based on language in the state’s Solid Waste Management Act (SWMA) that in many ways paralleled New Mexico’s Solid Waste Act (e.g., the purposes of the Act included “the protection of safety, health, welfare and property of the public and the air, water and other natural resources of the Commonwealth”), the court found that the legislature had made the basic policy choices regarding what factors needed to be considered in regulating landfills, and had delegated appropriate authority to the agency to implement those goals with regulations.

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185 For example, in *Mayor of Lansing v. Public Serv. Comm’n*, 666 N.W.2d 298, 309 n.7 (Mich. Ct. App. 2003), the court declined to entertain an environmental justice claim inadequately raised below, bluntly stating: “The city and Dedden assert that environmental racism is a relatively new area of law and occurs whenever corporations or governments burden minority communities with environmental hazards. The issue has not been addressed by Michigan's appellate courts in a published opinion. The city and Dedden do not point to any published case law from sister jurisdictions that have addressed the matter.”


187 *Id.* at 871.

188 *Id.*

189 *Id.* at 879.
The *Eagle* decision, like that of the *Rhino* court, established that the statute need not explicitly direct the agency to consider social impacts; language directing the agency to protect the public health was sufficient to support an inclusion of environmental justice considerations in agency decision-making. Although it was grounded somewhat in the principle of deference to the expert agency, *Eagle Environmental* provides some support to the theory that *Rhino* may signal an increased willingness among state courts to recognize agencies’ authority and obligation to include environmental justice criteria in their interpretation of broad environmental protection mandates, as some scholars have called for.\(^{190}\)

**B. Applicability to Other New Mexico Environmental Laws**

The Supreme Court’s reliance on the public participation requirements of the Solid Waste Act could potentially have powerful implications for other state environmental laws enforced by the NMED. As the NMELC noted in its amicus brief, most of New Mexico’s environmental laws include similar requirements.\(^{191}\)

For example, prior to issuing a permit allowing for the construction or modification of any air pollution source, the state’s Air Quality Control Act requires not only relevant technical information, but also “public notice, comment period and public hearing.”\(^{192}\) Similarly, as summarized in the NMELC brief:

> the State Hazardous Waste Act requires the EIB [Environmental Improvement Board] to adopt regulations establishing procedures for the issuance of permits, and specifies that the regulations shall provide for public notice, public comment, and an opportunity for a public hearing. NMSA 1978 §74-4-4.A.7. The New Mexico Mining Act mandates that the New Mexico Mining Commission adopt regulations providing for the issuance of permits under that statute, and that those regulations provide for public hearings prior to the issuance of permits. NMSA 1978 §69-36-7.K. The State Water Quality Act

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\(^{190}\) See e.g., CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 195 (2002).

\(^{191}\) NMELC Brief, supra note 172, at 16.

provides that the Water Quality Control Commission (hereafter "the WQCC") shall develop procedures that ensure that the public and others receive notice of applications for permits pursuant to that Act, and that no permit shall be issued until there is an opportunity for a public hearing. NMSA 1978 §74-6-5.F.193

Applying the court’s reasoning from Rhino, each of these requirements for a public hearing demonstrates legislative intent that the NMED take non-expert community member comments into consideration when making permitting decisions. To make the public hearing requirements meaningful, the NMED’s permitting decisions under each of these statutes must be based not only on whether an application satisfies the technical requirements, but also on an evaluation of the community impact – including environmental justice and community quality of life concerns. Therefore, if read broadly, the Rhino decision requires the NMED to reevaluate its permitting regulations across many different state environmental laws, and to ensure that such concerns are given proper weight in the Department’s decision-making.

C. Impact on New Mexico’s Solid Waste Act Regulations

Before the New Mexico Supreme Court handed down its decision in Rhino, the NMED had been informed by successive General Counsels for the Department that the NMED lacked the authority to revise the Solid Waste regulations to include environmental justice concerns.194 The General Counsel’s position was that the statute would have to be revised in order to authorize such a change.195 The Rhino court’s reading of the statute and existing regulations shattered that understanding.

To give effect to the ruling, the NMED adopted a series of amendments to the Solid Waste Act Regulations, which took effect August 1, 2007. In addition to all the technical and scientific studies, permit applicants must now include information about whether the site is

193 NMELC Brief, supra note 172, at 17.
194 Interview with Felicia Orth, Hearing Officer, New Mexico Environment Department in Santa Fe, N.M. (Sept. 7, 2007).
195 Id.
located within a “vulnerable area,” defined as a community with (1) a percentage of economically stressed households that exceeds the state average (with “economically stressed” in turn defined as a household at 150% or less of the federal poverty level, based on Census data), (2) at least fifty people per square mile within the New Mexico portion of the site, and (3) three or more regulated industrial facilities (not including the applicant’s facility).

If a site falls within the “vulnerable area” definition, then the permit applicant is subject to additional procedural requirements. First, the applicant must provide detailed notice to the community of its plans before submitting the application to the NMED. The notice will include a date for a public hearing not less than 30 days later. If the NMED Secretary determines, based on comments submitted at the community meeting and within 60 days thereafter, that there is significant community opposition to the proposal, then the applicant is required to complete a Community Impact Assessment (CIA), which examines the area within a four-mile radius of the proposed facility. The community assessment process begins with two public meetings: the first is the scoping meeting, where the applicant informs the community of what factors will be examined in the CIA (based on the requirements included in the regulations, discussed below) and also seeks input from the community about specific issues or concerns that should also be included, and whether the CIA should be produced in multiple languages. At the second pre-assessment meeting, the permit applicant presents the final scope of the CIA, based on the public input received at the first meeting, and receives additional public

196 N.M. CODE R. § 20.9.3.8 D.
197 N.M. CODE R. § 20.9.2.7 V(3).
198 These requirements apply only to sites that have not already been zoned for such activity, a significant loophole that is discussed further infra Part IV.D.
199 N.M. CODE R. § 20.9.3.8 D(1).
200 N.M. CODE R. § 20.9.3.8 D(1)(a).
201 N.M. CODE R. § 20.9.3.8 D(2). It is unclear from the regulations how much opposition is required to reach the threshold level of “significance” or how the department will make that evaluation.
202 Id.
feedback. Finally, once the draft assessment is prepared, it must be made available for a 30-day public comment period, with the applicant to modify the report or otherwise respond to the public comments received. The CIA, comments submitted about the CIA, and the applicant’s response to those comments must all be filed with the NMED as part of the permit application.

The revised regulations also set out the minimum requirements of a CIA (along with any site-specific issues raised by community members during the scoping process). This list of factors runs for a page and a half of the revised Solid Waste Act regulations. Factors include a

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203 Id.
204 Id.
205 Id.
206 N.M. CODE R. § 20.9.3.8 D(2)(a)–(j).
207 The full list of factors that must be included in a CIA under N.M. CODE R. § 20.9.3.8 D(2)(a)–(j) is:

(a) Description of:
   (i) purpose and need for the project
   (ii) site location and description;
   (iii) land use;
   (iv) known existing and documented proposed regulated facilities within the vulnerable area;
   (v) other existing development and documented planned development in the vulnerable area;
   (vi) historic and cultural resources;
   (vii) visual and scenic resources;
   (viii) climatology, meteorology, and air quality, including odors and dust;

(b) Socioeconomic profile and environmental justice:
   (i) population, demographic profile, education, age and language;
   (ii) occupational profile and household income;
   (iii) socio-economic impacts:
   (i) local employment;
   (ii) community services;
   (iii) revenue to local funds;
   (iv) property values;
   (v) property taxes;
   (vi) cost effective disposal of community solid waste;
   (vii) other quality of life concerns raised at public meetings;

(c) noise;
(d) litter;
(e) transportation;
   (i) local roads and highways;
   (ii) railroads;
   (iii) other transportation issues;
   (iv) access to facility;
   (v) air quality, including odors and dust;
   (vi) noise;
   (vii) traffic;
(f) public and occupational health and safety issues;
(g) positive and negative socioeconomic impacts:
   (i) local employment;
   (ii) community services;
   (iii) revenue to local funds;
   (iv) property values;
   (v) property taxes;
   (vi) cost effective disposal of community solid waste;
   (vii) other quality of life concerns raised at public meetings;

(h) cumulative and individual impacts of the proposed facility, other existing development and other planned development submitted to a local government within the vulnerable area, to:
description of the site and the proposed use, and a socioeconomic and environmental justice profile, including “population, demographic profile, education, age and language; occupational profile and household income.”\textsuperscript{208} The CIA must also evaluate a wide range of impacts, ranging from noise, litter, and transportation, to positive and negative socioeconomic impacts.\textsuperscript{209} It must investigate “cumulative and individual impacts of the proposed facility,”\textsuperscript{210} including impacts on land use, cultural resources, socioeconomics, and short-term, intermediate term, and long-term effects. Finally, the CIA must describe reasonable mitigation measures and how the applicant has consulted with the public.\textsuperscript{211} The CIA will be considered alongside all the technical and scientific data in the NMED’s decision of whether or not to grant the permit.\textsuperscript{212}

In addition to the changes in permit application requirements, the revised Solid Waste Act regulations include a new requirement that operators of landfills and waste transformation

\begin{itemize}
\item (i) land use in the area;
\item (ii) historical and cultural resources;
\item (iii) visual and scenic resources;
\item (iv) air quality, including odors and dust;
\item (v) socioeconomics and environmental justice, considering population, demographic profile, education, age language,
\item (vi) occupational profile and household income;
\item (vii) transportation;
\item (viii) unavoidable adverse environmental impacts;
\item (ix) analysis of short-term, intermediate term and long term effects of the proposed facility;
\item (i) summary of reasonable mitigation measures proposed to address the facility’s contribution to any expected adverse impacts; these measures may include but are not limited to:
\begin{itemize}
\item (i) historical and cultural resources impact mitigation measures;
\item (ii) visual and scenic resource impact mitigation measures;
\item (iii) air quality impact mitigation measures, including for odors and dust;
\item (iv) socioeconomic and environmental justice impacts mitigation measures;
\item (v) noise impact mitigation measures;
\item (vi) transportation impact mitigation measures;
\item (vii) public and occupational health impacts mitigation measures;
\end{itemize}
\item (j) consultation, coordination and public involvement:
\begin{itemize}
\item (i) agencies and local governments consulted;
\item (ii) public involvement;
\item (iii) responsive summary;
\item (iv) comments.
\end{itemize}
\end{itemize}

\textsuperscript{208} N.M. CODE R. § 20.9.3.8 D(2)(b).
\textsuperscript{209} N.M. CODE R. § 20.9.3.8 D(2)(c)--(e), (g).
\textsuperscript{210} N.M. CODE R. § 20.9.3.8 D(2)(h).
\textsuperscript{211} N.M. CODE R. § 20.9.3.8 D(2)(i)--(j).
\textsuperscript{212} N.M. CODE R. § 20.9.3.17.
facilities (i.e. incinerators) must complete training programs on environmental justice every three years. The regulations define environmental justice as “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”

D. Remaining Challenges

The revisions to the Solid Waste Act regulations are a good beginning. By including environmental justice considerations at an early stage in the application process, rather than only during the post-application public hearing, the regulations force permit applicants to consider social and community impacts in their initial siting decision, before too much time and money have been invested in the project. In addition, since the CIA requirements increase the effort and expense involved in a permit application, they provide a strong disincentive to locate regulated facilities within a four-mile radius of a vulnerable community, which may encourage applicants to seek out sites less likely to impact vulnerable communities.

However, although they are certainly a step in the right direction, the new regulations also highlight the daunting challenges that still remain. To begin with, the revised regulations contain a major loophole: the additional procedural requirements of pre-application notice to the community and completion of a CIA apply only “in an area that has not been designated for the proposed use as the result of a land-use zoning process conducted by the local government that requires a quasi-judicial public hearing, with the opportunity for public participation.”

Therefore, as long as the site has been zoned for industrial use in a process that included some

213 N.M. CODE R. § 20.9.7.8.
214 N.M. CODE R. § 20.9.2.7.
215 Interview with Chuck Noble, Assistant General Counsel, New Mexico Environment Department in Santa Fe, N.M. (Sept. 7, 2007).
216 N.M. CODE R. § 20.9.3.8 D.
opportunity for public participation – regardless of how long ago that process occurred or how extensive the public participation actually was – the project is exempt from any of the additional procedural requirements. This substantial loophole is even more troubling considering that zoning processes have historically exacerbated environmental injustice by excluding low-income residents and residents of color from certain areas (e.g., by requiring minimum lot sizes or restricting multi-family dwellings) and by permitting dirtier, heavier impact land uses in neighborhoods with higher minority and low-income populations.217

Even where the additional requirements apply, their impact is limited by the very narrow definition of “vulnerable area.” This definition starts with Census data, which, as described above, tends to be inaccurate and is particularly distorted in high-minority, low-income communities like Chaparral.218 It excludes rural areas with fewer than fifty persons per square mile – a significant factor considering that in 2006, only Bernalillo, Doña Ana, Los Alamos, Santa Fe, and Valencia counties averaged over fifty persons per square mile (Otero county averaged a mere nine persons per square mile).219 It then limits the analysis to a four-mile radius around the site. The problem with this narrow geographic unit of analysis is that impacts of environmentally harmful land uses may extend much further. It also fails to take into account factors such as wind direction, underground movement of water, or site-specific factors (for example, if the vulnerable community is five miles away, but the site is located along the community’s primary transportation artery so that community exposure will be substantial).

Using Chaparral as an example, the four-mile radius excludes the McCombs Municipal Landfill, the El Paso Sludge Monofill, the Newman Power Plant, the Fred Hervey Water

218 See SKERRY, supra note 22, and accompanying text.
Reclamation Plant, Otero County Prison, White Sands Missile Range, and the Rinchem hazardous waste container storage facility. Most of these sites are encompassed within a ten-mile radius of the Rhino site, but when the range is reduced to four miles, only the abandoned illegal dump, the Chaparral Sand and Gravel Quarry, and the existing Rhino soil remediation site are included, thus painting an unrealistically rosy picture of the environmental burdens borne by the community.

Beyond the narrow geographic scope, the CIA’s required factors fall short of a comprehensive analysis of environmental justice considerations. In its 1997 guidance policy for agencies considering environmental justice issues under the National Environmental Policy Act (NEPA),220 the Council on Environmental Quality (CEQ) laid out six principles that should guide the community impact evaluation process:221 (1) consider the demographic and socioeconomic composition of the affected area to determine whether there may be disproportionate adverse effects on vulnerable populations (tribes, low-income populations, communities of color); (2) consider relevant public health data, particularly with regard to multiple or cumulative effects and historical patterns of exposure; (3) recognize “interrelated cultural, social, occupational, historical, or economic”222 factors that may amplify the effects of the activity – such as the physical sensitivity of the population and projected impact on the social structure of the community; (4) develop effective public participation strategies, including active outreach; (5) assure meaningful community representation throughout the process; and (6) seek tribal representation consistent with tribes’ sovereign status.223

221 Id. at 9.
222 Id.
223 Id.
New Mexico’s revised Solid Waste Act regulations do not fully satisfy these principles. Although they require notice and a sequence of public meetings, they do not include any specific provisions for targeted outreach to the vulnerable community. The CEQ guidelines recommend supplementing and enhancing standard public notice practices with “better use of local resources, community and other nongovernmental organizations, and locally targeted media,”224 such as by reaching out to churches and community groups.225 Public participation is facilitated by requiring the CIA to be produced in multiple languages at the request of either the community or NMED, but further steps recommended by CEQ – such as providing for audio or video rather than written comments, or utilizing a variety of meeting sizes and formats targeted to the community’s needs226 – were not included in the revised regulations.

In addition, while the regulations require a thorough description of the physical and socioeconomic characteristics of the community, they provide much less guidance when it comes to public health and social and cultural factors.227 Permit applicants are required to include information about “public and occupational health and safety issues”228 and the cumulative effects and mitigation efforts relating to “historical and cultural resources,”229 but these factors are not defined, leaving it up to the applicant to determine the parameters of what they include.

As a result, the CIA for the Rhino landfill project (prepared in response to the Supreme Court’s decision) provides a very limited analysis of these crucial factors. The existing health condition of Chaparral is provided by health statistics from the New Mexico Department of Health, which compare rates of cancer, diabetes, and asthma in Doña Ana and Otero counties to

224 COUNCIL ON ENVIRONMENTAL QUALITY, supra note 220, at 11.
225 Id.
226 Id. at 13.
227 See N.M. CODE R. § 20.9.3.8 D(2)(a)–(j). Factors are listed supra note 207.
228 N.M. CODE R. § 20.9.3.8 D(2)(f).
229 N.M. CODE R. § 20.9.3.8 D(2)(h)–(i).
those of the rest of New Mexico.\textsuperscript{230} These county-wide statistics are supplemented by a list of illnesses treated at two of the medical clinics serving the community, as determined by telephone interviews with representatives of the clinics.\textsuperscript{231} The expected health impacts of the new landfill are addressed even more cursorily, with a three-paragraph statement to the effect that the other solid waste sites in the vicinity have no recorded violations of environmental laws – presumably implying that a lack of known violations indicates a lack of adverse health impacts, and that the impact of the Rhino landfill will be similar.\textsuperscript{232}

This mode of analysis, referred to as “remote social science” research, has been criticized by University of Washington Professor Devon Peña, who prepared an analysis of the Rhino CIA for the New Mexico Environmental Law Center.\textsuperscript{233} Such a distant approach fails to accurately reflect the health impacts experienced by community members. For example, as Peña notes, “chronic stress is associated with perception of environmental risk – including feelings of uncertainty and helplessness – and these feelings are expected to correlate strongly with negative health effects.”\textsuperscript{234} Yet because these health effects are less amenable to quantitative study than rates of illnesses and environmental violations at other regulated facilities, they were left out of the CIA.

The shortcomings of the “remote social science” approach are even more apparent in the realm of cultural and historical impacts. Like the health impacts, social and cultural impacts were not thoroughly considered in the Rhino CIA. The assessment includes a very brief history of the

\textsuperscript{230} Hicks & Co., \textit{supra} note 18, at 37–40.
\textsuperscript{231} \textit{Id.} at 40.
\textsuperscript{232} \textit{Id.} at 69.
\textsuperscript{234} \textit{Id.} at 2. This phenomenon was also emphasized by Sister Diana Wauters during her September 12, 2001 testimony in opposition to the Rhino landfill. Sister Wauters was most concerned about the landfill’s social impact on Chaparral, stating that “collective morale is substantially influenced by perceived community stigmatization associated with a land facility siting and operation, and this is true even though technological risk may never cause physical harm.” Transcript of Proceedings, \textit{supra} note 91, at 372.
area and an unilluminating description of the culture as “predominantly of Hispanic descent.”

In describing the likely effects of the new facility, the assessors seemed to be at a loss, stating that “the broader effects of the proposed landfill on the community – its social cohesion, perceptions of risk and identity, and sense of unfairness in the historical siting of multiple industrial facilities – is the least tangible, most difficult to characterize quality of life element at issue in the CIA process.”

The report goes on to note that these issues seemed to be of concern to the community, but that the only goal of the CIA is to “give voice” to those concerns, not to make any judgments or determinations about them.

By contrast, Peña points to the guidelines for Social Impact Analyses developed by the federal General Services Administration, which require a serious evaluation of, among other factors:

- “The ways people cope with life through their economy, social systems, and cultural values;”
- “The ways people use the natural environment, for subsistence, recreation, spiritual activities, cultural activities;”
- “The ways people use the built environment, for shelter, making livelihoods, industry, worship, recreation, gathering together;”
- “The ways communities are organized, and held together by their social and cultural institutions and beliefs;”
- “Ways of life that communities value as expressions of their identity;”
- “A group’s values and beliefs about appropriate ways to live, family and extra-family relationships, status relationships, means of expression, and other expressions of community;”
- “The esthetic and cultural character of a community or neighborhood — its ambience.”

Evaluating social and cultural impact at this level requires on-the-ground ethnographic and anthropological research, a much more intensive process than the quantitative data compilation utilized in the Rhino report. For example, the closest the Rhino CIA comes to an

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235 HICKS & CO., supra note 18, at 37–40.
236 Id. at 85.
237 Id. at 87.
238 PEÑA, supra note 233, at 4–5.
239 Id.
analysis of the community’s governance structures is to note that the residents of Chaparral recently voted down a proposal to incorporate the community, and that in response Rhino “appealed to the community to form an advisory committee or economic development group that, in the absence of a representative municipal body, could provide an alternative entity capable of negotiating certain conditions or incentives that might benefit the community.”

Social and cultural impacts often go to the heart of a community’s concerns about a new industrial facility, and when a CIA is written in distant, highly technical and scientific language, it only contributes to the community’s sense of exclusion, marginalization, and lack of control or access to the process.

To address these concerns, the list of required factors in the Solid Waste Act regulations should be further developed to clarify exactly what factors must be investigated to determine how the new facility will likely impact the community’s health, and its social and cultural systems (and perhaps even to require some field work to supplement the quantitative statistical analysis). The process should also be evaluated with an eye toward reducing the heavy burden on the community. Under the current regulations, communities with concerns about new waste sites must organize the initial “substantial opposition” required to trigger the CIA requirements. They must then organize the community’s participation in the two follow-up meetings and comment period. Because the scope of the CIA is determined in large part by community concerns, communities that lack the capacity to bring in experts are at a serious disadvantage in articulating their anxieties in a manner that results in an appropriately expansive scope, as well as in evaluating and responding to the scope proposed by the permit applicant. This process might be

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240 HICKS & CO., supra note 18, at 86.
241 See PEÑA, supra note 233, at 3.
improved by placing additional responsibility on NMED to develop and support the community’s capacity to participate throughout the process.

On an even more fundamental level, the revised regulations fail to address the post-hoc nature of the evaluation process: the permit applicant first selects a site for the proposed facility, and then evaluates it to determine whether it will survive the review process. While it is certainly an improvement to require permit applicants to investigate the presence of vulnerable communities and those communities’ concerns before investing a great deal of time and money in completing all the other analyses required for the application, the applicant may still be committed to siting in the proposed location despite the fact that it may not be the most appropriate site from an environmental justice perspective. The applicant’s priorities in site selection are likely to focus on the cost of acquiring the land and developing the facility in that location; they do not generally align with the public interest in ensuring the most environmentally safe location and achieving some level of fair distribution of risks among communities.  

For this reason, some states have considered different approaches, such as a statewide siting scheme in which the state government creates a list of suitable locations for waste facilities, taking into consideration both environmental and environmental justice criteria. Permit applicants then select from the list of approved sites. Although this approach is not totally immune from political considerations, it is at least not motivated exclusively by profit, and it offers more potential for balancing environmental burdens statewide.

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242 For example, it is likely that one reason Rhino Environmental Services was so strongly committed to developing the new Chaparral landfill at the proposed location was that it already owned the land, thus eliminating the time and expense of acquiring a new site. Rhino therefore had an incentive to promote that site regardless of whether it was the best location for a landfill based on more objective environmental and social criteria.


244 Id.

245 Id. at 406.
Given the problems with the revised regulations’ major loophole, narrow scope, inadequate definition of required factors, and failure to address the post hoc nature of the site evaluation process, it is not at all apparent the new Solid Waste Act regulations are sufficient to satisfy the standard set by the New Mexico Supreme Court in *Rhino*. Perhaps due to this concern, the CIA for the Rhino landfill site, which was completed in response to the decision, exceeded the requirements of the regulations in several respects, such as by analyzing not only a four-mile radius around the site, but a ten-mile radius as well.246

Ultimately, the *Rhino* decision demands more than merely additional procedural requirements such as those imposed by the revised Solid Waste Act regulations. *Rhino* takes a first step toward establishing a substantive, normative limit on the number of environmentally harmful sites any one community may be required to accept, regardless of how comprehensively a new proposed site is analyzed.

In its discussion of why the NMED must consider proliferation of industrial sites in its permitting decisions, the court emphasized that the Solid Waste Act “regulations also require all solid waste facilities to be located and operated in such a manner that does not cause a public nuisance or create a potential hazard to public health, welfare, or the environment.”247 To satisfy this requirement, the court held that NMED must “consider whether the cumulative effects of pollution, exacerbated by the incidences of poverty, may rise to the level of a public nuisance or hazard to public health, welfare, or the environment.”248 This holding goes beyond the procedural requirements of the revised Solid Waste Act regulations. Instead, the court interpreted the Solid Waste Act as imposing a substantive limit on the amount of environmental degradation that any one community must bear: once the cumulative effects, in the context of the

246 *Hicks & Co.*, *supra* note 18.
248 *Id.* at 948.
socioeconomic status of the population, create a hazard to health or a public nuisance, then no more facilities may be permitted there.

Such a substantive limit poses both promise and peril. On the positive side, limiting the concentration of environmental burdens in vulnerable communities will make it much more difficult to continue the unjust status quo of disposing of waste where it is “out of sight, out of mind” for most of the population. This, in turn, will likely make waste disposal more expensive, which could be technology forcing, pressuring our society to come up with better ways of dealing with the waste we produce. On the other hand, it could simply lead to the proliferation of industrial facilities in more rural and pristine areas, creating new environmental problems in its wake. As long as Americans continue to produce municipal solid waste at a rate of 1,600 pounds per person every year,\textsuperscript{249} that waste and the environmental harm that comes with it will have to go somewhere.

\textsuperscript{249} U.S. Envtl. Protection Agency, \textit{supra} note 72.
V. AFTERMATH

As of the end of 2007, the Rhino landfill application hangs in limbo. In June of 2002, after the initial permit had been granted but before the courts had spoken, the Rhino site and permit were purchased by Waste Connections, Inc. (WCI), a national company that operates a landfill in the nearby *colonia* of Sunland Park.250 After the Supreme Court issued its decision in the Rhino case, WCI changed the name of the proposed landfill to the High Desert Landfill and commissioned a Community Impact Analysis in an effort to satisfy the demands of the court.251 The CIA was completed in November of 2006, and the NMED scheduled a rehearing on the permit application to begin July 19, 2007.252

However, on July 10, 2007, the rehearing was postponed for one year to allow WCI to investigate the feasibility of an alternate site for the proposed landfill, north of the originally proposed site and approximately 3.24 miles from the edge of Chaparral.253 In some respects, this new site appears preferable to the old one because it is further away, downwind, and not located on the growing edge of Chaparral – all troubling features of the original proposed site.254 However, the new site is located on state trust land, and the environmental and technical aspects have only begun to be investigated, so additional complications may arise.255 In addition, merely moving the site further away does not eliminate many of the harmful social consequences for the

252 Notice of Limited Public Hearing at 1, In re Application of Rhino Envtl. Servs., Inc. for a Solid Waste Permit, No. SWB 01-03 (P) (Jun. 18, 2007).
253 Order, In re Application of Rhino Envtl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (July 11, 2007). Because this new site is still within a four-mile radius of Chaparral, a CIA would still be required for it; however, that analysis would exclude many of the hazards burdening the community. This illustrates one of the most serious problems with the revisions to the Solid Waste Act regulations: landfill proposals can avoid them altogether by simply moving a little farther away from the community, though not far enough to eliminate the damage.
254 Interview with Doug Meiklejohn, *supra* note 34.
255 Id.
community, particularly the stigma of feeling “dumped on,” targeted for more than its fair share of the region’s waste facilities.²⁵⁶

Despite the imperfections of the alternate site, CDC considered it enough of an improvement that the group entered a stipulation agreeing not to challenge the landfill on social impact grounds if it was sited in the alternate location.²⁵⁷ However, WCI kept its permit application for the original site active, just in case the new location turned out not to be feasible,²⁵⁸ and on October 1, 2007, the CDC revoked its stipulation after discovering that the alternate location being investigated by WCI was substantially closer to the community than they had been led to believe.²⁵⁹ The rehearing on the permit for the original site is currently scheduled to take place in June of 2008.²⁶⁰

In the end, the Rhino case illuminates the complex challenges facing environmental justice communities and their advocates. Although it was as favorable a decision as the community could have hoped for, the Supreme Court’s opinion raised as many questions as it answered. It is one thing to require, as the court did, “that the community be given a voice, and the concerns of the community be considered in the final decision making.”²⁶¹ It is quite another to figure out how to implement this requirement. In the aftermath of the remarkable Rhino decision, New Mexico’s citizens and environmental regulators are left to determine how best to articulate and evaluate community concerns about quality of life impacts, and how to measure those factors and weigh them against the more technical, quantitative aspects of permit

²⁵⁶ Telephone interview with Dr. Diana Bustamante, supra note 39.
²⁵⁷ Order, In re Application of Rhino Envtl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (July 11, 2007).
²⁵⁸ Telephone interview with Dr. Diana Bustamante, Executive Director, Colonias Development Council (Dec. 13, 2007).
²⁶⁰ Telephone interview with Dr. Diana Bustamante, supra note 258.
applications. NMED’s revised Solid Waste Act regulations are a first attempt at answering those questions, and even though they fall short in many ways, they serve as a starting place for this important dialogue. The challenge from this point forward is to continue that dialogue, revising and refining the necessary legislation and regulations until they effectively protect communities from disproportionate environmental burdens and ensure a more environmentally just future for all New Mexicans.