

THE *RHINO* IN THE *COLONIA*: HOW *COLONIAS*
DEVELOPMENT COUNCIL V. RHINO ENVIRONMENTAL
SERVICES, INC. SET A SUBSTANTIVE STATE STANDARD
FOR ENVIRONMENTAL JUSTICE

BY

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In 2005, the New Mexico Supreme Court issued a groundbreaking decision in Colonias Development Council v. Rhino Environmental Services, Inc., (Rhino) holding that the New Mexico Environment Department had to consider environmental justice factors—such as the socioeconomic status of the population, the cumulative environmental impacts borne by the community, and the social impact of living in an area surrounded by waste sites—during solid waste facility permitting decisions. The court’s holding was based primarily on the public participation requirements of the state statute. The decision went further than previous environmental justice jurisprudence by establishing a substantive, rather than merely procedural, standard for environmental justice: if the cumulative effects of a proposed waste site, in the context of the existing hazardous sites and the socioeconomic status of the community, will constitute a hazard to health or a public nuisance, then the agency may not grant the permit, even if all the technical requirements are satisfied. This Article explores the history and ramifications of the Rhino decision and analyzes the Solid Waste Act regulations developed in response to the decision. Both the decision and the revised regulations provide guidance to other states grappling with how to incorporate environmental justice considerations into their own environmental laws.

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I. INTRODUCTION.....	398
II. BACKGROUND.....	400
A. <i>Waste Siting and the Origins of the Environmental Justice Movement</i>	400
B. <i>Chaparral, New Mexico</i>	401
C. <i>The Rhino Landfill Proposal</i>	404
D. <i>The Hearing</i>	408
III. RHINO IN THE COURTS.....	412
A. <i>The Initial Appeal</i>	412
B. <i>The Supreme Court's Decision</i>	414
IV. THE SIGNIFICANCE OF THE RHINO DECISION.....	416
A. <i>New Mexico Sets a High Bar for Other States</i>	416
B. <i>Applicability to Other New Mexico Environmental Laws</i>	418
C. <i>Impact on New Mexico's Solid Waste Act Regulations</i>	419
D. <i>Evaluation of the Revised Regulations</i>	422
E. <i>From a Procedural to a Substantive Environmental Justice Requirement</i>	428
V. AFTERMATH.....	429

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. (Rhino)*,¹ requiring the New Mexico Environment Department (NMED) to consider environmental justice criteria 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*.² The public hearing on the permit application took place amidst the national chaos and disruption of the terrorist attacks of September 11, 2001.³ During this hearing, the NMED Hearing Officer bluntly informed the community members in attendance that their concerns about the disproportionate concentration of industrial and waste sites in the predominantly minority and low-income community of Chaparral were quite simply irrelevant to the permitting decision.⁴

When the New Mexico Supreme Court overruled the agency and required it to consider environmental justice factors—including the socioeconomic status of the population, the cumulative environmental impacts of existing sites, and the social

¹ 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939.

² *Colonias* are rural settlements, usually located along the United States-Mexico border, that have populations consisting primarily of recent immigrants and that typically lack basic infrastructure such as safe housing, potable water, wastewater treatment, drainage, electricity, and paved roads. *Id.* ¶ 4, 138 N.M. at 135, 117 P.3d at 941 (citing Nancy L. Simmons, *Memories and Miracles—Housing the Rural Poor Along the United States-Mexico Border: A Comparative Discussion of Colonia Formation and Remediation in El Paso County, Texas, and Doña Ana County, New Mexico*, 27 N.M. L. REV. 33 (1997)).

³ See *infra* Part II.D.

⁴ See *infra* notes 131–35 and accompanying text.

impact of living in a community surrounded by waste sites—in its Solid Waste Act⁵ permitting decisions, it signaled a profound shift in the interpretation of New Mexico environmental law. Prior to the *Rhino* decision, NMED had assumed that it lacked the authority to consider such “non-technical” factors in its permitting decisions under the Solid Waste Act.⁶ 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.⁷ Under the court’s reasoning, similar reforms could be required for permitting processes under other state environmental laws, including New Mexico’s Air Quality Control Act, Hazardous Waste Act, and Water Quality Act.⁸

Even more importantly, the court’s holding went beyond requiring additional procedural safeguards during the permitting process, and, for the first time, found that the Solid Waste Act and its regulations actually set a substantive limit prohibiting the siting of new or expanded landfills in communities that are disproportionately burdened by industrial sites if the cumulative harmful effects will constitute a public nuisance or a hazard to public health, welfare, or the environment.⁹

Rhino not only affects environmental law in New Mexico. It also serves as a model for other state courts in the interpretation of their own environmental laws. Prior to the decision, no state court had held that environmental justice must be considered in the application of media-specific environmental laws like the Solid Waste Act (and only two had found such requirements in their broad state “Environmental Policy Acts”¹⁰). Not long after *Rhino*, however, the Pennsylvania Supreme Court came to a similar conclusion as the New Mexico Supreme Court and upheld the Pennsylvania Department of Environmental Protection’s decision to include environmental justice criteria in its waste site permitting analysis despite the lack of any specific statutory mandate to do so.¹¹

Although it constitutes an important milestone in the jurisprudence of environmental justice, *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 that have been zoned for industrial use.¹² 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.

⁵ N.M. STAT. ANN. § 74-9-1 to -42 (LexisNexis 2000).

⁶ *Rhino*, 2005-NMSC-024, ¶ 20, 138 N.M. at 138–39, 117 P.3d at 944–45.

⁷ N.M. ADMIN. CODE § 20.9.3.8 (2007), available at http://www.nmcpr.state.nm.us/nmac/_title20/title20.htm.

⁸ See *infra* Part IV.B; N.M. STAT. ANN. §§ 74-2-2 to -22 (LexisNexis 2000) (New Mexico’s Air Quality Control Act); *id.* §§ 74-4-1 to -14 (New Mexico’s Hazardous Waste Act); *id.* §§ 74-6-1 to -17 (New Mexico’s Water Quality Act).

⁹ See *infra* Part III.B.

¹⁰ See *infra* notes 190–93 and accompanying text.

¹¹ *Eagle Envtl. II, L.P. v. Pa. Dep’t. of Envtl. Prot.*, 884 A.2d 867, 871 (Pa. 2005).

¹² See *infra* Part IV.D.

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.¹³ In 1982, national attention was drawn to a large protest over the siting of a PCB landfill in Warren County, North Carolina.¹⁴ The landfill was intended to store 30,000 cubic yards of PCB-contaminated soil from across the state.¹⁵ At the time, Warren County was the poorest county in the state, with an annual per capita income of around \$5000 and a population that was 65% black.¹⁶ Most of the residents got their drinking water from shallow wells, as the water table was only five to ten feet below the surface.¹⁷

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.¹⁸ More than 500 of the protestors were arrested, and national civil rights groups—including the United Church of Christ's Commission for Racial Justice, the Southern Christian Leadership Conference, and the Congressional Black Caucus—joined the effort against the landfill.¹⁹ This event has come to be 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.²⁰

In response to the increasing awareness of the disparities in environmental risks and burdens sparked by protests like that in Warren County, studies were conducted that examined the distribution of landfills and hazardous waste sites. These studies included a 1983 General Accounting Office study which found that hazardous waste landfills were concentrated in predominantly minority and low-income communities, and the well-known 1987 report by the United Church of Christ's Commission for Racial Justice, titled *Toxic Wastes and Race in the United States*, which concluded that race was the single most significant variable determining where toxic facilities were located.²¹ Although the environmental justice movement has rapidly expanded to embrace issues of workplace safety, neighborhood infrastructure (or lack thereof), and control over traditional lands 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.

¹³ FENG LIU, ENVIRONMENTAL JUSTICE ANALYSIS: THEORIES, METHODS, AND PRACTICE 1 (2001).

¹⁴ Robert D. Bullard, *Environmental Justice for All*, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE & COMMUNITIES OF COLOR 5 (Robert D. Bullard ed., 1994). PCBs are polychlorinated biphenyls, compounds similar to dioxins, which are highly toxic and carcinogenic. Ken Geiser & Gerry Waneck, *PCBs and Warren County*, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE & COMMUNITIES OF COLOR, *supra*, at 44–46.

¹⁵ Bullard, *supra* note 14.

¹⁶ Geiser & Waneck, *supra* note 14, at 50.

¹⁷ *Id.* at 51.

¹⁸ LIU, *supra* note 13, at 1.

¹⁹ Bullard, *supra* note 14, at 5.

²⁰ LIU, *supra* note 13, at 2; Bullard, *supra* note 14, at 5.

²¹ See LIU, *supra* note 13, at 2; Bullard, *supra* note 14, at 6, 17.

B. Chaparral, New Mexico

Chaparral is an unincorporated *colonia*²² located on the border between Doña Ana and Otero counties in southern New Mexico, just over twenty miles north of El Paso, Texas.²³ 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.²⁴ To the north and east lie the White Sands Missile Range and the Fort Bliss military reservation.²⁵

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,²⁶ census counts have been hindered by the fact that the community actually spans two counties and contains a predominantly minority population, which tends to be undercounted in censuses.²⁷ As a result, while the 2000 Census recorded 6117 persons in the Doña Ana portion of Chaparral, an estimate based on water bill data puts the community's actual population at around 20,000 as of 2006.²⁸

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 Groups²⁹ (CBGs), three in Doña Ana and one in Otero county.³⁰ 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.³¹ Slightly more than 20% of the Chaparral population demonstrated Limited English Proficiency (speaking English "not well" or "not at all").³² 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.³³

The median income across the four CBGs was \$22,540, compared to the statewide average of \$34,133.³⁴ Poverty rates (measured by the percentage of the

²² For a definition of *colonia*, see *supra* note 2.

²³ HICKS & CO., PROPOSED HIGH DESERT SOLID WASTE FACILITY COMMUNITY IMPACT ASSESSMENT, at vii, figs.1 & 2 (2006); Las Cruces, N.M. Convention & Visitors Bureau, <http://www.lascrucescvb.org/> (last visited Apr. 18, 2009).

²⁴ HICKS & CO., *supra* note 23, at vii, figs.1, 2.

²⁵ *Id.* at 7 fig.1.

²⁶ 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 Apr. 19, 2009).

²⁷ The research indicates that Hispanics are undercounted in the census at a rate approximately seven times higher than that of non-Hispanic whites. See PETER SKERRY, COUNTING ON THE CENSUS? RACE, GROUP IDENTITY, AND THE EVASION OF POLITICS 82-83, 83 tbl.4-2 (2000).

²⁸ HICKS & CO., *supra* note 23, at 29.

²⁹ Census Block Groups are the smallest geographic entities for which the 2000 census tabulated data; they usually contain 300 to 3000 persons. U.S. CENSUS BUREAU, *supra* note 26.

³⁰ HICKS & CO., *supra* note 23, at 39-30, fig.4.

³¹ *Id.* at 30 app. C, tbl.C.1.

³² *Id.* at 30 app. C, tbl.C.4.

³³ *Id.*

³⁴ *Id.* tbl.C.16.

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.³⁵ New Mexico's statewide poverty rate was 18.4%, while Doña Ana and Otero counties reported 25% and 19% respectively.³⁶ About a quarter of the Chaparral population over age twenty-five had completed high school, with 42% having obtained some schooling but not a high school diploma, compared to 21% statewide.³⁷ The CBGs containing Chaparral also reported a higher percentage of children: 36% of the population counted was under age eighteen, compared with 28% statewide.³⁸

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 group is the farthest east, and it contains the growing edge of the community.³⁹ This is the CBG in which the site of the proposed Rhino landfill facility is located.⁴⁰ 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.⁴¹

To supplement the Census data, the Colonias Development Council (CDC),⁴² 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 to 2007.⁴³ This cluster survey (which was also conducted in Sunland Park, a *colonia* located about forty miles southeast of Chaparral) was designed to collect a wide variety of information relevant to community organizing efforts, and also to train and empower residents in gathering information about their communities.⁴⁴ CDC volunteers visited 172 households throughout the community to complete the survey.⁴⁵

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 31% of the Chaparral residents they surveyed reported annual incomes of less than \$10,000, and 37% reported incomes between \$10,000 and \$19,999.⁴⁶ Only 16% reported annual incomes of over \$30,000.⁴⁷

In addition, the community survey questioned Chaparral residents about their quality of life, including family health and access to infrastructure. Approximately

³⁵ *Id.*; U.S. CENSUS BUREAU, POVERTY DEFINITIONS, <http://www.census.gov/hhes/www/poverty/definitions.html> (last visited Apr. 18, 2009).

³⁶ HICKS & CO., *supra* note 23, at app. C tbl.C.16.

³⁷ *Id.* tbl.C.8.

³⁸ *Id.* tbl.C.3.

³⁹ Interview with Douglas Meiklejohn, Executive Dir., N.M. Envtl. Law Ctr., in Santa Fe, N.M. (Sept. 7, 2007).

⁴⁰ HICKS & CO., *supra* note 23, fig.4.

⁴¹ *Id.* at 30, app. C tbl.C.16. CBG 9 is in Otero County. *Id.* at 30.

⁴² See *infra* notes 88–89 and accompanying text for a more complete description of the CDC and its work.

⁴³ COLONIAS DEV. COUNCIL, A SNAPSHOT OF CHAPARRAL AND SUNLAND PARK, NEW MEXICO: PRELIMINARY ANALYSIS OF A DESCRIPTIVE COMMUNITY DRIVEN SURVEY (2007).

⁴⁴ Telephone Interview with Dr. Diana Bustamante, Executive Dir., CDC (Sept. 25, 2007).

⁴⁵ COLONIAS DEV. COUNCIL, *supra* note 43, at 1.

⁴⁶ HICKS & CO., *supra* note 23 at 30 app. C tbl.C.16; COLONIAS DEV. COUNCIL, *supra* note 43, at 21.

⁴⁷ COLONIAS DEV. COUNCIL, *supra* note 43, at 21.

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.⁴⁸ Other diseases included respiratory and skin allergies, gastrointestinal problems, and depression.⁴⁹

In terms of community infrastructure, the survey found that about 95% of Chaparral residents have running water and lights in their homes.⁵⁰ Existing public facilities include six churches, three medical clinics, one veterinary clinic, two elementary schools, two middle schools (a high school is also planned), a fire department, a multipurpose center, a cemetery, and a park.⁵¹ There are also a handful of small businesses, primarily restaurants, convenience stores, and gas stations.⁵² 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.⁵³ 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.⁵⁴ A full 83% of the households surveyed felt that the community lacked basic city services.⁵⁵

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 wastewater treatment.

One thing Chaparral does not lack is active industrial facilities. Four solid waste disposal sites, three industrial sites, and three other sites regulated by NMED, are located within a ten-mile radius of the community.⁵⁶ 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; the Otero County Prison; the White Sands Missile Range; and the Rinchem Hazardous Waste Container Storage Facility.⁵⁷

Most of these facilities operate under air and/or water discharge permits from New Mexico, Texas, or the United States Environmental Protection Agency, and 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.⁵⁸ This is significant since the community survey

⁴⁸ *Id.* at 7.

⁴⁹ *Id.*

⁵⁰ *Id.* at 8.

⁵¹ HICKS & CO., *supra* note 23, at 22.

⁵² *Id.* at 17.

⁵³ COLONIAS DEV. COUNCIL, *supra* note 43, at 9.

⁵⁴ *Id.* at 10.

⁵⁵ *Id.* at 18.

⁵⁶ Information on Chaparral's regulated facilities is obtained from HICKS & CO., *supra* note 23, at 22–28, and from PAUL ROBINSON, REPORT ON WASTE SITES NEAR CHAPARRAL, NEW MEXICO (2007).

⁵⁷ HICKS & CO., *supra* note 23, at 22–23.

⁵⁸ *Id.*; ROBINSON, *supra* note 56, at 2.

indicated that 81% of the residents work outside of Chaparral,⁵⁹ 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. Chaparral residents are clearly living in close proximity to a number of polluting facilities, and air monitoring by NMED's Air Quality Bureau indicates that their exposure to air pollutants does periodically exceed regulatory limits. The Chaparral air monitor found that the federal standard for ozone was exceeded seventeen times (out of 8637 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.⁶⁰ The highest spike was 6006.8 $\mu\text{g}/\text{m}^3$ —more than forty times higher than the federal standard for any twenty-four-hour period.⁶¹ 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.⁶²

C. The Rhino Landfill Proposal

In 1999, Rhino Environmental Services applied for a permit from NMED to open a landfill on the eastern edge of Chaparral.⁶³ 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, Texas area since 1989.⁶⁴

The landfill Rhino planned for Chaparral would accept municipal, construction, industrial, and special waste.⁶⁵ Special waste includes petroleum-contaminated soils, sewage sludge, slaughterhouse offal, industrial solid waste, and treated formerly characteristic hazardous waste, such as lead paint chips immobilized in concrete.⁶⁶ The proposed development would cover 160 acres, with the landfill itself occupying 135 acres.⁶⁷ 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 fifty to sixty acres of the site.⁶⁸

⁵⁹ COLONIAS DEV. COUNCIL, *supra* note 43, at 4.

⁶⁰ HICKS & CO., *supra* note 23, at 58–59.

⁶¹ *Id.* at 59.

⁶² *Id.* at J-1 to J-6 (citing U.S. ENVTL. PROT. AGENCY, 2006 Distribution of Environmental Burdens in Otero County, http://www.scorecard.org/community/ej-summary.tcl?fips_county_code=35035#dist (last visited Apr. 19, 2009); U.S. ENVTL. PROT. AGENCY, 2006 Distribution of Environmental Burdens in Doña Ana County, http://www.scorecard.org/community/ej-summary.tcl?fips_county_code=35013#dist (last visited Apr. 19, 2009)).

⁶³ *Id.* at 1–2, 7. A “completed, amended permit Application” was filed in August 2001. Application for Solid Waste Facility Permit from Rhino Env'tl. Servs. to State of N.M. at 1, No. SW 01–03 (P) (Aug. 13, 2001) [hereinafter Permit Application].

⁶⁴ Rhino Env'tl. Servs., Inc., <http://rhinoservices.net/> (last visited Apr. 19, 2009).

⁶⁵ Permit Application, *supra* note 63, at ES-1.

⁶⁶ HICKS & CO., *supra* note 23, at 9.

⁶⁷ Permit Application, *supra* note 63, at ES-1, 2.

⁶⁸ *Id.* at 2.

By the time the final, “completed, amended,” and revised proposal was submitted to NMED in August of 2001, 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.⁶⁹ The final application filled two four-inch binders and was accompanied by sheaves of supplemental maps.⁷⁰ 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, geologic 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 or archeological value.⁷¹

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 (twenty during the six months of construction, five thereafter),⁷² 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

⁶⁹ See generally N.M. ADMIN. CODE §§ 20.9.2, .25 (2007) available at http://www.nmcpr.state.nm.us/nmac/_title20/title20.htm.

⁷⁰ Description based on author’s own observations and examination of the permit application at the New Mexico Environment Department on September 7, 2007.

⁷¹ RHINO SOLID WASTE, INC., PROPOSED SUB-TITLE D LANDFILL (2001) [hereinafter RHINO POWERPOINT].

⁷² HICKS & CO., *supra* note 23, at 65.

department.⁷³ 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.⁷⁴ It stated that “local competition would decrease disposal rates and improve customer service,” as well as lowering transportation costs.⁷⁵ Indeed, those residents who later commented favorably about the proposed landfill generally based their support on the community’s need for a closer waste disposal facility.⁷⁶

However, Rhino’s plans for the facility indicated that this would be much more than a local landfill. The transportation plan projected twelve to fifteen trucks of waste per day, with twenty tons of waste per truck, for a total of 250 tons of waste daily.⁷⁷ Since Americans produce an average of 4.6 pounds of solid waste per person per day, a community the size of Chaparral would generate approximately forty-six tons of municipal solid waste each day.⁷⁸ Presumably the other 204 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. NMED’s 2006 *New Mexico Solid Waste Annual Report* identified Doña Ana County as accepting more out-of-state waste than any other county in New Mexico.⁷⁹ While its residents produced 220,464 tons of municipal waste 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.⁸⁰ On paper, of course, the Rhino landfill would be sited several miles across the border in Otero County, which accepted only 14,784 tons of out-of-state waste in 2005.⁸¹ 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).⁸² In addition, Otero County received the second highest proportion of out-of-state waste relative to what it produced in 2005, accepting foreign waste equal to 25% of what its residents produced, while San Juan County accepted 10%.⁸³ 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.

⁷³ RHINO POWERPOINT, *supra* note 71; 1 Transcript of Proceedings at 39, *In re* Application of Rhino Env’tl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (Sept. 10, 2001) [hereinafter Transcript of Proceedings].

⁷⁴ RHINO POWERPOINT, *supra* note 71.

⁷⁵ *Id.*

⁷⁶ HICKS & CO., *supra* note 23, at 52–53.

⁷⁷ RHINO POWERPOINT, *supra* note 71.

⁷⁸ U.S. ENVTL. PROT. AGENCY, MUNICIPAL SOLID WASTE GENERATION, RECYCLING, AND DISPOSAL IN THE UNITED STATES: FACTS AND FIGURES FOR 2007, at 1 (2008), available at <http://www.epa.gov/osw/nonhaz/municipal/msw99.htm#links>. This calculation assumes that Chaparral’s population is approximately 20,000. See *supra* note 28 and accompanying text.

⁷⁹ SOLID WASTE BUREAU, N.M. ENV’T DEP’T, 2006 NEW MEXICO SOLID WASTE ANNUAL REPORT 11 (2006), available at <http://www.nmenv.state.nm.us/swb/pdf/2006SWBAnnualReport.pdf>.

⁸⁰ *Id.*

⁸¹ *Id.* at 12.

⁸² *Id.* at 11–12.

⁸³ *Id.*

After Rhino's permit application and accompanying technical documentation were submitted, 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.⁸⁴ 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.⁸⁵ 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.⁸⁶ 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."⁸⁷

It was shortly after the public notice went out that the CDC became involved. The CDC is a nonprofit, community-based organization working to improve the quality of life in southern New Mexico's *colonias*.⁸⁸ 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*.⁸⁹

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.⁹⁰ 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.⁹¹ As the community groups learned more about Rhino's plan, their organizing efforts increasingly focused on protecting Chaparral from this serious new environmental threat.

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 fourteen years, and had originally been employed by Texas Rural Legal Aid's El Paso office.⁹² Southern New Mexico Legal Services represented Maria de Jesus Garcia, then head of the Chaparral Community Health Council.⁹³

The CDC and CCHC fought the proposed landfill with everything they had. By early June 2001, the groups had filed motions challenging the validity of the public notice (because it had only run in Doña Ana, not Otero County

⁸⁴ N.M. ADMIN. CODE § 20.9.3.8(D) (2007) available at http://www.nmcpr.state.nm.us/nmac/_title20/title20.htm; Notice of Hearing at 1, *In re* Application of Rhino Env'tl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (Apr. 25, 2001) [hereinafter Notice of Hearing].

⁸⁵ Notice of Hearing, *supra* note 84, at 1.

⁸⁶ *Id.* at 1–2.

⁸⁷ *Id.* at 1.

⁸⁸ Colonias Dev. Council (CDC), About Us, http://www.colonias.org/about_us.html (last visited Apr. 19, 2009); Nancy L. Simmons, *Memories and Miracles—Housing the Rural Poor Along the United States-Mexico Border: A Comparative Discussion of Colonia Formation and Remediation in El Paso County, Texas, and Doña Ana County, New Mexico*, 27 N.M. L. REV. 33, 33 n.1 (1997).

⁸⁹ CDC, *supra* note 88.

⁹⁰ Telephone Interview with Dr. Diana Bustamante, *supra* note 44.

⁹¹ *Id.*

⁹² *Id.*; Simmons, *supra* note 88, at 34.

⁹³ Telephone Interview with Dr. Diana Bustamante, *supra* note 44; Rene Romero, *Chaparral Stands Against Landfill: Residents Claim Discrimination*, ALBUQUERQUE J., Mar. 17, 2001, at E3.

newspapers),⁹⁴ 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 the amount included in the original permit application.⁹⁵ Rhino responded by providing supplemental documents to shore up the completeness of its proposal⁹⁶ and by challenging the technical evidence on environmental injustice that the community groups sought to introduce.⁹⁷ Rhino did, however, concede that the notice had been deficient, and the hearing was rescheduled for the week of September 10, 2001.

D. The Hearing

The hearing convened at 5:48 p.m. on September 10, 2001 in Chaparral.⁹⁸ 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.⁹⁹

That first day, the Hearing Officer took four hours of testimony on the proposal.¹⁰⁰ 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.¹⁰¹ 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).¹⁰² They also described all the benefits the community could expect to receive from the landfill.¹⁰³

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.¹⁰⁴ Doña Ana County Commissioner Paul Curry objected to the fact that the regional

⁹⁴ 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 at 2, *In re* Application of Rhino Env’tl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (June 3, 2001).

⁹⁵ Motion to Require the Environment Department to Reconsider the Application of Rhino Environmental Services, *In re* Application of Rhino Env’tl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (June 6, 2001).

⁹⁶ Notice of Compliance with June 21 Order of the Hearing Officer and Request for Completeness Determination, *In re* Application of Rhino Env’tl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (July 27, 2001).

⁹⁷ Objection to Certain Exhibits Filed by Mary de Jesus Garcia, *In re* Application of Rhino Env’tl. 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 Env’tl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (Sept. 5, 2001).

⁹⁸ Transcript of Proceedings, *supra* note 73, at 1.

⁹⁹ Telephone Interview with Dr. Diana Bustamante, *supra* note 44.

¹⁰⁰ See Transcript of Proceedings, *supra* note 73, at 1, 168.

¹⁰¹ See *id.* at 20–21; RHINO POWERPOINT, *supra* note 71.

¹⁰² Transcript of Proceedings, *supra* note 73, at 25–26.

¹⁰³ *Id.* at 38–44.

¹⁰⁴ *Id.* at 74–109.

South Central Solid Waste Authority board had not been consulted even though Chaparral was within its jurisdiction.¹⁰⁵ 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 the question of whether this new landfill would constitute environmental injustice or racism.¹⁰⁶ Many community members expressed their concerns arising from experiences with flies, odors, and illnesses they attributed to Chaparral's existing industrial sites,¹⁰⁷ and how this new landfill would further impact the community's self-esteem¹⁰⁸ and quality of life.¹⁰⁹ 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.¹¹⁰ Both received pointed questions and accusations from the crowd in response to their comments.¹¹¹ The hearing recessed at 9:45 p.m. that night, and was to reconvene at 2:00 p.m. the following day.¹¹²

The following day was September 11, 2001. Nearly 3000 people were killed in the most devastating terrorist attack ever to occur on U.S. soil.¹¹³ 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.¹¹⁴ When the hearing reconvened at 2:05 p.m., Olga 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.¹¹⁵ Only four members of the public were in the audience, and each indicated that they were not willing to stay.¹¹⁶ Although the Hearing Officer was initially reluctant, after some discussion it was agreed that the hearing would adjourn for the day.¹¹⁷

The hearing reconvened at 2:05 p.m. the following day, and the Hearing Officer announced that then-Governor of New Mexico Gary Johnson had instructed the state government to proceed with its normal functions.¹¹⁸ 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.¹¹⁹ The CDC's attorney, Nancy Simmons, had returned home to

¹⁰⁵ *Id.* at 77–80.

¹⁰⁶ *Id.* at 90, 92–95.

¹⁰⁷ *Id.* at 110.

¹⁰⁸ *Id.* at 120.

¹⁰⁹ *Id.* at 128.

¹¹⁰ *Id.* at 98, 131, 136.

¹¹¹ *Id.* at 104–09, 139–56.

¹¹² *Id.* at 168.

¹¹³ NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 311 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>.

¹¹⁴ *September 11: Chronology of Terror*, CNN.COM, Sept. 12, 2001, <http://archives.cnn.com/2001/US/09/11/chronology.attack/> (last visited Apr. 19, 2009).

¹¹⁵ Transcript of Proceedings, *supra* note 73, at 170, 173.

¹¹⁶ *Id.* at 182.

¹¹⁷ *Id.* at 177–78, 200–01.

¹¹⁸ *Id.* at 205, 212.

¹¹⁹ *Id.* at 214–15.

Albuquerque, 260 miles north of Chaparral, to take care of her family.¹²⁰ 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.¹²¹ Ultimately, however, the Hearing Officer decided to continue to accept testimony, and between September 12th and 19th, approximately sixty members of the public spoke, and technical and community member testimony filled hundreds of pages of transcripts.¹²² The hearings proceeded late into the nights of September 12th, 13th, and 14th.¹²³

The community groups offered testimony from Sister Diana Wauters, who holds a master's degree in social work,¹²⁴ about the negative social impacts posed by the Rhino landfill.¹²⁵ She explained that she opposed the landfill on the basis of the cumulative impacts it would impose on Chaparral, the state's largest *colonia*, which she noted lacked key infrastructure (including a wastewater system, paved roads, and a high school).¹²⁶ 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.¹²⁷

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.¹²⁸ Their reasoning was that, since the Solid Waste Act regulations laid out the factors required for a permit in painstaking detail, the agency was only authorized to consider those factors in its permitting decisions—and social impact and environmental justice criteria were not among them.¹²⁹ As long as a permit applicant satisfied the list of technical 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.¹³⁰

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 the CDC's Executive Director, Dr. Diana Bustamante, questioned whether Rhino had performed any studies of the social impact the landfill would have 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

¹²⁰ *Id.* at 175, 213.

¹²¹ *Id.* at 214–15.

¹²² *See id.* at 212–13, 277–1530.

¹²³ *Colonias Dev. Council v. Rhino Env'tl. Servs., Inc.*, 2003-NMCA-141, ¶ 30, 134 N.M. 637, 645, 81 P.3d 580, 588, *rev'd by Rhino*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939.

¹²⁴ Transcript of Proceedings, *supra* note 73, at 368.

¹²⁵ *Id.* at 368–82.

¹²⁶ *Id.* at 369–70.

¹²⁷ *Id.* at 372, 379–80.

¹²⁸ *Rhino*, 2005-NMSC-024, ¶ 20, 138 N.M. at 138–39, 117 P.3d at 944–45.

¹²⁹ Hearing Officer's Report at 38, *In re Application of Rhino Env'tl. Servs., Inc. for a Solid Waste Permit*, No. SW 01-03 (P) (Jan. 9, 2002) [hereinafter Hearing Officer's Report].

¹³⁰ Transcript of Proceedings, *supra* note 73, at 753.

or the Solid Waste Management Regulations.”¹³¹ Bustamante asked if Rhino had performed studies of the archeology, soil, flora, and fauna, and questioned whether studies of social impact were done; again, the Hearing Officer reiterated that social concerns were irrelevant.¹³²

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?”¹³³ 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”¹³⁴ would not be sufficient grounds on which to deny the permit.¹³⁵

On January 9, 2002, the Hearing Officer issued her report recommending that the permit be granted.¹³⁶ The report summarized the technical and community testimony, and concluded that, under 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 environmental justice concerns, or the sociological concerns.”¹³⁷ 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.¹³⁸ 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,”¹³⁹ 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.”¹⁴⁰

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.¹⁴¹ On January 30, 2002, the Director of NMED’s Water and 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.¹⁴²

¹³¹ *Id.* at 726.

¹³² *Id.* at 726–27.

¹³³ *Id.* at 751–52.

¹³⁴ *Id.* at 752–53.

¹³⁵ *Id.* at 753.

¹³⁶ Hearing Officer’s Report, *supra* note 129, at 30.

¹³⁷ *Id.* at 38.

¹³⁸ *Id.*

¹³⁹ *Id.* at 39.

¹⁴⁰ *Id.* at 49.

¹⁴¹ Objections to Hearing Officer’s Report and Proposed Findings of Fact and Conclusions of Law, *In re* Application of Rhino Env’tl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (Jan. 18, 2002).

¹⁴² Final Order, *In re* Application of Rhino Env’tl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (Jan. 30, 2002).

Just before the deadline for filing appeals to the permit, the CDC appealed the final order to the New Mexico Court of Appeals.¹⁴³

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.¹⁴⁴ The CDC was not optimistic about its chances in the courts, but its members felt strongly that the permitting process had not given adequate consideration to the community's concerns.¹⁴⁵ What was most upsetting to many in the community was how lopsided the process appeared to them: 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.¹⁴⁶ 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.¹⁴⁷

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 additional sites on the community.¹⁴⁸ Because the CDC was challenging the agency's statutory interpretation, the Court of Appeals reviewed the question de novo.¹⁴⁹

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 public health, safety and welfare,"¹⁵⁰ and second, the Act's directive requiring the Environmental Improvement Board to adopt rules 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."¹⁵¹ Taken together, the CDC argued, these provisions indicated that the legislature intended NMED to consider the social impact of waste siting decisions,

¹⁴³ Telephone Interview with Dr. Diana Bustamante, *supra* note 44.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Colonias Dev. Council v. Rhino Env'tl. Servs., Inc., 2003-NMCA-141, ¶ 6, 134 N.M. 637, 640, 81 P.3d 580, 583, *rev'd by Rhino* 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939.

¹⁴⁹ *Id.*

¹⁵⁰ N.M. STAT. ANN. § 74-9-2(C) (LexisNexis 2000).

¹⁵¹ *Id.* § 74-9-8A; Colonias Dev. Council v. Rhino Env'tl. Servs., Inc., 2003-NMCA-141, ¶ 11, 134 N.M. at 641, 81 P.3d at 584.

including the effect on the public welfare of concentrating waste facilities in low-income and minority communities.¹⁵²

On October 3, 2003, the Court of Appeals issued its opinion rejecting the CDC's arguments, noting that "[t]he Act never uses the phrase 'social impact,'"¹⁵³ and finding that the language cited by the CDC was too general to imply such a requirement.¹⁵⁴ The court's primary concern was that the CDC's interpretation of the Solid Waste Act was overly broad, and would "transform [NMED] into a legislative body."¹⁵⁵ 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.¹⁵⁶ 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."¹⁵⁷ The court held that if the legislature had intended to delegate such a broad, policy-making role to NMED, then it would have made that intent clearer in the statute.¹⁵⁸

The court also rejected the CDC's arguments that the Hearing Officer's failure to grant a continuance in response to the events of September 11th was reversible error,¹⁵⁹ or that the Hearing Officer had demonstrated bias against the community groups.¹⁶⁰

Although disappointing, the decision of the New Mexico Court of Appeals did not come as a complete surprise to the CDC.¹⁶¹ The group had proceeded with the appeal to put on the record its concerns and objections to what it felt was a "blatant process of exclusion" of community groups and community concerns from the permitting process, but the CDC believed that the odds were stacked against it in the courts just as they had been during the permitting process itself.¹⁶² Nevertheless, the CDC appealed the decision to the New Mexico Supreme Court, which granted certiorari and agreed to hear the case.¹⁶³

¹⁵² Colonias Dev. Council v. Rhino Env'tl. Servs., Inc., 2003-NMCA-141, ¶ 11, 134 N.M. at 641, 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 *ECOLOGICAL L.Q.* 617, 625 (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 23, *Rhino*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939 (No. 28,337), available at 2004 WL 3728991.

¹⁵³ Colonias Dev. Council v. Rhino Env'tl. Servs., Inc., 2003-NMCA-141, ¶ 13, 134 N.M. at 641-42, 81 P.3d at 584-85.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* ¶ 15, 134 N.M. at 642, 81 P.3d at 585.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* ¶ 16, 134 N.M. at 642, 81 P.3d at 585.

¹⁵⁸ *Id.* ¶ 17, 134 N.M. at 642, 81 P.3d at 585.

¹⁵⁹ *Id.* ¶ 30, 134 N.M. at 645, 81 P.3d at 588.

¹⁶⁰ *Id.* ¶¶ 35-47, 134 N.M. at 646-48, 81 P.3d at 589-91.

¹⁶¹ Telephone Interview with Dr. Diana Bustamante, *supra* note 44.

¹⁶² *Id.*

¹⁶³ Colonias Dev. Council v. Rhino Env'tl. Servs., Inc., 2003-NMCERT-003, 135 N.M. 52, 84 P.3d 669.

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 *de novo*, the supreme court would only overturn NMED's 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.¹⁶⁴ Three groups joined the CDC as *amici curiae* in this final appeal: the Catholic Diocese of Las Cruces, the South Valley Coalition of Neighborhood Associations (an Albuquerque-based environmental justice group), and the New Mexico Environmental Law Center (NMELC).¹⁶⁵

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.¹⁶⁶ The first step involves the submission of technical and scientific information by the applicant to NMED.¹⁶⁷ The second step is the public hearing, where nontechnical, nonexpert testimony is presented for consideration by the decision makers.¹⁶⁸ As the 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?"¹⁶⁹ The interpretation embraced by the court of appeals, the CDC argued, telescoped the two steps into one, and thereby failed to give effect to the legislature's intent in mandating a public hearing.¹⁷⁰

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."¹⁷¹

In a groundbreaking opinion, the New Mexico Supreme Court overruled NMED's approach to environmental justice in solid waste permitting. The supreme court was persuaded by much of the CDC's argument, and its opinion focused in particular on the implications arising from the requirement of a public hearing.¹⁷² 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.¹⁷³ By contrast, "the

¹⁶⁴ *Rhino*, 2005-NMSC-024, ¶ 13, 138 N.M. 133, 137, 117 P.3d 939, 943.

¹⁶⁵ *Id.* at 2005-NMSC-024, ¶ 11, 138 N.M. at 133, 117 P.3d at 943.

¹⁶⁶ Petitioner's Brief-in-Chief on Certiorari at 25–26, *Rhino*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939 (No. 28,337), available at 2004 WL 3728991.

¹⁶⁷ See N.M. STAT. ANN. § 74-9-23 (LexisNexis 2000). 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." *Id.* § 74-9-24.

¹⁶⁸ See *id.* § 74-9-23.

¹⁶⁹ Brief-in-Chief of Petitioner-Appellant at 26, *Rhino*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939, available at 2004 WL 3728991.

¹⁷⁰ *Id.*

¹⁷¹ *Rhino*, 2005-NMSC-024, ¶ 1, 138 N.M. 133 at 35, 117 P.3d 939 at 941.

¹⁷² See *id.* ¶¶ 21–23, 138 N.M. at 139, 117 P.3d 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. ANN. § 74-9-29(A)(4) (LexisNexis 2000).

¹⁷³ *Rhino*, 2005-NMSC-024, ¶ 1, 138 N.M. at 135, 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."¹⁷⁴ 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.¹⁷⁵

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,"¹⁷⁶ which was too broad and nonspecific to grant NMED authority to deny a permit based solely on the opposition of the community.¹⁷⁷ Such an interpretation would indeed delegate too much policy-making power to the agency, the court held.¹⁷⁸ Nevertheless, the supreme court found that the existing Solid Waste Act regulations *did* require a consideration of quality of life and proliferation issues.¹⁷⁹ The provision the court focused on had been emphasized by the NMELC in its amicus brief.¹⁸⁰ 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."¹⁸¹

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 NMED) had based the permitting decision, the second requirement expanded the agency's duties beyond "mere technical oversight."¹⁸² 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, as does the socioeconomic status and current health of the community.¹⁸³ Therefore, the court held, the department must hear and consider testimony about the existing state of the community, including the proliferation of landfills: "[T]he 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."¹⁸⁴ If the location of a new landfill in proximity to numerous existing industrial sites would result in cumulative harmful effects that reach 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.¹⁸⁵

Because NMED had failed to consider the important and relevant factors of social impact and proliferation of landfills around Chaparral, the New Mexico

¹⁷⁴ *Id.* ¶ 21, 138 N.M. at 135, 117 P.3d at 945.

¹⁷⁵ *Id.* ¶ 27, 138 N.M. at 140, 117 P.3d at 946.

¹⁷⁶ *Id.* ¶ 29, 138 N.M. at 141, 117 P.3d at 947.

¹⁷⁷ *See id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See id.* ¶ 32, 138 N.M. at 142, 117 P.3d at 948.

¹⁸⁰ Brief of the N.M. Env'tl. Law Ctr. & S. Valley Coal. of Neighborhood Ass'ns as Amici Curiae Supporting Petitioner at 15, *Rhino*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939 (No. 28,337).

¹⁸¹ *Rhino*, 2005-NMSC-024, ¶ 18, 138 N.M. at 138, 117 P.3d at 944 (quoting N.M. ADMIN. CODE § 20.9.1.200(L)(10)). For the version of this regulation currently in effect, see N.M. ADMIN. CODE § 20.9.3.18 (2007), available at <http://www.nmcpr.state.nm.us/nmac/parts/title20/20.009.0003.pdf>.

¹⁸² *Rhino*, 2005-NMSC-024, ¶ 31, 138 N.M. at 141, 117 P.3d at 947.

¹⁸³ *Id.* ¶ 32, 138 N.M. at 141-42, 117 P.3d at 947-48.

¹⁸⁴ *Id.* ¶ 32, 138 N.M. at 142, 117 P.3d at 948.

¹⁸⁵ *See id.*

Supreme Court set aside the order granting the permit as arbitrary and capricious, and remanded the issue to the Department for a rehearing.¹⁸⁶ 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.”¹⁸⁷ For the moment, at least, the CDC had prevailed.

IV. THE SIGNIFICANCE OF THE *RHINO* DECISION

A. *New Mexico Sets a High Bar for Other States*

Although its immediate impact was felt only in 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.¹⁸⁸

For the most part, state courts have been reluctant to find environmental justice requirements in statutes that do not expressly include them.¹⁸⁹ Prior to *Rhino*, only the New York¹⁹⁰ and California¹⁹¹ state judiciaries had interpreted state environmental laws to require consideration of environmental justice factors. Both

¹⁸⁶ See *id.* ¶¶ 39–45, 138 N.M. at 143–44, 117 P.3d at 949–50.

¹⁸⁷ *Id.* ¶ 43, 138 N.M. at 144, 117 P.3d at 950.

¹⁸⁸ For a comprehensive survey of state environmental justice cases, legislation, and executive orders, see PUB. LAW RESEARCH INST., ENVIRONMENTAL JUSTICE FOR ALL: A FIFTY STATE SURVEY OF LEGISLATION, POLICIES AND CASES (3d ed. 2007), available at http://www.uchastings.edu/site_files/plri/EJ2007.pdf.

¹⁸⁹ See, e.g., *Ten Residents of Boston v. Boston Redevelopment Auth.*, No. 05-0109-BLS2, 2006 WL 2440043, at *18 n.9 (Mass. Super. Ct. Aug. 2, 2006), *aff'd & remanded sub nom.* *Allen v. Boston Redevelopment Auth.*, 877 N.E.2d. 904 (Mass. 2007). The decision in *Ten Residents of Boston* stated:

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.

Id. See also *Pine Bluff for Safe Disposal v. Ark. Pollution Control & Ecology Comm'n*, 127 S.W.3d 509, 521–22 (Ark. 2003). That decision stated:

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.

Id.

¹⁹⁰ *Am. Marine Rail*, DEC Project No. 2-6007-00251/00001, 2000 N.Y. ENV Lexis 63, at *195 (Dep't of Env'tl. Conservation Aug. 25, 2000) (holding that the broad mandate of New York's State Environmental Quality Review Act (SEQRA) encompasses consideration of environmental justice factors).

¹⁹¹ *Bakersfield Citizens for Local Control v. City of Bakersfield*, 22 Cal. Rptr. 3d. 203, 219 (Cal. Ct. App. 2004) (holding that the California Environmental Quality Act requires consideration of social or economic impacts if they may lead to adverse changes in the physical environment such as “urban decay”).

of those cases involved state environmental policy acts, not narrow, media-specific environmental laws like New Mexico's Solid Waste Act.¹⁹² Since the state environmental policy acts, like their federal counterpart, call for extensive analyses of a wide array of environmental factors, the courts were persuaded that the legislatures had intended to include consideration of environmental justice factors, even though they were not explicitly spelled out in the statutes.¹⁹³

Where state statutes specifically require consideration of environmental justice or environmental equity, state courts have generally been willing to enforce those requirements;¹⁹⁴ however, they are quick to defer to agency interpretations of how extensive the considerations must be,¹⁹⁵ and to adopt relatively narrow interpretations of the statutory mandates.¹⁹⁶ On the whole, state judiciaries have been extremely hesitant to find or enforce strict environmental justice requirements in media-specific environmental laws, due at least in part to the lack of precedent for doing so in their own and sister state jurisdictions.¹⁹⁷ In this context, *Rhino* represents an instance of judicial leadership on environmental justice that may serve as a model for other state courts.

¹⁹² N.M. STAT. ANN. § 74-9-3(N) (LexisNexis 2000) (defining "solid waste" with nine exceptions); *Bakersfield Citizens for Local Control*, 22 Cal. Rptr. 3d. at 227; *Am. Marine Rail*, 2000 N.Y. ENV Lexis at *195.

¹⁹³ See *Bakersfield Citizens for Local Control*, 22 Cal. Rptr. 3d. at 210 (holding that environmental impact reports were inadequate because "they failed to consider the projects' individual and cumulative potential to indirectly cause urban/suburban decay"); *Am. Marine Rail*, 2000 N.Y. ENV Lexis at *195 (holding that the broad mandate of SEQRA encompasses consideration of environmental justice factors).

¹⁹⁴ See, e.g., *Hartford Park Tenants Ass'n v. R.I. Dep't of Env'tl. Mgmt.*, No. C.A. 99-3748, 2005 WL 2436227, at *20 (R.I. Super. Ct. Oct. 3, 2005) (overturning a permit issued under the state's Industrial Property Remediation and Reuse Act because the department had failed to carefully consider environmental equity consequences of the siting, as required by the Act).

¹⁹⁵ See, e.g., *Mass. Port Auth. v. City of Boston*, No. 0102731BLS2, 2003 WL 23163109, at *14 (Mass. Super. Ct. Nov. 18, 2003) (upholding the agency's decision to evaluate all communities affected by siting jointly, rather than individually, which decreased the proportion of low-income and minority residents in the affected population); *Harrelson Materials Mgmt. v. La. Dept. of Env'tl. Quality*, No. 2006 CA 1822, 2007 WL 1765563, at *9-10 (La. Ct. App. June 20, 2007) (upholding the department's decision to allow use of 1990 Census data in the permit application, even though 2000 data became available shortly thereafter).

¹⁹⁶ See, e.g., *Gaeta Recycling Co.*, 2007 WL 609161, at *7 (N.J. Super. Ct. App. Div. Mar. 1, 2007) (finding no private right of enforcement for New Jersey's Executive Order on Environmental Justice); *Bronx Env'tl. Health & Justice v. N.Y. City Dept. of Env'tl. Protection*, No. 25754/04, 2005 WL 1389360, at *8 (N.Y. Sup. Ct. May 11, 2005) (limiting environmental justice analysis to permit applications before the State Department of Environmental Conservation, not other agencies).

¹⁹⁷ For example, in *Mayor of Lansing v. Public Service Commission*, the court declined to entertain an environmental justice claim inadequately raised below, 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.

Mayor of Lansing v. Pub. Serv. Comm'n, 666 N.W.2d 298, 309 n.7 (Mich. Ct. App. 2003), *superseded by statute on other grounds*, MICH. COMP. LAWS SERV. § 247.183 (LexisNexis 2001). See also *City of Lansing v. State*, 737 N.W.2d 818, 820 (Mich. Ct. App. 2007) (describing the Michigan legislature's amendments to the statute in response to the *Mayor of Lansing* cases).

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 (Eagle)*.¹⁹⁸ In that case, a landfill applicant challenged the regulations developed by the Pennsylvania Environmental Quality Board under the state's Solid Waste Management Act.¹⁹⁹ The regulations required permit applicants to "demonstrate that the benefits of the project to the public clearly outweigh the known and potential environmental harms,"²⁰⁰ and they specifically called for consideration of social and economic costs and benefits as well as environmental impacts.²⁰¹

Like *Rhino*, *Eagle Environmental* argued that this requirement exceeded the agency's statutory authority.²⁰² Based on language in the Solid Waste Management Act 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 needed to be considered in regulating landfills and had delegated appropriate authority to the agency to implement those goals with specific regulations.²⁰³

The *Eagle* decision, like that of the *Rhino* court, established that an environmental statute need not explicitly direct an agency to consider social impacts; language directing the agency to protect the public health and safety was sufficient to support an inclusion of environmental justice considerations in agency decision making. Although it was grounded in part on the principle of deference to an expert agency, *Eagle* 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.²⁰⁴

B. Applicability to Other New Mexico Environmental Laws

The *Rhino* court's reliance on the public participation requirements of the Solid Waste Act has powerful implications for other state environmental laws enforced by NMED. As the NMELC noted in its amicus brief, most of New Mexico's environmental laws include similar requirements.²⁰⁵

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

¹⁹⁸ 884 A.2d 867 (Pa. 2005).

¹⁹⁹ 35 PA. STAT. ANN. §§ 6018.101–6018.1003 (West 2003). The plaintiffs in *Eagle* presented a facial challenge to the regulations establishing a "Harms/Benefits" test as part of the permitting process for waste disposal facilities. *Eagle*, 884 A.2d at 870.

²⁰⁰ *Eagle*, 884 A.2d at 871.

²⁰¹ *Id.*

²⁰² *Id.* at 876.

²⁰³ *Id.* at 879.

²⁰⁴ See, e.g., CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 195 (2002).

²⁰⁵ Brief of the N.M. Env'tl. Law Ctr. & S. Valley Coal. of Neighborhood Ass'ns as Amici Curiae Supporting Petitioner at 16, *Rhino*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939 (No. 28,337).

requires not only relevant technical information, but also “public notice, comment period and public hearing.”²⁰⁶ Similarly, as summarized in the NMELC brief:

[T]he State Hazardous Waste Act requires the [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. 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. The State Water Quality Act provides that the Water Quality Control Commission . . . 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.²⁰⁷

Applying the court’s reasoning from *Rhino*, each of these requirements for a public hearing demonstrates legislative intent that NMED take nonexpert community member comments into consideration when making permitting decisions. To make the public hearing requirements meaningful, NMED’s permitting decisions under each of these statutes must be based not only on whether an application satisfies technical requirements, but also on an evaluation of the community impact—including concerns about environmental justice and community quality of life. Therefore, the *Rhino* decision ultimately requires NMED to re-evaluate 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*, successive general counsels for NMED had taken the position that the agency lacked the authority to revise the Solid Waste Act regulations to include environmental justice concerns.²⁰⁸ The general counsel’s belief was that the statute would have to be revised in order to authorize such a change.²⁰⁹ The *Rhino* court’s reading of the statute and existing regulations shattered that understanding.

To give effect to the ruling, NMED adopted a series of amendments to the Solid Waste Act regulations, which took effect August 2, 2007.²¹⁰ In addition to all the technical and scientific studies, permit applicants must now include information about whether the site is located within a “vulnerable area,”²¹¹ defined as an area within a four-mile radius from the site’s geographic center with 1) a percentage of

²⁰⁶ N.M. STAT. ANN § 74-2-7(B)(5) (LexisNexis 2000).

²⁰⁷ Brief of the N.M. Env’t. Law Ctr. & S. Valley Coal. of Neighborhood Ass’ns as Amici Curiae Supporting Petitioner at 16–17, *Rhino*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939 (citations omitted).

²⁰⁸ See Interview with Felicia Orth, Hearing Officer, N.M. Env’t Dep’t, in Santa Fe, N.M. (Sept. 7, 2007).

²⁰⁹ *Id.*

²¹⁰ See 13 N.M. Reg. 519 (July 16, 2007) (codified at N.M. ADMIN. CODE § 20.9.2.1–20.9.20.64 (2007), available at http://www.nmcpr.state.nm.us/nmac/_title20/title20.htm).

²¹¹ See N.M. ADMIN. CODE § 20.9.3.8(D) (2007) (mandating submission of information the secretary needs to determine if a proposed facility is a vulnerable area).

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).²¹²

If a site is located within a vulnerable area, then the permit applicant is subject to additional procedural requirements.²¹³ First, the applicant must provide detailed notice to the community of its plans *before* submitting the application to NMED.²¹⁴ The notice will include a date for a public hearing not less than thirty days later.²¹⁵ If the NMED secretary determines, based on comments submitted at the community meeting and within sixty 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.²¹⁶ 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.²¹⁷ At the second 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 feedback.²¹⁸ Finally, once the draft assessment is prepared, it must be made available for a thirty-day public comment period, with the applicant to modify the report or otherwise respond to the public comments received.²¹⁹ The CIA, comments submitted about the CIA, and the applicant’s response to those comments must all be filed with NMED as part of the permit application.²²⁰

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).²²¹ This list of issues runs for a page and a half in the revised Solid Waste Act regulations.²²² The requirements include a description of the site and the

²¹² *Id.* §§ 20.9.2.7(V)(3), 20.9.2.7 E (1).

²¹³ 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.

²¹⁴ *See* N.M. ADMIN. CODE § 20.9.3.8(D)(1) (2007).

²¹⁵ *See id.* § 20.9.3.8(D)(1)(a) (mandating that the community meeting “not be held less than 30 days following publication of the notice”).

²¹⁶ *See id.* § 20.9.3.8(D)(2) (prescribing the methods for completing a community impact assessment). It is unclear from the regulations how much opposition is required to reach the threshold level of “significant” or how NMED will make that evaluation.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *See id.* § 20.9.3.8(D)(2)(a)–(j).

²²² *Id.* (laying out the full list of factors that must be included in a CIA).

(a) Description of:

- (i) purpose and need for the project
- (ii) site location and description;
- (iii) land use;

including “population, demographic profile, education, age and language; occupational profile and household income.”²²³ The CIA must also evaluate a wide range of impacts, ranging from noise, litter, and transportation to positive and negative socioeconomic impacts.²²⁴ It must examine “cumulative and individual impacts of the proposed facility,” including impacts on land use, cultural resources, socioeconomics, and short-term, intermediate-term, and long-term effects.²²⁵ Finally, the CIA must describe reasonable mitigation measures and how the applicant has consulted with the public.²²⁶ The CIA will be considered alongside all the technical and scientific data in NMED’s decision of whether or not to grant the permit.²²⁷

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 facilities (i.e., incinerators) must complete training programs on environmental justice every three years.²²⁸ 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.”²²⁹

D. Evaluation of the Revised Regulations

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.²³⁰

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.”²³¹ Therefore, as long as the site has been zoned for industrial use, the project is exempt from any of the

²²³ *Id.* § 20.9.3.8(D)(2)(a)–(b).

²²⁴ *Id.* § 20.9.3.8(D)(2)(c)–(e), (g).

²²⁵ *Id.* § 20.9.3.8(D)(2)(h).

²²⁶ *Id.* § 20.9.3.8(D)(2)(i)–(j).

²²⁷ *Id.* § 20.9.3.18(B).

²²⁸ *Id.* § 20.9.7.8(A).

²²⁹ *Id.* § 20.9.2.7(E)(2).

²³⁰ Interview with Chuck Noble, Assistant Gen. Counsel, N.M. Env’t Dep’t in Santa Fe, N.M. (Sept. 7, 2007).

²³¹ N.M. ADMIN. CODE § 20.9.3.8(D) (2007), available at http://www.nmcpr.state.nm.us/nmac/_title20/title20.htm.

additional procedural requirements. This loophole is 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 multifamily dwellings) and by permitting dirtier, heavier impact land uses in neighborhoods with higher minority and low-income populations.²³²

The effects of this loophole are mitigated somewhat by the fact that the revised regulations include in the definition of “quasi-judicial proceeding” the requirement that “[t]he proceeding must consider whether the facility at issue would result in a disproportionate effect on the health or environment of a particular socioeconomic group or in an unreasonable concentration of regulated facilities.”²³³ This means that a zoning process that completely failed to consider environmental justice issues would not qualify for the loophole. However, a proceeding that gave the issue only a cursory examination and failed to incorporate environmental justice protections in its ultimate zoning plan would qualify, as would a process that took place many years ago when the community’s demographic composition—and concentration of waste sites—could have been significantly different.

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 tends to be particularly inaccurate in high-minority, low-income communities like Chaparral.²³⁴ It excludes rural areas with fewer than fifty persons per square mile—a significant factor considering that in 2000, only four of New Mexico’s thirty-three counties averaged over fifty persons per square mile (e.g., Otero county averaged a mere nine persons per square mile).²³⁵ 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—the analysis fails to take into account factors such as wind direction, underground movement of water, or site-specific conditions (for example, if the vulnerable community is more than four 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 around the proposed Rhino landfill site excludes the McCombs Municipal Landfill, the El Paso Sludge Monofill, the Newman Power Plant, the Fred Hervey Water Reclamation Plant, Otero County Prison, White Sands Missile Range, and the Rinchem hazardous

²³² See Craig Anthony (Tony) Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. U. L. REV. 1, 3, 93 (1998); see also Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in *ZONING AND THE AMERICAN DREAM* 101, 101–03 (Charles M. Haar & Jerold S. Kayden eds., 1989).

²³³ N.M. ADMIN. CODE § 20.9.2.7(Q) (2007), available at http://www.nmcpr.state.nm.us/nmac/_title20/title20.htm.

²³⁴ See *supra* note 27 and accompanying text.

²³⁵ U.S. CENSUS BUREAU, CENSUS 2000 SUMMARY FILE 1, GCT-PH1: POPULATION, HOUSING UNITS, AREA, AND DENSITY: 2000 (2000). The counties averaging over 50 persons per square mile were Bernalillo, Los Alamos, Santa Fe, and Valencia. *Id.* In 2007, only one additional county was projected to reach 50 persons per square mile—Doña Ana County. See U.S. CENSUS BUREAU, DOÑA ANA COUNTY QUICKFACTS, <http://quickfacts.census.gov/qfd/states/35/35013.html> (last visited Apr. 19, 2009).

waste container storage facility.²³⁶ Most of these sites are encompassed within a ten-mile radius of the Rhino site, but when the range is reduced to four miles, they fall outside the bounds of the analysis, thus painting an unrealistically rosy picture of the environmental burdens borne by the community.²³⁷

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,²³⁸ the Council on Environmental Quality (CEQ) laid out six principles that should guide the community impact evaluation process:²³⁹ 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"²⁴⁰ factors that may amplify the effects of the activity—such as the physical sensitivity of the population and the 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.²⁴¹

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 guidance recommends supplementing and enhancing standard public notice practices with "better use of local resources, community and other nongovernmental organizations, and locally targeted media,"²⁴² such as by reaching out to churches and community groups.²⁴³ Under the revised Solid Waste Act regulations, public participation is facilitated by requiring the CIA to be produced in multiple languages at the request of either the community or NMED, but additional steps recommended by the CEQ—such as providing for audio or video feedback rather than written comments, or utilizing a variety of meeting sizes and formats targeted to the community's needs²⁴⁴—were not included.²⁴⁵

In addition, while the regulations require a thorough description of the physical and socioeconomic characteristics of the community, they provide much

²³⁶ HICKS & CO., *supra* note 23, fig. 1.

²³⁷ *Id.*

²³⁸ COUNCIL ON ENVTL. QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 11 (1997), available at http://www.epa.gov/compliance/resources/policies/ej/ej_guidance_nepa_ceq1297.pdf.

²³⁹ *Id.* at 8–9.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* at 11.

²⁴³ *Id.*

²⁴⁴ *Id.* at 13.

²⁴⁵ Compare *id.*, with N.M. ADMIN. CODE § 20.9.3.8(D) (2007), available at http://www.nmcpr.state.nm.us/nmac/_title20/title20.htm.

less guidance when it comes to public health and cultural factors.²⁴⁶ Permit applicants are required to include information about “public and occupational health and safety issues”²⁴⁷ and the cumulative effects and mitigation efforts relating to “historical and cultural resources,”²⁴⁸ 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 New Mexico Supreme Court’s decision) provides a very limited analysis of these crucial factors. The existing health condition of Chaparral is provided by county-level health statistics from the New Mexico Department of Health, which compares rates of cancer, diabetes, and asthma in Doña Ana and Otero counties to those of the rest of New Mexico.²⁴⁹ These county-level 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.²⁵⁰ 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.²⁵¹

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.²⁵² 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.”²⁵³ Yet the complex, long-term effects of chronic stress are less amenable to quick quantitative study than rates of illnesses at a snapshot in time or environmental violations at other regulated facilities, and 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 area and an unilluminating

²⁴⁶ See N.M. ADMIN. CODE § 20.9.3.8 D(2)(a)–(j) (2007). The regulatory factors are listed *supra* note 222.

²⁴⁷ *Id.* § 20.9.3.8(D)(2)(f).

²⁴⁸ *Id.* § 20.9.3.8(D)(2)(h)–(i).

²⁴⁹ HICKS & CO., *supra* note 23, at 37–39.

²⁵⁰ *Id.* at 40.

²⁵¹ *Id.* at 69.

²⁵² DEVON G. PEÑA, THE ACEQUIA INST., PROPOSED HIGH DESERT SOLID WASTE FACILITY, CHAPARRAL, NEW MEXICO: A CRITICAL ANALYSIS OF THE COMMUNITY IMPACT ASSESSMENT PREPARED BY CONSULTANTS (HICKS & COMPANY) 5 (2007).

²⁵³ *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, *supra* note 73, at 372.

description of the culture as “predominantly of Hispanic descent.”²⁵⁴ 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.”²⁵⁵ 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.²⁵⁶

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.²⁵⁷

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 CIA.²⁵⁸ For example, the closest the Rhino CIA comes to an 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 for 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.”²⁵⁹ 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

²⁵⁴ HICKS & CO., *supra* note 23, at 29, 28–33.

²⁵⁵ *Id.* at 85.

²⁵⁶ *Id.* at 87.

²⁵⁷ PEÑA, *supra* note 252, at 4–5.

²⁵⁸ *Id.* at 4–6.

²⁵⁹ HICKS & CO., *supra* note 23, at 86.

scientific language, it only contributes to the community's sense of exclusion, marginalization, and lack of control over or access to the process.²⁶⁰

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 are responsible for organizing 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 will result in an appropriately expansive scope of study, as well as in evaluating and responding to the scope proposed by the permit applicant. This process might be 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 the proposed location despite the fact that it may not be an 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 sound location and achieving some level of fair distribution of risks among communities.²⁶¹ 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.²⁶² Permit applicants then select from the list of approved sites.²⁶³ Although this approach is not totally immune from political considerations, it is at least not motivated exclusively by profit, and it offers greater potential for balancing environmental burdens statewide.²⁶⁴

²⁶⁰ See PEÑA, *supra* note 252, at 3.

²⁶¹ 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. See *supra* note 102 and accompanying text.

²⁶² Rachel Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 405–06 (1991).

²⁶³ *Id.*

²⁶⁴ *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 that 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.²⁶⁵

E. From a Procedural to a Substantive Environmental Justice Requirement

Ultimately, the *Rhino* decision demands more than even the most exacting and conscientious site evaluation. *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 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 a manner that does not cause a public nuisance or create a potential hazard to public health, welfare, or the environment.'"²⁶⁶ 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."²⁶⁷ 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 may bear: once the cumulative effects, in the context of the socioeconomic status of the population, create a hazard to health or a public nuisance, then no more facilities may be located there.

This articulation of a substantive limit on the concentration of hazardous facilities is only a first step because it remains to be seen how NMED, and ultimately the courts, will define a "public nuisance" or a "hazard to public health, welfare, or the environment" in the context of a vulnerable low-income or minority community. The court remanded the *Rhino* case to NMED to determine whether that threshold was met in this case. However, it will not be clear exactly how the agency will interpret the standard or where it will draw the line between an acceptable level of pollution and a public nuisance until a number of similar situations have been evaluated.

New Mexico's new substantive limit on the concentration of hazardous facilities poses both promise and peril. On the positive side, limiting the number of environmental burdens in vulnerable communities will make it more difficult to continue the unjust status quo of disposing of waste where it is "out of sight, out of

²⁶⁵ HICKS & CO., *supra* note 23, at 1.

²⁶⁶ *Rhino*, 2005-NMSC-024, ¶ 31, 138 N.M. 133, 141, 117 P.3d 939, 947.

²⁶⁷ *Id.* ¶ 32, 138 N.M. at 142, 117 P.3d at 948.

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 1600 pounds per person every year,²⁶⁸ that waste and the environmental harm that comes with it will have to go somewhere.

V. AFTERMATH

As of late 2008, 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.²⁶⁹ After the Supreme Court issued its decision in the Rhino case, WCI changed the name of the proposed landfill to the High Desert Solid Waste Facility and commissioned a CIA in an effort to satisfy the demands of the court.²⁷⁰ The CIA was completed in November of 2006, and NMED scheduled a rehearing on the permit application to begin July 19, 2007.²⁷¹

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.²⁷² In some respects, this new site appeared to be preferable to the old one because it was farther away, downwind, and not located on the growing edge of Chaparral—all troubling features of the original proposed site.²⁷³ The new site was located on state trust land, however, and the environmental and technical factors had not been investigated.²⁷⁴ In addition, merely moving the site slightly farther away would not eliminate many of the harmful social consequences for the

²⁶⁸ U.S. ENVTL. PROT. AGENCY, *supra* note 78.

²⁶⁹ HICKS & CO., *supra* note 23, at vii, 1–2; Gabriela C. Guzman, *Chaparral, N.M., Residents Seek Landfill Controls*, LAS CRUCES SUN-NEWS, Oct. 18, 2003, available at 2003 WLNR 10936137.

²⁷⁰ HICKS & CO., *supra* note 23, at vii, 1–2; Notice of Limited Public Hearing at 1, *In re* Application of Rhino Env'tl. Servs., Inc. for a Solid Waste Permit, No. SWB 01-03 (P) (June 18, 2007) [hereinafter Notice of Limited Public Hearing].

²⁷¹ Notice of Limited Public Hearing, *supra* note 270, at 1.

²⁷² Order at 1, *In re* Application of Rhino Env'tl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (July 11, 2007); Stipulation to Postponement of Hearing Scheduled for July 19, 2007 at Exhibit A, *In re* Application of Rhino Env'tl. Servs. for a Solid Waste Permit, No. SW 01-03 (P) (July 10, 2007) [hereinafter Stipulation to the Postponement of Hearing]. Because Chaparral is still within a four-mile radius of this new site, a CIA would still be required for it; however, that analysis would exclude many of the other industrial hazards burdening the community. See *supra* notes 236–37 and accompanying text. 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.

²⁷³ Interview with Douglas Meiklejohn, *supra* note 39.

²⁷⁴ *Id.*

community, particularly the stigma of feeling “dumped on” and targeted for more than its fair share of the region’s waste facilities.²⁷⁵

Despite the imperfections of the alternate site, the 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.²⁷⁶ However, WCI kept its permit application for the original site active, just in case the new location turned out not to be feasible,²⁷⁷ 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 the group had been led to believe.²⁷⁸ The rehearing on the permit for the original site was scheduled to take place in June of 2008, but has been repeatedly postponed at the request of WCI.²⁷⁹

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.”²⁸⁰ It is quite another to determine how to implement this requirement. In the aftermath of the remarkable *Rhino* decision, New Mexico’s citizens and environmental regulators are left to decide 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 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 of New Mexico’s communities.

²⁷⁵ Telephone Interview with Dr. Diana Bustamante, *supra* note 44.

²⁷⁶ Stipulation to the Postponement of Hearing, *supra* note 272, at 5.

²⁷⁷ Telephone Interview with Dr. Diana Bustamante, Executive Director, CDC (Dec. 13, 2007).

²⁷⁸ The Colonias Development Council’s Revocation of its Agreement to the Stipulation to Postponement of Hearing Scheduled for July 19, 2007 at 1, *In re* Application of Rhino Env’tl. Servs., Inc. for a Solid Waste Permit, No. SW 01-03 (P) (Oct. 1, 2007).

²⁷⁹ Interview with Dr. Diana Bustamante, Executive Director, CDC (Nov. 7, 2008) (based on author’s recollection of interview).

²⁸⁰ *Rhino*, 2005-NMSC-024, ¶ 43, 138 N.M. 133, 144, 117 P.3d 939, 950.