SpencerFane®

New Mexico's Constitution Does Not Provide a Private Right of Action Under Its Pollution Control Clause to Stop Oil and Gas Development

On June 3, 2025, the New Mexico Court of Appeals issued its long-awaited decision in *Atencio v. State of New Mexico*. The appellate court reversed the order of the district court and found that the plaintiffs' complaint should be dismissed in its entirety.

Novel Questions of State Law Under the Constitution

Writing for the court, Judge J. Miles Hanisee began by stating that the case presented:

> novel questions of state law regarding the justiciability of claims alleging failures of the State, its legislative and executive branches of government, and several of its administrative entities and officers to adequately control pollution caused during the extraction and production of oil and natural gas.

The plaintiffs included advocacy organizations and individual citizens, including several Indigenous people, while the defendants included state executive agencies and officials, including Governor Michelle Lujan Grisham, the State of New Mexico itself, and the New Mexico Legislature.

The plaintiffs asked for declaratory relief seeking orders that the current statutory and regulatory scheme controlling pollution from oil and natural gas fails to protect the environment under Article XX, Section 21 of the New Mexico Constitution – also known as the "Pollution Control Clause" (PCC). The plaintiffs asked the court to enjoin the defendants from permitting further oil and gas extraction until sufficient environmental protections are established.

The plaintiffs also claimed that the inadequacy of the current system regulating oil and gas pollution violates their constitutional rights to due process and equal protection of law under New Mexico's Bill of Rights. *See* N.M. Const. art. II, § 18.

No Enforceable Right to Be Free from a Given Amount of Pollution

The bulk of the opinion addresses the plaintiffs' claims arising under the PCC. The court notes that by its plain text, the PCC "contains no enforceable right, guaranteed to any individual or group, to be free from a given amount of pollution." Opinion 17. Rather, it describes the PCC as a declaration of legislative power to pass environmental laws.

What is the Duty Under the Pollution Control Clause of the New Mexico Constitution?

Turning to the duty owed under the PCC, the court holds that the "plain meaning of the [PCC] requires that legislation designed to limit pollution only does so to the extent that it does not contradict the development and use of natural resources for the stated maximum benefit of all New Mexicans." Opinion 19. Put differently, "the legislature's duty is only of balancing competing interests." *Id*. Ultimately, the court concludes that, because the PCC, "does not contain rights-creating language nor a standard by which we may measure pollution limitation" it "does not create an individual right the judiciary may enforce or protect." Opinion 22.

And the Separation of Powers and Other Environmental Statutes?

On the issue of the separation of powers, the court notes that the PCC reserves to the legislature "policy decisions regarding pollution control" including "balancing pollution-limiting legislation with the economic benefits obtained from oil and gas development, determining the maximum allowable amounts of pollution in the environment, and creating and funding enforcement agencies." Opinion 23. Therefore, granting the relief sought by the plaintiffs "would both unconstitutionally infringe upon past legislative action and impermissibly encroach on future legislative power." *Id*.

Citing several environmental statutes and regulations, the court observes that "the legislature *has* complied with its constitutional duty to balance pollution control policies with resource development that maximally benefits the people of New Mexico." Opinion 27. It also finds that addressing the plaintiffs' complaint would intrude on the province of the executive branch because resolving the dispute would require agency expertise and would interfere with the "exclusive statutory and regulatory remedies to improve pollution control." Opinion 30.

According to the court, its conclusions are supported by the political question doctrine because the "plaintiffs' PCC-based claim cannot be resolved by the courts without unconstitutionally intruding upon the powers of the executive and legislative branches of government."

Due Process and Equal Protection Claims Fail

On the plaintiffs' due process claims, the court noted that "the law, history, and tradition of our state demonstrates that resource extraction must be considered alongside, and must coexist with, pollution control legislation." Opinion 39. Accordingly, the plaintiffs' due process claims fail because the New Mexico Constitution does not recognize an individual right that supports their position.

Finally, on the plaintiffs' equal protection claims, the court concluded that the Equal Protection Clause is not violated by "generally applicable, facially neutral statutes that result in incidental harms based on the geographic location of individuals." Opinion 43.

The court reversed the order of the district court and remanded with instruction to dismiss the plaintiffs' complaint. If the plaintiffs intend to pursue an appeal, they must petition the New Mexico Supreme Court within 30 days.

This blog was drafted by Jeffrey J. Wechsler, an attorney in the Spencer Fane Santa Fe, New Mexico, office and *John L. Watson, an attorney in the Spencer Fane Denver, Colorado, office. For more information, visit www.spencerfane.com.*

Click **here** to subscribe to Spencer Fane communications to ensure you receive timely updates like this directly in your inbox.