

Attorney General of New Mexico

HAL STRATTON
Attorney General



P.O. Drawer 1508
Santa Fe, New Mexico 87504
505-827-6000

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OPINION
OF
HAL STRATTON
Attorney General

No. 87-48

By: Alicia Mason
Assistant Attorney General

To: Michael J. Burkhart, Director
Environmental Improvement Division
Post Office Box 968
Santa Fe, New Mexico 87504-0968

QUESTION:

Can the Environmental Improvement Division (EID) deputize city or county law enforcement officials to act as EID agents to enforce the Division's asbestos disposal regulations?

CONCLUSION:

No.

ANALYSIS:

The Health and Environment Department, Environmental Improvement Division ("EID") "is responsible for environmental management and consumer protection programs." Section 74-1-7 NMSA 1978. Further, the EID "shall maintain, develop and enforce regulations and standards in the areas of food protection, water supply...[and] air quality management." *Id.* The legislature intended to give EID exclusive, statewide authority to promulgate and enforce regulations and standards in those areas. New Mexico Municipal League, Inc. v. New Mexico Environmental Improvement Bd., 88 N.M. 201, 206, 539 P.2d 221, 226 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975).

Administrative agencies, being creatures of statute, may exercise only the powers and responsibilities conferred and prescribed by statute, and in accordance with the authority granted. In re Proposed Revocation of Food and Drink Purveyor's

Permit for House of Pancakes, 102 N.M. 63, 66, 691 P.2d 64, 67 (Ct. App. 1984). Administrative agencies and officers thereof may delegate the performance of certain ministerial functions. Knickerbocker v. Redland's High School Dist., 49 C.A. 2d 722, 122 P.2d 289 (Cal. Ct. App. 1942). Agencies also may delegate discretionary power if specific statutory authority enables them to delegate. Fellows v. La Tronica, 151 Colo. 126, 377 P.2d 547 (1964). Absent specific statutory authority, however, administrative agencies cannot delegate power, authority, functions or discretionary acts that the law requires the agency to perform. Kerr McGee Nuclear Corp. v. New Mexico Environmental Bd., 97 N.M. 88, 97, 637 P.2d 38, 45 (Ct. App. 1981). See also Anderson v. Grand River Dam Authority, 446 P.2d 814 (Okla. 1968); Voth v. Fisher, 407 P.2d 848 (Ore. 1965).

The promulgation and enforcement of environmental standards and regulations are discretionary functions of EID that EID has no specific statutory authority to delegate. See 1984 Op. Att'y Gen. No. 366-428-84 (Alaska) (conducting necessary inspections and investigations are discretionary functions that may not be delegated except as specifically provided by statute). EID has no statutory authority to deputize assistants to delegate these official duties. In the absence of such authority, EID may not delegate the enforcement of its asbestos disposal regulations to city and county law enforcement officials. See 1984 Op. Att'y Gen. No. 184-175 (Arizona) (Arizona Department of Health and Environmental Services has no authority to deputize individuals for purposes of enforcing the state's motor vehicle emission's regulations).

EID may seek assistance from city and county law enforcement agencies to enforce asbestos disposal regulations pursuant to the Mutual Aid Act, Sections 29-8-1 through 29-8-3 NMSA 1978. "Any state, county or municipal agency having and maintaining peace officers may enter into a mutual aid agreement with any public agency with respect to law enforcement, provided any such agreement shall be approved by the agency involved and the governor." Section 29-8-3, supra. If EID does not have sufficient staff to monitor closely a contaminated area on a frequent basis and thereby adequately enforce the asbestos disposal regulations, then EID may opt to pursue a mutual aid agreement with the local county or municipal law enforcement agencies.


HAL STRATTON
Attorney General


ALICIA MASON
Assistant Attorney General