

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

CITIZEN ACTION,

Appellant,

v.

No. 25,896

SANDIA CORPORATION, and/or
on behalf of SANDIA NATIONAL
LABORATORIES, and the NEW
MEXICO ENVIRONMENT DEPARTMENT

Appellees.

APPEAL FROM THE DECISION OF THE SECRETARY OF ENVIRONMENT

ANSWER BRIEF OF APPELLEE SANDIA CORPORATION

Louis W. Rose
Jeffrey J. Wechsler
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, NM 87504-2307
(505) 982-3873

and

Amy J. Blumberg
Sandia Corporation
Post Office Box 5800
Albuquerque, NM 87185-0141
(505) 284-4547

Attorneys for Sandia Corporation

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SUMMARY OF PROCEEDINGS

I. Nature of the Case.

This is an appeal of a decision by the Secretary of the Environment approving a modification of the Sandia National Laboratories' ("SNL") hazardous waste permit for corrective action at the Mixed Waste Landfill ("MWL").

II. Course of Proceedings.

On January 23, 2004, Sandia requested a Class 3 modification of the Permit to select a corrective measure for the MWL. On August 11, 2004, NMED issued a draft permit modification that proposed to alter the Permit in the following respects: (1) incorporate the Corrective Measures Study ("CMS") Report by reference; (2) select a vegetative soil cover with a bio-intrusion barrier; (3) require a Corrective Measures Implementation Plan ("CMIP") with schedules for the landfill that incorporates the final remedy; (4) require a Corrective Measures Implementation Report; (5) require SNL to submit progress reports to NMED during implementation of the remedy; and (6) require long-term monitoring and maintenance.

NMED issued a public notice informing interested parties that NMED proposed to modify the Permit to "incorporate into the RCRA Permit requirements for corrective measures for the SNL Mixed Waste Landfill." AR 001.

After a four day hearing, the Secretary approved a permit modification incorporating the CMS by reference into the Permit and approving a vegetative soil cover with a bio-intrusion barrier as the corrective action remedy for the MWL. The Secretary further ordered (1) that Sandia conduct a "comprehensive fate and transport model that studies and predicts future movement of contaminants in the landfill and whether they

will eventually move further down the vadose zone and/or to groundwater;" (2) that the CMIP include monitoring triggers for future testing or an additional or different remedy; (3) open access to the CMIP and other remedy implementation documents; (4) responses by NMED to public comments on remedy implementation documents; and (5) a report by Sandia every five years re-evaluating the feasibility of excavation and analyzing the continued effectiveness of the remedy. Final Order (dated May 26, 2005), AR 901-907.

III. Summary of Facts Relevant to Issues on Appeal.

A. Site Description

SNL is a federal facility located within the boundaries of Kirtland Air Force Base ("KAFB"), immediately south of the City of Albuquerque. SNL is owned by DOE and is managed and operated for DOE by Sandia. Since 1945, SNL has been engaged in research and development of conventional and nuclear weapons, alternative energy sources, and a wide variety of national security related research and development. As a result of these activities, SNL has generated hazardous, radioactive, mixed, and solid wastes. From 1945 to 1988, these wastes were disposed of at SNL at numerous locations that have been classified by NMED and the EPA as SWMUs or areas of concern ("AOCs"). The SWMUs and AOCs include landfills, waste piles, and test areas that pre-date permitting requirements. AR 908-966, 20699-20716.

The MWL, a 2.6 acre fenced compound located in the north-central section of TA-3 at SNL, is designated as SWMU 76. The MWL accepted low-level radioactive waste and minor amounts of mixed waste¹ from Sandia research facilities and off-site generators from March 1959 until December 1988. *Id.*

B. Regulatory History

¹ Mixed waste is waste that contains both radioactive and solid waste.

The federal Resource Conservation and Recovery Act ("RCRA"), as amended by the Hazardous and Solid Waste Amendments ("HSWA"), governs the disposal of hazardous waste. *See* 42 U.S.C. §§ 6901 – 6992. Pursuant to RCRA, EPA authorized New Mexico to enforce the New Mexico Hazardous Waste Act ("HWA"), NMSA 1978 §§ 74-4-1 to 74-4-14, and the New Mexico Hazardous Waste Management Regulations ("HWMR), 20.4.1 NMAC *et seq.*, in lieu of EPA RCRA enforcement on April 16, 1985. FoF No. 11, AR 814-815; *see also* 42 U.S.C. § 6926. The 1985 authorization did not include authorization for corrective action under HSWA or to regulate mixed waste. New Mexico received authority to regulate mixed waste in 1990. *New Mexico v. Watkins*, 969 F.2d 1122, 1129 (D.C. Cir. 1992). EPA retained the authority for corrective action under HSWA until 1996, when it authorized New Mexico to enforce the HWA and HWMR in lieu of HSWA. FoF No. 13, AR 815.

On August 6, 1992, NMED issued permit, No. NM589011518-1 ("Permit"), for storage of hazardous waste at SNL. FoF No. 21, AR 816, AR 4364-4517. On August 26, 1993, EPA issued Module IV, to add Hazardous and Solid Waste Amendments ("HSWA") provisions to the Permit.² Module IV of the Permit contains provisions for permit modification and corrective action for releases pursuant to 40 C.F.R. § 264.101. AR 18160; Module IV at IV.A, IV.E, IV.H. The MWL was designated as a solid waste management unit ("SWMU") in Module IV of the Permit. FoF No. 15, AR 902.

Under Module IV and the corrective action rules, Sandia is required to investigate and remediate SWMUs. Sandia completed the investigative process for the MWL in September, 1996. Following this process, Sandia recommended no further action be

² Module IV was inadvertently left out of the Administrative Record in this matter. Upon information and belief, NMED will be correcting this oversight and supplementing the administrative record with Module IV pursuant to Rule 12-209(C).

taken at the MWL. NMED rejected this recommendation and on June 11, 1998, NMED informed Sandia of its decision to require corrective action for the MWL. AR 10954-10955, 10977. In 2001, the NMED directed Sandia to conduct a CMS that complied with the requirements set forth in Sections N, O, P, Q and S of Module IV of the Permit. FoF No. 93, AR 829. The purpose of the CMS was to identify and screen, develop, and evaluate potential corrective measures alternatives in order to recommend the corrective action to be taken at the MWL. FoF Nos. 96-100, AR 829-830. The final CMS Report was submitted on May 21, 2003. FoF No. 95, AR 829. After evaluating the long-term reliability and effectiveness, reduction of toxicity, mobility or volume of wastes, short-term effectiveness, implementability and cost of possible corrective measures, Sandia recommended a vegetative soil cover as the preferred alternative. FoF Nos. 99-107, AR 830-833. Notwithstanding Sandia's preference, NMED selected a vegetative soil cover with a bio-intrusion barrier. FoF No. 108, AR 833.

The HWMR allow a facility to request modification of an existing permit. 20.4.1.900 NMAC, incorporating 40 C.F.R. § 270.42. Modification of the SNL Permit was necessary to establish the framework to complete corrective action at the MWL. In accordance with this provision, on January 23, 2004, Sandia requested a Class 3 modification of the Permit to select a corrective measure or remedy for the MWL. On August 11, 2004, NMED issued a draft permit modification that proposed to alter the Permit in the manner described above. NMED did not request Sandia to perform a fate and transport model, and took the position that a fate and transport model was not necessary to approve the proposed permit modifications. Tr. Vol. 3, 1006:14 – 1008:13.

Finally, on April 29, 2004, NMED, DOE and Sandia entered into a Compliance Order on Consent ("Consent Order"). See NMED Exhibit 24, AR 1380-1473. The Permit and Consent Order govern the corrective action process at SNL and apply to hazardous waste at the MWL.³ FoF Nos. 17, 160., AR 816, 843

C. Waste Inventory

Sandia has compiled a detailed inventory of the MWL. The inventory was compiled from classified disposal records, unclassified disposal records, extensive interviews with current and retired employees, solid waste information sheets, nuclear material management records, and photographic records. FoF No. 43, AR 820-821, Tr. Vol. 1, 107:19-23; Tr. Vol. 3, 910:16-22; AR 9579-9598; AR 9619-10283. NMED conducted a review of selected disposal records from various years to assess the accuracy of the inventory and determine whether the specific waste items and quantities in the classified inventory could be traced to the Sandia published waste inventory. FoF No. 44, AR 821; Tr. Vol. 3, 911:11 – 912:13; NMED Exhibit 15, AR 1256-1258. For each of the 36 records reviewed, NMED was able to trace the specific classified waste item to a waste item listed in the Sandia published waste inventory. *Id.*, Tr. Vol. 3, 911:11 – 912:13; NMED Exhibit 15. Furthermore, the characterization results corroborate the description of the inventory. Tr. Vol. 1, 113:18-24. Thus, the inventory published by Sandia "is reasonably complete and accurate." FoF No. 45, AR 821; Tr. Vol. 1, 114; Tr. Vol. 3, 912:6-10; AR 9579-9598; AR 9619-10283; NMED Exhibit 15.

D. Characterization of the MWL.

³ The Consent Order will replace the Permit's corrective action requirements upon approval of an agreed modification to the Permit.

Sandia has conducted extensive characterization of all environmental media at the MWL dating back over 35 years, Tr. Vol. 1, 49:12-18; AR 3465-3679; AR 8466-8779. These characterization activities include the following: (1) decennial environmental monitoring (1969, 1979); (2) annual environmental monitoring (1980 to present); (3) additional borehole drilling (1981, 1982); (4) Phase 1 RCRA Facility Investigation ("RFI") (1989-1990); (5) Phase 2 RFI (1992-1996); (6) groundwater monitoring (1990 to present); (7) air monitoring (1992-1998); (8) tritium flux monitoring (1992, 1993, and 2003); (9) ecological study (1997); and (10) interim storage site sampling (2001). FoF No. 51, AR 822; Tr. Vol. 1, 51:23 – 52:23; AR 1008-1009. In sum, the extensive characterization verifies the contents of the inventory and indicates that the future releases of contaminants would be minimal and would not pose a significant risk to human health or the environment. FoF Nos. 69, 72-73, 77, 167, AR 825-826, 844.

ARGUMENT

The HWA specifies that this Court may only set aside the action of the Secretary granting the Permit modification if it is found to be: "(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law." NMSA 1978 § 74-4-14(C). Appellant raises three challenges to the approved permitting action, claiming that the Secretary (1) misconstrued the regulatory scheme; (2) misconstrued his own authority to issue a remedy; and (3) failed to consider specific evidence. As discussed in more detail below, each of these contentions fails, and the action of the Secretary should be affirmed.

I. Appellant Has Waived Its Challenge to the Findings of Fact, And At Any Rate, The Are Supported By Substantial Evidence.

Interspersed throughout its three primary substantive arguments, Appellant makes conclusory challenges to four of the Findings of Fact adopted by the Secretary. *See*, Brief in Chief at 24, 29, 30. Appellant's argument is more noteworthy for what it does not allege: Appellant does not claim that the alleged error in adopting the challenged Findings of Fact requires reversal. To the contrary, Appellant appears to have carefully crafted its arguments to avoid the burden associated with the substantial evidence standard. Appellant cannot evade this burden. Appellant's challenge to Findings of Fact Nos. 21, 101, 133 and 148 fails because Appellant has not complied with Rule 12-213 and Appellant cannot satisfy its burden under the substantial evidence standard.

A. The Unchallenged Findings Are Accepted As Settled Fact.

As an initial matter, Rule 12-213(A) requires that the precise ground for a challenge to a finding be stated, and that a generalized attack on the findings of fact is not proper or sufficient. *See, e.g., Kerr v. Akard Bros.*, 73 N.M. 50, 385 P.2d 570 (1963). Findings that are not specifically attacked in the manner required by Rule 12-213 are accepted as facts upon which the case rests on appeal. *See, e.g., Lerma v. Romero*, 87 N.M. 3, 528 P.2d 647 (1974). In the present appeal, Appellant challenges only four findings of fact, namely Findings of Fact Nos. 21, 101, 133 and 148. It follows that the remaining findings are accepted as facts upon which this appeal rests.

B. This Court Should Decline To Review Appellant's Challenge To The Findings Of Fact.

This Court should decline to review Appellant's challenge to Findings of Fact Nos. 21, 101, 133 and 148 because Appellant did not comply with Rule 12-213. Rule 12-213(A) provides in pertinent part:

A contention that a . . . finding of fact is not supported by substantial evidence shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing upon the proposition, and the argument has identified with particularity the fact or facts which are not supported by substantial evidence

The primary purpose of Rule 12-213 is to “fully apprise the reviewing court of the fact-finder’s view of the facts and its disposition of the issues, and to help the court decide the issues on appeal.” *Martinez v. Southwest Landfills, Inc.*, 115 N.M. 181, 185, 848 P.2d 1108, 1112 (Ct. App. 1993). For that reason, this Court has explained that a challenge to the sufficiency of the evidence supporting a finding of fact involves a two-step process:

Step one. The party challenging the sufficiency of the evidence supporting a proposition must set forth the substance of *all* evidence bearing upon the proposition. [Rule] 12-213 requires this.

Step two. Once the challenging party has set forth the substance of all pertinent evidence, the party must then demonstrate why, on balance, the evidence fails to support the finding made.

Id. at 184, 848 P.2d at 1111 (citations omitted) (emphasis in original). Appellant has fallen far short of complying with this process.

Instead, Appellant makes a conclusory challenge to each of the challenged Findings. For example, in its challenge to Finding of Fact No. 21, Appellant argues:

NMED has suggested that “NMED issued a permit to Sandia to store hazardous waste under the Hazardous Waste Act and Hazardous Waste Management Regulations in 1992.” (Emphasis supplied). Tr.p.968. The Hearing Officer inexplicably found as much in her Proposed Finding No. 21, which Appellant believes should be deemed a “conclusion of law,” rather than a “finding of fact.” *See* HO PFFCL, ¶ 21, AR at 000816. Regardless, Citizen Action explicitly challenges Finding No. 21 on appeal.

Brief in Chief at 23-24. Conspicuously absent from this discussion is the requisite resuscitation of the evidence bearing on the proposition or explanation of why that evidence does not support the Secretary’s Finding. Each of Appellant’s other challenges

to the Findings of Fact are, likewise, vague and lacking in substance or explanation. This Court has routinely declined to consider a challenge to findings of fact where a party has failed to comply with Rule 12-213. For example, in *Chavez v. S.E.D. Laboratories*, 2000-NMCA-34, 128 N.M. 768, 999 P.2d 412, this Court ruled that the appellant had waived his substantial evidence argument by “fail[ing] to mention *any* evidence accepted below that contradicts his position on appeal.” *Id.* at ¶ 27. In the present appeal, Appellant goes one step further by also neglecting to list the evidence upon which it relies for its challenge to the adopted Findings of Fact. Appellant offers no more than non-specific allegations for each of its four “challenges” to the Findings of Fact. As a result, this Court should follow prior precedent and decline to consider these arguments.

C. Findings Of Fact Nos. 21, 101, 133 And 148 Are Supported By Substantial Evidence.

In the event that the Court decides to review Appellant’s challenges, Findings of Fact Nos. 21, 101, 133 and 148 are supported by substantial evidence in the record. “Substantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Oil Transp. Co v. N.M. State Corp Comm’n*, 110 N.M. 568, 571, 798 P.2d 169, 172 (1990). “The reviewing court starts out with the perception that all evidence, favorable and unfavorable, will be viewed in the light most favorable to the agency’s decision.” *Tallman v. ABF*, 108 N.M. 124, 129, 767 P.2d 363 (Ct. App. 1988). Appellant cannot satisfy its burden because each of the challenged Findings is supported by evidence in the record. Indeed, the Hearing Officer specifically cited to the authority she relied upon.

Given Appellant’s failure to comply with Rule 12-213, it would be unfair and impractical to require Sandia to engage in a full description of the evidence supporting

the challenged Findings of Fact. Nonetheless, the challenged Findings of Fact are supported in part by the following evidence:

- Finding of Fact No. 21: AR 4364-4517; Module IV;
- Finding of Fact No. 101: Tr. 1012;
- Finding of Fact No. 133: Tr. 156-57; Tr. 1006-1008;
- Finding of Fact No. 148: Tr. 969-70; NMED Ex. 9 at 7-9, AR 1150-1224.

This proof provides relevant evidence that a reasonable mind would accept as adequate to support a conclusion, and the Court should reject Appellant's challenge to Findings of Fact No. 21, 101, 133, and 148.

II. The Secretary Applied the Proper Regulatory Framework.

For its initial argument, Appellant asserts that corrective action pursuant to 40 C.F.R. 264.101 and 40 C.F.R. 270.42 was improper. As discussed in more detail below, Appellant's argument fails because corrective action is proper for a SWMU.

A. Standard of Review

A ruling that is not in accordance with law should be reversed "if the agency unreasonably or unlawfully misinterprets or misapplies the law." *Phelps Dodge Tyrone, Inc. v. New Mexico Water Quality Control Com'n*, 2006-NMCA-115, ¶ 33, 140 N.M. 464, 143 P.3d 502 (citation omitted).

B. The Governing Statutory And Regulatory Scheme.

1. The Resource Conservation and Recovery Act.

RCRA was enacted by Congress to establish a comprehensive cradle-to-grave program for regulating the treatment, storage and disposal of hazardous waste. *See United Tech. Corp. v. EPA*, 821 F.2d 714, 716 (D.C. Cir. 1987); 40 C.F.R. Part 261. As

originally enacted, RCRA imposed a regulatory scheme for the active management of hazardous wastes. It did not require remedial action to remedy past mismanagement. *Id.* To address this regulatory gap, Congress enacted the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”) to provide for the clean-up of past releases. In 1984 Congress amended RCRA to provide additional protection for past releases. Section 3004(u) requires corrective action for releases from a SWMU, regardless of the date waste was deposited. 42 U.S.C. § 6924(u).

States may take primary responsibility for RCRA implementation by installing an EPA-approved hazardous waste program. 42 U.S.C. § 6926(b). Three regulatory milestones in New Mexico’s RCRA delegation are significant for this appeal.

a. Base RCRA Authorization.

First, pursuant to RCRA, EPA authorized New Mexico to enforce the HWA, NMSA 1978 §§ 74-4-1 to 74-4-14, and the HWMR, 20.4.1 NMAC, in lieu of RCRA on April 16, 1985 through delegation numbers 8-31 and 8-32. FoF No. 11, AR. 814-815. “NMED has maintained its delegation from EPA over hazardous waste management in New Mexico and from time to time has amended its state program to conform to statutory or regulatory changes in RCRA.” FoF No. 12, AR 815. The 1985 authorization did not include authorization for the HSWA or authorization to regulate mixed waste. *See New Mexico v. Watkins*, 969 F.2d 1122, 1128-29 (D.C. Cir. 1992).

b. Authorization To Regulate Mixed Waste.

“RCRA provides that its prescriptions shall not apply to substances and activities regulated under the Atomic Energy Act (“AEA”), 42 U.S.C. § 2011 *et seq.*, unless RCRA regulation is not inconsistent with the AEA. 42 U.S.C. § 6905(a).” *Watkins*, 969 F.2d at

1128. The radioactive component of the mixed waste at SNL that was produced from research and development of nuclear weapons and other national security related research is regulated under the AEA. In 1980, EPA explained in its "mixture rule" that RCRA regulates waste containing a mix of solid waste and hazardous waste. *Id.* at 1132. However, the RCRA definition of "solid waste" specifically excludes "source, special nuclear, or byproduct material as defined by the [AEA]." 42 U.S.C. § 6903(27). RCRA also defines mixed waste as "waste that contains both hazardous waste and source, special nuclear, or by-product material subject to the Atomic Energy Act of 1954." 42 U.S.C. § 6903(41). In 1986, EPA interpreted RCRA to regulate mixed wastes for the first time. *See State Authorization to Regulate the Hazardous Components of Radioactive Mixed Wastes Under the Resource Conservation and Recovery Act*, 51 Fed. Reg. 24,504 (July 3, 1986) ("1986 Notice"); *see also Clarification of Interim Status Qualification Requirements for the Hazardous Components of Radioactive Mixed Waste*, 53 Fed. Reg. 37,045, 37,046 (Sept. 23, 1988) ("1988 Notice"). Until that date, EPA did not require state programs to regulate mixed wastes. *Watkins*, 969 F.2d at 1128. Thus, New Mexico's original RCRA authorization in 1985 did not permit New Mexico to regulate mixed waste. Even after RCRA was interpreted as applying to mixed waste, EPA explained in 1988 that facilities treating mixed waste would not be subject to RCRA regulation until the state received the necessary supplemental authorization. 53 Fed. Reg. 37,045, 37,047 (Sept. 23, 1988). The date a state received authorization to regulate mixed waste would trigger the regulatory change for purposes of determining interim status of a facility. New Mexico received EPA authorization to regulate mixed waste on July 25, 1990. *Watkins*, 969 F.2d at 1129. Accordingly, in New Mexico, no facility

containing mixed waste qualified for interim status or required a RCRA permit until 1990. Of course, a facility such as the MWL that closed prior to 1990 never qualified for interim status and never required a RCRA permit.

c. Authorization To Enforce Corrective Action.

Facilities that treat, store, or dispose of hazardous waste must have a RCRA permit. 42 U.S.C. § 6925(a). In enacting RCRA, however, Congress realized EPA and authorized States did not have the resources to issue final permits to all affected facilities within the statutory time-frame allowed. As a result, RCRA Section 3005(e), 42 U.S.C. § 6925(e), was enacted as a transitional measure. Under this section, existing facilities that deal with hazardous waste were allowed to continue operations in "interim status" as they applied for a permit. As amended in 1980 and 1984, RCRA provides that facilities of two kinds may qualify for interim status: (1) those facilities "in existence" on November 19, 1980; and (2) those facilities that become subject to permit requirements because of RCRA statutory or regulatory changes adopted after the facility commences operations. 42 U.S.C. § 6925(e)(1)(A).

As originally enacted, RCRA was primarily aimed at prevention of future problems. *See Iron & Steel Inst. V. E.P.A.*, 886 F.2d 390, 393 (D.C. Cir. 1989). Due to concern that past releases from RCRA facilities posed a threat to human health and the environment, Congress amended RCRA in 1984 with passage of HSWA. HSWA provided EPA with authority to require permitted or interim status owners and operators of treatment, storage and disposal ("TSD") facilities to investigate and cleanup past releases of hazardous waste. *See* 42 U.S.C. §§ 6924(u), (v) and 6928(h). The investigation and cleanup of hazardous waste is referred to as corrective action. 42

U.S.C. 6928(h). "EPA delegated to NMED on January 2, 1996 authority to enforce corrective action requirements under the federal Hazardous and Solid Waste Amendments." FoF No. 13, AR 815.

2. Corrective Action Pursuant to the SNL Permit.

On August 6, 1992, NMED issued the Permit for storage of hazardous waste at the whole SNL facility. FoF No. 21; AR 816. Because New Mexico had not yet received authority to implement corrective action under HSWA, EPA issued a joint HSWA permit with NMED as Module IV on August 26, 1993. Section 74-4-4.2 of the HWA dictates that all permits issued after April 8, 1987 must require corrective action for releases of hazardous waste or constituents from any SWMU. FoF No. 14, AR 814. A SWMU is "any discernible unit at which solid waste has been placed at any time, from which NMED determines there may be a risk of release of hazardous waste or hazardous constituents, regardless of whether the unit was intended for the management of solid or hazardous waste." *Id.* RCRA, the HWA and the SNL Permit require corrective action for releases of hazardous waste from a SWMU.

The MWL is SWMU 76 at SNL, as identified in Module IV, Table 2 of the Permit. FoF No. 15; AR 902. As such, it is regulated under 40 C.F.R. 264.101 (incorporated by 20.1.4.500 NMAC), Module IV of the Permit, and the Consent Order. *Id.* As discussed above, in December 2001, the NMED directed Sandia to conduct a CMS that complied with the requirements set forth in Sections N, O, P, Q and S of Module IV of the Permit. The final CMS Report was submitted on May 21, 2003.

Modification of the Permit pursuant to 20.4.1.500 NMAC (incorporating 40 C.F.R. § 270.42) was necessary to establish the framework to complete corrective action at the MWL.

C. The Issue Of Whether The MWL Requires A Post-Closure Permit Is Not Before The Court.

Appellant's first argument for reversing the Secretary's Permit modification is that corrective action pursuant to 40 C.F.R. 264.101 is improper for the MWL. Brief in Chief at 20-28. Appellant bases this argument on the unsupported claim that "[t]here is nothing in the record to support that the [MWL] was added to, nor that it was listed as, a unit of any permit which can be subject to 'modification,' as now ordered by the Secretary." Appellant's Brief in Chief at 23; *see also id.* at 9 ("the MWL was not added to, nor is the MWL listed as, a unit of *any* permit which is then subject to modification"), 24 ("[t]here is no evidence that the MWL thereafter became retroactively permitted in 1992"). Based on this factual contention, Appellant argues that rather than corrective action pursuant to 40 C.F.R. 264.101, Sandia is required to apply for a closure and post-closure permit pursuant to 40 C.F.R. 264.110. The Court can dispose of Appellant's first argument by answering the question of whether RCRA and HWA allow corrective action for a SWMU. If Sandia is correct that the answer to this question is in the affirmative, then Appellant's first argument necessarily fails.

Appellant's entire argument rests on an incorrect presumption that the MWL is not a unit of any permit which can be subject to modification. Brief in Chief at 9, 23-24. As discussed above, the entire SNL facility applied for and received a RCRA permit in 1992. FoF No. 21, AR 816. At that time, New Mexico did not have authority to enforce corrective action pursuant to HSWA. FoF No. 17. As a result, on August 26, 1993, EPA

issued Module IV, to add HSWA provisions to the RCRA Permit. Significantly, the Hearing Officer found, and Appellant's do not challenge, that the MWL "is SWMU 76 at SNL and regulated under 40 C.F.R. 264.101 (incorporated by 20.1.4.500 NMAC)." FoF No. 15. Thus, Appellant is incorrect as a factual matter that "the MWL was not added to, nor is the MWL listed as, a unit of *any* permit which is then subject to modification." Brief in Chief at 9. The uncontested facts demonstrate that the MWL is regulated as a SWMU under Module IV of the SNL Permit. Because Finding of Fact No. 15 is not challenged, the Court must base its decision on the MWL's proper characterization as a SWMU. From this designation, the applicable regulatory scheme neatly flows. The Court need only ask itself whether corrective action is permissible for a SWMU, and need not address the issue of a post-closure permit.

The HWMR, which adopt 40 C.F.R. Parts 264 and 270 by reference, require corrective action at SWMUs where releases of hazardous waste or hazardous constituents have or may have occurred. 20.4.1.500 NMAC; 20.4.1.900 NMAC. Specifically, 40 C.F.R. § 264.101 provides that as part of its RCRA permit, the permittee is required to "institute corrective action as necessary to protect human health and the environment for *all releases* of hazardous waste or constituents *from any solid waste management unit* at the facility, regardless of the time at which the waste was placed in such unit." 40 C.F.R. § 264.101; 20.1.4.500 NMAC (emphasis added). The HWMR further provide that "[c]orrective action will be specified in the permit. . . ." 40 C.F.R. § 264.101; 20.1.4.500 NMAC. Module IV of the Permit contains provisions for permit modification and corrective action for releases pursuant to 40 C.F.R. § 264.101.

Contrary to Appellant's contention, the Court need not reach the issue of whether the MWL requires a separate permit under 40 C.F.R. 264.110. That question is not before the Court. Rather, the action approved by the Secretary is a permit modification to incorporate a corrective action for a SWMU. Accordingly the applicable standards are provided in the regulations for permit modifications, 40 C.F.R. § 270.42, and corrective actions, 40 C.F.R. § 264.101. NMED first notified Sandia that corrective action at the MWL would be required in 1998. To pull a regulatory sleight-of-hand and change the applicable standard after Sandia has complied with EPA and NMED's directives for the corrective actions standard would be fundamentally unfair and indefensible under the RCRA and HWA regulations.

Indeed, once the MWL was included in the Permit as a SWMU, the applicable regulatory scheme was set. The proper time to challenge the inclusion of the MWL in the Permit as a SWMU was in 1993 when EPA and NMED first made this regulatory decision. *See* 42 U.S.C. § 6976; *see also* NMSA 1978 § 74-4-14; 20.4.1.901.B(10) NMAC. Appellant, or any other interested party, had a statute based period to appeal Module IV. They failed to do so. After the time for appeal had passed, that regulatory decision become final, and Appellant, along with NMED and Sandia, were bound by it. Appellant did not file a timely appeal to challenge the inclusion of the MWL in the Permit as SWMU 76, and it should not now be allowed to challenge the substance of that decision in this proceeding.

No matter how Appellant styles this claim, it is a collateral attack on a permit decision that has been final for over 13 years. Collateral attacks on permit provisions are prohibited under the doctrines of res judicata, statute of limitations, and waiver. For

example, in *Ojavan Investors, Inc. v. California Coastal Commission*, 26 Cal.App.4th 516 (Cal. Ct. App. 1994), the appellants sought to stay enforcement of the California Coastal Commissions cease and desist order directing that they refrain from conveying deed-restricted lots. The court upheld the trial court finding that the appellants' challenge amounted to an attempt to relitigate the Commission's right to enforce permit conditions that had been imposed years earlier. *Id.* at 524; *see also Daniel v. County of Santa Barbara*, 288 F.3d 375, 384 (9th Cir. 2002); *Jones v. Gordon*, 792 F.2d 821 *Hensler v. City of Glendale*, 876 P.2d 1043 (Cal. 1994).

This same reasoning applies to the present appeal. Once that regulatory decision became final, NMED was bound to apply the corrective action measures provided in 40 C.F.R. 264.101 to any release that occurred at the MWL. Appellant's argument that the MWL requires closure and post-closure permits is untimely. Appellant cannot properly challenge the decision to include the MWL as a SWMU in Module IV of the Permit over 13 years later. Thus, Appellant's argument that the MWL should be required to seek and obtain a closure and post-closure permit is not properly before this Court in this appeal.

D. The MWL Is Properly Regulated As A SWMU.

Even if the Court were to address the issue of the applicability of the post-closure permit regulations to the MWL, which Sandia submits would be improper, the applicable law dictates that the MWL is properly designated as a SWMU under the HSWA Module of the SNL Permit and, as such, should be regulated pursuant to the corrective action provisions in 20.4.1.500 NMAC and 40 C.F.R. Part 264.101. As discussed below, this is true because the post-closure permit requirement applies only to facilities or units that are not otherwise subject to a RCRA Permit.

**1. The MWL Is Properly Regulated As A SWMU Because
The Entire SNL Facility Is Subject To A RCRA Permit.**

On its face, 40 CFR 270.1(c) could be read to require a post-closure permit for any landfill unit that received waste after July 26, 1982. When read in context, however, it is clear that the post-closure permit requirement applies only to units that are not otherwise subject to a RCRA permit.

RCRA Section 3005(i) provides:

(i) Interim status facilities receiving wastes after July 26, 1982

The standards concerning ground water monitoring, unsaturated zone monitoring, and corrective action, which are applicable under section 6924 of this title to new landfills, surface impoundments, land treatment units, and waste-pile units required to be permitted under subsection (c) of this section shall also apply to any landfill . . . *qualifying for the authorization to operate* under subsection (e) of this section which receives hazardous waste after July 26, 1982.

42 U.S.C. § 6925(i) (emphasis added). In the 1985 Federal Register codifying HSWA regulations, EPA noted that “the legislative history of section 3005(i) suggests that the major purpose of this provision is to ensure that landfills, waste piles, surface impoundments and land treatment units that receive waste after July 26, 1982, are subject to the ground-water monitoring and corrective action requirements contained in existing Subpart F of Part 264.” 50 Fed Reg. 28702, 28714, (July 15, 1985). Because Part 264 standards are applicable only to RCRA permitted units, EPA was concerned that it had “no means of implementing the Part 264 standards for certain units” that “would not be required to obtain an RCRA permit to implement those standards,” and that “[i]t would be extremely difficult to apply Subpart F without a permit-type mechanism.” 51 Fed Reg. 10706, 10715-16 (March 28, 1986). For this reason, EPA established the post-closure rule for units that were not subject to a permit. Through a post-closure permit ground water monitoring, unsaturated zone monitoring and

corrective action can be applied to unpermitted, inactive land-based units that would not otherwise be subject to RCRA permit requirements. It goes without saying, however, that such an additional mechanism for requiring monitoring and corrective action is unnecessary for a unit that is already subject to a RCRA permit.

For example, in the case of the MWL, the unit is subject to Part 264 requirements under the HSWA Module of the SNL Permit. As discussed, the MWL was identified as a SWMU in the original DOE/EPA correspondence related to issuance of the HSWA Module and was included in Table 2 of the final HSWA Module. Moreover, the designation of the MWL as a SWMU is supported by EPA guidance. In EPA's first notice on regulation of mixed waste, EPA explained that "[b]ecause radioactive mixed waste is considered a solid waste under the Federal RCRA program, units containing radioactive mixed wastes are SWMUs and are subject to corrective action *if* there is another unit requiring a RCRA permit at the facility...." 51 Fed Reg. 24504 (July 3, 1986). Because DOE and Sandia obtained the RCRA Permit for the SNL facility, it was appropriate to include the MWL as a SWMU, and thereby subject it to Part 264.101 standards under the SNL facility-wide Permit. In short, contrary to Appellant's contentions, the MWL is covered by the existing facility-wide Permit and thereby is subject to statutory and regulatory requirements, eliminating the need to impose a separate post-closure permit requirement.

2. 40 C.F.R. 270.1(c) Does Not Apply To The MWL Because It Did Not Require An Operating Permit And Did Not Qualify For Interim Status.

It is significant to recognize the regulatory status of the MWL prior to its inclusion as a SWMU under the facility-wide Permit. As discussed above, prior to 1986, RCRA was not interpreted to regulate mixed waste. Thus, no separate operating permit was ever issued for the MWL. FoF No. 20, AR 902. Appellant argues that under 40

C.F.R. 270.1(c), the MWL is required to obtain post-closure permits because it “received waste after July 26, 1982.” A review of the regulatory scheme, however, reveals that the MWL was not required to obtain post-closure permits because it did not require an operating permit during its active life, and did not qualify for interim status.

Determining the applicability of 40 CFR 270.1(c) requires an analysis of the statute and the overall regulatory scheme. When analyzing the meaning of administrative rules and regulations, the courts apply the same canons used to ascertain the meaning of statutes. *See Johnson v. New Mexico Oil Conservation Comm’n*, 1999-NMSC-21, 17, 127 N.M. 120, 124, 978 P.2d 327, 331 (“[w]e apply [statutory canons of construction] to . . . rules in the same manner that we apply [them] to a statute”).

“The main goal of statutory construction is to give effect to the intent of the legislature.” *State v. Rowell*, 121 N.M. 111, 114, 908 P.2d 1379, 1382 (1995). Typically, plain meaning is the primary indicator of legislative intent. *Mem’l Med. Ctr., Inc. v. Tatsch Constr., Inc.*, 2000-NMSC-030, ¶ 27, 129 N.M. 677, 12 P.3d 431. The New Mexico Supreme Court, however, has advised that:

[C]ourts must exercise caution in applying the plain meaning rule. Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute’s meaning. As a result, we must examine the context surrounding a particular statute, such as its history, its apparent object, and other statutes in *pari materia*, in order to determine whether the language used by the Legislature is indeed plain and unambiguous.

State v. Cleve, 1999-NMSC-017, ¶ 8, 127 N.M. 240, 980 P.2d 23. “A statute is ambiguous when it can be understood by reasonably well-informed persons in two or more different senses.” *State v. Elmquist*, 114 N.M. 551, 552, 844 P.2d 131, 132 (N.M. Ct. App. 1992). Under the rule of *pari materia*, each statute or regulation is construed in

light of, with reference to, or in connection with other statutes and regulations on related subjects. “[T]he general rule is that statutes or statutory provisions which relate to the same person or thing, or to the same class of persons or things, or to the same or a closely allied subject or object, may be regarded as *pari materia*.” 73 Am. Jur. 2d *Statutes* § 103 (2001).

Section 270.1(c) contains precisely the type of “beguiling simplicity” that the New Mexico Supreme Court cautioned against in *Cleve*. 1999-NMSC-017, ¶ 8. Like the law at issue in *Cleve*, 40 C.F.R. 270.1(c) also masks an important ambiguity. It is tempting to presume from the language of Section 270.1(c) that it applies to all facilities that received waste after July 26, 1982. However, the statute itself, combined with the structure of the regulations and regulatory guidance makes it clear that 40 C.F.R. § 270.1(c) does not apply to the MWL. At the very least, the applicability of 40 C.F.R. 270.1(c) “can be understood by reasonably well-informed persons in two or more different senses.” *Elmquist*, 114 N.M. at 552, 844 P.2d at 132. It is therefore necessary to examine the overall scheme of the regulations as well as relevant guidance to determine the scope of 40 C.F.R. 270.1(c).

It is axiomatic that the regulations must be consistent with the statute. RCRA itself provides guidance as to the applicability of its provisions to facilities that received waste after 1982. In the permit provision of RCRA, it defines “interim status facilities receiving wastes after July 26, 1982,” the language contained in 40 C.F.R. 270.1(c), as applying to “any landfill . . . unit *qualifying for the authorization to operate under* [the interim status provisions of RCRA] which receives hazardous waste after July 26, 1982.” 42 U.S.C. § 6925(i) (emphasis added). Thus, 40 C.F.R. 270.1(c) only applies to the

MWL if it qualified for the authorization to operate under the interim status provisions of RCRA.

Facilities of two kinds may qualify for interim status under RCRA: (1) those facilities "in existence" on November 19, 1980; and (2) those facilities that become subject to permit requirements because of RCRA statutory or regulatory changes adopted after the facility commences operations. 42 U.S.C. § 6925(e)(1)(A). In 1988, EPA published a Federal Register clarification notice on interim status qualification for mixed waste facilities. In that notice, EPA stated:

Facilities treating, storing or disposing of radioactive mixed waste but not other hazardous waste in a State with base program authorization *are not subject to RCRA regulation until the State program is revised and authorized to issue RCRA permits for radioactive mixed waste.* The effective date of the State's receipt of radioactive mixed waste regulatory authorization from EPA will therefore be the regulatory change that subjects these TSDFs [treatment, storage, and disposal facilities] to RCRA permitting requirements.

53 Fed. Reg. 37,047 (date) (emphasis added). The clarification notice clearly links the effective date of the State's mixed waste authorization to the applicability of RCRA permitting requirements. The notice goes on to specify that this same date, the effective date of the State's mixed waste authorization, is the trigger date after which the RCRA permitting requirements apply to a facility.

As discussed, New Mexico received authorization to regulate mixed waste on July 25, 1990. Therefore, mixed waste facilities in New Mexico became subject to RCRA permitting requirements and became eligible for interim status in 1990. This is significant because the MWL closed in 1988. FoF No. 818. As a result, the MWL never qualified for authorization to operate under interim status. It necessarily follows that the MWL never

qualified for interim status. Because the MWL never qualified for interim status, it also was not subject to the post-closure permit requirements of 40 C.F.R. 270.1(c).

Indeed, the necessary "qualification for interim status" element for post-closure permits has been recognized by courts. For example, in *American Iron and Steel Institute v. EPA*, 886 F.2d 390 (D.C. Cir. 1989), EPA's authority to impose post-closure permit requirements on a facility that had closed under interim status provisions was challenged.

The court summarized the challenge and responded as follows:

The argument rests on the entirely accurate point that 3005(i) does not mention 'closure or permits.' Accurate, but inconsequential. Section 3005(i) provides that the new corrective action requirements 'shall also apply' to any unit '[1] *qualifying for the authorization to operate under [the interim status provisions]* [2] which receives hazardous waste after July 26, 1982.' We do not understand petitioners to assert that the units in dispute fail to meet both those criteria. It is obviously true that for a unit that closed by removal under the interim status standards in 1983, for example, 'qualifying' for interim status on the date of HSWA's enactment in 1984 would (apart from this provision) have appeared to be no more than an irrelevance of ancient history.

Id. at 402 (emphasis added). The court went on to uphold EPA's authority to impose a post-closure permit requirement. Notably for the purposes of this appeal, the court's interpretation clearly ties the applicability of the post-closure permit requirement to satisfaction of both elements, qualifying for interim status and receiving hazardous waste after July 26, 1982.

In several guidance documents, EPA has confirmed the precondition that a unit must qualify for interim status before it is required to obtain a post-closure permit. Of particular note is a 1988 response to an inquiry about a facility that disposed of mixed waste onsite but discontinued disposal prior to the State's receipt of mixed waste authorization. The State had RCRA base authority and also had promulgated mixed waste regulations independent of

RCRA authority. The facility had never submitted a Part A or Part B permit application. With the exception of the existence of independently applicable State regulations, the factual situation presented in the 1988 inquiry to EPA directly parallels the operational history of the MWL. EPA explained:

According to the Federal Register of July 3, 1986 (51 FR 24504), mixed radioactive and hazardous waste is subject to RCRA regulation. In a state which is authorized to implement Subtitle C, the mixed waste will not be subject to the Subtitle C authorized program until the state becomes authorized to regulate mixed waste; however, state regulations enforced under state law would apply to the mixed waste. In addition, if the facility contained a RCRA-regulated unit, and was applying for its permit, EPA could use RCRA Section 3004(u) authority for releases of hazardous constituents from solid waste management units (the mixed radioactive and hazardous waste would be a solid waste, per Section 261.2(b)).

Once the State receives authorization to regulate mixed radioactive and hazardous waste, the disposal unit would become subject to the State's authorized program regulations, and would become subject to the HSWA provisions (which would be enforced by EPA until the State gained authorization to implement HSWA authorities).

OSWER Directive 9431.1988(02) (January 1988), 1998 WL 525066. In other words, a facility that disposed of mixed waste, but discontinued disposal prior to the State's authorization to regulate mixed waste, such as the MWL, is properly characterized and regulated as a SWMU.

To the same effect, EPA was asked in 1989 whether the land disposal restrictions applied to the disposal of mixed waste. EPA replied in two parts, distinguishing the responses based on the status of the State's RCRA authorization:

[I]f the State in which the facility is located is authorized for the base RCRA program, and the State has not yet received mixed waste authorization, the waste is not considered hazardous and the land ban does not apply."

OSWER Directive 9551.1989(02) (March 1989), 1989 WL 550920. This guidance confirms that EPA viewed mixed waste, prior to State mixed waste authorization, as solid waste, not

hazardous. Because the MWL ceased operation prior to the State's mixed waste authorization, the landfill was properly categorized and regulated as an inactive solid waste management unit. *See also* RCRA/Superfund Hotline Questions and Answers, RCRA-71, Post-Closure Permits, Elsevier, 1994.

Last, EPA has also provided explanations of the applicability and intent of the post-closure permit requirements in the preambles accompanying the proposed and final rules. *See* 51 Fed. Reg. 10706, 10715-10716 (March 28, 1986); 52 Fed. Reg. 45788, 45794-45795 (December 1, 1987). Throughout these discussions, EPA referred only to units that are permitted or are subject to interim status. There is no indication that EPA intended to extend the post-closure permit requirements to facilities that were not subject to permit requirements or that did not qualify for interim status.

Therefore, Appellant's argument that the Secretary should have applied the post-closure permit requirements apply to this action fails as a matter of law.

E. The Permit Modification Satisfies The Closure Regulations Because the Consent Order Qualifies As An Enforceable Document.

Even if Appellant were correct, which Sandia specifically denies, that the regulatory standards of 40 C.F.R. § 270(c)(1) should have been applied to the permit modification, the action by the Secretary is nonetheless proper because both the Consent Order and the Permit with the corrective action modification qualify as enforceable documents that satisfy the post-closure requirements and 40 C.F.R. §270.1(c).

As discussed above, Sandia maintains that the action approved by the Secretary is proper and should be analyzed by the Court pursuant to 40 C.F.R. § 264.101. Even assuming *arguendo*, however, that 40 C.F.R. § 270.1(c)(1) applies, the corrective action approved by the Secretary is consistent with the regulations. Appellant bases its

argument that a post-closure permit was required on its contention that 40 C.F.R. § 270.1(c)(1) should have been applied. Appellant acknowledges, however, that 40 C.F.R. § 270.1(c)(1) provides that a facility which is required to obtain a post-closure permit may “obtain an enforceable document in lieu of a post-closure permit” An enforceable document is defined as “an order, a plan, or other document issued by . . . an authorized State under an authority that meets the requirement of 40 CFR 271.16(e),” and imposes the requirements found in 40 C.F.R. § 265.121. 40 C.F.R. § 270.1(c) (7). Part 265.121, in turn, provides the corrective action monitoring requirements; while 40 C.F.R. § 271.16(e) explains that to qualify as an enforceable document for the purposes of the regulations, a document must protect the ability to bring suit in courts of competent jurisdiction, provide authority to compel compliance with applicable requirements, and provide for civil penalties for violations.

Both the Consent Order and modified Permit meet this criteria. First, the permit modification approved by the Secretary complies with the information and monitoring requirements set forth in 40 C.F.R. § 265.121 by imposing requirements which demonstrate equivalency and Appellant does not argue otherwise. *E.g.* FoF No. 40, 51-82, 148, AR 820, 822-827, 840. Second, the Consent Order and modified Permit both preserve the right to bring an action in court, compel compliance, and seek civil penalties. *See* Consent Order at 20-22, 31-32; AR 1380-1473, 4363-4577. In fact, the Consent Order itself specifies that it is an enforceable document. Consent Order at 32. The Hearing Officer and Secretary agreed, finding that the “corrective action process at the landfill is now governed in large part by an enforceable Consent Order. . . .” FoF 17, AR 816; *see also* FoF 160, AR 843 (describing “numerous enforceable provisions of the

Consent Order”). Significantly, these findings have not been challenged, and are facts upon which this appeal rests.

Rather than challenge the findings, Appellant makes three arguments as to why the Consent Order does not satisfy the requirements of an enforceable document. First, Appellant recycles its argument that the MWL does not qualify because it did not have a permit during its active life. As explained above, however, the MWL was never required to obtain a permit during its active life because NMED did not receive authorization to regulate hazardous waste until after the MWL had closed in 1988.

Next, Appellant argues that the Consent Order does not qualify as an enforceable document because the Hearing Officer did not “make any findings as to Sandia’s compliance with Section 265.111.” Brief in Chief at 26. This argument fails, however, because Appellant misconstrues the regulations and the Hearing Officer’s findings. Appellant’s argument rests on the incorrect assumption that 40 C.F.R. § 265 applies to the MWL. It does not. Part 265 regulates interim status facilities. *See* 40 C.F.R. § 265.1. As discussed above, the MWL did not qualify for interim status. Indeed, the Hearing Officer found, and Appellant does not challenge, that “40 C.F.R. Part 265 does not apply to the landfill as it is not an interim status facility . . .”. FoF No. 20, AR 816. As a result, Appellant’s argument also fails.

Furthermore, the Secretary found that the permit modification and regulatory approach was “technically equivalent” to the post-closure requirements of 40 C.F.R. § 264.110 and 40 C.F.R. § 265.110. FoF No. 148, AR 840. Put another way, as a factual matter, the Secretary found that the regulatory approach at the MWL was sufficient to satisfy the post-closure permit requirements. Appellant generally challenges this finding

of fact, but as discussed below in Section III, it misconstrues the Secretary's finding and fails to meet its burden under Rule 12-213 NMRA. Notwithstanding Appellant's conclusory challenge, Finding of Fact No. 148 confirms that the Consent order and modified permit qualify as "enforceable documents."

For its third argument that no enforceable document exists, Appellant asserts that it is not bound by the Consent Order because it was not a party. Brief in Chief at 27. Appellant's status with regard to the Consent Order, however, has no bearing on whether it qualifies as an "enforceable document" within the meaning of the applicable regulations. As discussed, the Consent Order meets the criteria set forth in sections 270.1(c)(1), 270.1(c)(7), 270.16(e), and 265.121. Those regulations do not tie qualification as an enforceable document to a citizen group's involvement as a party.

Moreover, the Consent Order was not entered as a part of any court case. Instead, it was issued pursuant to Section 74-4-10 of the HWA. Consent Order at 1, AR 1380-1473. Prior to its issuance, NMED made a draft of the Consent Order available to the public for review and comment. *Id.* at 11. Appellant availed itself of this opportunity and submitted comments. *Id.* at 12. As with any order issued by the Secretary, the Consent Order was subject to an appeal. NMSA 1978 § 74-4-14 Neither Appellant, nor any other party appealed the Consent Order, and it became final and binding.

As the foregoing makes clear, the Consent Order and modified Permit qualify as a matter of law as enforceable documents. Thus, even if this Court were to apply the regulatory standards in 40 C.F.R. § 270(c)(1), which Sandia maintains is improper, the action of the Secretary was nonetheless permissible.

III. The Record Does Not Support Appellant's Contention That The Secretary Misconstrued His Authority.

Appellant makes two arguments for overturning the Secretary's decision based on the inclusion of a fate and transport model as part of the corrective action.

First, Appellant manufactures the argument that the Hearing Officer "apparently believed she was without authority to order development of such a model prior to recommending a final remedy." Brief in Chief at 28. There is no support for this allegation in the record, nor does Appellant cite to any. Rather, as Appellant acknowledges, the Hearing Officer requested input from the parties on the flexibility available to the Secretary in selecting a remedy. Brief in Chief at 10-11. During the proceedings below, Sandia argued that the inclusion of the fate and transport model was duplicative, not supported by substantial evidence, and without a rational basis. *See* U.S. Department of Energy's and Sandia Corporation's Comments and Objections On the Hearing Officer's Report and Proposed Order at 3-6; FoF No. 128. Similarly, NMED testified that a fate and transport model was not necessary. FoF No. 132, AR 837-838. Notwithstanding these objections, the Secretary ordered that a fate and transport model be included in the CMIP.⁴ Likewise, the Secretary required a five-year report to re-evaluate the feasibility of excavation, an alternative that was not previously proposed. Thus, Appellant's unsupported argument that the Hearing Officer and Secretary improperly considered themselves locked into the proposed remedies is belied by the fact that the Secretary ordered a fate and transport model as well as the five-year report, both previously unproposed alternatives that were not supported by either Sandia or NMED.

Further, Appellant does not challenge the finding that this remedy is protective of human health and the environment. FoF No. 167, AR 844. In light of this fact it is

⁴ Despite its initial objections, Sandia has already complied with this directive by submitting its *Probabilistic Performance-Assessment Modeling of the Mixed Waste Landfill at Sandia National Laboratories* in November of 2005.

difficult to justify Appellant's argument that the selection of a fate and transport model is error.

Second, Appellant challenges what it views as the Secretary's finding that all of the proposed remedies were technically equivalent. *See* Brief in Chief at 11, 28-29. The Secretary made no such finding. Rather a review of Findings of Fact Nos. 143-148, as well as the associated transcript citations, indicates that Finding of Fact No. 148 addresses the technical requirements of the post-closure regulations as they compared to the corrective action requirements for the MWL and the requirements imposed by NMED. Finding of Fact No. 148 finds that the regulatory course of action taken at the MWL was "technically equivalent" to the post-closure permit regulations. Contrary to Appellant's contentions, the Secretary made no findings regarding equivalency or similarity of the alternative remedies. *See* FoF Nos 102-127, AR 830-836.

Similarly, Appellant's argument that the selected corrective action remedy stifles public participation is directly contradicted by the Final Order. The Secretary required NMED and Sandia to provide a convenient method for public review and comment on the documents to be submitted by Sandia, and required NMED to respond to these public comments, a condition which requires far more than the applicable regulations. AR 904. In light of these provisions, Appellant's argument that the corrective action remedy does not adequately involve the public is unsupported.

IV. The Secretary Properly Considered Evidentiary Issues.

For its last argument, Appellant asserts that three components of the selected corrective action were arbitrary and capricious because the Secretary failed to address

evidentiary issues in the record. In each case, Appellant is simply incorrect, and does not satisfy its burden.

A. Standard of Review

“An agency action is arbitrary and capricious if it is unreasonable, if it provides no rational connection between the facts found and the choices made, or if it entirely omits consideration of important aspects or relevant factors of the issue at hand.” *In the Matter of the Petition to Amend Ground Water Quality Standards Contained in 20.6.2 NMAC, WL CITE*, (Ct. App. 2006) (citing *Sierra Club*, 2003-NMSC-005, ¶ 17; *Atlixco*, 1998-NMCA-134, ¶ 24). This Court has recently explained that the Hearing Officer and Secretary need not explicitly mention or discuss each and every proposed finding and conclusion. *Pickett Ranch, LLC v. Curry*, 2006-NMCA-082, ¶¶ 52-53, 57, 140 N.M. 49, 139 P.3d 209. Rather, to succeed on its claim that the Hearing Officer or Secretary acted arbitrarily and capriciously, Appellant must show that they “entirely omit[ted] consideration of relevant factors or important aspects of the problem at hand.” *Atlixco Coal v. Maggiore*, 1998-NMCA-134, ¶ 24, 125 N.M. 786, 965 P.2d 370.

B. The MWL Inventory Is Reasonably Complete And Accurate.

First, Appellant argues that the Final Order was arbitrary and capricious because the content of the MWL is unknown. Brief in Chief at 14-15, 32. This argument is directly contradicted by the Secretary’s Findings of Fact. The Secretary noted that Sandia prepared a “waste inventory for the landfill, compiled from classified disposal records, unclassified disposal records, interviews with current and retired employees, solid waste information sheets, nuclear material management records, and photographic records.” FoF No. 43, AR 820:821. The accuracy of this inventory was verified by

NMED. FoF No. 44, AR 821. While the inventory is not perfect, ultimately the Secretary concluded that the MWL inventory “is reasonably complete and accurate.” FoFNo. 45, AR 821. Appellant does not challenge these findings, and it can not argue that they were arbitrary and capricious as an end around the substantial evidence standard.

C. The Radioactive Component Of Mixed Waste At The MWL.

Similarly, Appellant argues that it was arbitrary and capricious for the Secretary to fail to consider the radioactive component of the mixed waste at the MWL. Appellant once again misconstrues both the law and facts. In support of its argument, Appellant represents that “the United States Court of Appeals for the Tenth Circuit has held that the State of New Mexico *can* impose conditions addressing the presence and disposal of mixed waste containing radionuclides and hazardous waste at a federal government owned facility, pursuant to RCRA.” Brief in Chief at 32 (citing *United States v. New Mexico*, 32 F.3d 494 (10th Cir. 1994)) (emphasis in original). This is incorrect. In *United States v. New Mexico* the Tenth Circuit Court of Appeals held that conditions imposed by the state on DOE’s hazardous waste incinerator were “requirements” under state law, and applicable to DOE’s facility under RCRA. The court noted, however, that DOE did not raise the issue of whether state regulation of the radioactive component of solid waste is preempted by the AEA. *Id.* at 498. Thus, the court did not address the critical question of whether a state can regulate the radioactive component of mixed waste.

Mixed waste is defined in RCRA as “waste that contains both hazardous waste and source, special nuclear or by-product material subject to the [AEA].” 42 U.S.C. § 6903(41). RCRA’s definition of “solid waste” expressly excludes materials covered by

the AEA. 42 U.S.C. § 6903(27). Thus, “mixed waste” includes both a radioactive component that is subject to the AEA, and a hazardous waste component subject to RCRA. Notably, the only courts to address the issue of a state’s ability to regulate the radioactive component of mixed waste have found that the AEA preempts state regulation of AEA materials mixed with other waste. *See, e.g., U.S. v. Commonwealth of Kentucky*, 252 F.3d 816, 825 (6th Cir. 2001); *U.S. v. Manning*, 434 F. Supp. 2d 988, 1002-03 (E.D. Wash. 2006) (“The State cannot, however, regulate the AEA radioactive component of mixed waste.”). Given this regulatory framework, it would have been appropriate for the Secretary to refrain from addressing the radioactive component of the mixed waste at the MWL. Contrary to Appellant’s contention, however, that is not what occurred.

Rather, the record reflects that the Secretary considered radiological risks. Although it is correct that the Consent Order does not apply to radionuclides, “Sandia has committed to voluntarily include information on radionuclides in the corrective action process.” FoF No. 18, AR 816. As a result, the record is rife with data and information about radionuclides at the MWL. FoF Nos. 30, 58, 90, 112, 117, 119-121, 152, AR 818, 824, 828, 833-834, 835 841. For example, the CMS, which is incorporated by reference into the permit modification, expressly evaluates radiological risks to both human and ecological receptors. FoF No. 117, AR . Thus, the remedy selection process, and the Final Order, took into consideration radiological risks. It follows that Appellant cannot meet its burden of showing that the Secretary’s decision was arbitrary and capricious.

D. VOCs

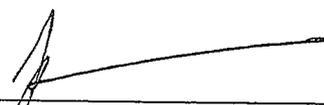
Finally, Appellant argues that the Secretary failed to address VOCs detected in soil gas in 1993. Brief in Chief at 34-35. However, the Secretary specifically acknowledged that Sandia found VOCs in the soil in two passive soil-gas sampling surveys, one active soil-gas sampling program, and analysis of 15 bore holes during the Phase 2 RFI. FoF No. 63-66, AR 824-825. The Hearing Officer also heard testimony that the concentrations of VOCS were orders of magnitude below EPA screening levels. Tr. Vol. 1, 72:13-25, 73:1-74.3. Based on this evidence, the Secretary concluded that VOC vapor levels in the soil “pose insignificant risk to human health and the environment under an industrial land use scenario.” FoF No. 72, AR 825. Although, as Appellant acknowledges, it is not necessary for an agency to address every finding, Brief in Chief at 31, the Secretary directly addressed VOCs at the MWL. Appellant has not met its burden and this contention should be dismissed.

CONCLUSION

For the foregoing reasons, the Court should affirm the Secretary’s action.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.

By  
Louis W. Rose
Jeffrey J. Wechsler
Post Office Box 2307
Santa Fe, NM 87504-2307

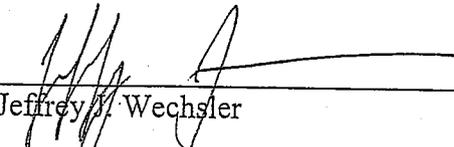
Amy J. Blumberg,
Sandia Corporation
Post Office Box 5800
Albuquerque, NM 87185-0141
(505) 284-4547

Attorneys for Sandia Corporation

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **ANSWER BRIEF OF APPELLEE SANDIA CORPORATION** to be mailed on December 18, 2006 to the following:

Nancy L. Simmons, Esq. 2001 Carlisle Blvd, NE, Suite E Albuquerque, NM 87110	Tannis L. Fox, Esq. Deputy General Counsel New Mexico Environment Dept. Post Office Box 26110 Santa Fe, NM 87502-6110
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Jeffrey J. Wechsler