

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 Opinion Number: \_\_\_\_\_

3 Filing Date: December 19, 2007

4 **NO. 25,896**

5 **IN THE MATTER OF REQUEST FOR A CLASS 3**  
6 **PERMIT MODIFICATION FOR CORRECTIVE**  
7 **MEASURES FOR THE MIXED WASTE LANDFILL**  
8 **SANDIA NATIONAL LABORATORIES,**  
9 **BERNALILLO COUNTY, NEW MEXICO,**  
10 **EPA ID NO. NM5890110518.**

11 **CITIZEN ACTION,**

12 Appellant,

13 v.

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

17 Appellees.

18 **ADMINISTRATIVE APPEAL FROM THE NEW MEXICO ENVIRONMENT**  
19 **DEPARTMENT**

20 **Ron Curry, Secretary of the New Mexico Environment Department**

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STATE OF NEW MEXICO  
GINA MESTAS

1 Law Offices of Nancy L. Simmons, P.C.  
2 Nancy L. Simmons  
3 Albuquerque, NM

4 for Appellant

5 Montgomery & Andrews, P.A.  
6 Louis W. Rose  
7 Jeffrey J. Wechsler  
8 Santa Fe, NM

9 Sandia Corporation  
10 Amy J. Blumberg  
11 Albuquerque, NM

12 for Appellee Sandia Corporation

13 New Mexico Environment Department  
14 Tannis L. Fox, Deputy General Counsel/  
15 Special Assistant Attorney General  
16 Santa Fe, NM

17 for Appellee New Mexico Environment Department

1 **OPINION**

2 **CASTILLO, Judge.**

3 {1} Citizen Action appeals a decision by the Secretary of the New Mexico  
4 Environment Department (Secretary) granting the request of Sandia National  
5 Laboratories (Sandia) for a Class 3 Permit Modification for Corrective Measures for  
6 the Mixed Waste Landfill (MWL) located at Sandia. In challenging the remedy  
7 adopted by the Secretary in his final order, Citizen Action makes a number of  
8 arguments. As to the contention that Sandia was required to apply for a closure or  
9 post-closure permit, rather than a permit modification for the MWL, we hold that this  
10 issue is not jurisdictional and, further, that it was not preserved. We hold that the  
11 Secretary did not abuse his discretion by adopting the findings of the hearing officer  
12 and, further, that those findings were supported by substantial evidence. We  
13 conclude that the Secretary did not render the public comments irrelevant by  
14 submitting his written response to these comments after issuing a final order.  
15 Accordingly, we affirm the Secretary's order.

16 **I. BACKGROUND**

17 {2} Sandia is a federal facility owned by the Department of Energy (DOE). Since  
18 1945, Sandia has conducted research and development of conventional and nuclear  
19 weapons, national security measures, and alternative energy sources. As a result of

1 this research and development, Sandia has generated hazardous, radioactive, mixed,  
2 and solid wastes. Mixed waste is waste that contains both radioactive and solid  
3 waste. Sandia disposed of low-level radiation waste and minor amounts of mixed  
4 waste at the MWL from 1959 until 1988.

5 {3} The regulatory scheme governing mixed waste landfills has developed over a  
6 number of years. See Angela Cole Bonstead, *EPA's Mixed Approach to Mixed*  
7 *Waste*, 8 *Envtl. Law.* 521, 536-546 (2002). The first comprehensive federal law  
8 relating to the generation, storage, treatment, and disposal of hazardous waste was  
9 passed when Congress enacted the federal Resource Conservation and Recovery Act  
10 of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k (1976, as amended through 2002). See  
11 Bonstead, *supra*, at 536-37. Later, Congress passed the Hazardous and Solid Waste  
12 Amendments of 1984 (HSW Amendments), Pub. L. No. 98-616, 98 Stat. 3221  
13 (codified as amended at 42 U.S.C. §§ 6901-6981). The HSW Amendments expanded  
14 the authority under RCRA to require corrective action as a remedy for certain  
15 hazardous waste sites and designated solid waste management units (SWMU). The  
16 MWL was designated as an SWMU in 1993, as we explain in paragraph 6 of this  
17 opinion.

18 {4} In 1985, the federal Environmental Protection Agency (EPA) authorized the  
19 State of New Mexico to administer and enforce a hazardous waste program, pursuant

1 to the New Mexico Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to -14 (1977, as  
2 amended through 2007). The HSW Amendments continued to be enforced by the  
3 EPA until 1996, when New Mexico obtained authorization for their enforcement.  
4 Citizen Action does not dispute that the New Mexico Environment Department  
5 (NMED) regulates the MWL under the New Mexico Hazardous Waste Act or that  
6 pursuant to RCRA, the EPA authorizes NMED to enforce Sandia's compliance with  
7 applicable federal law.

8 {5} Sandia received a permit from NMED to store hazardous waste in 1992. The  
9 MWL was not included in the 1992 permit because the MWL stopped accepting  
10 mixed waste for permanent storage toward the end of 1988 and because NMED did  
11 not yet have the authority to implement corrective measures at facilities no longer  
12 accepting waste.

13 {6} In 1993, the EPA issued a document titled Module IV. This permit authorized  
14 the MWL under federal law and operated together with the 1992 NMED permit as a  
15 joint permit. Module IV designates the MWL as an SWMU, subject to corrective  
16 measures under the HSW Amendments. When NMED took over enforcement of the  
17 HSW Amendments in 1996, NMED also took over enforcement of Module IV and  
18 oversight of the corrective measures at the MWL.

19 {7} Sandia conducted internal investigations of the MWL to determine whether

1 remediation was required. As a result of these investigations, Sandia recommended  
2 that no further action be taken at the MWL. NMED rejected Sandia's  
3 recommendation, and in 1998, NMED notified Sandia that corrective action was  
4 required for the MWL. In 2001, NMED compelled Sandia to undertake a corrective  
5 measures study (Study), pursuant to Section 74-4-10.1(A). The purpose of the Study  
6 was to recommend what corrective action, or remedy, should be implemented at the  
7 MWL. The Study examined four alternative remedies: (1) no further action,  
8 (2) vegetative soil cover, (3) vegetative soil cover with bio-intrusion barrier, and  
9 (4) future excavation. Sandia ultimately recommended a vegetative soil cover to be  
10 the most appropriate remedy for the MWL. NMED again disagreed and, instead,  
11 elected to implement a vegetative soil cover with a bio-intrusion barrier. In August  
12 2004, NMED proposed its selected remedy in a draft permit. A public evidentiary  
13 hearing regarding the draft permit was held in December 2004.

14 {8} At the hearing, five parties—including Sandia, NMED, Citizen Action, Dr. Eric  
15 Nuttall, and WERC: A Consortium for Environmental Education and Technology  
16 Development (WERC)—presented technical testimony. Citizen Action recommended  
17 that NMED select excavation and disposal as the remedy to be applied to the MWL.  
18 Dr. Nuttall and WERC favored a fate and transport model, which would allow Sandia  
19 to fully assess the contaminants. The public was actively involved in the

1 proceedings: approximately 30 people testified, approximately 15 submitted written  
2 comments, and more than 350 mailed in postcards. On April 20, 2005, the hearing  
3 officer submitted her report, which was more than eighty pages long. The report  
4 included a summary of the testimony given at the hearing, findings of fact,  
5 conclusions of law, a recommended decision, and a proposed order.

6 {9} The Secretary, with few changes, none of which are material to this appeal,  
7 adopted the remedy proposed in the hearing officer's report; the final order was  
8 issued on May 26, 2005. The remedy was an amalgamation of the testimony at the  
9 hearing, which combined the previously selected remedy of a vegetative soil cover  
10 with a bio-intrusion barrier and the development of a fate and transport model. The  
11 Secretary required Sandia to develop systems (1) to trigger future remedial action,  
12 (2) to conduct long-term monitoring, and (3) to maximize public comment and access  
13 to documents. The order mandates that every five years, Sandia prepare a report to  
14 evaluate the feasibility of excavation and the continued effectiveness of the remedy  
15 selected. NMED issued a response to public comments on August 2, 2005. In this  
16 consolidated appeal, Citizen Action contests both the Secretary's final order and the  
17 response to public comments.

## 18 **II. DISCUSSION**

19 {10} Citizen Action challenges the Secretary's order on several bases. First, Citizen

1 Action argues that the entire administrative proceeding for permit modification was  
2 improper because there was no valid permit to modify and, further, that the absence  
3 of a valid permit deprived the Secretary of jurisdiction over the proceedings. Citizen  
4 Action also disputes that the hearing officer and the Secretary properly addressed  
5 certain evidence presented at the hearing. Next, Citizen Action contests a number of  
6 individual findings made by the hearing officer and contends that the Secretary  
7 misunderstood his authority to implement a creative remedy. Last, Citizen Action  
8 argues that the Secretary did not sufficiently consider public comment before issuing  
9 the final order. We address each argument in turn.

10 **A. The Permit**

11 {11} We first consider Citizen Action's argument that the Secretary erred as a matter  
12 of law by concluding that Sandia need only obtain a permit modification, rather than  
13 an entirely new closure or post-closure permit. According to Citizen Action, whether  
14 or not the proper permit was issued implicates the Secretary's jurisdiction: if the  
15 MWL did not have a valid permit, then the Secretary had no jurisdiction to modify  
16 a permit. NMED essentially responds that the matter was not preserved because the  
17 scope of the hearing was limited to remedy selection. The question of subject matter  
18 jurisdiction does not require preservation. *See* Rule 12-216(B) NMRA. Accordingly,  
19 we begin by examining whether the Secretary had jurisdiction to modify the joint



1 permit.

2 **1. Jurisdiction**

3 {12} We determine de novo whether an agency has jurisdiction over the parties or  
4 the subject matter of a case. *See Morningstar Water Users Ass'n v. N.M. Pub. Util.*  
5 *Comm'n*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995). The subject matter jurisdiction  
6 of an administrative agency is defined by statute, and an agency is limited to  
7 exercising only the authority granted by statute. *See Martinez v. N.M. State Eng'r*  
8 *Office*, 2000-NMCA-074, ¶ 22, 129 N.M. 413, 9 P.3d 657. The New Mexico  
9 Environmental Improvement Act, NMSA 1978, §§ 74-1-1 to -16 (1971, as amended  
10 through 2003), created NMED and charged it with the responsibility for  
11 environmental management. Section 74-1-2. Section 74-1-7(A)(13) vests NMED  
12 with jurisdiction to “maintain, develop and enforce rules and standards” in the area  
13 of “hazardous wastes . . . [,] as provided in the Hazardous Waste Act.” In 1990,  
14 NMED received authority from the EPA to regulate mixed waste, under the  
15 New Mexico Hazardous Waste Act. *See State of New Mexico: Final Authorization*  
16 *of State Hazardous Waste Management Program*, 55 Fed. Reg. 28,387 (July 11,  
17 1990); *see also* 40 C.F.R. § 272.1601 (2006). Because NMED has jurisdiction to  
18 regulate mixed waste under New Mexico law and because the MWL is a mixed waste  
19 landfill, the Secretary has jurisdiction, under the New Mexico Hazardous Waste Act,

1 to “maintain, develop and enforce rules and standards” regarding the MWL. Section  
2 74-1-7(A)(13). Enforcement of rules and standards necessarily includes permit  
3 questions such that any issues regarding the proper permit for a mixed waste landfill  
4 would necessarily be determined by the Secretary. *See* § 74-4-4.2 (setting forth  
5 requirements for permit issuance, denial, modification, suspension, and revocation).  
6 Accordingly, we conclude that the Secretary has jurisdiction over questions relating  
7 to the proper category of permit for the MWL.

8 {13} This conclusion is consistent with what Citizen Action is really  
9 requesting—that our Court hold that a post-closure permit is required and then  
10 remand this case to the Secretary with instructions to immediately close the MWL,  
11 consistent with post-closure regulations. *See Doña Ana Mut. Domestic Water*  
12 *Consumers Ass’n v. N.M. Pub. Regulation Comm’n*, 2006-NMSC-032, ¶ 8, 140 N.M.  
13 6, 139 P.3d 166 (“This challenge is directed at the correctness of the [agency’s]  
14 determination[,] rather than the [agency’s] authority to address the issue or power to  
15 force the parties to comply with its orders. We therefore review this matter as an  
16 agency determination[.]”). If the Secretary lacks subject matter jurisdiction, then our  
17 Court is similarly without jurisdiction to decide this issue, a result not contemplated  
18 by Citizen Action. *See Maso v. N.M. Taxation & Revenue Dep’t*, 2004-NMCA-025,  
19 ¶ 13, 135 N.M. 152, 85 P.3d 276 (“[A]n appeal from a court or agency that lacks

1 subject matter jurisdiction confers no jurisdiction on the appellate court.” (internal  
2 quotation marks and citation omitted)).

3 {14} Because the question of permit status is not one of jurisdiction, we continue our  
4 analysis and examine whether this question is one our Court may review on appeal.  
5 *See Lopez v. Las Cruces Police Dep’t*, 2006-NMCA-074, ¶ 23, 139 N.M. 730,  
6 137 P.3d 670 (“Because we have determined that the [issue] does not implicate  
7 jurisdiction, the [party] was required to properly and timely preserve its arguments  
8 on this point.”).

## 9 **2. Preservation**

10 {15} Issues raised on appeal from an administrative hearing must be preserved.  
11 *Selmeczki v. N.M. Dep’t of Corr.*, 2006-NMCA-024, ¶ 23, 139 N.M. 122, 129 P.3d  
12 158. In support of preservation, Citizen Action points us to testimony that the  
13 “NMED should have required Sandia to submit a closure plan under Part 264 or Part  
14 265 for the mixed waste landfill in lieu of requiring corrective action as a solid waste  
15 management unit.” Nowhere in the cited testimony does the witness suggest that  
16 Sandia did not follow the appropriate permitting process. A review of Citizen  
17 Action’s submitted proposed findings of fact and conclusions of law is similarly void  
18 of any argument that Sandia should have to apply for a new closure or post-closure  
19 permit. According to the hearing officer’s report of witness testimony, the only

1 evidence offered regarding the appropriate regulatory framework for the MWL was  
2 from William Moats, an NMED employee. Moats explained the permitting process  
3 that Sandia went through, and the hearing officer incorporated his testimony into her  
4 findings.

5 {16} We will not search the voluminous record for evidence that Citizen Action  
6 preserved the argument that Sandia has operated under the incorrect regulatory  
7 framework for more than a decade. *See In re Norwest Bank of N.M., N.A.*, 2003-  
8 NMCA-128, ¶ 30, 134 N.M. 516, 80 P.3d 98 (stating that this Court will not search  
9 the record for evidence of preservation). There is no indication that the permit status  
10 of the MWL was an issue of contention at the administrative hearing. The purpose  
11 of the hearing was to select a remedy for the MWL. Citizen Action duly operated  
12 within the defined scope of the hearing and argued that a particular remedy, future  
13 excavation, should be adopted by the Secretary.

14 {17} In order for a party to sufficiently preserve an issue during an administrative  
15 hearing, the party must elicit testimony and invoke a ruling by the hearing officer.  
16 *Garza v. N.M. Taxation & Revenue Dep't*, 2004-NMCA-061, ¶ 8, 135 N.M. 673,  
17 92 P.3d 685; *see also* Rule 12-216(A). There was testimony that certain federal  
18 regulations required a particular remedy, but Citizen Action cites no testimony to the  
19 effect that NMED could not modify Sandia's existing Module IV permit or that

1 Sandia should be required to apply for a different permit altogether. Further, Citizen  
2 Action fails to show us where it made an objection to the type of permit that formed  
3 the basis for the proceedings. We will not address these arguments for the first time  
4 on appeal. *See Pickett Ranch, LLC v. Curry*, 2006-NMCA-082, ¶ 3, 140 N.M. 49,  
5 139 P.3d 209 (declining to reach an issue raised on appeal because it was not raised  
6 before the hearing officer); *Builders Contract Interiors, Inc. v. Hi-Lo Indus., Inc.*,  
7 2006-NMCA-053, ¶ 5, 139 N.M. 508, 134 P.3d 795 (rejecting an argument made for  
8 the first time on appeal).

9 **B. Challenges to Findings**

10 {18} Citizen Action challenges a number of specific findings made by the hearing  
11 officer. We set aside final orders of the Secretary only if the decision was  
12 “(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial  
13 evidence in the record; or (3) otherwise not in accordance with law.” NMSA 1978,  
14 § 74-9-30(B) (1990). “A ruling by an administrative agency is arbitrary and  
15 capricious if it is unreasonable or without a rational basis, when viewed in light of the  
16 whole record.” *Colonias Dev. Council v. Rhino Env'tl. Servs. Inc.*, 2005-NMSC-024,  
17 ¶ 13, 138 N.M. 133, 117 P.3d 939 (quoting *Rio Grande Chapter of the Sierra Club*  
18 *v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806).

1 **1. Basis for Findings**

2 {19} Citizen Action first generally contends that the hearing officer did not  
3 sufficiently explain the basis for her findings, as required by *Atlixco Coalition v.*  
4 *Maggiore*, 1998-NMCA-134, 125 N.M. 786, 965 P.2d 370. In *Atlixco*, we considered  
5 whether a decision by the Secretary to depart from the findings of the hearing officer  
6 without explanation was arbitrary and capricious. *Id.* ¶¶ 1, 13-14. We noted that  
7 “[w]hen the Legislature specifically directs the Secretary to state the reasons for an  
8 administrative action, the reviewing court ‘may not supply a reasoned basis for the  
9 agency’s action that the agency itself has not given.’” *Id.* ¶ 20 (quoting *Motor*  
10 *Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29,  
11 43 (1983)).

12 {20} At the end of the hearing in our case, the hearing officer asked the participants  
13 to answer a series of questions regarding the hearing officer’s ability to design a  
14 remedy based on the input of all of the participants. The hearing officer did not  
15 address those points in her proposed findings of fact and conclusions of law. Citizen  
16 Action now argues that because the hearing officer had questions at the hearing about  
17 the limits of her discretion to create a remedy, she was required by *Atlixco* to “supply  
18 a reasoned basis for the” remedy selected. 1998-NMCA-134, ¶ 20 (internal quotation  
19 marks and citation omitted). We find *Atlixco* to be inapplicable. The core issue of

1 *Atlixco* was that the Secretary departed from the findings of the hearing officer  
2 without explanation. *Id.* ¶¶ 2, 13, 21-22. The Secretary in the present case accepted  
3 the findings of the hearing officer with only a few exceptions, which are not relevant  
4 to this discussion, and thus supplied “a reasoned basis for the agency’s action.” *Id.*  
5 ¶ 20 (internal quotation marks and citation omitted).

6 {21} Even if *Atlixco* were applicable, the hearing officer cited to particular testimony  
7 upon which her findings were based. Citizen Action specifically challenges  
8 finding 148: “NMED, however, demonstrated that the requirements it demanded for  
9 the landfill remedy were technically equivalent to those [Citizen Action] urged it to  
10 enforce”; Citizen Action argues that there is no explanation for how the hearing  
11 officer determined the remedies were “technically equivalent.” The hearing officer,  
12 in that finding, directed the reader’s attention to the testimony of Moats; he testified  
13 that “[w]hile the two regulatory approaches have some differences, the technical  
14 requirements are essentially the same for both.” Moats continued to explain the  
15 requirements of the remedies for several pages of the hearing transcript. Viewing the  
16 hearing officer’s finding in the light of the whole record, we hold that the finding was  
17 not unreasonable or without rational basis. *See Rio Grande Chapter of the Sierra*  
18 *Club*, 2003-NMSC-005, ¶ 17.

19 {22} Citizen Action also asserts that the Secretary arbitrarily relied on an incomplete

1 record regarding the waste inventory provided by Sandia. This argument is without  
2 merit. The hearing officer's report acknowledged that "[g]iven the length of time this  
3 landfill has been documented and studied, it makes sense that not all documentation  
4 is accurate." The hearing officer was "troubled" by one study, which suggested that  
5 NMED conducted only a cursory review of records to conclude that "the classified  
6 records were sound and Sandia knew how much of what went into the landfill over  
7 time." However, the hearing officer determined that "NMED's testimony [was]  
8 credible" on the subject, and "for the most part[, she] was impressed with the detailed  
9 efforts and studies from both Sandia and NMED showing that high-level radioactive  
10 waste was not buried at the landfill." Though she noted that there was a "significant  
11 amount of controversy surrounding the inventory raised by Citizen Action's  
12 witnesses, the WERC panel and the public," the hearing officer ultimately concluded  
13 that "in spite of this, based on NMED's and Sandia's testimony, [she] had to agree  
14 that there is a reasonably accurate and complete inventory for the landfill, and that  
15 more is known about this landfill than about many other historic landfills."

16 {23} This conclusion is represented by finding 45:

17 The waste inventory is unlikely to be complete or completely accurate.  
18 However, it is reasonably complete and accurate considering the age of  
19 the records, length of time the landfill operated, and the types of wastes  
20 routinely disposed of in the landfill. Most older landfills operating  
21 during the same time period have no disposal records or incomplete  
22 disposal records.



1 Based on a review of the whole record, we can find no indication that the decision to  
2 rely upon the waste inventory was either unreasonable or irrational. The hearing  
3 officer clearly weighed the testimony presented about the waste inventory, and she  
4 came to a conclusion that the inventory was sufficient. The Secretary, as permitted  
5 by NMED's regulations, adopted the hearing officer's findings with minor alterations  
6 not relevant to the issues in this appeal. *See* Post Hearing Procedures, New Mexico  
7 Environment Department, 20.1.4.500(D)(2) NMAC ("The Secretary may adopt,  
8 modify, or set aside the Hearing Officer's recommended decision, and shall set forth  
9 in the final order the reasons for the action taken."). We find no error here.

## 10 **2. Findings 101 and 133**

11 {24} Citizen Action challenges findings 101 and 133. "We review an agency's  
12 findings by examining the entire record, but we must affirm a decision if it is  
13 supported by substantial evidence." *Selmeczki*, 2006-NMCA-024, ¶ 15. In  
14 finding 101, the hearing officer stated, "Any remedy that is protective of human  
15 health and the environment may be selected; Sandia is not required to select the most  
16 protective remedy." In support of this finding, the hearing officer referenced the  
17 testimony of Moats, who used this same terminology when outlining the different  
18 remedy options. We observe that this same language is found in Section 74-4-4.2(C),  
19 which governs the issuance and modification of permits. *Id.* ("[T]he secretary may

1 issue . . . a permit subject to any conditions necessary to protect human health and the  
2 environment[.]”).

3 {25} Finding 133 notes that the hearing officer heard testimony that “[a fate and  
4 transport] model could be useful at any stage of work on the landfill, and could assist  
5 in identifying future action levels or triggers.” Citizen Action maintains that a fate  
6 and transport model is not a useful tool if it is used after the final remedy has been  
7 selected, since the purpose of the model is to provide information that is useful in  
8 selecting a remedy. The hearing officer heard testimony about the benefits of a fate  
9 and transport model and then concluded that the model should be used to evaluate  
10 future options, triggers, monitoring, and conditions. Both findings 101 and 133 are  
11 supported by substantial evidence, and we will not disturb those findings.

### 12 **C. Failure to Address Evidentiary Issues**

13 {26} Citizen Action also contends that the hearing officer’s report does not refer to  
14 or incorporate specific evidence that Citizen Action provided regarding  
15 (1) transuranic waste, (2) waste that is greater than Class C level, and (3) volatile  
16 organics. Citizen Action again attempts to apply *Atlixco* in order to require the  
17 Secretary to explain why he did not consider this particular evidence. We again find  
18 *Atlixco* inapplicable. There is no evidence that the Secretary departed from the  
19 hearing officer’s findings. Instead, the Secretary adopted all of the hearing officer’s

1 findings with regard to these issues.

2 {27} The hearing officer's report does not explicitly address "[t]ransuranic waste"  
3 or "[g]reater than Class C level waste." Both NMED's and Sandia's briefs refer to  
4 these two specific topics generally—as "radioactive" material. The proposed findings  
5 of fact did discuss radioactive waste in findings 46-50, particularly nuclear fuel  
6 canisters, to which Citizen Action refers as "[g]reater than Class C level waste."  
7 Additionally, the hearing officer addressed radioactive material in the following  
8 factual findings: 30, 58, 90, 112, 117, 119-121, and 152. Citizen Action's argument  
9 that the hearing officer and the Secretary did not consider evidence of radioactive  
10 materials is not persuasive.

11 {28} We point out that Citizen Action cites no authority to suggest that the hearing  
12 officer acts arbitrarily and capriciously if she does not address each point raised by  
13 a party at a hearing or in a recommendation. *See Pickett Ranch*, 2006-NMCA-082,  
14 ¶¶ 51-52. "In the absence of authority supporting [the a]ppellant's position, we will  
15 not presume error on the part of the Secretary." *Id.* ¶ 53.

16 {29} Citizen Action also refers us to conclusion of law K and argues that it  
17 represents a misunderstanding about the Secretary's jurisdiction to consider  
18 radioactive materials and should therefore be reviewed de novo. We disagree. In  
19 order to implement the remedy that NMED selected after the Study was conducted,

1 Sandia, NMED, and DOE entered into a compliance order (Consent Order), pursuant  
2 to Section 74-4-10(A)(1). Conclusion K refers to the Consent Order and states, “The  
3 requirements of the Consent Order apply to hazardous waste and the hazardous waste  
4 component of mixed waste.” There is no indication in this conclusion that the  
5 Secretary believes his jurisdiction to consider radioactive materials is limited.  
6 Conclusion L continues the reasoning: “The Consent Order does not apply to  
7 radionuclides, including but not limited to source, special nuclear, or byproduct  
8 material as defined in the Atomic Energy Act of 1954, or the radioactive portion of  
9 mixed waste.” The limitations of the Consent Order are not a jurisdictional limitation  
10 on the Secretary. The Secretary, in these quoted conclusions, merely stated that the  
11 Consent Order so defined the limits of this particular inquiry. We will not create  
12 jurisdictional confusion where none existed.

13 {30} With regard to volatile organics, the Secretary relied entirely on the findings  
14 of the hearing officer. Findings 63-66 explicitly discuss volatile organics. The  
15 hearing officer concluded in finding 72 that the volatile organics “pose [an]  
16 insignificant risk to human health.”

17 **D. Extent of Authority**

18 {31} Citizen Action further argues that the hearing officer was confused about the  
19 extent of her authority, as indicated by the comments at the end of the hearing, and

1 that she felt constrained to choose only between the remedies presented by Sandia and  
2 NMED and not the other parties that presented testimony. There is no evidence in the  
3 record to support this theory. The hearing officer recommended the following  
4 remedy, in relevant part:

5 1. The remedy shall be a vegetative cover with bio-intrusion  
6 barrier[.]

7 2. As part of the Corrective Measures Implementation Plan that  
8 incorporates the final remedy (described in the draft permit modification  
9 in Paragraph V.3), Sandia shall additionally include the following:

10  
11 a. a comprehensive fate and transport model that studies and  
12 predicts future movement of contaminants in the landfill and whether  
13 they will eventually move f[a]rther down the vadose zone and/or to  
14 groundwater;

15 b. triggers for future action, [which] identify and detail  
16 specific monitoring results that will require additional testing or the  
17 implementation of an additional or different remedy.

18 . . . .

19 5. Sandia shall prepare a report every 5 years, re-evaluating the  
20 feasibility of excavation and analyzing the continued effectiveness of  
21 the selected remedy.

22 {32} This proposed remedy was, in fact, a combination of suggestions from various  
23 interested parties. An independent panel recommended a fate and transport model to  
24 the hearing officer; both NMED and Sandia argued against including a fate and  
25 transport model as part of the remedy for the MWL. The hearing officer, on her own  
26 initiative, required Sandia to submit a report every five years in order to facilitate

1 reevaluation of the feasibility of excavation. There is no indication that the hearing  
2 officer felt she could not compose a unique remedy based on the suggestions  
3 proffered at the hearing. Despite the hearing officer's comments regarding her ability  
4 to craft a creative remedy, which were made at the close of the hearing, the ultimate  
5 recommendation to the Secretary was based on the testimony taken and the evidence  
6 received at the hearing. *See Grogan v. N.M. Taxation & Revenue Dep't*, 2003-  
7 NMCA-033, ¶ 35, 133 N.M. 354, 62 P.3d 1236 (“[D]espite the verbal comments at  
8 the hearing, the hearing officer's determination of negligence was supported by  
9 substantial evidence.”).

10 {33} Furthermore, Citizen Action does not argue that the hearing officer acted  
11 outside her authority when she constructed the remedy that was ultimately adopted  
12 by the Secretary. When considering modifications to permits, the hearing officer  
13 must consider input from “interested persons.” Section 74-4-4.2(H) (“No ruling shall  
14 be made on permit issuance, major modification, suspension or revocation without  
15 an opportunity for a public hearing at which all interested persons shall be given a  
16 reasonable chance to submit data, views or arguments orally or in writing and to  
17 examine witnesses testifying at the hearing[.]”). It is evident from the record that the  
18 hearing officer considered recommendations from interested persons: during a four-  
19 day public hearing in 2004, the hearing officer considered the testimony of  
20 approximately 30 people and read more than 350 postcards.

21 {34} Citizen Action claims that the hearing officer did not consider its remedy or  
22 that recommended by the independent panel “on an even playing field.” The

1 evidence supports the opposite conclusion. For more than thirty pages, the hearing  
2 officer's report outlines the testimony of each interested party and weighs its  
3 credibility. In some circumstances, the hearing officer found that the testimony of  
4 Citizen Action's witnesses was more credible than that of other organizations'  
5 witnesses: "Citizen Action presented a convincing argument that Sandia had  
6 over[ ]estimated the costs of excavation[.]" The hearing officer was required to find  
7 some testimony more persuasive than other testimony; we cannot conclude that the  
8 hearing officer did not consider all of the testimony simply because in the end, she  
9 had to choose a position and formulate a conclusion. *See Pickett Ranch, 2006-*  
10 *NMCA-082, ¶ 57* ("[G]iven the hearing officer's explicit statement that she reviewed  
11 [the a]ppellant's proposed conditions, we conclude that the officer properly  
12 considered all of the proposed conditions and adopted only those that she thought  
13 were necessary to protect the public and the environment.").

#### 14 **E. Response to Public Comments**

15 {35} Citizen Action next argues that the order of the Secretary must be set aside  
16 because NMED did not sufficiently consider public comment prior to issuing the final  
17 decision. The New Mexico Administrative Code requires the following: "No ruling  
18 shall be made on permit issuance or denial without an opportunity for a public  
19 hearing, at which all interested persons shall be given a reasonable chance to submit  
20 significant data, views or arguments orally or in writing and to examine witnesses  
21 testifying at the public hearing." 20.4.1.901(A)(5) NMAC. The Code also dictates,  
22 "At the time that any final permit decision is issued, the Secretary shall issue a

1 response to comments.” 20.4.1.901(A)(9) NMAC. Citizen Action contends that  
2 because the Secretary did not respond to comments from the public until after he  
3 issued the final decision, public participation in the permit process was made  
4 irrelevant. We disagree.

5 {36} Citizen Action confuses the requirement for consideration of public comments  
6 with the requirement for a written response to the comments. As we have repeatedly  
7 stated in preceding paragraphs, the hearing officer carefully considered the public’s  
8 comments and incorporated some of those comments into the ultimate remedy. There  
9 is no evidence that the hearing officer and the Secretary did not “give due  
10 consideration and the weight he/she deems appropriate to all comments received  
11 during a public comment period and to all relevant facts and circumstances presented  
12 at a public hearing.” 20.4.1.901(A)(7) NMAC. Simply because the Secretary did not  
13 provide a written response to the submitted public comments before issuing the final  
14 order does not mean that the Secretary did not consider the public input when drafting  
15 the order.

16 {37} Citizen Action also challenges the method of evaluating the remedy  
17 implemented. In NMED’s response to the hearing officer’s report, NMED objected  
18 to the suggestion that NMED should be required to respond to public comment on  
19 progress reports issued by the United States Department of Energy regarding  
20 implementation of the remedy. NMED argued that the progress reports “will not be  
21 further modified, approved or finalized by NMED as a result of public comment.”  
22 Citizen Action characterizes this objection as “ma[king] clear early on that entry of



1 a final order made public participation in any ongoing review of the fate and transport  
2 model legally irrelevant.” We do not agree that the public will have no part in the  
3 review of the efficacy of the fate and transport model.

4 {38} The objection by NMED merely pointed out that the agency should not have  
5 to respond to public comment regarding a report that NMED did not issue and could  
6 not change. Actually, the Secretary’s order greatly expands public participation in  
7 the future review of the MWL. Finding 171 states the following:

8 As several components of the selected remedy remain to be developed,  
9 it is important that the public continue to have access to information and  
10 to participate in future decisions regarding the landfill. Many members  
11 of the public who commented at the hearing encouraged NMED to  
12 require that Sandia provide convenient public access to monitoring data,  
13 major documents, and other significant information.

14 (Citation omitted.) In addition to establishing this finding, the hearing officer  
15 proposed, and the Secretary accepted, that the order include the following language:

16 3. NMED and Sandia shall provide a convenient method for the  
17 public to review Sandia’s Corrective Measures Implementation Plan,  
18 Corrective Measures Implementation Report, progress reports, long-term  
19 monitoring and maintenance plan, and any other major documents  
20 developed by NMED or Sandia for the MWL (“the documents”),  
21 including but not limited to[ ] posting the documents on a  
22 publicly[ ]accessible website.

23 4. NMED and Sandia shall provide a method and schedule that  
24 allows interested members of the public to review and comment on the  
25 documents, and NMED shall review, consider and respond to these  
26 public comments prior to approving any of these documents[.]

27 5. Sandia shall prepare a report every 5 years, re-evaluating the  
28 feasibility of excavation and analyzing the continued effectiveness of

1 the selected remedy. . . . Sandia shall make the report and supporting  
2 information readily available to the public, before it is approved by  
3 NMED. NMED shall provide a process whereby members of the public  
4 may comment on the report and its conclusions, and shall respond to  
5 those comments in its final approval of the report.

6 The public has not been shut out of the decision-making; nor have public comments  
7 been made legally irrelevant. Instead, the Secretary's remedy includes additional  
8 provisions to ensure that the public will remain involved in the future remedy for the  
9 MWL.

10 **III. CONCLUSION**

11 {39} We affirm the Secretary's order granting permit modifications to allow for  
12 corrective measures for the MWL at Sandia.

13 {40} **IT IS SO ORDERED.**

14   
15 **CELIA FOY CASTILLO, Judge**

16 **WE CONCUR:**

17   
18 **MICHAEL D. BUSTAMANTE, Judge**

19   
20 **RODERICK T. KENNEDY, Judge**