IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

COPY

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

No.: 25896
Dept. of Environment HWB 04-11(M)

CITIZEN ACTION,

Appellant,

vs.

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

Appellees.

APPELLANT'S REPLY BRIEF

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I. The Maze of Hazardous Waste Regulation

Federal hazardous waste regulation is a complex area of law, with staggered compliance schedules, due to the early failure of the federal government to control contamination from numerous sources, specifically including the Sandia National Laboratories mixed waste landfill. Thus when SNL first began dumping hazardous and radioactive waste in the mixed waste landfill ("MWL"), there was little if any federal regulation of the site. Live and learn – Congress eventually enacted the Resource Conservation and Recovery Act to address the growing danger.

> Congress enacted the RCRA to address increasingly serious environmental and health dangers arising from waste generation, management, and disposal. Congress was particularly concerned with the management and disposal of "hazardous wastes," for which is provided comprehensive "cradle-to-grave" regulation in RCRA Subtitle C.

Fla. Power & Light Co. v. EPA, 145 F.3d 1414, 1416 (D.C. Cir. 1998)(citations omitted).

"The RCRA requires facilities that treat, store or dispose of hazardous waste to obtain a permit from either the United States Environmental Protection Agency or an authorized state." *Id.* "Following authorization, EPA retains its full enforcement authority, although authorized states have primary enforcement responsibility." *Id.* at 1417.

When RCRA was passed, however, numerous sites would have been immediately non-compliant, had Congress not set up a "grace period" for affected sites, known as "interim status."

> Recognizing that EPA could not issue permits to all affected facilities before the RCRA's effective date, Congress provided that existing facilities meeting certain requirements could operate on an "interim status" basis until final agency action could be taken on a facility's permit application.

Id. at 1416. "Interim status," however, was not automatic. Rather, a facility was required to file a "RCRA Part A Permit Application," a limited application requesting interim status, pending a

decision on the facility's "RCRA Part B Permit Application."[1] Because "interim status" is a creature of statute, EPA's issuance of a Part A permit is not absolute proof of interim status. *State of New Mexico v. Watkins,* 969 F.2d 1122, 1130 (D.C. Cir. 1992).

The parties agree that New Mexico obtained general RCRA enforcement authority prior to SNL's submission of its Part B Permit Application for the SNL facility. Thus SNL submitted a Part A and a Part B permit application to NMED, not the EPA. NMED granted SNL this authority, and it is this RCRA Part B Permit that SNL sought to modify below, to now include the mixed waste landfill under the same umbrella as the Part B Permit for the SNL facility.

Here's the wrinkle. The mixed waste landfill, by Appellees' admission, was not originally included in the Part B permit for the SNL facility. Instead, SNL sought and obtained a "corrective action module," so-called "Module IV" from the EPA, on the theory that the MWL was not subject to Part B permitting requirements, and NMED had no other regulatory authority. Following this theory along, regulation of the MWL therefore defaulted to the Hazardous and Solid Waste Amendments ("HSWA"), which only the EPA was authorized to apply. *Fla Power & Light Co,* 145 F.3d at 1417 (separate EPA authority to take corrective action).

The question on appeal is therefore whether the MWL took the wrong regulatory path, *viz.*, whether the MWL was instead subject to RCRA Part B permitting requirements. If so, the MWL has been and still is operating illegally, and the original RCRA Part B Permit for the SNL

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[1] The RCRA permit application consists of two parts. Part A gives only general information. 40 C.F.R. § 270.13. A Part A permit application is necessary for a waste site to receive "interim status," pending more formal regulation. Part B of the application is more detailed and includes specific information relating to disposal facilities, environmental impact, and other details necessary for the review of the permit application. *Id.* § 270.14 . EPA or a state issuing authority will not review the permit application or issue a permit until it has received all of the information required on Part B of the permit application. *Id.* § 124.3. "Part B regulations" refer to 40 C.F.R. § 270.1(c), which govern closure and post-closure for hazardous waste sites submitting a RCRA Part B permit application.

facility cannot now simply be "modified" to include the illegal MWL unit under its umbrella, without first requiring the MWL itself to comply with all RCRA Part B permitting requirements.

"Corrective action," the action taken by the EPA in Module IV, is not a substitute for the stricter RCRA Part B permitting requirements, either in practice or by law. Instead, "corrective action" is, in essence, a "stop gap" measure, designed to require removal or remediation of either (1) old hazardous waste "sites" within otherwise permitted "facilities," or (2) hazardous waste sites or facilities currently in the limbo of "interim status," awaiting a Part B permit.

> As originally enacted, RCRA did not require permittees to take significant remedial action to correct past mismanagement of hazardous waste. In part to address the concern that releases from RCRA facilities posed a threat to human health and the environment, Congress amended the RCRA with the Hazardous and Solid Waste Amendments of 1984. In the HSW Amendments, Congress significantly expanded EPA's authority to require facilities to undertake "corrective action" to address hazardous releases at RCRA treatment, storage, and disposal facilities. With respect to permitted facilities, section 3004(u) provides that any permit issued to a facility after November 8, 1984 "shall require . . . corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit." 42 U.S.C. § 6924(u). In section 3008(h), Congress provided EPA with corresponding authority to require corrective action at interim status facilities. *See* 42 U.S.C. § 6928(h).

Fla. Power & Light, 145 F.3d at 1416 (some citations and internal punctuation omitted).

Here's the question. SNL and NMED take the position that at the time SNL submitted its RCRA Part A and Part B Permit Application for the SNL *facility*, the mixed waste landfill *unit* was not independently subject to RCRA Part B regulation. Accordingly, the argument goes, the HSW Amendments were triggered, to instead require "corrective action" at the MWL site. If, indeed, the MWL *was not otherwise subject to RCRA Part B regulation*, then SNL and NMED are correct that it was subject instead to the HSW Amendments – in other words, the MWL could not go entirely unregulated. On the other hand, if the MWL *was* subject to RCRA Part B

regulation, then "corrective action:" was not a substitute for a Part B Permit, and the facility's Part B Permit cannot now be "modified" to include the MWL, without submitting the MWL to the more rigorous Part B permitting requirements.

> EPA [or the State issuing authority] may issue or deny a permit for one or more units at a facility without simultaneously issuing or deny a permit to all of the untis at the facility. The interim status of any unit *for which a permit has not been issued* or denied *is not affected by the issuance or denial to any other unit at the facility.*

40 C.F.R. § 270.1(c)(3)(iii)(4)(emphasis added). Thus the Part B Permit for the SNL facility did not grant any special status to the MWL site, one way or another.

Thus either SNL required a Part B Permit for the MWL, and is therefore now operating the MWL illegally, or it never required a Part B Permit, in which case the "corrective action" module was appropriate. MWL. SNL and NMED, however, cannot have it both ways; they cannot contend that having taken the road of "corrective action," they can now substitute Module IV for a Part B Permit for the MWL.

> Having a permit for some different substance would frequently offer no more protection to the public than having no permit at all. Just as a deer hunting license does not imply a license to hunt duck, a facility "which does not have a permit" clearly implies . . . a facility which does not have a *relevant* permit. Any other construction would ignore the central object of the permit program, which is to limit the disposal of any given waste to an appropriate facility.

United States v. MacDonald & Watson Waste Oil Company, 933 F.2d 35, 46 (1st Cir. 1991). Thus here, if a RCRA Part B Permit was required for the MWL unit, neither Module IV for the MWL unit, nor the RCRA Part B Permit for the entire SNL facility, suffices as a permit for the MWL waste unit. Quite simply, SNL can't go deer hunting with a duck license, and then claim that's a duck on the hood of its car after it's caught with the wrong license.

In its Brief-in-Chief, Citizen Action contended that NMED lacked jurisdiction to *modify* a

RCRA Part B Permit to allow for the storage or treatment of mixed hazardous waste in the MWL,, because Sandia National Laboratories ("SNL") never applied for or obtained a RCRA Part B Permit for the MWL in the first instance. In their Answer Briefs, NMED and SNL concede that Sandia never obtained a RCRA Part B Permit for the MWL, but apparently argue:

(1) The MWL was not subject to RCRA Part B permitting requirements.

(2) The RCRA Part B permit for the SNL facility can now be modified to include Module IV or vice versa.

(3) Citizen Action cannot collaterally attack the absence of a RCRA Part B Permit for the Sandia MWL, because Citizen Action failed to appeal the grant of RCRA corrective action, "Module IV," when it first issued in 1993.

II. The MWL Was and Is Subject to RCRA Part A and Part B Permitting Requirements

A. SNL Was Required to Apply for a RCRA Part a and Part B Permit, at the Latest, within Twelve Months of July 25, 1990, and Failed to Do So

Citizen Action agrees that the EPA did not clarify that mixed waste[2] was subject to RCRA until 1986. *See* NMED Answer Brief at pp. 5, 22-23. By NMED's own admission, however, the MWL did not close until December, 1988. *See* NMED Answer Brief, pp. 5-7. Citizen Action will argue, *infra,* that the MWL has never "closed" pursuant to applicable RCRA regulations. Regardless of who is correct, the MWL was subject to RCRA Part B permitting requirements by 1986 at the latest, prior to *any* of the purported closure dates for the MWL.

Instead, Appellees contend that the MWL was exempt from RCRA Part B regulations because NMED was not authorized to regulate *mixed waste* until July 25, 1990. NMED Answer Brief at pp. 4-5; Sandia Answer, pp. 12-13. As a result, SNL contends that the MWL received, in effect, an indefinite grace period. Citizen Action takes issue with the "indefinite" in "indefinite grace period." Thus SNL is correct insofar as its argument goes, but it incorrectly

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[2] "Mixed waste" is a mixture of hazardous and radioactive waste.

concludes that the temporary grace period resulting from NMED's lack of authority continued on indefinitely, even once NMED *had* the authority to regulate mixed waste.

In support, Sandia cites 53 Fed.Reg. 37045. There, EPA indeed declared that "[f]acilities treating, storing or disposing of radioactive mixed waste in States that received authorization [to regulate hazardous waste] by September 23, 1988 are not subject to RCRA regulations until the State revises its existing authorized hazardous waste program to include authority to regulate radioactive mixed waste. Owners and operators *must then comply with applicable State requirements regarding interim status*." 53 Fed.Reg. at 37045 (emphasis added).

At the time this clarification was issued in September, 1988, New Mexico had base program authorization[3] but no authorization to regulate mixed waste. Thus RCRA Part B regulation of mixed was essentially held in abeyance in New Mexico until such authority was in place. SNL arguably did receive a windfall grace period from this clarification in the Federal Register, but only until the State received the authority to regulate mixed waste on July 25, 1990.

However, instead of tracing its obligations along the same timeline as set forth by the EPA in 53 Fed.Reg. 37045, SNL attempts to bootstrap this grace period into permanent immunity from RCRA Part B permitting requirements. This is not permissible. Instead, SNL should have continued reading. While the EPA indeed granted the MWL a grace period in its Federal Register Notice, it made clear in the same notice that once the existing State program was expanded to include regulation of mixed wastes, "[o]wners and operators must then comply with applicable State requirements regarding interim status." 53 Fed.Reg. at 37045. Accordingly, SNL was required to begin the RCRA Part A process for the MWL at the time New

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[3] EPA declared that in states without even base program authorization mixed waste would be regulated pursuant to RCRA by the EPA. 53 Fed.Reg. at 37045.

Mexico first received authority to regulate mixed waste, that is, on or about **July 25, 1990.** By its own admission, SNL never submitted a RCRA Part A application. The MWL was therefore immediately required to close. *See, e.g., United States v. Ekco Housewares, Inc.*, 62 F.3d 806, (6th Cir. 1995). Instead, the MWL has been operating illegally since at least 1990.

Moreover, SNL was required subsequently to submit a Part B Application, within twelve months of July 25, 1990, which would mean SNL was required to submit a Part B Application, at the latest, by **July 25, 1991.** SNL's failure to obtain interim status pursuant to a RCRA Part A application in no way operates as an excuse for its subsequent failure to otherwise comply with 40 C.F.R. § 270.1(c). Instead, although "the consequence of loss of interim status was closure of the facility," *Ekco Housewares, Inc.*, 62 F.3d at 813, the MWL's lack of interim status did not result in "an absolution from otherwise applicable regulatory obligations." *Id.*

Thus SNL – if it was not forced to close immediately due to its loss (or failure ever to obtain) interim status – was required to submit a RCRA Part B permit application. The EPA was very specific in this regard:

> Mixed waste [sites] in States with base program authorization must comply with applicable State requirements and deadlines for obtaining interim status as prescribed in authorized State law. Radioactive mixed waste land disposal facilities obtaining interim status in authorized States are nevertheless subject to the section 3005(e)(3) one-year provision on loss of interim status for newly listed wastes. Thus, the owners or operators of such facilities *must submit the State analogue of the Part B permit application and the required certifications within twelve months of the effective date of the State's authorization to regulate radioactive mixed waste. Failure to submit the Part B permit application or the required certifications will result in loss of interim status for the affected units and possibly for the facility.*

53 Fed.Reg. at 37047 (emphasis added).

The RCRA Part B Permit for the SNL facility was submitted on April 17, 1991. AR 001394. There followed "numerous exchanges of technical comments." AR 004364. SNL did

not remove the MWL from its Part B Permit Application until very late in the process; indeed, the notice of public hearing issued on July 9, 1991 provided notice only that the issuing authorities were "considering granting a permit," not that EPA was considering corrective action. Appellant's Motion to Strike, Etc., filed January 23, 1007, at Exhibit B. The Part B Permit was not granted until on or about August 6, 1992. AR 001394 and 004364. By this date, SNL's Part A Application for interim status for the MWL was untimely, its Part B Application was overdue, and NMED clearly had authority to regulate mixed waste.

The MWL was still in operation, by SNL's own admission, until at least December, 1988. Thus in September, 1988, when EPA declared in the Federal Register that mixed waste landfills would have to comply with Part A and Part B permitting requirements once their State was authorized to regulate mixed waste, the MWL was still operating. SNL was thus subject to the Federal Register Notice. Indeed, it cites the Notice to assert its "grace period;" it just ignores its larger ultimate effect.

SNL instead seeks to avoid RCRA Part B requirements solely because it contends it no longer disposed of mixed waste after December, 1988. It therefore contends that as of the date of its Part B Permit Application, it was no longer operating a mixed waste landfill.

There are at least two problems with this approach to the issue. First, once subject to the rule that it must apply for a Part A permit upon the occurrence of State authority to regulate mixed waste, and for a Part B permit within twelve months thereof, SNL could not simply cease disposal operations and therefore avoid liability. Clearly this is not the intent of the Federal Register notice. Rather, the intent is clear that all mixed waste sites in existence at the time mixed waste was declared subject to RCRA Part A and Part B permitting requirements in 1986 would ultimately be required to submit a Part B Permit Application, but were permitted to wait

until state regulatory authority was in place, plus an additional grace period of twelve months. Merely ceasing disposal operations with the hazardous waste still stored on site cannot shield a site from its pre-existing responsibility. Second, as Citizen Action will now address, the MWL did not, in fact, "close" merely by ceasing disposal of mixed hazardous waste at MWL. Indeed, the MWL continues as a storage and treatment site to this date.

B. The MWL Did Not Cease Storage of Hazardous Mixed Wastes Until 1996 at the Earliest

As a factual matter, the MWL continued to store mixed waste until 1996, well past the trigger date of NMED's authority to regulated mixed waste. Report of the Mixed Waste Landfill, dated September, 1996, AR 008178, 8196; *see also* Motion to Strike, Etc., filed January 23, 2007, at Exhibit C (setting burial date of hazardous waste as 1989 or later, and noting as of 1991 that "disposal records generally would not have identified hazardous wastes separate from radioactive constituents"). Regardless, however, as a matter of law, the MWL continues to "store" and "treat" mixed waste as of today's date, because the MWL was never "closed" pursuant to state or federal law.

"Closure" of a unit is a term of art in environmental law. *See generally* 40 C.F.R. § 260.10 (definitions of "active life,"and "closed portion,"). In contrast, "'[i]n operation' refers to a facility which is treating, storing, or disposing of hazardous waste." *Id.* Here, SNL is currently storing mixed waste in the MWL, and intends to treat the waste *in situ*. Specifically, "[s]torage means the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere." *Id.* "Treatment means any method, technique, or process . . . designed to change the . . . character or composition of any hazardous waste so as to neutralize such waste, . . . or so as to render such waste non-hazardous, or less hazardous; safer to transport, store, or dispose of; or amenable for recovery, amenable for

storage, or reduced in volume." *Id.* At the time MWL ceased *disposal* operations, whenever that date may be fixed, *storage* and future plans for *treatment* remained – indeed, storage and future plans for treatment continue to this day.

> This was sufficient to trigger the need to apply for a RCRA Part B Permit for the MWL.
>
> "Storage" of wastes is defined as "the holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed of, or stored elsewhere." [Defendant's] contention that no wastes were brought in after March, 1980, *is thus immaterial where he continued to store substances deposited at the farm prior to that date.*

Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331, 335 (4th Cir. 1983)(emphasis added); *see also Fishermen's Ass'n v. Remington Arms Co.*, 989 F.2d 1305, 1315 (2nd Cir. 1993)(although gun club ceased skeet shooting and therefore ceased disposal of hazardous waste, it continued operating storage facility where contamination left on site). Thus once RCRA's protections are triggered, ceasing disposal operations does not mean that an operator is not still actively engaged in contaminating the site.

Thus the MWL continues to be in operation, and was *a priori* active in July, 1990, when SNL was required to submit a RCRA Part A application for interim status, as well as in July, 1991, when SNL was required to submit a RCRA Part B application that included a closure plan in compliance with 40 C.F.R. § 270.1(c).

III. The RCRA Part B Permit for the SNL Facility Cannot Be Modified to Include Module IV

The threshold issue with regard to "Module IV" is that it was never made part of the administrative record in this matter. Citizen Action addressed this deficiency at length in its Motion to Strike, docketed by this Court on January 23, 2007. Regardless, even if Module IV is considered by this Court, its existence does not change the result that NMED cannot now, in 2007, "modify" the 1992 Part B permit for the SNL facility to confer Part B compliance on the

MWL, where it never before existed. Again, the granting of SNL's Part B Application for the SNL facility did not confer any special status on the MWL; the question whether Module IV was the proper regulatory framework for the MWL site is entirely separate from the existence of the Part B Permit for the facility. 40 C.F.R. § 270.1(c)(3)(iii)(4).

No one disagrees that the MWL was explicitly omitted from SNL's original RCRA Part A *and* Part B applications. Indeed, NMED concedes at one point in its Answer Brief that "[t]he MWL . . . *is not a unit that is permitted to operate under the Permit.*" NMED Answer Brief at p. 22 (emphasis added). Curiously, however, NMED next insists that now, "SNL applied for and NMED granted a permit modification to the HSWA Module ["Module IV"] so that the terms and conditions for implementing corrective action at the MWL would be part of the Permit." NMED Answer Brief at p. 22.

There are at least four problems with this analysis. First, of course, "Module IV" is not a "permit" at all -- it is an order for corrective action, issued by EPA. Thus SNL cannot make Module IV part of its RCRA Part B permit via a request to "modify a permit," which was the subject of the administrative proceeding below. Moreover, NMED cites no authority for its implication that it has the authority to modify Module IV, rather than EPA as the issuing authority. *Cf. Fla Power & Light Co. v. EPA*, 145 F.3d at 1417 (state must have explicit authority to take corrective action).

Second, the "permit" referenced in the request to modify a "permit" can only be the RCRA Part B Permit issued by NMED for the SNL facility. Thus NMED's position must be that it has now *modified* SNL's RCRA Part B permit to turn "Module IV" into part of SNL's RCRA Part B permit, without requiring SNL to go through the regulatory process necessary to obtain a RCRA Part B permit. Nonetheless, NMED still maintains the diametrically opposed position

that NMED could not have regulated the MWL back in 1992 when SNL originally received its RCRA Part B Permit from NMED, because by then SNL had "ceased" operations. This is the ultimate legal fiction, that the MWL is regulated now pursuant to a "modification" of the original RCRA Part B Permit, but could not be regulated under the RCRA Part B Permit back in 1992 because the MWL could not have been an "operating unit" at that point in time.

Third, regardless whether it claims to be modifying Module IV to be part of the Part B Permit, or modifying the Part B Permit to include Module IV, NMED cannot so easily turn two different documents, SNL's 1992 RCRA Part B Permit for its facility, and "Module IV," a "non-permit" issued by EPA for the MWL in 1993, into a single RCRA Part B Permit. For one thing, SNL cannot leap frog the RCRA Part B permitting requirements contained in 40 C.F.R. § 270.1(c) ("Subtitle C"). Thus pursuant to Subtitle C, SNL was required to submit a Part B permit for RCRA waste pursuant to 40 C.F.R. Part 264 and a RCRA closure plan pursuant to 40 C.F.R. Part 264 or 265. Calling "Module IV" part of a RCRA Part B Permit does not make it so.

Further, Module IV was issued by the EPA later in time than the RCRA Part B Permit and expired on September 20, 2002. See Module IV, Supplemental Record, Bates stamp, 021174-75 and Consent Order, AR 001394, ¶ 27. *See* 42 U.S.C. §6225(c)(3), ("Any permit under this section shall be for a fixed term, note to exceed 10 years in the case of any land disposal facility [or] storage facility). It defies logic to "revive" Module IV after the fact by the device of "modifying" the RCRA Part B Permit issued by NMED, or simply declaring Module IV to be some sort of attachment to the RCRA Part B Permit. *Cf. United States v. MacDonald & Watson Waste Oil Co.,* 933 F.2d 35 (1st Cir. 1991)(possession of facility permit did not excuse failure to have permit for particular unit).

Fourth, all of this was subject to the requirement of a public hearing, which has never

occurred; NMED itself states that only "corrective action" was a proper subject for review at the administrative proceeding, and that post-closure activities will be addressed at the design and implementation stage. NMED Answer Brief at pp. 19-20. Citizen Action received no notice whatsoever that a public hearing on "corrective action" would have the effect of making "Module IV," which was never issued as a RCRA Part B Permit and never subjected to the same rigorous standards as Section 270.1(c), into part of the original Part B Permit. Moreover, NMED has made clear Citizen Action is not permitted to participate as a party in the "design and implementation stage" of any closure plan, and thus the public process accorded for turning Module IV into part of the RCRA Part B Permit is nowhere near what is required. *See generally* 40 C.F.R. § 270.1.

IV. Citizen Action Can Attack the Absence of a RCRA Part B Permit for the MWL as Part of the Current Appeal

NMED contends that Citizen Action cannot collaterally attack the absence of a RCRA Part B Permit for the Sandia MWL, because Citizen Action failed to appeal the grant of RCRA corrective action, "Module IV," when it first issued in 1993. NMED Answer Brief at p. 18. There are at least three problems with this argument.

First, when Module IV first issued in 1993, it was not deemed by NMED to be or be included as part of, a RCRA Part B Permit, as it now apparently is. Instead, the morphing of two documents into one occurred for the first time in the administrative proceedings below, and thus Citizen Action can challenge that action on the basis that there is no legal way to mix Module IV's apples with the Part B Permit's oranges. Specifically, NMED contends that the current action modified two independent documents, the original Part B Permit and Module IV, to turn two into one, such that Module IV is now a regulated unit under the original RCRA Part

B Permit. Thus the Part B Permit now somehow incorporates the Module IV corrective action. Specifically, NMED states that "SNL applied for and NMED granted a permit modification to the HSWA Module ["Module IV"] so that the terms and conditions for implementing corrective action at the MWL would be part of the Permit." NMED Answer Brief at p. 22. This action purportedly occurred as a result of the final order arising from the current administrative proceedings. And if it occurred at some earlier date, there was no public hearing even held on the issue.

If NMED had the authority to thus transform Module IV corrective action into part of a RCRA Part B Permit, then so be it, but certainly Citizen Action has the right to appeal such a determination. There is no "collateral attack," because the administrative order below is the first and only occasion when NMED has purportedly declared that Module IV is, or is part of, a RCRA Part B Permit, *nunc pro tunc.*

Second, there is no indication in the Record Proper, either in the actual record or in the belatedly submitted Module IV, that any interested party other than NMED and SNL received notice of its issuance. "Under the standards of the APA, 'notice necessarily must come-if at all-from the Agency." *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991), *citing Small Refiner v. Lead Phase-Down Task Force v. EPA,* 705 F.2d 506, 549 (D.C.Cir. 1983) *and American Fed'n of Labor v. Donovan*, 757 F.2d 330, 340 (D.C.Cir. 1985)(holding that the court cannot "properly attribute notice to [interested parties] on the basis of an assumption that they would have monitored the submission of comments."). Indeed, Module IV and the accompanying documentation belatedly submitted on appeal support just the opposite conclusion, in that the settlement agreement that resulted in the granting of Module IV explicitly states that "[t]he EPA will issue a HSWA permit to the DOE and SNL *without further public*

comment . . . ." Supplemental Record, Bates stamp 021176 (emphasis added).

Third, SNL's failure to obtain interim status, and its failure to include the MWL in a RCRA Part B Permit application is a jurisdictional issue, which Citizen Action can raise at any time. *Gonzales v. Surgidev Corp.* , 120 N.M. 133, 899 P.2d 576 (1995). Thus if the MWL is operating illegally, as Citizen Action has argued, NMED had no jurisdiction to modify Module IV or the Part B Permit. If there was never a "license," there can be no license renewal. Indeed, if the MWL was out of compliance at the time EPA issued Module IV, EPA's action could not grant legal status to the MWL in the first place. *Cf. Watkins,* 969 F.2d at 1130 (permit granted by EPA did not conclusively determine issue of status, because status is a creature of statute). Indeed, the very notion that the question whether a hazardous waste dump is operating illegally ca be waived flies in the face of RCRA's statutory "cradle-to-grave" regulatory framework.

V. Conclusion

Citizen Action respectfully requests, with regard to the question whether the MWL is subject to Part B permitting requirements, 40 C.F.R. §270.1(c), that this Court hold that the MWL is so subject, and vacate the order modifying the permit and remand with instructions that the MWL must immediately close in accordance with Section 270.1(c).

With regard to its other arguments on appeal, Citizen action relies on its Brief-in-Chief, and requests that this Court remand this matter to the Hearing Officer for further consideration.

Respectfully submitted,

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