IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

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 BRIEF-IN-CHIEF

Submitted by:

LAW OFFICES OF NANCY L. SIMMONS, P.C.
Nancy L. Simmons
2001 Carlisle Blvd. NE, Suite E
Albuquerque, New Mexico 87110
Attorney for Appellant
(505) 232-2575

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

FEDERAL AUTHORITY

US Codes

Federal Case Law

Code of Federal Regulation

NEW MEXICO AUTHORITY

N.M. Statutes

New Mexico Supreme Court

New Mexico Court of Appeals

N.M. Codes

III. Summary of Proceedings

A. Nature of the Case

This is an appeal of a decision by the Secretary of the Environment granting Sandia Corporation's request for a Class 3 Permit Modification for Corrective Measures for the Mixed Waste Landfill at Sandia National Laboratories. Appellant seeks review of two orders in this consolidated appeal, for May 26, 2005 and August 25, 2005.

B. Statement of Facts and Course of Proceedings

Pursuant to the New Mexico Hazardous Waste Act, NMSA 1978, § 74-4-1, *et seq.*, and the Resource Conservation and Recovery Act, 42 U.S.C. §6901, *et seq.*, ("RCRA"), Sandia National Laboratories ("Sandia") received a permit modification from the New Mexico Secretary of the Environment ("Secretary" or "NMED"), for a mixed waste landfill ("Sandia landfill" or "MWL"). Citizen Action participated as a party in the public hearing on Sandia's request.

Citizen Action raises three issues on appeal: (1) the Secretary erred as a matter of law, by misconstruing and misinterpreting the proper regulatory framework for decision pursuant to RCRA, (2) the Secretary erred as a matter of New Mexico statutory law in rejecting the Hearing Officer's recommendation of a more practical and protective approach to the request for permit modification, (3) the Secretary erred as a matter of law or acted arbitrarily and capriciously, by issuing a decision based on a incomplete and inaccurate inventory of the hazardous contents of the mixed waste landfill and their release and potential release into the environment, especially in the context of the proper regulatory framework.

First, the Secretary erred as a fundamental matter of his own jurisdiction, in concluding that the Sandia landfill was *not* subject to the permitting and closure requirements of the RCRA. Sandia never in fact received a permit to operate the Sandia landfill, and therefore NMED's

conclusion that Sandia could receive a permit "modification" was legal error.

Second, the Secretary erred as a matter of New Mexico statutory law. By rejecting even the possibility to craft a more practical and protective response to Sandia's request, to better protect the Albuquerque community, the Secretary misconstrued the extent and mandate of his authority pursuant to New Mexico statutory law.

Third and finally, even setting aside the Secretary's errors as to his jurisdiction and authority, he also erred as a matter of law, or acted arbitrarily and capriciously, in failing to consider the known and unknown content of the landfill in deciding whether to grant Sandia's permit modification.

1. Summary of Background Facts

Sandia has operated the TA-3 Mixed Waste Landfill in Albuquerque, New Mexico, since March, 1959. Hearing Officer's Proposed Findings of Fact, Conclusions of Law, ¶ 29, p. 6 ("HO PFFCL"), Administrative Record ("AR") at 000818. The Sandia landfill sits on the eastern margin of the Albuquerque Basin, within the boundaries of Kirtland Air Force Base. *Id.* at ¶ 37, AR at 000819-000820. Albuquerque uses groundwater from the Albuquerque Basin as its principal source of water. *Id.* at ¶ 38, AR at 000820. Groundwater below the landfill is about 470 feet away. *Id.* at ¶ 42, AR at 000820. In addition, there are four major faults on the east side of Kirtland. *Id.* at ¶ 37, AR at 000820.

"From March 1959 to December 1988 the [Sandia] landfill accepted radioactive waste and mixed waste from SNL research facilities and off-site generators including 100,000 cubic feet of radioactive waste . . . ." *Id.* at ¶ 30, AR at 000818; *see also* AR at 002689, 002779, 003915, 009552 - 0009554. The Sandia landfill continued in use by SNL until at least 1993 for the storage of containerized low-level radioactive wastes. AR at 004495, 004828. Chemical

wastes were also deposited in the landfill. HO PFFCL, ¶ 33, AR at 000818-819. Water was also deposited, including wastewater and water used to extinguish a fire. *Id.* at ¶ 34, AR at 000819.

The wastes were categorized by "classified" and "unclassified." *Id.* at ¶¶ 31-32, AR at 000818. The constituents of the classified waste were reviewed by NMED personnel with necessary security clearances.

Some of the waste has migrated since its deposit, and will likely migrate in the future. Alarmingly, "[w]aste was commonly contained in tied, double polyethylene bags, sealed metal military containers of various sizes, fiberboard drums, wooden crates, cardboard boxes, 55-gallon drums, and 55-gallon polyethylene drums for disposal. Larger items, such as glove boxes, spent fuel-shipping casks, and contaminated soils, were disposed of in bulk without containment." *Id.* at ¶ 36. Testimony by Dr. Eric Nutall was that "all of those container materials will eventually decay -- plastics are maybe 20, 30 years, something like that. The 55-gallon drum, depending on the moisture, could be 20 or 30 years. They are going to decay, and they are going to expose the radioactive material to the soil, which then can be picked up by possibly existing water or water that could come in by intrusion at that point." Tr. 161,165, l.19-22.[1] Dr. Eric Nuttall was correctly considered by the Hearing Officer to be an "independent witness." AR at 000780.

Concerns also exist that hydrological characterization of the MWL site was inadequate,

---

[1] There is substantial additional evidence in the appellate record that there is a potential danger of non-containment and migration of hazardous waste from the landfill. *See, e.g.,* AR at 003907 (acid pit potentially contaminated with heavy metals); AR at 003466 (Comprehensive Environmental Assessment and Response Program "had a positive finding for RCRA regulated wastes at the MWL with a high potential for migration of wastes from the site"); AR at 011863 (numerous gamma-emitting radionuclides were detected in MWL groundwater monitoring including lead, thallium, radium, thorium, zirconium, and bismuth); AR at 013445 (monitoring wells in 1998 showed Strontium-90 activities above historically established levels and above DOE guidelines); AR at 005441-005442 (volatile constituents, such as tritium and VOCs [Volatile Organic Compounds], may migrate from the waste facility in the vapor or liquid phase).

which would have a direct effect on any future ability to predict or monitor groundwater contamination. *See, e.g.,* AR at 004829-004833; *see especially* AR at 005323; 004831-32. "Some alluvial deposits are highly permeable, and contaminants from the MWL may migrate to groundwater in spite of the considerable depth to groundwater and the high potential evapotranspiration rates." AR at 05440. Moreover, monitoring wells may not be sufficient to actually monitor potential groundwater contamination. "The installation of MWL-MW4 will not adequately address the issue of potential vertical gradients at the MWL site." AR at 004832.

The Hearing Officer made no explicit finding regarding the danger of groundwater or other contamination from the Sandia landfill. HO PFFCL, ¶¶ 72 - 82, AR at 000825 - 27. However, the Hearing Officer did appear to accept Sandia's testing that "VOC vapor levels at the landfill pose insignificant risk to human health and the environment under an industrial land use scenario," and that "the landfill presents little risk of groundwater contamination, and that there was no evidence of groundwater contamination from the landfill." HO PFFCL, ¶¶ 72 - 73, AR at 000825, *citing* Tr. 985 - 86. *But see* HO PFFCL ¶¶ 78, 81, and 82.

At the same time, the Hearing Officer clearly signaled throughout her Report and Proposed Findings that she had an incomplete and likely inaccurate record before her, and that therefore any final remedy should await further study:

> To a certain extent, the creation, operation and closure of any landfill involves a good deal of faith. Particularly when dealing with a landfill that *predates environmental regulation, one rarely can determine exactly what went into the landfill, how its contents are reacting, or how it will behave in the future. This necessarily results in uncertainty about how best to regulate it.* When considering a mixed waste landfill, such as the one involved in this matter, the stakes are very high: there is no disagreement that hazardous and radioactive materials went into this landfill, which sits over a portion of Albuquerque's drinking water supply and is not far from residences. Thus, any decisions regarding the landfill must err on the side of protection of human health and the environment, to ensure the landfill does not now or in the future threaten the people of Albuquerque and their water supply.

HO Report, AR at 000770 (emphasis added).

Respectfully, the Hearing Officer also signaled in her opening paragraph a critical jurisdictional error, in suggesting that the Sandia landfill "predates environmental regulation." Instead, as Appellant will discuss and argue, *infra*, Sandia's deposit of hazardous waste into the Sandia landfill after July 28, 1982 triggered an explicit regulatory framework, requiring a RCRA permitting process and careful recordkeeping that Sandia failed to follow or maintain. Moreover, despite the Hearing Officer's expression of concern that her recommendation should "err on the side of protection of human health," she accepted Sandia's view that the applicable mandatory RCRA regulatory framework should instead serve only as "guidance," and therefore made the extraordinary *factual finding* that "[a]ny remedy that is protective of human health and the environment may be selected; Sandia is not required to select the most protective remedy." HO PFFCL, ¶ 101, AR at 000830, *citing* Tr. 1012. The authority for the this "finding" as to the proper legal standard was an expert in geology, who testified on behalf of NMED. *See* Tr. 1012.

In turning what should have been an independent *legal* analysis of the appropriate regulatory framework into presumed deference to the opinion of an expert in geologist, the Hearing Officer ceded to NMED as advocate what should have been her role as independent review as to the applicable law. As Appellant will also argue, *infra*, the Hearing Officer, in ceding this responsibility, also failed to take into account the overarching directive of NMSA 1978, § 74-4-2 that "[t]he purpose of the Hazardous Waste Act is to help ensure the maintenance of the quality of the state's environment; to confer *optimum* health, safety, comfort, and economic and social well-being on its inhabitants."

2. The Sandia Landfill Received RCRA Regulated Waste after July 28, 1982, without the Necessary RCRA Permit

While the completeness of the inventory may be in question, the administrative record *is* clear that the inventory in the Sandia landfill includes a toxic witch's brew of RCRA regulated waste and radioactive material. HO PFFCL, ¶ 30, AR at 000818.[2] "[T]here is no disagreement that hazardous and radioactive materials went into this landfill, which sits over a portion of Albuquerque's drinking water supply and is not far from residences." Hearing Officer's Report ("HO Report"), p. 1, AR at 000770. Significantly, the Sandia landfill accepted RCRA regulated waste through December, 1988. HO PFFCL, ¶. 30, AR at 000818. This date is legally significant, because, as Appellant will argue, *infra*, any landfill that accepted RCRA regulated waste after **July 26, 1982** was required to have a post-closure permit, which Sandia has never obtained. *See generally* 40 C.F.R. § 270.1(c).

The Hearing Officer accepted NMED's analysis that Sandia received a RCRA permit to operate the MWL in 1992, and that therefore RCRA regulations applicable to permit

---

[2] *See, e.g.,* AR at 002689 (depleted uranium, approximately 50,000 cubic feet of uranium, approximately 270,000 gallons of reactor coolant water, liquid wastes, radioactive metals, low-level fission products, high efficiency particulate air (HEPA) filters, liquid scintillation cocktail (LSC) vials, plutonium, tritium, contaminated oils and other liquids, and explosives), 002689 and 004498 (Cobalt 60, 20,000 lbs. of Cesium contaminated soil, 360,000 pounds of contaminated equipment, and Polaris missile sections contaminated with Thorium), 002901-002929 (cyanide, arsenic, beryllium, cadmium, chromium, lead, trichloroethane, toluene, and xylene), 006341 (cadmium-115, chromium-51, and silver-110, unknown quantities of wastes containing lead deposited in trenches A, B, and C). *See* 40 C.F.R Part 261, Appendix VIII.

In 1987, the Environmental Protection Agency (EPA) listed the Sandia landfill as containing wastes regulated by the RCRA. AR 003476, 005344; *see* 42 U.S.C. § 6901. "The CEARP (Comprehensive Environmental Assessment and Response Program) … *had a positive finding for RCRA regulated wastes at the MWL with a high potential for migration of wastes from the site."* Letter from DOE to NMEID, 12,/13/91, AR at 003466. (emphasis added); *see specifically* AR at 006341, 006344, 006345, et seq.; *see also* AR at 003744, 003915, 006241, 006405.

modification applied to Sandia's current request. Specifically, NMED geologist William Moats provided a three-tiered analysis of the proper regulatory framework: (1) Sandia received an original permit to operate the MWL in 1992, (2) a 2004 consent order required corrective action under the permit, and (3) 40 C.F.R. § 264.101, applies to corrective action modification of an existing landfill permit. NMED thus adopted the following analysis by Mr. Moats, a non-lawyer:

> *NMED issued a permit to Sandia to store hazardous waste under the Hazardous Waste Act and Hazardous Waste Management Regulations in 1992. The permit requires Sandia to take corrective action* in accordance with applicable corrective action requirements of the permit.
>
> The mixed waste landfill is regulated as a solid waste management unit, or SWMU, under 40 CFR 264.101, as incorporated by 20.1.1 500 NMAC, for which corrective action was required under the permit and is now required under the Consent Order.
>
> The Consent Order is an enforceable order entered into by NMED, the US Department of Energy and Sandia Corporation as of April 29th, 2004, that governs Sandia's corrective action at the facility.
>
> *****
>
> The mixed waste landfill is not required as a permitted facility under 40 CFR Part 264 *because Sandia never applied for or was issued a Part B permit for the mixed waste landfill.* The mixed waste landfill is not regulated as an interim status facility under 40 CFR Part 265 *because Sandia did not include the mixed waste landfill in its Part A permit application for the facility.*
>
> *****
>
> . . . [I]t is important to understand that NMED, as a regulatory agency, must abide by its regulatory authority, *and may not impose requirements that it does not have authority to impose*. Such action would be arbitrary and subject to legal challenge.
>
> *****
>
> Dr. Resnikoff and members of the public have testified that the NMED should have required Sandia to submit a closure plan under Part 264 or Part 265 for the mixed waste landfill in lieu of requiring corrective action as a solid waste management unit. While the two regulatory approaches have some differences, the technical requirements are essentially the same for both.

Tr. 968-970 (emphasis added).

The so-called "permit" granted to Sandia in 1992 appears nowhere in the administrative record.. The consent order itself states, "*Unpermitted landfills* include, but are not limited to, those at . . . TA-III (MWL)." AR at 001391 (emphasis added). "TA-III (MWL)," explicitly listed as an unpermitted landfill in the consent order, is the same Sandia landfill that is the subject of this appeal. Thus by its very terms, the consent order does not provide that the Sandia landfill ever obtained a RCRA permit in 1992.

Moreover, the only "RCRA permit" presumably available in 1992 would be a Subtitle C permit, as directed by 40 C.F.R. § 270.1(c). This permit consists of a Part A application and interim status and a Part B permit. 40 CFR § 270.1(b). Sandia continued to deposit RCRA waste through all of 1988, but never sought such a permit, as Mr. Moats conceded. Indeed, "regulatory oversight has been virtually absent." AR at 003915.[3] The Hearing Officer explicitly concluded that Sandia never obtained Part A interim status or a Part B permit. HO PFFCL, ¶ 0, AR at 000847.

Mr. Moats' testimony suggested that the consent order permitted Sandia to apply for corrective action and modification of an existing permit. The consent order to which Mr. Moats referred is the Consent Order of April 29, 2004 ("consent order"), which appears in the administrative record at AR 001382, *et seq.* Appellant submits and will argue, *infra*, that the

---

[3] At one point, NMED apparently agreed with Citizen Action's current position that the Sandia landfill is subject to the RCRA permitting process. Specifically, NMED position was that the Mixed Waste Landfill is required to close under the Closure Plan requirements of ... 40 CFR 265, Subpart G, Closure and Post Closure, and Subpart N, Landfills." The NOD further states that "Under ... 40 CFR 270.1(c), owners and operators of landfills that received waste after July 26, 1982 are required to obtain a post-closure permit for the facility, unless closure by removal is demonstrated. For Facilities that did not receive an operating permit, and close under interim status standards, this post closure permit serves to impose several critical statutory and regulatory requirements, including the requirements for corrective action (61 FR 19438, May 1, 1996)." AR at 009166; *see* also AR at 009183-009184; AR 009552 - 010954.

consent order, among NMED, Sandia, and the United States Department of Energy, is insufficient authority to allow Sandia to request permit modification, without any showing that it does, in fact, have a permit in the first instance.

The Hearing Officer did not discuss, much less analyze, NMED's view of its own authority to grant a permit modification. Rather, the Hearing Officer concluded that the Sandia landfill predates environmental regulations. HO Report, PFFCL, p. 1, AR at 000770. She admitted that she "was confused" by the testimony of Mr. Moats. Tr. 1096. Nonetheless, rather than engaging in a *legal analysis* of the applicable regulatory framework, the Hearing Officer simply adopted NMED's view of whether the Sandia landfill already had a hazardous waste permit, allowing it to proceed to corrective action. HO PFFCL, ¶ 21, AR at 000816.

NMED's framework, in fact, *presumes* an existing RCRA permit, a permit which Sandia has yet to apply for and NMED has never granted. Thus there is no "permit" to which such "corrective action" could apply, nor is there a permit on the basis of which NMED can grant a "permit modification." In fact, the record on appeal reflects that the Sandia landfill was never subject to the RCRA permitting process. Specifically, the MWL was not added to, nor is the MWL listed as, a unit of *any* permit which is then subject to modification.

3. The Secretary Erred in Restricting the Conditions on the Permit Modification and in Failing to Address Public Comments as Part of the Permitting Process

a. Hearing Officer's Questions Regarding Fate and Transport Model and Creative Remedies

Four corrective measures were found potentially suitable by Sandia Laboratories for the landfill. They were evaluated in detail in the "Corrective Measure Study Final Report" ("CMSFR") submitted as part of Sandia's application. AR at 018145 et seq. The remedies included (1) no further action; (2) vegetative soil cover; (3) vegetative cover with bio-intrusion

barrier; and (4) future excavation. NMED Exhibit 1 (Public Notice No. 04-11), AR at 001084. The Secretary adopted NMED's recommendation of vegetative cover with bio-intrusion barrier. NMED's recommendation also relied on Sandia's CMSFR, with regard to long-term monitoring. Citizen Action's PFFCL, Finding No. 59, AR at 000756. In contrast, Citizen Action sought excavation, treatment, and redisposal of wastes in RCRA-compliant containment systems and redisposal of transuranic wastes in deep geologic systems, as disposal of transuranic wastes is prohibited by law from disposal in shallow pits, as is currently the case in the Sandia landfill. *Id.* at Finding No. 60, AR at 00756.[4] Dr. Nuttall, as an independent expert, also recommended cover with future excavation, substantially in accordance with Citizen Action's position. Tr. 198 (Nutall); *see also* Citizen Action's PFFCL, Finding No. 74-75, AR at 000759 - 760.

The Hearing Officer expressed the concern that she did not have the authority and jurisdiction to order future excavation. Thus at the end of the public hearing, the Hearing Officer asked the parties to address the scope of her jurisdiction and authority. Specifically, the Hearing Officer asked :

> to see addressed in the proposed hearing submittals might be, first, how much flexibility does the Secretary have in terms of selecting a remedy proposed by a party or discussed in the record; second, *would a current excavation remedy violate the terms of the public notice and disenfranchise the public from commenting on this?* . . . Third, *how creative could the Secretary be in combining pieces of remedies proposed, adding additional conditions, or requiring additional testing analysis or study before implementing a selected remedy?* Four, regulatory citations and standards for decision, . . . that touch on a decision-maker exceeding their authority or the scope of the record. And when I say "discussion of the standards for the decision," I'm looking for some guidance on

---

[4] Citizen Action presented evidence that the decrease in tritium activity over time would also reduce the radioactivity. Citizen Action's PFFCL, Finding Nos. 62-65, AR at 000756-757. In contrast, in estimating the cost and danger of excavation, Sandia did not consider covering the landfill and excavating at a future date, once tritium activity has decreased. Citizen Action's PFFCL, Finding No. 62, 64, AR at 000756-757. However, Sandia has previously publicized that it could excavate the site. *Id.* at Finding No. 80, AR at 000659.

> whether do you just submit the list, what are the requirements for decision, does the applicant have to prove the remedy protects public health and the environment, exactly what . . . would have to be defended on appeal in this decision?"

Tr. 1399 - 1400 (emphasis added).

To the degree that appellate counsel can determine, the Hearing Officer did not explicitly address, in her Report and Proposed Findings, the suggestion that she wished to pursue a more creative remedy. *See generally,* HO Report, PFFCL, AR at 000770, *et seq.* She did find, however, that "NMED cannot exceed its regulating authority, and cannot demand compliance with regulations it has no authority to enforce." HO PFFCL, Proposed Finding No. 148, AR at 000840. Nonetheless, the Hearing Officer found that "NMED . . . demonstrated that the requirements it demanded for the landfill remedy were technically equivalent to those [Citizen Action] urged it to enforce." *Id.*

The Hearing Officer's finding of technical equivalence is impossible to decipher in the current procedural and substantive context. Thus the backdrop of the Hearing Officer's finding includes her rejection of the need for Sandia to obtain a RCRA permit prior to proceeding to modification of such permit, and her finding that Sandia was not required to select the most protective remedy for the landfill. Thus, as Appellant will argue, *infra*, the finding of "technical equivalence" becomes so baseless that judicial review is not even possible.

The Hearing Officer ultimately recommended development of a comprehensive "fate and transport model." AR at 000807. In other words, the Hearing Officer recommended a practical approach of "let's see if this works on paper first." This approach appeared to attempt to follow the recommendation of the report of an independent peer review panel. The panel, however, recommended that the fate and transport model be developed prior to the selection of a final remedy. HO PFFCL, ¶ 128, AR at 000837; HO PFFCL, ¶ 129, AR at 000837 (independent panel

"found it regrettable that such a model had not yet been developed"); *see also* Tr. 156-58.

The Hearing Officer noted that Dr. Nuttall "agreed during cross-examination that a fate and transport model could be developed *after the remedy for the landfill is selected.*" HO PFFCL ¶ 133, AR at 000838 (emphasis added); *see* Tr. at 156-57. However, in cross-examination, NMED asked only whether, if a remedy *were* already selected, whether a fate and transport model would still be helpful. Dr. Nuttall never suggested that the optimum course would be to create a predictive model after the final remedy was decided; quite the contrary.

> It's never too late to do that but it — but obviously, in this case, *it could impact how you would engineer — how you would design that cover.*
>
> I think at any point the model would be helpful. *I'm also concerned that how do you really predict the internal behavior of the mixed waste landfill if you don't have such a model and be able to do what some people call worst-case scenarios, or scenarios that would involve breaching of all the canisters, and what happens if the system, for whatever reason that we can't perceive now, does become wet, how would the system behave, and if we do see that from monitoring wells, what does that mean?*
>
> . . . I mean, *do we wait until it's one foot above the water table? Do we wait until it's all the way to the water table before we take any corrective action?*
>
> A model would help us, at least, *in the decision-making process, and, technically, that's what we're talking about today*, that's input that management needs and would use, then, to take corrective actions or take actions.
>
> Of course, *it's most useful in the design originally.* It would be — I could use the analogy that it's kind of like building an airplane, and how would you know whether it's likely to fly or not? Well, we have design criteria, but they also do extensive modeling, because it's very complicated. How do we take in all the complexities of the mixed waste landfill and all the transport possibilities, and so on, without a numerical model?
>
> The same would be true for an airplane. It's far too complex for somebody to independently design the wing, somebody to independently design each piece of it, without having some integrating, and I think that's why the panel used the word "integral model" to interpret the overall system performance, which is what we're talking about now, how does it actually perform, and without knowing, in this case particularly, whether the canisters are breached — we've got 55-gallon drums, et cetera, we don't know the status of those and how much has

been released at this point.

> So if we have a transport, or whatever we're — *we really don't know how to interpret it without the model,* and it's not likely that Sandia is going to go in and actually look at the canisters, and so on, because that breaches the landfill itself.

Tr. 156-58 (emphasis added).

Thus Dr. Nuttall made clear that a fate and transport model should be done in designing any remedy for the landfill, and relied upon in the decisionmaking process. The Hearing Officer, however, essentially reversed this approach, with no factual support that this was the optimum approach, and with the clear indication that she believed she was legally bound to choose a remedy *now*, rather than postpone a final remedy pending development of an adequate fate and transport model. The fate and transport model thus became part of the implementation, rather than the design of the final remedy. Specifically, the Secretary adopted the following language as part of the permit modification:

> As part of the Corrective Measures Implementation Plan that incorporates the final remedy . . . , Sandia shall additionally include the following:
>
> a. 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;
>
> b. triggers for future action, that identify and detail specific monitoring results that will require additional testing or the implementation of an additional or different remedy.

Secretary's Final Order at p. 4, AR at 000904.

b. Failure to Address Public Comments

The Secretary of the New Mexico Environment Department issued its final order on May 26, 2005. On August 2, 2005, over two months later, NMED provided its response to public comments. *See* Letter dated August 2, 2005, from John E. Kieling, AR

at 002626. Even then, NMED did not respond to all public comments. *See* Letter dated August 4, 2005, from Susan Dayton, AR at _____.[5]

NMED's failure to address public comments is ongoing and is a direct result of the Secretary's decision to require development of a fate and transport model during the implementation phase of the final remedy, rather than prior to entry of the Secretary's final order. Indeed, NMED specifically objected to responding to public comments after entry of a final order "because the progress reports will not be further modified, approved or finalized by NMED as a result of public comment." AR at 000869. Thus by ordering development of a fate and transport model only as part of implementation, rather than prior to the final order, the Secretary effectively shut the public out of the process.

4. The Hearing Officer and the Secretary Based Their Decision on an Incomplete and Inaccurate Assessment of the Contents of the Landfill

a. The Hazardous Contents of the Landfill Are Unknown

Citizen Action submits that the Hearing Officer failed to take into account or minimized the level of ignorance concerning what and how much hazardous material is contained in the landfill. "Short of inventing a time machine, no one can go back and know definitively what was placed in the landfill and how it was deposited." HO Report, p. 40, AR at 000809. In fact, as late as 1994, Sandia indicated that many of the records of waste had been purged. AR at 006511. There are at least two pieces of uncontroverted evidence demonstrating that the Hearing Officer's finding as adopted by the Secretary, that the waste inventory "is reasonably complete and accurate" was arbitrary and

---

[5] Despite the voluminous appellate record, some post-final remedy documents do not appear to be part of it. This may illustrate the difficulty of postponing substantial analytical work to the implementation stage of the "final" remedy. In any event, appellate counsel will attempt to locate the letter in the current appellate record, or move to supplement.

capricious. HO Report, PFFCL, Finding No. 45, AR at 000821.

First, according to the hearing officer,

> [g]iven the length of time this landfill has been documented and studied, it makes sense that not all documentation is accurate. However, *I was troubled by the . . . study in July 2000*, which acknowledged that only 3 hours were spent comparing and tracing 36 items in landfill records that otherwise would take months to study. From this small sampling of records, [NMED] concluded that the classified records were sound and Sandia knew how much of what went into the landfill over time. *I was not convinced that enough was done in this area to verify these records and inventory*, particularly given the significant amount of controversy surrounding the inventory raised by Citizen Action's witnesses, [the peer review panel] and the public. However, in spite of this, I had to agree that there is a reasonably accurate and complete inventory for the landfill, and that more is known about this landfill than about many other *historic landfills.*

Hearing Officer's Report at p. 41 (emphasis added), AR at 000810; *see also* NMED Exhibit 5, p. 8, AR at 001117, NMED Exhibit 15, and NMED Exhibit 15, *as cited in* Citizen Action's PFFCL, No. 36, AR at 001258; AR at 000749. As Appellant will argue, *infra*, the reference to "historic landfills" is somewhat disturbing, against the backdrop of use of the landfill through 1988, triggering *current* RCRA records maintenance as well as a RCRA permit. In any event, neither NMED nor Sandia has even completed studies which could have been done, to match at least some of the historical inventories.

Also according to the Hearing Officer, "[i]ssues include whether waste from particular tests and projects went in, what sorts of containers were placed where, and how much liquid was placed in or on the landfill. As with the controversy regarding discharge potentially affecting groundwater, Sandia has changed its reporting and listing of the contents of the landfill over time, and even rejected a study by its consultants, claiming the improved information is the result of additional research and interviews with former employees." HO Report, AR at 000809-810. Due chiefly to the uncertainties with the

landfill inventory, NMED cannot be certain that the mixed waste landfill will never release additional contaminants to the environment. For this reason, NMED believes that continued monitoring will be necessary to ensure that unacceptable levels of contaminants do not migrate from the landfill. Tr. p. 1096 (Moats).

Second, Sandia conceded at the public hearing that Sandia's own CMSFR, submitted as part of Sandia's application, contains the sole estimates of radioactive and hazardous material containing waste and debris ultimately used in the Corrective Measure Study Final Report evaluation. Tr., pp. 297-99; *see also* CMSFR AR 03-035, *as cited in* Citizen Action's PFFCL, at Finding No. 17, AR at 000745. This estimate, however, was prepared by a contractor, who did not testify and who was not identified as the author of the Final Report. Tr. 297-299 (Peace); Tr. 305-306 (Fate); Tr. 314 (Peace); Tr. 328-29 (Fate), *as cited in* Citizen Action's PFFCL, at Finding No. 20, AR at 000746. At the public hearing, Sandia expressed that it has no confidence that the estimates of waste and debris volume presented in the SNL CMSFR, even though the estimates are based on data provided by SNL. Tr. 323-29 (Miller, Fate, Peace).

In contrast, the Mixed Waste Landfill Inventory submitted by Sandia and cited by NMED in testimony neither identifies nor estimates the volume or amount of hazardous volatile organics, semi-volatile organics ("SVOCs"), metals, other hazardous constituents, radionuclides in individual disposal trenches or pits or for the mixed waste landfill as a whole. NMED Exhibit 16, *as cited in* Citizen Action's PFFCL at No. 16, AR at 000745. Moreover, the Mixed Waste Landfill Inventory and the originally submitted CMSFR do not provide matching or consistent estimates of the volume of waste containing radium, beryllium, uranium and other materials in the Mixed Waste Landfill.

Tr. 299-304 (Fate and Peace); Tr. 310-325 (Fate, Peace, and Miller), *as cited in* Citizen Action's PFFCL, Finding No. 19, AR at 000746. Thus substantial uncertainty exists as to the volume or amount of this waste at the landfill.[6] *See* Citizen Action's PFFCL, Nos. 27-35, AR at 000747-749, and citations to the record therein.

The Hearing Officer was puzzled that Sandia "even rejected a study by its consultants," and was troubled by NMED's failure to match the inventory of the classified materials with the unclassified material. She nonetheless declared that "there is a reasonably accurate and complete inventory for the landfill." HO Report, AR at 000810. She failed to explain this apparent logical leap, reasoning merely that "more is known about this landfill than about many other historic landfills." *Id.*

b. Existence of Transuranic Waste and Greater than Class C Radioactive Waste

"Transuranic waste" is "waste or debris known or suspected of containing elements with atomic numbers greater than 92 and half lives greater than twenty years, in

---

[6] Further, the history of inaccurate reporting of the contents of the landfill is mirrored by current attempts at monitoring the threat of contamination of Albuquerque's ground water due to migration of contaminated waste. In 1994, the NMED concluded that "The monitoring system is inadequate." AR at 006227, at 45. NMED concluded in 1994 that several of the wells at the MWL did not produce reliable water quality data, and did not produce reliable data on rate of movement of contaminated groundwater away from the dump to the drinking water wells. Nevertheless, the unreliable data remains in the later reports used by NMED for the purposes of presence of contamination and speed of the groundwater. This conflicts with NMED's position that: "The hydraulic conductivity of the aquifer is unknown; the poor capacity of the wells at the MWL may have more to do with the drilling methodology (mud-rotary) having a detrimental effect on the hydraulic characteristics of the aquifer sediments than natural conditions." AR at 006224. "Mud rotary is considered to be the worse [sic] drilling technology available for the installation of ground water monitoring wells. This is due to the potential detrimental impacts to the hydraulic characteristics of aquifer sediments and water quality. Other better drilling technologies were in existence at the time the MWL wells were drilled." AR at 006224.

concentrations greater than 100 [nanoCuries per gram] of alpha-emitting isotopes."[7] CMSFR, AR at 03-035, Appendix J, "Summary," *as cited in* Citizen Action's PFFCL, Finding No. 22, AR at 000746. Twenty one cubic yards of transuranic waste was deposited in the unclassified area of the landfill and fifty three cubic yards of transuranic waste was deposited in the classified area of the landfill. *Id.*, at Table J.1.1, *as cited in* Citizen Action's PFFCL, Finding No. 23, AR at 000747; *see also* Proposed Finding No. 25, AR at 000747 (total of 73 cubic yards of transuranic waste found by SNL, for cost estimate purposes). Sandia's witnesses testified that there is transuranic waste at the landfill, but they do not know the volume. *Id.* at Finding No. 24, AR at 000747.

There are also discrepancies in the record with regard to the existence and amount of "greater than Class C" radioactive waste. Citizen Action's PFFCL, Findings No. 12-16, AR at 000743-745. Direct gamma radiation readings of pit contents, for example, Pit 25, do not match Sandia's inventory of the mixed waste landfill. Tr. 622-24 (Resnikoff). "Greater than class C" radioactive is the most radioactive of the several categories of low-level radioactive waste. Greater than Class C radioactive waste is a category of radioactive waste that has high enough radioactive emissions to have the potential to cause health risk to people directly exposed to it.

The Hearing Officer did not address either transuranic waste or greater than Class C radioactive waste in her Report and Proposed Findings. *See generally,* HO Report, PFFCL, p. 1, *et seq,* AR at 000770 et seq. While she did look at the hazard level of all waste, her discussion is unclear as to whether she even intended to address radioactive

---

[7] These measurements are useful in determining whether a particular radioactive material exceeds threshold safety levels.

waste. *See, e.g.,* AR at 000777. She clearly did not address a substantial portion of Citizen Action's Proposed Findings of Fact on these issues. *See, e.g.,* Citizen Action's PFFCL, Finding Nos. 12 - 16, 22 - No. 25, AR at 000743 - 000746.

Instead, in her Proposed Conclusion of Law No. J, adopted by the Secretary, the Hearing Officer stated that "[t]he corrective action process at SNL is now governed in large part by the Consent Order dated April 29, 2004 entered into by NMED, DOE and Sandia Corporation," and that "[t]he Consent Order does not apply to radionuclides, including but not limited to source, special nuclear, or byproduct material as defined in the Atomic Energy Act of 1954, or the radioactive portion of mixed waste." HO PFFCL, ¶¶ J and L, AR at 000846, 000847. Thus the Hearing Officer and the Secretary appeared to conclude that the consent order prohibited their consideration of the radioactive portion of the Sandia landfill.

c. Release of Volatile Organic Compounds

Releases of volatile organic compounds and semi-volatile organic compounds ("SVOC's") from the landfill were documented more than a decade ago. *See* Citizen Action's PFFCL, Findings Nos. 42-54, AR at 000751-754. and citations to the record therein. No additional sampling for these compounds has been done in over a decade, since 1993-94. Tr. p. 234-38 (Goering). These compounds found at the landfill are toxic pollutants.[8]

---

[8] "Twelve VOCs were detected in surface soil gas at the MWL." They include: Tetrachloroethene (PCE), Trichloroethene (TCE), 1,1,1-Trichloroethane (TCT), Toluene, Ethylbenzene, Xylene, 1,1,2-Trichloro-trifluroethane, Dichoroethyne, Acetone, Isopropyl Ether, 1,1 –dichloroethene and Styrene, AR at 008260-008260; NMED Exhibit 7, at 001143; see also, Citizen Action's Proposed Findings, 17-33, AR at 000745-749. Testimony at the hearing supported that one of the volatile organics found at the landfill, trichloroethylene (TCE), had previously leaked from the chemical waste landfill at Sandia National Laboratories and reached

NMED contended that the organic compounds reported by Citizen Action were phenolics, acetone, and toluene. NMED's Proposed Findings of Fact and Conclusions of Law, ¶ 320, AR at 000717. NMED and Sandia submitted evidence that "[t]he reported detections [of acetone and phenolics] are likely laboratory contamination or false positives." *Id.* at ¶ 321; and portions of the record cited therein, *see* also *id.* at ¶ ¶ 322-324 and portions of the record cited therein. NMED conceded that "[t]here have been detections of toluene at the MWL," but submitted that these were false positives or low-level. *Id.* at ¶ ¶ 90-95, AR at 000662-000664.

The Hearing Officer noted that Sandia's expert detected volatile organic compounds and semi-volatile organic compounds at levels below any EPA action levels. HO Report, PFFCL, at pp. 5,6, AR at 000774-775. This was based on the sampling done in 1992, by Mr. Goering. The Hearing Officer did not directly or adequately address whether, despite the EPA action levels, the volatile and semi-volatile organic compounds posed a health risk that could not adequately be addressed by NMED's remedy. *See generally* HO Report, PFFCL, AR at 000770 et seq.

IV. Argument

A. Whether the Secretary Erred as a Matter of Law in Concluding that the Sandia Landfill Required Merely a Permit Modification, Rather than a Closure and Post-Closure Permit?

The Secretary applied the incorrect regulatory framework to the Sandia landfill. This issue was preserved by the testimony of Dr. Resnikoff that the "NMED should have required Sandia to submit a closure plan under Part 264 or Part 265 for the mixed waste

---

groundwater. NMED Exhibit 9, p. 16. The 2001Annual Groundwater Monitoring Report shows detected values in the groundwater for Toluene and Dibenzo(a,h)anthracene. Estimated values occur for Trichlorethene, Cis-1,2 Dichloroethene, 2-Methylnaphthalene, Acenaphthylene, Anthracene, Benzo(a)pyrene and others. AR at 016719-016720.

landfill in lieu of requiring corrective action as a solid waste management unit." Tr. 970; *see also* Hearing Officer Report p.19, AR at 000788. The issue of the Secretary's jurisdiction is subject to a *de novo* standard of review. NMSA 1978, § 74-4-14(c); *see, e.g., State ex rel. Shell Western E & P, Inc. v. Chavez*, 131 N.M. 445, 447, 38 P.3d 885, 888 (Ct.App. 2001)(interpretation of statute subject to *de novo* review).

NMED regulates the Sandia landfill under the New Mexico Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to 74-4-14. In addition, pursuant to RCRA, 42 U.S.C. §§ 6901-6992, the EPA authorizes NMED to enforce Sandia's compliance with applicable federal law. Here, however, NMED mistakenly applied 40 C.F.R. Part 264, Subpart F to the landfill, requiring merely corrective action and permit modification, rather than requiring Sandia to obtain a closure and post-closure permit under 40 C.F.R. Part 264, Subpart G.

Specifically, 40 C.F.R. § 270.1 requires Sandia to remove the hazardous waste and obtain a post-closure permit under Subpart G of Part 264. Sandia has not remotely complied with Section 270.1, nor did NMED so find or conclude, implicitly ruling instead that Section 270.1 does not regulate the landfill.

In contrast, Section 264.101, which the Hearing Officer wrongly applied to the landfill, requires *remediation* of hazardous waste and on-site storage in an on-site unit. "Remediation" is defined as "waste that is managed for implementing cleanup." A "'remediation waste management site' means a facility where an owner or operator is or will be treating, storing, or disposing of hazardous remediation wastes." 40 C.F.R. § 260.10. Nothing of this sort is occurring at the Sandia landfill. Instead, NMED has ordered merely that Sandia cover the waste. Thus even if Section 264.101 applies instead of Section 270.1, Sandia has not complied with the explicit requirements of that section either.

Rather than explicitly address and analyze what regulatory framework applies to the Sandia landfill, the Hearing Officer wrongly assumed that the landfill "predated" environmental regulation. She then adopted NMED's view of the correct regulatory framework on faith, without tracing the correct framework applicable to landfills accepting hazardous waste after July 26, 1982.[9] Significantly, however, Sandia continued disposing of waste at the Sandia landfill until at least 1988 or 1989.

Sandia's landfill therefore requires a RCRA permit, not merely the corrective action ordered by NMED. Specifically, 40 C.F.R. § 270.1(c) provides,

> Owners and operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit. Owners and operators of . . . landfills . . . that received waste after July 26, 1982, or that certified closure (according to Section 265.115 of this chapter) after January 26, 1983, must have post-closure permits, unless they demonstrate closure by removal or decontamination as provided under Section 270.1(c)(5) and (6), or obtain an enforceable document in lieu of a post-closure permit, as provided under paragraph (c)(7) of this section. If a post-closure permit is required, the permit must address applicable 40 C.F.R. part 264 groundwater monitoring, unsaturated zone monitoring, corrective action, and post-closure care requirements of this chapter.

40 C.F.R. § 270.1(c).

Thus any land based Solid Waste Management Unit ("SWMU") that received waste after July 26, 1982, or that did not certify closure under 40 CFR § 265.115 by January 26, 1983, was required to obtain a post closure permit, unless the solid waste management unit was closed by *removal or decontamination* under 40 CFR § 270.1(c). Otherwise all Treatment, Storage and Disposal Facilities ("TSD") were required to seek a permit to continue to operate as such. 40

---

[9] Contrary to the Hearing Officer's suggestion that the MWL predates environmental regulation, the MWL operated during the period that the Resource Conservation and Recovery Act of 1976, 42 U.S.C Section 6901 et seq., came into effect and the addition of the 1980 and the 1984 amendments that imposed cradle-to-grave regulations of hazardous wastes and required that disposal of hazardous wastes at a facility necessitated a valid RCRA permit. *See* Pub L No 96-482, 94 Stat 2334 (1980) and Pub L No 98-616, 98 Stat 3221 (1984).

CFR § 270.1(c).

Here, the Sandia landfill received RCRA waste after July 26, 1982, and thus Sandia must do at least one of the following, either

> **(1)** "have a post-closure permit," or
>
> **(2)** "demonstrate closure by removal or decontamination as provided under Section 270.1(c)(5) and (6)" or
>
> **(3)** "obtain an enforceable document in lieu or a post-closure permit, as provided under paragraph (c)(7) of this section."

40 C.F.R. § 270.1(c).

Absolutely none of these alternatives has been or will be accomplished by Sandia pursuant to the Secretary's final order. Indeed, neither the Hearing Officer's documents nor the Secretary's final order even address these points.

1. Sandia Never Obtained a Post-Closure Permit

First, Sandia never obtained a post-closure permit pursuant to Section 270.1. Rather, the MWL operated and continues to operate in violation of the RCRA requirement to obtain a RCRA permit. *Chemical Waste Management, Inc. v. EPA*, 869 F.2d 1526, 1529 (D.C.Cir. 1989); *see also* 40 C.F.R § 270.1(b)("[T]reatment, storage, or disposal of hazardous waste by any person who has not applied for or received a RCRA permit is prohibited.").

There is nothing in the current record to support that the Sandia landfill 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. Indeed, "regulatory oversight has been virtually absent." AR at 003915.

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.

In fact, the permit issued in August 1992 was for the Hazardous Waste Management Facility and did not include the Sandia MWL which is a different facility. Consent Order, p.7 para 26, AR at 001394. The MWL supposedly was no longer in use by 1988 and had no permit at that time. There is no evidence that the MWL thereafter became retroactively permitted in 1992. Moreover, the 1992 permit was for "a hazardous waste *container* storage facility." AR at 004364, not a mixed waste landfill.

Neither the permit itself, nor any record of a public hearing preceding such a permit, appears in the record on appeal. Instead, Sandia and NMED appear to have bootstrapped the existence of a 1992 permit from the consent order, and the Hearing Officer merely repeated the error in her Finding No. 21.

In fact, RCRA permit requirements are quite explicit. Specifically, a valid RCRA permit consists of a Part A application and a Part B final permit. 40 CFR § 270.1(b). NMED itself concedes that the Sandia landfill has *not* complied with either Part A or Part B, and the Hearing Officer so found. HO PFFCL, ¶ 20, AR at 000816. Curiously, the Hearing Officer adopted findings as to the regulatory framework, rather than engaging in any independent legal analysis. Indeed, The Hearing Officer herself stated that she "was confused" by the testimony of Mr. Moats who asserted that 40 CFR Part 264 does not apply to the MWL because the landfill is not a Part B permitted facility and also lacked interim status because the MWL has no interim status under a Part A permit application. Tr. at 1265. Mr. Moats also asserted what appeared to the Hearing Officer as the contrary position that the NMED regulates the landfill as a solid waste

management unit pursuant to 40 CFR § 264.101 and the Consent Order, which purportedly justifies corrective action, rather than obtaining a post-closure permit.

Contrary to Mr. Moats' analysis, there is nothing in the RCRA regulatory framework to support cobbling together Section 264.101 with the actual RCRA regulatory framework, which nowhere suggests such an option. Moreover, 40 C.F.R. § 264.90(2) explicitly states that "[a] landfill that receives hazardous waste after July 26, 1982 ... must comply with the requirements of Sections 264.91 through 264.100 *in lieu of* section 264.101 for purposes of detecting, characterizing and responding to releases to the uppermost aquifer." (emphasis supplied). Thus the RCRA framework that is in place rejects NMED's approach.

2. Sandia Was Not Legally Authorized to Remove or Decontaminate the Waste, in Lieu of Obtaining a RCRA permit, as provided under Section 270.1(c)(5) and (6)

In lieu of a RCRA permit, a polluter must either demonstrate closure by removal or decontamination pursuant to Section 270.1(c)(5) and (6), or obtain an "enforceable document," pursuant to (c)(7). However, by their terms, Sections 270.1(c)(5) and (6) do *not* apply to landfill operators such as Sandia.[10] In any event, Sandia has never demonstrated compliance with Section 270.1(c)(5) and (6). Indeed, neither the Hearing Officer nor the Secretary addressed the point, and apparently did not rely on this subsection to justify granting the permit modification. Sandia's only remaining alternative was an "enforceable document." 40 C.F.R. § 270.1(c)(3).

---

[10] Pursuant to Section 270.1(c)(5), the operators of "surface impoundments, land treatment units, and waste piles" must close by removal or decontamination under Part 265 standards by obtaining a post-closure permit, or demonstrate that they meet equivalent standards pursuant to Section 264.228, 264.280(e), or 264.258. Operators of "landfills" are not mentioned and therefore appear to be excluded. Therefore, as a threshold matter, this option is not available to a "landfill," which is listed individually and separately from "surface impoundments, land treatment units, and waste piles" in Section 270.1, and is therefore implicitly omitted from coverage pursuant to the precise list provided in Section 270.1(c)(5). Sandia therefore cannot substitute this option for a RCRA permit.

3. Sandia Never Obtained an "Enforceable Document"

In his testimony, Mr. Moats used the phrase "enforceable document" to refer to the consent order. The consent order, however, does not meet the definition of an enforceable document.

Specifically, the consent order states that "*Unpermitted landfills* include, but are not limited to, those at TA-II (Classified Waste and Radioactive Landfills) and TA-III (MWL) at p. 4." AR 001391 (emphasis supplied). Thus by its own terms, the consent order also does not constitute a substitution for a RCRA permit for the MWL.

Further, 40 CFR 265.110(d)(2) states that in order to exempt a facility from other regulations of 40 CFR 265, the requirements of an "enforceable document" must satisfy the closure performance of 40 CFR 265.111 (a) - (c):

> The owner or operator must close the facility in a manner that:
>
> (a) Minimizes the need for further maintenance, and
>
> (b) Controls, minimizes or eliminates, to the extent necessary to protect human health and the environment, post-closure escape of hazardous waste, hazardous constituents, leachate, contaminated run-off, or hazardous waste decomposition products to the ground or surface waters or to the atmosphere, and
>
> (c) complies with the closure requirements of this subpart, including, but not limited to, the requirements of Sections 265.197, 265.228, 265.258, 265.280, 265.310, 265.351, 265.381, 265.404, and 264.1102.

40 C.F.R. § 265.111(a) - (c).

The Hearing Officer did not make any findings as to Sandia's compliance with Section 265.111, because she did not apply this section to the proposed "modification" of non-existent permit. Moreover, the consent order does not mandate compliance with Section 265.111, as necessary to turn it into an enforceable document. Rather, "[T]he DOE and SNL/NM have *elected* to use the RCRA landfill closure requirements *as guidance*, when appropriate, in

evaluating remedies." AR at 018160 (emphasis added).

Moreover, Citizen Action is not bound by a prior consent order to which it was not a party. That the Hearing Officer believed she was bound by such a consent order, in addressing Citizen Action's concerns as a party to these proceedings, was a violation of Citizen Action's statutory rights to public participation and comment, pursuant to the RCRA and the New Mexico Hazardous Waste Act.

4. The Sandia Landfill Does Not Meet the Requirements for Corrective Action under 40 C.F.R. Section 264.101(a) and (b), upon which the Hearing Officer Relied

By its own terms, 40 C.F.R. Section 264.101 does not apply to the Sandia landfill. Specifically, 40 CFR Part 264.101 (a) refers to "the owner or operator of a facility *seeking a permit* for the treatment, storage or disposal of hazardous waste." (Emphasis added.) Section 264.101 (b) states that "corrective action will be specified in the *permit* in accordance with this section and Subpart S of this part." (Emphasis added). Sandia "put the cart before the horse," by seeking a permit modification pursuant to the authority of NMED to grant a permit.

By the same token, Subpart S, to which Section 264.101(b) directs the reader, is equally inapplicable to the Sandia landfill. By its terms, Subpart S applies to "Corrective Action Management Units." A "CAMU" is "an area *within a facility* that is used only for managing *remediation wastes* for implementing corrective action or cleanup at the facility." 40 C.F.R § 264.551. Here, the Sandia landfill *is* "the facility;" it cannot, by definition, be an area "used for managing remediation wastes" arising from clean-up of the facility.

By incorrectly relying upon an inappropriate regulatory interpretation for the application of corrective action, the Secretary foreclosed the remedy of RCRA closure sought by Citizen Action. Rather than requiring excavation, the Permit Modification relies on corrective action consisting of institutional controls, associated with a vegetative soil cover rather than the removal or

decontamination of the hazardous wastes at the MWL required under 40 CFR Part 270.1(c). NMED, by failing to require the MWL to submit a Part A application or demand a post closure permit application under 40 CFR 265.110-120, allowed Sandia to avoid numerous standards furnished under 40 CFR 265 for protection of the public.

B. Whether the Secretary Had the Authority and Jurisdiction to Modify the Permit Application to Protect the Well-being of the Community, in the Absence of Prior Explicit Public Notice of Contemplated Modifications?

This issue was preserved by the presentation of evidence during the hearing, by post-hearing briefs, by Objections to the Hearing Officer's Report, and by Citizen Action's Proposed Findings of Fact and Conclusions of Law. AR at 000735-740; 000871-887; *see specifically* AR 000737 at, ¶ 2; AR 000882, at ¶ 7. The issue of the Secretary's legal authority is subject to a *de novo* standard of review. *See, e.g., Chavez*, 131 N.M. at 447, 38 P.3d at 888.

At the end of the public hearing, the Hearing Officer asked the parties for authority on how "creative" the Secretary could be, in requiring additional conditions or studies. Thus the Hearing Officer appeared to wish to have additional studies, including the recommended fate and transport model, but apparently believed she was without authority to order development of such a model prior to recommending a final remedy. As a matter of law, however, the Secretary has the authority to require additional studies. In implicitly finding that he was required to evaluate only what Sandia and NMED submitted, on a "take it or leave it" basis, the Secretary erred as a matter of law.

As a threshold matter, Appellant submits that the Hearing Officer's ambivalence concerning the dearth of information in the record without any explanation of why and how she concluded she could still move forward, provides an inadequate basis for judicial review pursuant to *Atlixco Coalition v. Maggiore*, 125 N.M. 786, 792–993, 965 P.2d 370, 376-77 (Ct. App. 1998).

Thus the Hearing Officer called for authority to craft a more creative remedy and decried the lack of a basis to evaluate the remedies proposed by Sandia, yet failed to address these points in her Report or Proposed Findings and Conclusions, inexplicably finding instead that all the proposed remedies were "technically equivalent." Appellant explicitly challenges Finding of Fact No. 148.

Beyond the explicit requirements imposed on corrective action for hazardous waste sites, "[t]he purpose of the Hazardous Waste Act is to help ensure the maintenance of the quality of the state's environment; to confer optimum health, safety, comfort, and economic and social well-being on its inhabitants; and to protect the proper utilization of its land." NMSA 1978 § 74-4-2. Pursuant to § 74-4-4.2(C), "the secretary may issue a permit subject to any conditions necessary to protect human health and the environment for the facility." In contrast to this broad mandate, the Hearing Officer questioned, without apparently resolving the issue, whether she had the authority and jurisdiction to order additional studies or future excavation as a "creative" remedy.

This position is not sustainable. For one thing, the New Mexico Hazardous Waste Act clearly permitted the Hearing Officer to consider creative solutions beyond the recommendations and reports provided in the original public notice. Otherwise, the statutory structure of the application review procedure, allowing for public comment and expert testimony by *all* interested parties, makes very little logical sense. *See Colonias Development Council v. Rhino Environmental Services*, 138 N.M. 133, 117 P.3d 939 (2005). Having had no opportunity in drafting the public notice, Citizen Action could not be barred from presenting alternative remedies during the public portion of the application process.

Moreover, the Secretary's statutory mandate is to "confer *optimum* health, safety, comfort, and economic and social well-being" on New Mexico's inhabitants. NMSA 1978 § 74-4-2 (emphasis added). The Hearing Officer's view that the Secretary's mandate was limited to an up

or down vote on the recommendations of NMED or Sandia, without even considering the remedy recommended by Citizen Action or the independent panel, on an even playing field, was legally in conflict with Section 74-4-2's broad language.

Again, Appellant submits that the Hearing Officer's Finding No. 101, that "[a]ny remedy that is protective of human health and the environment may be selected; Sandia is not required to select the most protective remedy" is, instead, a legal conclusion, subject to *de novo* review. Nonetheless, Appellant explicitly challenges Finding No. 101. Appellant also explicitly challenges Finding No. 133, insofar as it suggests that a fate and transport model could be equally beneficial at anytime.

The harm caused by the Secretary's rejection of Dr. Nuttall's recommendation of a "wait and see approach" was evident soon after the final decision was entered. Specifically, NMED has made clear that the permit modification will stand as granted, regardless of what the ordered fate and transport model may demonstrate or the subsequent public comment thereon. As NMED has already conceded, "NMED's response to public comments on the [landfill] obviously did not form the basis for its June 24, 2005 decision because the response had not even been issued at the time of the decision. Rather, the June 24, 2005 decision will form the basis for NMED's response to public comments. The June 24, 2005 decision contains the totality of NMED's reasoning in selecting the remedy for the [landfill]." Appellee NMED's Response to Appellants' Motion for Extention (sic) of Time to File Docketing Statement, filed August 1, 2005, at p. 2 n.1. This admission that consideration of public comments occurred only *after* issuance of the final decision demonstrates structural error in the proceedings, requiring reversal. [11]

---

[11] This error also violates NMED's own regulations. Specifically, NMAC § 20.4.1.901 requires that NMED's response to comments be issued by the Secretary "[a]t the time that any final permit decision is issued."

Here, decisionmaking by NMED is ongoing, relying on a developing fate and transport model and revealing heretofore undiscovered problems with well monitoring, suggesting potential groundwater contamination may be a greater issue than originally found. However, because the final remedy *preceded* the fate and transport model, these decisions are currently taking place outside the requirement of public notice and an opportunity to be heard and litigate in a public hearing. Indeed, NMED made clear early on that entry of a final order made public participation in any ongoing review of the fate and transport model legally irrelevant because "the progress reports will not be further modified, approved or finalized by NMED as a result of public comment." AR at 000869.

C. Whether the Secretary Erred as a Matter of Law or Acted Arbitrarily and Capriciously, by Failing to Address Evidentiary Issues in the Record?

These issues were preserved by the presentation of evidence during the hearing, by post-hearing briefs, by Objections to the Hearing Officer's Report, and by Proposed Findings of Fact and Conclusions of Law. AR at Citizen Action's PFFCL, at Finding Nos. 14-21, AR at 000744-746 (incomplete record); *id.* at Finding Nos. 21-26, AR at 000746-747 (transuranic waste); AR at *id.* at Finding Nos. 42-56, AR at 000751-754 (volatile organics). The standard of review is a deferential "whole-record" review, to determine whether the Secretary's action was arbitrary and capricious. *See, e.g., Duke City Lumber Co. v. New Mexico Environmental Improvement Board*, 101 N.M. 291, 294, 681 P.2d 717, 720 (1984). However, to enable this Court to apply whole-record review, the Secretary must provide an explanation for his decision. "[T]he reviewing could may not supply a reasoned basis for the agency's action that the agency itself has not given." *Atlixco Coalition v. Maggiore*, 125 N.M. 786, 792 - 93, 965 P.2d 370, 376 - 377 (Ct.App. 1998). Moreover, to the extent the Secretary believed he had no jurisdiction to review the radioactive content of the landfill, Appellant submits his decision is subject to *de novo* review. *Chavez,* 131

fate and transport model prior to deciding the final remedy, rather than as part of implementation, violated New Mexico statutory law. In addition, however, the Hearing Officer found that SNL's waste inventory was incomplete and contradictory, but found that it was sufficient because it appeared to be more accurate that other landfill records. Appellant submits that this is an irrational, and therefore an arbitrary and capricious basis for decision. *See, e.g. Atlixco.* The Secretary acted arbitrarily and capriciously in adopting the Hearing Officer's Proposed Finding No. 45.

2. Transuranic Waste and Greater than Class C Level Waste

Transuranic waste is admittedly addressed in a different section of the Code of Federal Regulations, and governed generally by the Atomic Energy Act of 1954, not by the Resource Conservation and Recovery Act of 1976 ("RCRA"). Here, however, hazardous waste has been mixed with radioactive waste. Pursuant to the New Mexico Hazardous Waste Act, the Hearing Officer was required to address the presence of radioactive waste, so long as such consideration was not inconsistent with the Atomic Energy Act. Specifically, 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 the RCRA. *United States v. State of New Mexico*, 32 F.3d 494 (10th Cir. 1994); *see also Sierra Club v. United States Department of Energy*, 734 F. Supp. 946 (D. Colo. 1990).

The Hearing Officer did not explicitly address transuranic waste or Greater than Class C level waste in her Report or Proposed Findings and Conclusions, and the Secretary did not address these contaminants in his Decision. The Secretary did not clarify whether this omission was subsumed by an implicit rationale that there was no high level transuranic or Greater than C level waste in the Sandia landfill, or whether the Secretary did not believe he had jurisdiction to address this type of waste in evaluating a permit modification for a mixed waste landfill. Specifically, the Hearing Officer appeared to suggest that the consent order of April 29, 2004 prohibited NMED's consideration of the radioactive portion of Sandia's mixed waste landfill. *See* HO PFFCL, ¶ ¶ J-K, AR at 000847. Thus the Hearing Officer explicitly rejected any authority to regulate radionuclides, including "the radioactive portion of mixed waste," based on the consent order among NMED, DOE, and Sandia Corporation. *Id.*

Appellant has already discussed *supra*, why the consent order cannot bar Citizen Action's litigation of any issue otherwise properly before NMED. Specifically, neither Citizen Action nor the public at large was a party to the consent order. Moreover, if radioactive waste *should be* considered as part of the initial decisionmaking process on a RCRA permit, then the consent order, by truncating the public process, has denied the public the statutory right of a public hearing on the issue. *See Colonias Development Council,* 138 N.M. 133.

Appellant submits that the Secretary did not adequately explain the basis for his failure to address transuranic waste and Greater than C level Waste in his final remedy decision. Moreover, the Hearing Officer's findings, adopted by the Secretary, wrongly suggested NMED had no jurisdiction over this type of waste. Accordingly, this issue must be remanded to the Secretary for decision, pursuant to the reasoning in *Atlixco Coalition,* 125 N.M. at 792 - 93, 965 P.2d at 376 - 377.

In the alternative, Appellant submits that the implicit decision that the transuranic waste and Greater than Class C Waste did not pose a significant hazard, without addressing expert testimony submitted by Citizen Action, was arbitrary and capricious. *See Pickett Ranch v. Curry,* 140 N.M. 49, _____, 139 P.3d 209, 224 (Ct. App. 2006). While an agency need not mention every single proposed finding, it cannot ignore explicit relevant factors brought to its attention. *Id.*

3. Volatile Organics

The Secretary also failed to adequately address the uncontroverted evidence on record that VOCs and SVOCs detected in soil gas and borehole samples at and below the landfill in 1993 and 1994 that demonstrate the escape of "hazardous constituents ... or hazardous waste decomposition products... to the atmosphere." *See* 20 NMAC 4.1.500 and 40 CFR § 264.111. These wastes and waste products are in violation of applicable regulations because they "are not naturally occurring" and they have "escaped... to the atmosphere." *Id.*

The Secretary failed to address uncontroverted evidence that the only corrective measure alternative identified in the CMSFR AR 03-035 and in the record in this matter that has the potential to meet the requirements of 20 NMAC 4.1.500 and 40 CFR § 264.111 to "close the facility in a manner that ... controls, minimizes or eliminates post-closure escape of hazardous constituents or hazardous waste decomposition products such as ... to the atmosphere" is the remedy of future excavation, urged by Citizen Action. That alternative is the only remedy which does not rely on a soil cover that does not, and cannot, prevent the escape of VOCs and SVOCs. In contrast, approval of a Permit Modification with a remedy of future excavation would provide a remedy that allows for the excavation, treatment and disposal of the sources of releases of VOCs and SVOCs already detected. These issues must be addressed, in order to protect human health, as required by the New Mexico Hazardous Waste Act. Specifically, "[g]round level ozone, . . .

which forms through the reaction of volatile organic compounds and oxides of nitrogen in the presence of heat and sunlight, is very harmful to human health." *1000 Friends of Maryland v. Browner*, 265 F.3d 216, 220 n.2 (4th Cir. 2001).

Appellant submits that the final decision, with regard to remedying the potential release of volatile organics, was arbitrary and capricious and without substantial evidence.

V. Conclusion

Appellant respectfully requests that this Court reverse the decision of the Secretary, granting permit modification, and remand for dismissal of the Sandia's application for lack of jurisdiction. In the alternative, should this Court conclude that permit modification was the correct regulatory framework, but applied incorrectly, Appellant respectfully requests that this Court reverse and remand the decision of the Secretary, and remand for full consideration of alternate remedies.

Respectfully submitted,

THE LAW OFFICES OF NANCY L. SIMMONS, P.C.

By: Nancy L. Simmons

Nancy L. Simmons
2001 Carlisle Blvd. NE, Suite E
Albuquerque, New Mexico 87110
(505) 232-2575
Attorney for the Appellant

I hereby certify that a true and correct copy of the foregoing was mailed this 10th day of October 2006 to all counsel of record.

Nancy L. Simmons