KAFB

ENTERED

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
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Patricia C. Manzanares

UNITED STATES OF AMERICA,
DEPARTMENT OF THE AIR FORCE,
Appellant

vs.

No. 12,550

STATE OF NEW MEXICO,
ENVIRONMENTAL IMPROVEMENT DIVISION
OF THE HEALTH AND ENVIRONMENT DEPARTMENT,
Appellee.

APPELLEE'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES:

New Mexico:

Other Jurisdictions:

TABLE OF AUTHORITIES, Cont.

TABLE OF AUTHORITIES, Cont.

INTRODUCTION

This is a statutory appeal from a hazardous waste storage permit issued by the Director ("Director") of the Environmental Improvement Division ("Division") of the New Mexico Health and Environment Department to Kirtland Air Force Base ("KAFB"). §74-4-4.2.G NMSA 1978 (Repl. Pamp. 1990). KAFB submitted its first permit application in 1984. R 352. Subsequent applications were turned in with minor changes. R 469, 645, 914. The parties had extended discussions aimed at establishing an understanding of KAFB's hazardous waste activities and the permit's appropriate regulation of them. R 7, 26, 205, 235 and T 13, 14, 19. After several years of intermittent focus, the Division finalized a draft permit for public comment and hearing. T 13, 14. Following comment from the public and from KAFB, the Director issued KAFB's permit on July 24, 1990. R 1272. The permit governs conditions of management and storage of identified hazardous wastes at KAFB. R 1272.

KAFB challenges the permit on grounds that it is burdensome, that it is arbitrary, and that it is inconsistent with pertinent state and federal law. KAFB's challenges are misplaced; its arguments indicate confusion about the conditions in the permit and a lack of understanding for the permitting process. Much of what KAFB now complains came initially from its own technicians. Some of it is raised now on appeal for the first time. Much of KAFB's

argument is simply incomprehensible. KAFB's challenges are unsupported, procedurally out of time and obscure. Accordingly, this Answer Brief covers the waterfront, notwithstanding the Appellant's recognized burdens on appeal. KAFB has not carried its burden. The Brief in Chief lacks citations to support factual allegations. Olguin v. Manning, 104 N.M. 791, 792, 727 P.2d 556, 557 (Ct. App. 1986).

SUMMARY OF PROCEEDINGS

KAFB appealed the permit to this Court on August 22, 1990. The Docketing Statement, filed on September 19, 1990, raised seven issues. Docketing Statement pp. 4-12. Issues a. and f. were settled pursuant to Court of Appeals Settlement Week, November 26-30 and will not be addressed in this Brief. See Stipulated Agreement filed January 3, 1991. KAFB's Brief in Chief was mailed February 5, 1991. This Answer Brief is timely if filed on or before March 11, 1991.[1]

The Division disagrees with some of the summary of facts set forth by KAFB and pursuant to SCRA 1986 §12-213.B (Cum. Supp. 1990), offers the following summary.

The permit on appeal contains conditions for the storage of hazardous waste in containers at buildings 1024, 28009 and 615 at

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[1] The taped proceeding in this administrative appeal was transcribed. All references will be to the transcript of the public hearing as "T" or the Record Proper as "R".

KAFB. R 1429. Prior to the issuance of the permit, buildings 28009 and 615 stored hazardous waste under interim status regulations. T 12, 13. Interim status is the minimum national standard acceptable for the management of hazardous wastes until a facility is permitted or closed. See §74-4-9 NMSA 1978 (Repl. Pamp. 1990) and 40 C.F.R. §265.1 (1988).[2]

Hazardous waste facilities already in existence when the federal Resource Conservation and Recovery Act ("RCRA") permitting regulations became effective in 1980 were required to file a notification of hazardous waste activity and to submit to the Environmental Protection Agency or authorized state a Part A application consisting of general information about the facility, the types of wastes generated, handled, stored and/or disposed of.[3] 40 C.F.R §270.1(b). Facilities doing so were granted interim status and treated as if they had a permit. Subsequently, facilities, either voluntarily or upon order of the appropriate regulatory agency were required to submit a much more specific Part

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[2] This Brief will cite directly to the 1988 revision of the C.F.R., because it is the latest version that has been adopted by New Mexico.

[3] An "authorized" state is a state with laws that are at least as stringent as the federal laws for the regulation of hazardous waste. See 40 C.F.R. §271.1. EPA has delegated its authority under RCRA to New Mexico to regulate hazardous waste. The Division has been New Mexico's authorized executive agency for administration of the hazardous waste program since 1985. 50 Fed. Reg. 1515 (1985).

B permit application. 40 C.F.R §270.1(b). KAFB did so on May 10, 1984. R 352. The application was reviewed for administrative completeness. T 13 and R 11-13, 18, 26, 213. KAFB revised its Part B permit application in May 1985, May 1988 and June 1989. R 469, 645, 914. When the application was administratively complete, the Division technically reviewed it and worked with KAFB to modify any portions of it that were incorrect or inadequate. T 13 and R 7, 26, 205, 213, 265. No committee drafted the permit. Compare Brief in Chief pp. 2, 4, 17, 20 and 22. KAFB's version of its applications and the accompanying correspondence were submitted by KAFB and the Defense Reutilization and Marketing Organization. R 235, 645, 914. Inter alia, the regulations require that a chief or senior executive officer of an applicant federal agency certify that the information provided in the permit application be true, accurate and complete. 40 C.F.R. §270.11. The Division then wrote the draft permit based on KAFB's information in its various applications. T 13, 14. The draft permit directly incorporated most of the information submitted by KAFB. T 13, 14, 19 and R 994. This draft permit was sent to KAFB on June 30, 1989. R 266. It was publicly noticed for comment on July 17, 1989 with public comments due by September 1, 1989. R 271. The Division held three public meetings to insure the widest possible range of public involvement. T 80. The public comment period was extended until

the end of the public hearing on October 24, 1989. R 318. The Division summarized and responded to all public comments. R 334. The draft permit was revised by the Division as described in its responses to public comments and issued as a Final Operating Permit on July 24, 1990. R 1272. KAFB's appeal is from the Division Director's decision to issue the Final Operating Permit. §74-4-4.2.G.

KAFB's January 29, 1991 request for modification is outside the scope of this appeal. Brief in Chief, p. 2. If the modification renders this appeal moot, the Court will be notified immediately. There is however no evidence in the record in regards to this modification. "Matters not contained in the record are not before the Court on appeal." Matter of Sundance Mountain Ranches, 107 N.M. 192, 193, 754 P.2d 1211, 1212 (Ct. App.), cert. denied, 107 N.M. 267, 755 P.2d 605 (1988).

Finally, the Division disagrees with KAFB's characterization of the settlement conference on page 2 of its Brief in Chief. If the Court wishes to take evidence on the Settlement Week negotiations in this case, the Division will supply the Court with information.

ARGUMENT

Section 74-4-4.4.A NMSA 1978 (Repl. Pamp. 1990) gives the Environmental Improvement Board ("EIB") authority to "adopt

regulations for the management of hazardous waste [that are] equivalent to, and no more stringent than, federal regulations." See also, §74-4-4.4.D. The EIB adopted the Hazardous Waste Management Regulations ("HWMR") which incorporate the federal regulations at 40 C.F.R. §§260-270 (1988) with a few exceptions. HWMR-5, Amendment #1. Section 74-4-4.4.A(5) specifically authorizes the Board to establish standards, as may be necessary to protect human health and the environment, applicable to owners and operators of facilities for the treatment, storage and disposal of hazardous waste. 40 C.F.R. §270.32(b)(2) establishes that each hazardous waste permit issued shall contain terms and conditions as the EPA Administrator or the state Director determines necessary to protect human health and the environment. The Division submits that the permit terms and conditions are site specific and may be as stringent as is necessary to protect human health and the environment. "Courts defer to the interpretation of a regulation by the agency to which it is addressed unless such interpretation is plainly erroneous or inconsistent with the regulation." NMEID v. Bloomfield Irrigation District, 108 N.M. 691, 694, 778 P.2d 438, 441 (Ct. App. 1989).

The standard for review in this Court is a whole record review. Duke City Lumber Company v. NMEIB, 101 N.M. 291, 681 P.2d 717 (1984). The Court must look at all the evidence and "then

decide whether, on balance, the agency's decision was supported by substantial evidence." Tenneco Oil Company v. NMWQCC, 107 N.M. 469, 477, 760 P.2d 161, 169 (Ct. App. 1987), cert. denied, 106 N.M. 714, 749 P.2d 99 (1988). Section 74-4-4.2 states that the Court of Appeals shall set aside the decision of the Director only if found to be: 1) arbitrary, capricious or an abuse of discretion, 2) not supported by substantial evidence in the record; 3) or otherwise not in accordance with law.

1. Inclusion of 90-Day Automatic Reclassification of Material as Waste is Proper.

KAFB told the Division that it wanted to use the permitted storage buildings to store hazardous material in addition to hazardous waste. R 282, 283, 285 and T 39, 40. The Division therefore added a permit provision to allow the material to be stored in the buildings. R 1151, 1433. However, KAFB now states that materials are not placed in any hazardous waste storage facility. Brief in Chief, p. 11. The permit does not regulate material outside the storage buildings. R 1429. If KAFB does not store material in buildings 1024, 28009 or 615, there is no hazardous material which comes under the 90-day condition. There is no issue or controversy.

The permit contains a provision that a generator at KAFB may "turn-in" hazardous materials to the Defense Reutilization and

Marketing Office ("DRMO").[4] R 1295. DRMO then attempts to find a user for the material. R 1295. "If these attempts are unsuccessful the material is designated a waste and enters the hazardous waste management system." R 1295. The Division recognized DRMO's mission to find a user for material and had no objection to using the buildings for both hazardous material and waste. R 249, 1151, 1433. However, the Division also recognized the potential for confusion and therefore added a permit condition to allow the material to be stored in the buildings. R 340, 1151. The condition required the material be stored in a distinct location, it be compatible with other material stored in the area, it be clearly identified as material, its volume be included in determining available storage capacity, and its containers be managed properly. R 1151, 1433. KAFB does not appeal this portion of the permit.

At the public hearing a question was raised concerning the definition of material versus waste. T 61, Public Hearing EID Exhibit 8 and R 340. The Division considered this to be a valid concern. The 90-day provision was then added as a condition. R 340. Any hazardous material held by DRMO for more than 90 days

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[4] DRMO is an agency within the Department of Defense, as is the Department of the Air Force, and is the actual operator of KAFB's hazardous waste storage facilities. T 31 and R 260.

after turn-in is automatically classified as a hazardous waste. R 1295.

KAFB indicated that material might be stored in the permitted buildings. T 39, 40. During public comment, KAFB requested the permit include a condition that hazardous materials would only be stored if space were available and only if hazardous waste had precedence over material. R 285, 348. This again indicates to the Division that KAFB will store material in the building.

The permit is for container storage of hazardous waste in buildings 1024, 615 and 28009. R 1429. This 90-day condition only applies to material that is stored in the permitted buildings. KAFB and DRMO have an additional duty to comply with environmental laws that may govern the material stored outside the permitted buildings. Those duties are outside the scope of this permit appeal.

The Division's inclusion of a 90-day reclassification is reasoned and not arbitrary and capricious. Rather than allow KAFB to hold discarded hazardous material in the storage buildings for indefinite periods, the Division put the condition in the permit to limit DRMO to 90 days to find a user. Under the regulations, 90 days is exactly the time hazardous waste is allowed to be stored by a generator without a permit. 40 C.F.R. §262.34(a). It compares to the 90 days in the permit as the amount of time material can be

stored before it is regulated. 90 days is a reasonable amount of time to find a user. KAFB argues that 90 days is unreasonable, but it cites no evidence in support. Brief in Chief, p. 12. To the contrary, information provided by DRMO indicates that hazardous property undergoes either a 60-day cycle or a 120-day cycle. R 249. The 60-day cycle is for material that has the appearance of having been opened or tampered with. R 249. The 120-day cycle is for unused hazardous material. R 249.

Storage in the three permitted buildings is for one year, or longer if KAFB can make certain showings. R 1447 and 40 C.F.R. §268.50(b), (c). If a user is found during this year storage time, there is nothing in the permit to prevent DRMO from removing the waste from storage and "recycling" it. DRMO must comply with the RCRA recycling regulations.

The permit's 90-day recategorization is reasoned and not arbitrary and capricious. The 90-day provision is within the authority of Director to include terms and conditions in the permit that are protective of public health and the environment. 40 C.F.R. §270.32(b)(2). The permitted facilities are for temporary storage until hazardous wastes are accumulated and transported for disposal. T 27. In the absence of the 90-day limit, the material could be kept long enough to constitute disposal. The storage

buildings are not disposal sites. T 27. The permit condition is protective of public health and should be upheld on the merits.

Discarded material is waste at the time it enters KAFB's permitted buildings.[5] 40 C.F.R. §261.2(f) requires a known market or other disposition for the material be demonstrated when a claim is raised that certain material is not waste. The Division recognizes that there may be a market for some of the turn-in material. At some point, however, after no market can be found, the material needs final disposal. In order to protect human health and the environment, the Division is authorized to find that the material has no market and should be disposed of.

In its Brief in Chief at page 9, KAFB cites the Administrative Procedures Act, §§12-8-1 to 25 NMSA 1978 (Repl. Pamp. 1988) as setting the standard for this Court's review. The Administrative Procedures Act does not apply to this case. §12-8-23. The Hazardous Waste Act is not subject to coverage of the Administrative Procedures Act and neither the Division nor the EIB has adopted it by rule or regulation. See Livingston v. Ewing, 98 N.M. 685, 652 P.2d 235 (1982).

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[5] 40 C.F.R. §261.2(a)(2) states that a solid waste is any discarded material which is abandoned. A solid waste is a hazardous waste if it has hazardous characteristics or is otherwise hazardous under the regulations. 40 C.F.R. §261.3(a).

At pages 4, 11 and 18 of its Brief in Chief, KAFB relies on statements from the Division's Boyd Hamilton after the comment period ended and the Division could not accept additional substantive comments. Mr. Hamilton said the Division would contact KAFB as necessary during revision of the draft permit to avoid inadvertent imposition of untenable permit conditions. The 90-day recategorization of material to waste is not an "inadvertent" nor "untenable" permit condition. It protects of human health and the environment, because it prohibits infinite storage of hazardous material inside the permitted buildings.

KAFB cites 40 C.F.R. §261.11 for the proposition that the generator determines at turn-in whether an item is material or waste. Brief in Chief, pp. 13, 19. KAFB cited this section incorrectly. 40 C.F.R. §261.11 are the criteria for listing hazardous waste.[6]

KAFB suggests that the Division's inspectors can decide when material has been kept for an inordinate amount of time or if the

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[6] 40 C.F.R. §261.11 provides lists of solid wastes which have been determined to be hazardous wastes because they meet one of the following criteria: a) it exhibits certain specified characteristics of hazardous waste; b) it is found to be fatal to humans in low doses or otherwise capable of causing or significantly contributing to an increase in serious, irreversible or incapacitating reversible illness; or c) it contains any of certain specified toxic constituents, unless specified conditions have been met. As to these "listed wastes," the regulations assign an EPA hazardous waste number which must be used in complying with notification and reporting requirements.

storage containers pose a threat to the environment. Brief in Chief, p. 13. KAFB states that if the Division determines that DRMO is keeping the material too long, DRMO could then be required to become a satellite collection point. Brief in Chief, p. 13. KAFB is wrong. DRMO would not fit the requirements for a satellite accumulation point, because the waste is not under the control of the operator generating the waste. 40 C.F.R. §262.34(c)(1). KAFB's suggestion would put the current issue before this Court every time KAFB contests an inspector's finding that material has been stored for an inordinate amount of time. 40 C.F.R. §261.2(f) requires that KAFB demonstrate that there is a known market for the material. The permit condition of 90 days for storage of material in the permitted units before it automatically becomes waste is reasoned and supported by substantial evidence, and should be upheld.

2. Inclusion of Annual Waste Stream Analysis is Proper.

The permit requires that wastes from a steady state continuous process be retested annually by KAFB or when changes are suspected or known to occur. R 1298. The wastes are divided into two "groups". Group I wastes are wastes in the original container, unopened with original labels. R 1297. No testing is required of Group I wastes. R 1297. Group II wastes are those received from a) steady state processes, or b) from one-time or irregular

generators. R 1297-98. The permit's annual testing requirement is only for Group II a)-steady state wastes.[7] R 1298.

40 C.F.R. §264.13(a)(3) requires analysis be repeated to ensure accuracy and currency. 40 C.F.R. §264.13(a)(3)(1) sets forth the minimum requirement for all facilities, but discretion is left to the permitting authority to determine the frequency deemed sufficient at a specific facility. Brief in Chief, p. 15.

KAFB incorrectly states that the requirement for annual testing is not supported by evidence. Brief in Chief, p. 14, 15. KAFB's application Revision 4 itself provides for annual tests on the steady state, continuous process wastes. R 921. The Division incorporated KAFB's directive into the draft permit. R 1016. KAFB requested during the comment period that the word "annually" be removed because the "majority of waste streams are fairly constant" and "there is not sufficient manpower to accomplish annual waste stream testing." R 282. In its Response to Comments, the Division kept the annual requirement, because "given the rate of turnover of base personnel, the rate of change in processes and products used by the base generators, and the infancy of Kirtland's waste stream identification program, an annual reverification is appropriate." R 342-43. Inclusion is further supported by letters to KAFB in

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[7] The full text of this permit condition is on page 19-20 of this Answer Brief.

which the Division expressed its concern with faulty or incomplete waste characterization. R 26, 205. KAFB responded by stating that it continues to identify its hazardous waste streams and that the list is continuously being updated. R 235. Additionally, during the public comment period, KAFB submitted a revised list of quantities of wastes that it expects will be stored, and stated that in light of the large number of research and development facilities these numbers may be exceeded. R 285, 292-313. Again, this late submittal indicates to the Division that KAFB cannot predict its wastes with reliability. There is substantial evidence for inclusion.

The annual analysis requirement does not stand for the Division's disregard for the progress KAFB has made during the permitting process. Brief in Chief, p. 15. This permit condition takes account of KAFB's testing and analysis submitted through the years. The Division concluded, however, that given the rate of personnel turnover at the base, the rate of change in processes and products used by base generators and the relative infancy of KAFB's waste stream identification program, an annual reverification is appropriate. R 235, 342-43.

KAFB states that the annual testing requirements are not reasonably related to the purpose of RCRA and the New Mexico Hazardous Waste Act and that they are therefore arbitrary and

capricious under Tenneco Oil Company v. NMWQCC. Among the purposes of the Hazardous Waste Act is the maintenance of quality of the state's environment. §74-4-2 NMSA 1978 (Repl. Pamp. 1990). RCRA has a similar objective in that it promotes the protection of health and the environment. 42 U.S.C. §6902. That KAFB will have to verify its hazardous wastes yearly so it can be sure how to handle and store them is exactly what the Act and RCRA were designed to do.

Annual analysis of the Group II steady state waste will insure that KAFB has an accurate list of what is being handled and stored. R 1298. This is the backbone of the permit. Accurate waste characterization is needed for proper handling, and appropriate containment and mitigation of accidental releases. This condition in the permit should be upheld on the merits.

3. Group I and Group II Wastes Are Within the Division's Authority.

The permit has two classifications of hazardous waste that will be stored in the three buildings. R 1295. The Group I and Group II classifications were proposed by KAFB in the original 1984 application, before the Division had reviewed any application. R 365. They appear in subsequent revisions and they were included in the draft permit. R 482, 672, 917, 1014. As stated previously, there was no committee as represented by KAFB, Brief in Chief, p. 4, 11, 17, but the Division did work with KAFB on versions of the

permit application. T 13. However, KAFB made no attempt to change the groupings in the applications or through public comment. R 282. KAFB knew that the waste analysis plan, which delineates Groups I and II, would be incorporated directly into its final permit. R 26.

KAFB did not object to the classifications during the comment period or at the public hearing. Instead, KAFB requested that the definition for Group I and Group II wastes be made a part of the final permit. R 282, 343. KAFB specifically stated "that all references to Group I and II waste be amended to read Group I or II material or waste." R 282. This cite belies KAFB's objection on appeal to the Group I and Group II classification. KAFB was obligated to make its record of objection to the classifications before the Division. It did not. The challenge is waived. NMEID v. Thomas, 789 F.2d 825, 835 (10th Cir.1986). In NMEID v. Thomas, the Environmental Protection Agency solicited comments on the very issue that EID appealed. The Tenth Circuit ruled that EID's objection came too late:

> Neither EID nor anyone else advanced any dissatisfaction to the EPA through comments and documents in the record. Under these circumstances, we hold that such issue has been waived. If EID wished that the EPA consider a different formula which required EPA to study other information, it had a responsibility to place such information in the record.

> EID was obligated to make its record before the agency. It failed to do so. Thus, we decline to consider any inferences which EID urges upon us for the first time on appeal. (Citation omitted.)

NMEID v. Thomas, 789 F.2d at 835. The same rule applies here. The Division had no opportunity to apply its expertise nor to make a record because KAFB never raised the issue.

KAFB argues that the Group I wastes are actually material. Brief in Chief, p. 16. But, KAFB also states that no material is stored in the permitted building. Brief in Chief, p. 11. As stated previously, the permit does not regulate material outside the permitted buildings. The Group I wastes are "items purchased in excess to requirements and turned in to the DRMO in original containers, unopened, with original label." R 1297. Efforts should have been made to find a user and a market was not found within 90 days. R 344. Group I wastes are treated differently from Group II wastes in that "the item's physical and chemical characteristics [can be determined] by using standard references to supplement label information. No testing of these items is needed." R 1297. The regulations do not specifically address whether to provide for dividing the waste into two groups, but they do not preclude it. The classifications are reasonable for this site and should be upheld on the merits.

Finally, KAFB raise the issue of additional error in the permit in that DRMO personnel, instead of the generator, determine whether an item is waste or material. Brief in Chief, p. 18, 19. This issue was not raised in the docketing statement and is therefore waived. State v. Hoxsie, 101 N.M. 7, 9, 677 P.2d 620, 622 (1984).

4. Specific Tests Are Needed and Should Be Upheld.

KAFB asserts that the permit specifies certain tests must be performed on all waste streams and that performing all nine tests listed in Table C-2 is overly burdensome and unnecessarily expensive. Brief in Chief, pp. 19, 20. KAFB is mistaken about what is required. The permit does not require all tests be run on all wastes. Instead, the permit states:

> The chemical and physical information required to turn in Group II waste to the DRMO is summarized on waste profile sheets provided for each waste. Kirtland AFB generates two types of Group II hazardous wastes: (1) From steady state continuous processes that have a profile sheet on file; and (2) One-time or irregular generator that do not have profile sheets on file.
>
> Wastes from the steady state continuous process are retested annually by Kirtland, at a minimum, or when changes are suspected or occur in the process requiring an update of the profile sheet on file at Kirtland AFB Environmental Management Function and the DRMO. Table C-2 lists the test and rationale for these tests. Generations that do not have a profile sheet on file are tested when they occur using the appropriate tests listed in

> Table C-2. Flashpoint and EP Toxicity tests will be run on all wastes. pH will be run on all aqueous wastes and wastes having an aqueous phase. An IR screen will be run to verify the absence of organics on wastes identified as inorganic only. Total organic halogens will be run on all wastes not identified as containing halogens. The results are used to fill out a waste profile sheet, (see Appendix C-3). Analytical test methods are in Table C-3. (Emphasis added.)

R 1297-98. This means that for Group II wastes that do not have a profile sheet, the appropriate tests in Table C-2 are required in addition to flashpoint and EP Toxicity tests or other tests.[8] The permit provision does not apply to Group I wastes or to Group II wastes that have a profile sheet. KAFB states that its current practice is to do a waste profile sheet on each generation. Brief in Chief, p. 20. Assuming this is KAFB's consistent practice, there is no issue. If all wastes have profile sheets, the challenged testing is not required. KAFB's sealed battery example is inapposite. Brief in Chief, p. 20. Testing would not apply to a sealed battery unless it did not have a profile sheet.

40 C.F.R. §264.13(b)(1) states that the owner or operator must develop a waste analysis plan which specifies the parameters for which each hazardous waste will be analyzed. Table C-2 satisfies

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[8] The Toxic Characteristic Leaching Procedure ("TCLP") became effective September 1990 for large quantity generators and replaced the EP Toxicity test. 40 C.F.R. §261.24 (1990). The permit provides for TCLP to be used if required. R 1296. New Mexico does not have authorization to regulate TCLP, it is regulated by EPA.

this requirement. Throughout its applications, KAFB submitted test parameters to the Division. R 377, 494, 922. The Division incorporated KAFB's test parameters into the draft permit. R 1057. During the public comment period KAFB requested:

> Page 4, 1st paragraph, 2nd line - Request the word "appropriate" be inserted before "tests". It is unclear if the intent is to require all tests in Table C-2 for all samples. However, our interpretation of standard practice is to run those tests that are necessary given the user knowledge and if there is any doubt, additional tests should be run.

R 283. The Division added the word "appropriate" as requested by KAFB, but also added the specific tests on wastes without profile sheets. It is not more stringent than the regulations. It complies with 40 C.F.R. §§264.13(b)(1) and 270.32(b)(2).

There is no evidence in the record to support KAFB's incorrect understanding of the breadth of required testing or the cost of the tests. Brief in Chief, p. 20. Matters not of record are not before the reviewing court. Poorbaugh v. Mullen, 99 N.M. 11, 653 P.2d 511 (Ct.App.), cert. denied, 99 N.M. 47, 653 P.2d 878 (1982).

5. The Permit is Not Unclear.

KAFB argues that throughout the permit the use of the words "permittee", "owner" and "operator" are used interchangeably and in an inconsistent manner, thus making it unclear as to which requirements are applicable to the permittee and owner and which to the operator or both. This is the first time KAFB has raised this

issue. The Division has not previously had the opportunity consider it. "The court will not entertain arguments which should have properly been made before the agency in the first instance." NMEID v. Thomas, 789 F.2d at 836. KAFB was obligated to raise the technicalities of its jurisdictional entities with the Division in its applications for permit, during public comment or at the public hearing. KAFB failed to make a record and it is estopped now from raising the issue here. NMEID v. Thomas, 789 F.2d at 835.

The regulations are clear that the permit applies to the owner and operator. 40 C.F.R. §270.1(b). As owner of the facility, KAFB is ultimately responsible. R 261. KAFB had ample time to bring any errors it now complains to the attention of the Division. As for the permit's typographical and other non-substantive errors, KAFB has shown no prejudice. The complaint for the first time on appeal should be disregarded.

CONCLUSION

In New Mexico ex rel. Reynolds v. Aamodt, 30 NMSBB 171, 172 (1990), the Supreme Court recently stated:

> "[W]e must presume that the action of the state engineer is correct. . . .
>
> "On review of the acts or orders of administrative bodies, the courts will presume, among other things, that the administrative action is correct and that the orders and decisions of the administrative body are valid and reasonable; presumptions will not be indulged against the

regularity of the administrative agency's action." (Citation omitted.)

> By our action today we continue a long tradition of upholding the State Engineer's authority to take reasonable and appropriate action to protect and administer the water laws of New Mexico.

The record in this case shows that the Division has made every reasonable attempt to accommodate KAFB's concerns and to fashion appropriate conditions of hazardous waste storage and management. The process has been exhausted and lawful. KAFB's Brief in Chief offers nothing to show otherwise. Accordingly, the Division respectfully requests the Court to dismiss KAFB's appeal and affirm and uphold the Hazardous Waste Operating Permit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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