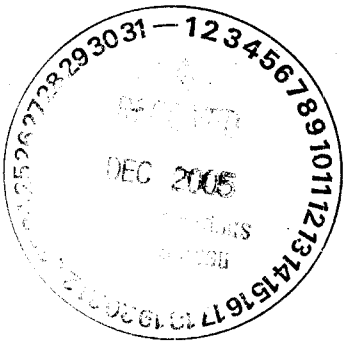
SNLMWL05 11/4/05

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 NM5890110518.



CITIZEN ACTION,

Appellant,

v.

No. 25,896 (consolidated)
Dept. Of Environment HWB 04-11(M)

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

Appellees.

DOCKETING STATEMENT

Citizen Action, by and through its attorney of record, Law Offices of Nancy L. Simmons, P.C., submits its Docketing Statement as follows.

I. Nature of the Proceeding

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, and the Final Remedy Decision and Response to Public Comment on Class 3 Permit Modification for Corrective Measures for the Mixed Waste Landfill at Sandia National Laboratories. 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.*, Sandia Corporation sought and received a permit modification. Citizen Action contends that the decision on the merits and the hearing procedures did not comply with applicable law and were in error.

II. Date of Judgment or Order Sought to Be Reviewed and Statement of Timely Filing of Appeal

Appellant seeks review of two orders in this consolidated appeal. The date of the first order sought to be reviewed is May 26, 2005. The appeal from the May 26 order was filed on or before June 24, 2005, less than thirty days after the date of the order. The date of the second order sought to be reviewed is August 25, 2005. The appeal from the August 25 order was filed on or before August 31, 2005, less than thirty days after the date of the order. Both appeals are therefore timely. *See* New Mexico Rules of Appellate Procedure, Rule 12-201(A).

III. Statement of the Case and Summary of Facts

A. Introduction

Citizen Action raises six issues on appeal, in support of reversal of the Secretary's decision: (1) the Hearing Officer and the Secretary acted arbitrarily and capriciously, by issuing a decision based on a incomplete or inaccurate inventory of the hazardous contents of the mixed waste landfill; (2) the Hearing Officer and the Secretary erred as a matter of law, by misconstruing and misinterpreting their statutory mandate; (3) the Hearing Officer and the Secretary erred as a matter of law by failing to address the issue of transuranic waste and Greater than Class C radioactive waste in the landfill; (4) the Hearing Officer and the Secretary erred as a matter of law by failing to address the issue of volatile organics and metals in the landfill or in the alternative, acted arbitrarily and capriciously or contrary to substantial evidence by failing to

address the issue adequately; (5) the Hearing Officer and the Secretary acted arbitrarily and capriciously in deciding what conditions or modifications to impose on the permit; and (6) the Hearing Officer and the Secretary erred as a matter of law by failing to consider or address public comments prior to the Secretary's issuing his final decision.

B. Summary of Facts

1. Background Factual Findings

Sandia National Laboratories ("Sandia" or "SNL") has operated a "mixed waste" landfill in Albuquerque, New Mexico, since March, 1959. Hearing Officer's Proposed Findings of Fact, Conclusions of Law, ¶ 29, p. 6. This landfill is known as the TA-3 Mixed Waste Landfill ("Sandia landfill"). *Id.* The landfill is located on the eastern margin of the Albuquerque Basin, within the boundaries of Kirtland Air Force Base ("Kirtland"). *Id.* at ¶ 37, p.7.

Management of the landfill is critical to the health and safety of the citizens of Albuquerque. Albuquerque uses groundwater from the Albuquerque Basin as the principal source of its water supply. *Id.* at ¶ 38, p.8. Groundwater below the landfill is about 470 feet away. *Id.* at ¶ 42. In addition, there are four major faults on the east side of KAFB. *Id.* at ¶ 73, pp. 7-8.

"From March 1959 to December 1988 the landfill accepted radioactive waste and mixed waste from SNL research facilities and off-site generators including 100,000 cubic feet of radioactive waste containing 6,300 curies ("Ci")[1] of activity at the time of disposal." *Id.* at ¶ 30, p.6. Chemical wastes were also deposited in the landfill. *Id.* at ¶ 33. The wastes were

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

categorized by "classified" and "unclassified." *Id.* at ¶¶ 31-32.

Water was also deposited into the landfill. This water included both wastewater and water used to extinguish a fire in 1975. *Id.* at ¶ 34. This raises a concern that the waste deposited in the landfill could travel, if it is not otherwise contained. Containment, however, is also an issue. For one thing, some waste was temporarily stored, in the early 1990's, above ground, in the "Interim Storage Site." *Id.* at ¶ 35. More 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.

2. The Hazardous Contents of the Landfill Are Unknown

The record is unclear as to what is buried 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." Hearing Officer Report, p. 40.

Citizen Action concurs with both the Hearing Officer and NMED that no one knows what is contained in the landfill, but submits that the Hearing Officer failed to take into account or minimized the level of ignorance and confusion concerning what and how much hazardous material is contained in the landfill. There are at least two primary 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 capricious. Hearing Officer's Report, Proposed Findings of Fact and Conclusions of Law, Proposed Finding No. 45.

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, [the New Mexico Environment Department ("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).

Thus neither NMED nor Sandia has even completed studies which could have been accomplished, to attempt to match at least some of the historical inventories. Specifically, in July, 2000, an NMED employee reviewed thirty six of the thousands of classified area disposal records from 1959 to 1989 and reported that it would take approximately two to three months of fulltime work to review every landfill classified water disposal record to verify that all classified wastes are included in the unclassified inventory. NMED Exhibit 5, p. 8 and NMED Exhibit 15, *as cited in* Citizen Action's Proposed Findings of Fact, Proposed Finding No. 36. This is the same study which also concerned the Hearing Officer. Hearing Officer's Report at p. 41.

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." *Id.* at pp. 40-41. 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 the "Sandia National Laboratories' Corrective Measure Study Final Report," 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 Proposed Findings of Fact and Conclusions of Law, at Proposed Finding No. 17. 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. p. 297-299 (Peace); Tr. p. 305-306 (Fate); Tr. p. 314 (Peace); Tr. p. 328-29 (Fate), *as cited in* Citizen Action's Proposed Findings of Fact and Conclusions of Law, at Proposed Finding No. 20. At the public hearing, SNL expressed that it has no confidence that the estimates of waste and debris volume presented in the SNL Corrective Measure Study Final Report are accurate, even though the estimates are based on data provided by SNL. Tr. p. 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 Proposed Findings at Proposed Finding No. 16. Moreover, the Mixed Waste Landfill Inventory and the originally submitted SNL Corrective Measure Study

Final Report do not provide matching or consistent estimates of the volume of waste or debris containing radium, beryllium, uranium and other materials in the Mixed Waste Landfill. Tr. pp. 299-304 (Fate and Peace); Tr. pp. 310-325 (Fate, Peace, and Miller), *as cited in* Citizen Action's Proposed Findings at Proposed Finding No. 19. Thus substantial uncertainty exists as to the volume or amount of radium, beryllium, depleted uranium, and metallic sodium at the landfill. *See* Citizen Action's Proposed Findings, at Findings Nos. 27-35, and citations to the record therein.

While the Hearing Officer was apparently 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." Hearing Officer's Report at p. 41. She failed to explain this apparent logical leap, reasoning merely that "more is known about this landfill than about many other historic landfills." *Id.* Appellant submits that Finding Number 45 is arbitrary and capricious.

3. The Hearing Officer and the Secretary Too Narrowly Interpreted Their Statutory Mandate

At the end of the public hearing, the Hearing Officer asked the parties to address questions related to the scope of her jurisdiction and authority. Specifically, the Hearing Officer asked how much flexibility the Secretary of Environment has to vary his decision from the draft permit modification identified in the public notice, such as changing the approved corrective measure from cover and bio-barrier to excavation, or requiring additional studies or delayed excavation. Citizen Action's Proposed Findings of Fact and Conclusions of Law, at pp. 1-2. She

also asked whether a requirement of excavation as a corrective measure would violate the rules for public notice and how "creative" the Secretary was allowed to be in requiring additional conditions or studies. Excavation was the remedy urged by Citizen Action. Finally, the Hearing Officer requested legal authority regarding decision-makers' exceeding their authority and/or an informed opinion regarding "what would need to be defended on appeal." Citizen Action's Proposed Findings of Fact and Conclusions of Law, at pp. 1-2.

That appellate counsel can determine, the Hearing Officer did not explicitly address, in her Report and Proposed Findings, this suggestion that she wished to pursue a more creative remedy, but felt her authority and jurisdiction was limited. *See generally,* Hearing Officers Report, Proposed Findings of Fact and Conclusions of Law. She did find, however, that "NMED cannot exceed its regulating authority, and cannot demand compliance with regulations it has no authority to enforce." Hearing Officer's Report, Proposed Findings of Fact and Conclusion of Law, Proposed Finding No. 148. 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.*

4. Existence of Transuranic 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 concentrations greater than 100 [nanoCuries per gram] of alpha-emitting isotopes."[2] Sandia National Laboratories Corrective Measure Study Final Report, AR 03-035, Appendix J, "Summary," *as cited in* Citizen

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

Action's Proposed Findings of Fact at Proposed Finding No. 22. 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. Sandia National Laboratories Corrective Measure Study Final Report, AR 03-035, Appendix J, Table J.1.1, *as cited in* Citizen Action's Proposed Findings of Fact, Proposed Finding No. 23; *see also* Proposed Finding No. 25 (total of seventy three cubic yards of transuranic waste found by SNL, for cost estimate purposes). Sandia Laboratories' witnesses testified that they know that transuranic waste is found at the landfill, but they do not know the volume. *Id.* at Proposed Finding No. 24.

There are also discrepancies in the record with regard to the existence and amount of "greater than Class C" radioactive waste. Citizen Action's Proposed Findings, Finding No. 37. Direct gamma radiation readings of pit contents, for example, Pit 25, do not match Sandia's inventory of the mixed waste landfill. Tr. p. 622-23 (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,* Hearing Officers Report, Proposed Findings of Fact and Conclusions of Law, p. 1, *et seq.*

5. 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 Proposed Findings, Proposed Findings Nos. 42-54, and citations to the record therein. No

additional sampling for volatile or semi-volatile organic compounds has been done in over a decade, since 1993-94. Tr. p. 234-38 (Goering). The volatile organic compounds and semi-volatile organic compounds found at the landfill are toxic pollutants. Testimony at the hearing supported that one of the volatile organics found at the landfill, trichloroethylene, had previously leaked from the chemical waste landfill at Sandia National Laboratories.

The Hearing Officer noted that SNL's expert had detected volatile organic compounds and semi-volatile organic compounds at levels below any EPA action levels. Hearing Officer's Report, Proposed Findings of Fact and Conclusions of Law, at pp. 5,6. This was based on the same 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* Hearing Oficer's Report, Proposed Findings of Fact and Conclusions of Law.

6. Recommended Permit Modifications

Four corrective measures were found 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. The remedies found suitable included (1) no further action; (2) vegetative soil cover; (3) vegetative cover with bio-intrusion barrier; and (4) future excavation. Of these four, Sandia recommended vegetative soil cover and NMED recommended vegetative cover with bio-intrusion barrier. NMED Exhibit 1 (Public Notice No. 04-11). NMED's recommendation also relied on Sandia's CMSFR, with regard to future long-term monitoring. Citizen Action's Proposed Findings of Fact, Finding No. 59. 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. The Hearing Officer and the Secretary adopted NMED's recommendation.

Dr. Eric Nutall, professor of nuclear and chemical engineering at the University of New Mexico, spoke on behalf of the Waste Education Research Consortium. Professor Nutall believed that the containers holding the hazardous waste "will all breach in time." Citizen Action's Proposed Findings, at Finding No. 74. At that point, according to Dr. Nutall, mixing of the hazardous wastes is a "strong possibility." *Id.* at Finding No. 75. Dr. Nutall therefore recommended cover with future excavation, substantially in accordance with Citizen Action's position. Tr. 198 (Nutall).

Citizen Action presented evidence that the decrease in tritium activity over time would also reduce the radioactivity. Citizen Action's Proposed Findings at Finding No. 62-65. Citizen Action therefore recommended future excavation as a remedy. 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 Proposed findings, at Finding No. 62, 64. However, Sandia has previously publicized that it could excavate the site. *Id.* at Finding No. 80. Nonetheless, the Hearing Officer expressed the concern that she did not have the authority and jurisdiction to order future excavation. *See* Section 3, *supra*, pp. 7-8.

7. 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, the NMED provided its response to public comments. *See* Letter dated August 2, 2005, from John E. Kieling. Even then, NMED did not respond to all public comments. *See* Letter dated August 4, 2005, from Susan Dayton.

IV. Statement of Issues and Preservation of Issues Below

The issues on appeal are as follows:

1. **Whether the hearing Officer and the Secretary, in adopting the Hearing Officer's Report, acted arbitrarily and capriciously, in relying on an incomplete record in deciding whether to grant the Class 3 permit modification?**

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 Proposed Findings of Fact and Conclusions of Law.

2. **Whether the Hearing Officer and the Secretary erred as a matter of law, by misinterpreting the scope of their jurisdiction and authority**?

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 Proposed Findings of Fact and Conclusions of Law.

3. **Whether the Hearing Officer and the Secretary, in adopting the Hearing Officer's Report, erred as a matter of law, by failing to address the issue of transuranic waste and Greater than Class C radioactive waste in determining whether to grant the Class 3 permit modification?**

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 Proposed Findings of Fact and Conclusions of Law.

4. **Whether the Hearing Officer and the Secretary, in adopting the Hearing Officer's Report, erred as a matter of law, by failing to address the potential contamination of groundwater by the release of volatile organics by the mixed waste landfill or in the alternative acted arbitrarily and capriciously or contrary to substantial evidence by failing to address the issue adequately?**

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 Proposed Findings of Fact and Conclusions of Law.

5. **Whether the Hearing Officer and the Secretary acted arbitrarily and capriciously in deciding what conditions or modifications to impose on the permit?**

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 Proposed Findings of Fact and Conclusions of Law.

6. **Whether the Hearing Officer and the Secretary erred as a matter of law, in failing to consider public comments in issuing the Hearing Officer's Report or in reaching the final decision?**

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 Proposed Findings of Fact and Conclusions of Law, as well as by a letter objecting to the Secretary's addressing public comments only after issuance of the final decision.

A. Legal Framework

The New Mexico Environment Department regulates Sandia's management of hazardous wastes under the New Mexico Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to 74-4-14 and its implementing regulations, the Hazardous Waste Management Regulations, now codified at 20.4-1 NMAC. "[H]azardous waste' means any solid waste or combination of solid wastes that becasue of their quantity, concentration or physical, chemical or infectious characteristics may (1) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed." *Id.* 74-4-3 (K). Pursuant to the federal Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992, the federal Environmental Protection Agency authorizes NMED to enforce Sandia's compliance with applicable law.

The New Mexico Hazardous Waste Act requires all permits issued after April 8, 1987 to require corrective action for all releases of hazardous waste to constituents from any solid waste management unit at a facility seeking a permit. NMSA 1978, § 74-4-4.2. In turn, 40 C.F.R. Part 264, Subpart F, 40 C.F.R. §§ 264.90 to 101, as incorporated in 20.4.1.500 NMAC generally governs releases from solid waste management units. Thus facilities such as Sandia, seeking a

permit for the treatment, storage or disposal of hazardous waste must "institute corrective action as necessary to protect human health and the environment for all releases of hazardous waste or constituents from any [SWMU] at the facility, regardless of the time at which the waste was placed in such unit." 40 C.F.R. § 264.101(a).

Beyond the explicit requirements imposed on correction action for the 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. Notwithstanding this broad mandate, "[n]othing in the Hazardous Waste Act shall be construed to apply to any activity or substance which is subject to the ... Atomic Energy Act of 1954, 42 U.S.C § 2011 *et seq* except to the extent that such application or regulation is not inconsistent with the requirements of such acts." *Id.* 74-4-3.1.

The standard of review on appeal requires Citizen Action to show the Secretary's action was "(1) arbitary, capricious, or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law." NMSA 1978 § 74-4-14(C).

B. Discussion of Issues

1. Reliance on an Incomplete Record

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. This is an irrational, and therefore an arbitrary and capricious basis for decision. The Secretary acted arbitrarily and capriciously in adopting this finding.

Significantly, 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 recommend additional studies, but believed she was without authority or jurisdiction. *See* Section 3, *supra* at pp. 7-8. As a matter of law, however, the Secretary has the authority to require additional studies. *See* Section 2, *infra*, at p. 16. In finding that she was required to accept whatever studies SNL gave her, on a "take it or leave it" basis, the Hearing Officer erred as a matter of law and also acted arbitrarily and capriciously, as did the Secretary in adopting the Hearing Officer's recommendations.

2. Narrow Interpretation of Scope of Secretary's Jurisdiction and Authority

Pursuant to NMSA 1978, § 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. Moreover, the Hearing Officer flatly rejected any possibility of considering, much less addressing, the "mixed" waste content of the landfill, in terms of the mixture of transuranic waste and greater than class C radioactive waste together with nonradioactive hazardous wastes.

Neither position is 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 SNL, without even considering the remedy recommended by Citizen Action, on an even playing field, was legally in conflict with Section 74-4-2's broad language.

3. Failure to Address Transuranic Waste in Determining Appropriate Permit Modifications

The Hearing Officer did not even 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. 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.

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, however, explicitly rejected any authority to regulate radionuclides, including "the radioactive portion of mixed waste," based on a prior consent order among NMED, DOE, and Sandia Corporation. Hearing Officer's Proposed Findings, Proposed Findings Nos. J and K. Citizen Action, however, as a party to these proceedings, is not bound by a prior consent order to which it was not a party. That the Hearing Officer believed that she was bound by such a consent order, in addressing Citizen Action's concerns as a party to the proceedings, was a violation of Citizen Action's statutory rights pursuant to the New Mexico Hazardous Waste Act and its Due Process rights pursuant to the United States and New Mexico Constitutions. This is a structural error requiring reversal.

While the federal regulations governing transuranic waste do not explicitly apply to mixed hazardous waste, they are persuasive authority on the question of how best to address mixed waste consisting of generic hazardous waste and radioactive waste. Thus 40 CFR § 191 *et seq.* provides proper guidance for the review of the disposal of transuranic waste in the Sandia landfill. Pursuant to the regulatory concerns expressed by 40 C.F.R. § 191 *et seq.*, transuranic waste cannot be safely disposed of in shallow pits and trenches such as those found at the landfill. However, the permit modification recommended in the Hearing Officer's Proposed Final Order does not provide a disposal system to the extent envisioned by 40 CFR § 191 *et seq.*

for the transuranic waste and "greater than Class C" radioactive waste identified at the landfill. By ignoring the problem of transuranic waste, the Hearing Officer and, by extension, the Secretary, violated the New Mexico Hazardous Waste Act and applicable regulations.

Instead, the safe disposal of transuranic waste, as set forth in 40 CFR § 191.13(a), and as testified to by Citizen Action's expert, requires the following standards be met:

> Disposal systems for spent nuclear fuel or high-level or transuranic radioactive wastes shall be designed to provide a reasonable expectation, based upon performance assessments, that the cumulative releases of radionuclides to the accessible environment for 10,000 years after disposal from all significant processes and events.

"Disposal," as defined in 40 CFR § 191.02 means,

> permanent isolation of spent nuclear fuel or radioactive waste from the accessible environment with no intent of recovery, whether or not such isolation permits the recovery of such fuel or waste. For example, disposal of waste in a mined geologic repository occurs when all of the shafts to the repository are backfilled and sealed

"Disposal system," as explained in 40 CFR § 191.12 means, "any combination of engineered and natural barriers that isolate spent nuclear fuel or radioactive waste after disposal."

The Permit Modification recommended in the Hearing Officer's Proposed Final Order does not provide for "permanent isolation of spent nuclear fuel or radioactive waste [including TRU and "greater than Class C" radioactive waste]" as required by 40 CFR § 191 *et seq.* Specifically, the Permit Modification recommended in the Hearing Officer's Proposed Final Order and adopted by the Secretary allows the transuranic waste and "greater than Class C" radioactive waste shown to occur at the landfill to remain in place within 25 feet of the surface in

a manner that does not comply with 40 CFR § 191 *et seq.* requirement for a disposal system that would result in "permanent isolation ... from the accessible environment...," or a "combination of engineered and natural barriers that isolate" the transuranic waste and "greater than Class C" radioactive waste.

In addition, the Permit Modification recommended in the Hearing Officer's Proposed Final Order and adopted by the Secretary does not "provide a reasonable expectation, based upon performance assessments, that the cumulative releases of radionuclides [found in transuranic waste and "greater than Class C" radioactive waste in the MWL] to the accessible environment for 10,000 years after disposal from all significant processes and events..." required by 40 CFR § 191.13(a) as no such performance assessment was identified on the record and the CMSFR fails to consider monitoring, surveillance, maintenance or access controls beyond 100 years, as noted at CMSFR AR 03-035, p. 51. Instead, the only corrective measure alternative identified in the CMSFR with 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 ... to the atmosphere" and provide for compliance with 40 CFR §191 *et seq.* standards for transuranic and "greater than Class C' radioactive waste was the remedy of "Future Excavation - V.e."

15. This adoption of the Permit Modification recommended in the Hearing Officer's Proposed Final Order resulted in the NMED's approval of disposal of transuranic waste and "greater than Class C" radioactive waste in a manner contrary to 40 CFR § 191 *et seq.* and, as such, would

constitute "willful disregard for environmental laws of any state or the United States" by NMED and SNL/DOE contrary to NMSA 1978 § 74-4-4.2(4).

Rather than requiring excavation, the Permit Modification recommended in the Hearing Officer's Proposed Final Order and adopted by the Secretary relied on institutional controls (ICs), including long-term monitoring, long-term surveillance and maintenance, and long-term access controls, associated with a vegetative soil cover that are assumed to be maintained for only the next 100 years, the longest period of time that active ICs can be relied upon for purposes of conducting performance assessments per NRC 10 CFR § 61 (CMSFR AR 03-035, p. 51). Therefore, the Permit Modification recommended in the Hearing Officer's Proposed Final Order was not based on a performance assessment that complies with the requirements of 40 CFR § 191.13(a) that assesses "the cumulative releases of radionuclides [such as the TRU and "greater than Class C" radioactive waste placed in the MWL] to the accessible environment for 10,000 years after disposal from all significant processes and events..." and is therefore arbitrary and capricious and otherwise contrary to law and regulation.

The permit and the permit modification must contain terms and conditions as necessary to protect human health and the environment. NMSA 1978 § 74-4-4.2.C. and 20 NMAC 4.1.900 incorporating 40 CFR 270.32(b)(2). These issues must be addressed, in order to protect human health and the environment, as required by applicable state and federal law. For example, "TRU waste remains radioactive for very long periods of time; its isolation from the human environment is essential to protect the public health and safety." *State of New Mexico v. Watkins,*

969 F.2d 1122, 1124 n.1 (D.C.Cir. 1992). The Hearing Officer's Proposed Final Order fails to acknowledge or address uncontroverted evidence in the record regarding both the occurrence of TRU and "greater than Class C" radioactive waste at the MWL and the release of VOCs, SVOCs and metals from locations where they were placed in the MWL, and is therefore contrary to law.

4. Failure to Adequately Address Volatile Organics

The Hearing Officer's Final Report 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," 20 NMAC 4.1.500 and 40 CFR § 264.111 from the MWL as:

The Hearing Officer's Proposed Final Report 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 Secretary's final decision, with regartd to remedying the potential release of volatile organics, was arbitrary and capricious and without substantial evidence.

5. Failure to Consider or Address Public Comments

As already described in Section A(7), p. 11, *supra*, NMED's response to public comments failed to address all public comments. Moreover, 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, 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.

V. List of Authorities in Support of Issues

A. Statutory and RegulatoryAuthority

New Mexico

New Mexico Hazardous Waste Act, NMSA 1978, § 74-4-1, *et seq*. (providing standards and authority for approval and conditions for approval on permit)

Hazardous Waste Management Regulations, 20.4-1, *et seq*. NMAC (same)

Federal

40 C.F.R. § 191 *et seq. (*regulating radioactive waste*)*

40 C.F.R. § 264, Subpart F (providing federal standards for treatment, management and disposal of hazardous waste)

Atomic Energy Act of 1954, 42 U.S.C § 2011 *et seq*. (governing recovery of radioactive waste)

Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq*. (governing treatment, management, and disposal of hazardous waste)

Case Authority

New Mexico

State v. Hermosillo, 88 N.M. 424, 432, 540 P.2d 1313, 1321 (Ct.App. 1975)(all relevant evidence should be admitted);

In re Miller, 88 N.M. 492, 498, 542 P.2d 1182 (Ct.App.), *cert. denied*, 89 N.M. 5, 546 P.2d 70 (1975)("The essence of justice is largely procedural."; exclusion of admissible evidence at administrative hearing violated Due Process);

Colonias Development Council v. Rhino Environmental Services, 138 N.M. 133, 117 P.3d 939 (2005) (holding that public hearing requirements in environmental statutes implied necessity of full consideration of public's concerns and that "social well-being" included considerations beyond technical requirements for granting landfill permit)

Federal

Gatreaux v. Romney, 448 F2d. 731 (7th Cir., 1971); *Meek v. Martinez*, 724 F.Supp 888 (S.D. Fla. 1987)(NMED must comply with all applicable federal laws)

United States v. State of New Mexico, 32 F.3d 494 (10th Cir. 1994) (State can consider radioactive content of hazardous waste in reviewing disposal of hazardous waste at a federal facility)

Sierra Club v. United States Department of Energy, 734 F. Supp. 946 (D. Colo. 1990) (same)

State of New Mexico v. Watkins 969 F.2d 1122, 1124 n.1 (D.C.Cir. 1992) (isolation of transuranic waste from human environment is essential to protect public health and safety)

1000 Friends of Maryland v. Browner, 265 F.3d 216, 220 n.2 (4th Cir. 2001)([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)

VI. Tape Recording of Proceedings

The hearing on Sandia Corporation's Application was transcribed.

VII. Related or Prior Appeals

There are no related or prior appeals.

VIII. Copy of Order of Appointment of Appellate Counsel

Counsel is privately retained, so this section is not applicable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, via first class mail, on this 4th day of November, 2005 to:

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