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ENTERED

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.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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APPELLANT'S BRIEF-IN-CHIEF

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NMED Hazardous Waste Bureau

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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

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,

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[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).

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."

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).

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

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

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

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

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

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[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.

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]

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[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

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.

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

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).

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[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.

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

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

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

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.

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,

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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.

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