**IN THE SUPREME COURT OF 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.

COA # No.: 25896
HWB 04-11(M)

**Sup. Ct. No. 30,844**

CITIZEN ACTION,

Petitioner/Appellant,

vs.

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

Respondents/Appellees.

# PETITION FOR WRIT OF CERTIORARI

Submitted by:

LAW OFFICES OF NANCY L. SIMMONS, P.C.
Nancy L. Simmons
120 Girard SE
Albuquerque, New Mexico 87106
(505) 232-2575
Attorney for Petitioner

## I. Timeliness of the Petition for Certiorari

The Court of Appeals filed its decision on December 19, 2007. This Court granted an extension on this Petition for Writ of Certiorari until January 28, 2008.

## II. Questions before the Court

(1) Whether the New Mexico Environment Department had jurisdiction pursuant to the Resource Conservation and Recovery Act ("RCRA") to "modify" a permit for the Sandia National Laboratories ("SNL") Mixed Waste Landfill ("MWL") site, where there was never an original Part B RCRA Permit issued for the site?

(3) Whether the Court of Appeals had jurisdiction to review a challenge by Petitioner to the jurisdiction of NMED?

(2) Whether the Court of Appeals could consider whether the so-called Module IV "corrective action" was properly treated as subject to modification by the NMED Hearing Officer, when Module IV was never part of the administrative record and the Record Proper was unilaterally supplemented by Respondent NMED, over the objection of Petitioner?

## III. Facts Material to the Questions Presented

Federal hazardous waste regulation is a complex area of law, with staggered compliance schedules and grandfathered immunities. Thus when SNL first began

dumping hazardous and radioactive waste in its mixed waste[1] landfill site, there was no federal regulation of the site. Congress enacted RCRA, 42 U.S.C. §6901, *et seq.*, to address the danger posed by sites such as the MWL. "Congress was particularly concerned with the management and disposal of 'hazardous wastes,' for which it provided comprehensive 'cradle-to-grave' regulation." *Fla. Power & Light Co. v. EPA*, 145 F.3d 1414, 1416 (D.C. Cir. 1998)(citations omitted). "The RCRA requires facilities that treat, store or dispose of hazardous waste to obtain a permit from either the [EPA] or an authorized state." *Id.*

When RCRA was passed, however, numerous sites would have been immediately non-compliant, had Congress not allowed a "grace period," known as "interim status." "[E]xisting facilities meeting certain requirements could operate on an "interim status" basis until final agency action could be taken on a facility's permit application." *Id.* at 1416. "Interim status," however, was not automatic. Rather, a facility was required to file a "RCRA Part A Permit Application," a limited application requesting interim status, pending a decision on the final "RCRA Part B Permit Application." *Compare* 40 C.F.R. § 270.13 (Part A) *and id.* § 270.14 (Part B). Further, while a Part A permit is a necessary condition for interim status, it is not a sufficient condition – EPA's issuance of a Part A permit is not absolute proof of interim status. *State of New Mexico v. Watkins,* 969 F.2d

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

1122, 1130 (D.C. Cir.1992).

The parties agree that New Mexico obtained general RCRA enforcement authority prior to SNL's submission of its Part B Permit Application for the SNL facility. NMED granted SNL a RCRA Part B Permit for its facility; it is this Part B Permit that SNL sought to modify below.

However, pursuant to the Hearing Officer's Conclusion of Law No. O, the MWL site *was never included in the Part B permit for the SNL facility.* Instead, SNL sought and obtained a "corrective action module" for the MWL *from the EPA,* the so-called "Module IV," on the theory that the MWL was *not* subject to Part B permitting requirements, and NMED had no regulatory authority over the MWL site. Regulation of the MWL therefore defaulted to the Hazardous and Solid Waste Amendments ("HSWA"), which only the EPA was authorized to apply. *Fla Power,* 145 F.3d at 1417 (separate EPA authority to take corrective action). Accordingly, there was and is no Part B Permit for the MWL to serve as a jurisdictional platform for SNL's current application to "modify" its permit.

While the Hearing Officer concluded that SNL *did not have* a RCRA Part B Permit for the MWL site, she also concluded, to the contrary, that NMED had authority to regulate SNL's management of hazardous waste pursuant to "Sandia's and DOE's RCRA permit," in her Finding of Fact No. D. There is a jurisdictional bar to what the NMED Hearing Officer did to address this gap, which was to

assume that the RCRA Part B Permit for the SNL *facility* allowed NMED to regulate the MWL *site* as a RCRA Part B permitted site. Just as a driver cannot seek to "renew" a New Mexico driver's license, only to produce a Colorado license from his pocket, the Hearing Officer strayed outside her jurisdiction in granting a modification of a non-existent Part B Permit — only a *relevant* permit can invoke the authority of New Mexico to grant a modification.

Moreover, in the case of a RCRA Part B Permit, more than an individual's interest was involved. Significantly, the public notice of the modification application, a jurisdictional prerequisite to NMED's assertion of authority, gave no notice that SNL intended to treat "Module IV" as equivalent to or part of a RCRA Part B Permit. Indeed, directly contrary public notice was provided by the Part B Permit itself: SNL's RCRA Part B Permit *explicitly excluded* the MWL site.

The question on appeal was whether SNL took the wrong regulatory path in failing to seek a RCRA Part B Permit for the MWL site. Thus the Court of Appeals erred in concluding that Petitioner's challenge was not directly to the jurisdiction of NMED to decide issues related to modification of a "permit," when, as a matter of law, the MWL is either operating illegally outside the regulatory authority of any agency until it complies with Part B permitting requirements, *or* it is subject to the HSWA, and is therefore subject to an entirely different regulatory

scheme. Quite simply, NMED had no jurisdiction to grant the "modification" of a permit that never existed.

Respectfully, the Court of Appeals compounded this error by addressing the significance of Module IV, without addressing Petitioner's objection to NMED's unilateral supplementation of the appellate record, when Module IV was *never made part of the administrative record before the NMED Hearing Officer*. Instead, NMED's appellate counsel, over the objection of Petitioner, was allowed to supplement the Record Proper unilaterally by attaching Module IV to a pleading she *herself* filed in the Court of Appeals. Module IV was not part of the administrative record transmitted by the Hearing Clerk to the Court of Appeals. There is not even any certainty that the Hearing Officer herself reviewed Module IV; indeed, the opposite impression is conveyed by the Hearing Officer's Finding of Fact No. 21, which provides that "*NMED* issued a hazardous waste permit for storage of hazardous waste at SNL on August 6, *1992*," when, in fact, Module IV was issued by the United States EPA in 1993.

Indeed, Petitioner itself did not have a copy of Module IV until it filed an Inspection of Public Records Act request with NMED *after* this matter was on appeal. As Petitioner described in its Motion to Strike, Citizen Action was required to submit an IPRA request even to locate what "permit" was being referenced by geologist Moats in the administrative hearing. *See* Opinion at pages

13-15. Nonetheless, despite the IPRA review, the documents ultimately submitted to the Court of Appeals by NMED as a "supplement" to the Record Proper included items never before seen by Petitioner.

## IV. Bases for Granting the Writ

### A. NMED Was without Jurisdiction to Grant the Relied Requested

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

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

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

SNL and NMED took the position before the Court of Appeals that at the time SNL submitted its RCRA Part A and Part B Permit Application for the SNL *facility*, the mixed waste landfill *unit* was not independently subject to RCRA Part B regulation. Accordingly, the HSW Amendments were triggered, to instead require "corrective action" by SNL at the MWL site, under the authority of the EPA. If, indeed, the MWL *was not otherwise subject to RCRA Part B regulation*, then SNL and NMED are correct that it was subject instead to the HSW Amendments – in other words, the MWL could not go entirely unregulated. On the other hand, if the MWL *was* subject to RCRA Part B regulation, then "corrective action" was not a substitute for a Part B Permit, and the *facility's* Part B Permit cannot now be "modified" to include the MWL, without submitting the MWL *unit* to the more rigorous Part B permitting requirements.

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

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

Either SNL requires a Part B Permit to continue to store and treat mixed waste at the MWL site, and is therefore operating illegally without having obtained a Part B Permit for the MWL, or it never required a Part B Permit in the

first place and therefore corrective action is applicable as to the MWL site. SNL and NMED, however, cannot have it both ways; they cannot contend that having taken the road of "corrective action," they can now substitute Module IV for a Part B Permit.

> Just as a deer hunting license does not imply a license to hunt duck, a facility "which does not have a permit" clearly implies a facility which does not have a *relevant* permit. Any other construction would ignore the central object of the permit program, which is to limit the disposal of any given waste to an appropriate facility.

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

To hold instead that NMED had original jurisdiction to "modify" Module IV as though it were a Part B Permit is akin to suggesting that a federal court could permit amendment of a complaint over which there was no original federal jurisdiction, merely by the device of asserting its authority to permit amendment pursuant to Rule 15 — the general authority to permit amendment does not confer subject matter jurisdiction where none existed in the first instance. *Cf. US Xpress, Inc. v. New Mexico Taxation and Revenue Dep't,* 139 N.M. 589, 594-595, 136 P.3d 999, 1004-1005 (2006)("In any matter brought before the court, the court

must have subject matter jurisdiction before determining if a particular procedure is appropriate;" thus subject matter jurisdiction is a prerequisite to exercise of all procedural authority).

B. Petitioner Appropriately Raised the Hearing Officer's Jurisdiction on Appeal

Petitioner could raise the issue whether NMED had jurisdiction to modify Module IV or the Part B Permit at any time. *Gonzales v. Surgidev Corp.* , 120 N.M. 133, 899 P.2d 576 (1995)(subject matter jurisdiction can be raised at any time, including on appeal). If there was never a "license," there can be no license renewal. Indeed, if the MWL was out of compliance at the time EPA issued Module IV, even EPA's action could not grant legal status to the MWL in the first place. *Watkins,* 969 F.2d at 1130 (Part A permit granted by EPA did not conclusively determine issue of "interim status," because such status is a creature of statute). Moreover, even if there was otherwise jurisdiction, the corrective action status granted by the EPA had expired by its own terms prior to SNL's request for modification. Finally, the very notion that the question whether a hazardous and radioactive mixed waste dump is operating illegally can be waived flies in the face of RCRA's statutory "cradle-to-grave" regulatory framework.

The Court of Appeals held that if NMED had no jurisdiction to grant the modification, then the Court of Appeals had no jurisdiction to address the issue on appeal, citing *Maso v. State of New Mexico Taxation and Revenue Dept.,* 135

N.M. 152, 85 P.3d 276 (Ct.App. 2004). Petitioner respectfully submits that this is an incorrect construction of the appellate remedy that applies where there is a challenge to the jurisdiction of an administrative agency or a trial court. Rather, *Maso* provides only that where a single issue was raised over which the agency has no jurisdiction, an appealing party may not obtain a review on the merits of that particular ruling on appeal; in contrast, if an administrative ruling has entered on a matter over which the agency has no jurisdiction, the remedy on appeal is not to leave the agency ruling standing, but to vacate the ruling over which there was never jurisdiction.

Thus while Petitioner would agree that in the absence of jurisdiction, NMED could not order a closure of the MWL site consistent with post-closure regulations, neither could NMED order modification of a non-existent Permit. If the NMED Hearing Officer had correctly reasoned that she was without agency jurisdiction to do what was requested, then certainly SNL would not be permitted at that point to continue storing unregulated mixed waste, but neither does this fact mandate that NMED instead has "clean up" jurisdiction to modify a RCRA Part B Permit that SNL does not hold and never has held for the MWL site. Rather, the proper remedy on appeal was remand for the NMED Hearing Officer to vacate her order permitting modification, with the result that SNL itself would have to proceed down the correct regulatory path to comply with state and federal law,

much as vacating a judicial order of modification returns the parties to the *status quo ante*. *See, e.g, Alvarez v. State of New Mexico Taxation and Revenue Dep't,* 126 N.M. 490, 971 P.2d 1280 (Ct.App. 1998)(order set aside for lack of jurisdiction); *Eldridge v. Circle K Corporation,* 123 N.M. 145, 934 P.2d 1074 (Ct.App. 1997)(reversing and remanding for lack of primary jurisdiction by the workers' compensation judge).

The omission of Module IV from the administrative record also raises an issue of the Hearing Officer's subject matter jurisdiction. "If the required initial pleading in a case has not been filed, the tribunal does not have jurisdiction to hear the claim, so failure to file the pleading can be raised for the first time on appeal." *Pineda v. Grande Drilling Corporation,* 111 N.M. 536, 540, 807 P.2d 234, 238 (Ct.App. 1991)(citations omitted).

C. The Court of Appeals Failed to Address that Module IV Was Never Part of the Administrative Record

The omission of Module IV from the administrative record before the NMED Hearing Officer takes on added significance in the context of Petitioner's jurisdictional challenge. The Court of Appeals erred in allowing appellate counsel for NMED to supplement the appellate Record Proper with Module IV, over the objection of Petitioner, when the lack of any permit to modify was the subject of Petitioner's jurisdictional challenge. Petitioner submits that the question of the

provenance and significance of Module IV should have been remanded to the Hearing Officer for consideration, rather than litigating the issue on appeal with newly added documents.

First, NMED as a party to the appeal was not equivalent to the "administrative entity" referenced in 12-601(c), who prepares the appellate Record Proper as part of the Clerk's authority, not as a party to the appeal. *See* NMRA 22-301(c)(record proper "shall be prepared and reproduced *by the clerk* of the district court" ). Second, the inclusion of materials not presented to the Hearing Officer is not a permissible use of supplementary authority. *See* NMRA 12-209; *see, e.g., Martinez v. New Mexico State Engineer Office*, 129 N.M. 413, 9 P.3d 657 (2000). Thus even NMED acting through its hearing clerk would not have the broad powers NMED counsel granted to herself in filing the purported supplemental record. *See* NMRA 12-209(c). The Rule contemplates documents that are submitted in the lower court or tribunal but omitted accidentally from the record proper, not documents that were never introduced below. *See, e.g., McKeough v. Ryan*, 79 N.M. 520, 445 P.2d 585 (1968).

Quite simply, while NMED may have had substantially more information on this case in its own records, it cannot use its position vis-a-vis the administrative hearing process to come through the back door with materials never included as part of the administrative record. For the Court of Appeals to allow such an action

conflated NMED's role as hearing officer and its role as a party in the case. In the concise words of the Fifth Circuit, the ability of a court to supplement the record exists so that the court may "conform the record to what happened, not to what did not." *U.S. v. Smith*, 493 F.2d 906 (5th Cir. 1974).

## V. Prayer for Relief

Petitioner respectfully requests that this Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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

Nancy L. Simmons
120 Girard SE
Albuquerque, NM 87106
(505) 232-2575

I hereby certify that a true and correct copy of the foregoing was mailed this 28th day of January 2008 to all counsel of record.

## STATEMENT OF COMPLIANCE

The undersigned counsel hereby certifies that this Petition for Writ of Certiorari complies with the type and volume limitations set forth in Rule 12-502 (D). The petition for writ of certiorari includes 3150 words in Times New Roman font, which is within the acceptable range for a petition for writ of certiorari pursuant to Rule 12-502(D)(3). I relied on the word counting utility in my word processing program, Word Perfect 12.0, to make the count reflected herein.

Nancy L. Simmons
Counsel for Petitioner-Appellant