IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CITIZEN ACTION,

Petitioner / Appellant,

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

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

Respondents / Appellees.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Louis W. Rose
Jeffrey J. Wechsler
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, NM 87504-2307
(505) 982-3873

and

Amy J. Blumberg
Sandia Corporation
Post Office Box 5800
Albuquerque, NM 87185-0141
(505) 284-4547

Attorneys for Sandia Corporation

INTRODUCTION

Sandia National Laboratories ("SNL") is a federal facility located within the boundaries of Kirtland Air Force Base immediately south of the City of Albuquerque. SNL is owned by the Department of Energy ("DOE") and is managed and operated for DOE by Sandia Corporation ("Sandia").

On August 6, 1992, the New Mexico Environment Department ("NMED") issued permit No. NM589011518-1 ("Permit") for the treatment, storage and disposal of hazardous waste at the SNL facility. The original Permit consisted of Modules I (general permit conditions), II (general facility conditions) and III (containers). Shortly thereafter, on August 26, 1993, the United States Environmental Protection Agency ("EPA") issued Module IV, to add corrective action provisions to the Permit. The Mixed Waste Landfill ("MWL"), the subject of this action, was designated as a solid waste management unit ("SWMU") in Module IV of the Permit.

On January 23, 2004, Sandia requested a modification to Module IV of the Permit to select a corrective measure for the MWL. After a four day hearing, the NMED Secretary approved a modification specifying a vegetative soil cover with a bio-intrusion barrier as the corrective action remedy for the MWL. On appeal, the Court of Appeals held that the Secretary had jurisdiction to modify the Permit, and

unanimously affirmed the Secretary's order. Citizen Action now seeks review of the Court of Appeals' decision.

SUMMARY OF ARGUMENT

Petitioner advances three grounds for review of the Court of Appeals' decision: (1) the Secretary lacked subject matter jurisdiction to modify the Permit because the MWL required its own federal Resource Conservation and Recovery Act ("RCRA") permit separate from the SNL facility-wide Permit; (2) it was not necessary to preserve the issue of whether the MWL required a separate RCRA permit; and (3) the Court of Appeals abused its discretion by failing to strike Module IV from the record.

Petitioner's arguments are without merit. *First*, Petitioner mischaracterizes its challenge to regulatory decisions for the MWL as jurisdictional. NMED has statutory jurisdiction over hazardous and mixed waste, the SNL RCRA Permit, and the MWL. *Second*, Petitioner makes no effort to identify how it preserved the issue of whether the MWL operated under the incorrect framework. *Finally*, the Court of Appeals did not abuse its discretion in finding that Rules 12-209 and 12-601 NMRA authorized NMED to supplement the record. The petition for a writ of certiorari should be denied.

BACKGROUND

Sandia offers the following background to supplement the material facts offered by Petitioner.

I. The Governing Statutory and Regulatory Scheme.

RCRA, as amended by the Hazardous and Solid Waste Act Amendments ("HSWA"), governs the treatment, storage and disposal of hazardous waste. *See* 42 U.S.C. §§ 6901 – 6992. As originally enacted, RCRA imposed a regulatory scheme for the active management of hazardous wastes. It did not require remedial action for past mismanagement. *United Tech. Corp. v. EPA*, 821 F.2d 714, 716 (D.C. Cir. 1987). In 1984 Congress amended RCRA to provide additional protection from past releases. HSWA requires corrective action for releases from a SWMU, regardless of the date waste was deposited. 42 U.S.C. § 6924(u).

States may take primary responsibility for RCRA implementation by installing an EPA-approved hazardous waste program. 42 U.S.C. § 6926(b). The New Mexico hazardous waste program is governed by the Hazardous Waste Act ("HWA"), NMSA 1978 §§ 74-4-1 to 74-4-14, and the New Mexico Hazardous Waste Management Regulations ("HWMR"), 20.4.1 NMAC *et seq.* Three regulatory milestones in New Mexico's RCRA delegation are significant for this appeal.

A. Base RCRA Program Authorization.

First, on April 16, 1985, EPA authorized New Mexico to enforce the HWA and the HWMR in lieu of the federal program. The 1985 authorization did not include authorization for corrective action under HSWA or to regulate mixed waste. *See New Mexico v. Watkins*, 969 F.2d 1122, 1128-29 (D.C. Cir. 1992).

B. Mixed Waste Authorization.

In 1986, EPA interpreted RCRA to regulate mixed wastes for the first time. *See* 51 Fed. Reg. 24,504 (July 3, 1986); *see also* 53 Fed. Reg. 37,045, 37,046 (Sept. 23, 1988). Until that date, EPA did not require state programs to regulate mixed wastes. *Watkins*, 969 F.2d at 1128. Even after RCRA was interpreted as applying to mixed waste, EPA explained in the 1988 Notice that facilities treating mixed waste would not be subject to RCRA regulation until the state received the necessary supplemental authorization to issue RCRA permits for mixed waste. 53 Fed. Reg. 37,045, 37,047. New Mexico received EPA authorization to regulate mixed waste on July 25, 1990. *Watkins*, 969 F.2d at 1129. Accordingly, in New Mexico, no facility containing mixed waste required a RCRA permit until 1990. Under this regulatory scheme, a facility such as the MWL that was closed prior to 1990 never required a RCRA permit. *Id.* at 1128-29.

C. Corrective Action Authorization.

As originally enacted, RCRA was primarily aimed at prevention of future contamination. *See Iron & Steel Inst. v. E.P.A.*, 886 F.2d 390, 393 (D.C. Cir. 1989). Due to concern about past releases, Congress amended RCRA in 1984 with passage of HSWA. HSWA authorized EPA to require treatment, storage and disposal facilities to investigate and cleanup past releases of hazardous waste. *See* 42 U.S.C. §§ 6924(u), (v) and 6928(h). The investigation and cleanup of hazardous waste is referred to as corrective action. 42 U.S.C. 6928(h). On January 2, 1996, EPA delegated to NMED the authority to implement and enforce HSWA.

II. Corrective Action At SNL.

In 1992, NMED issued the Permit for treatment, storage and disposal of hazardous waste at the entire SNL facility. Because New Mexico had not yet received authorization to implement HSWA, in 1993 EPA issued the corrective action portion of the Permit as Module IV. Module IV of the Permit became enforceable by NMED after it received HSWA delegation. *See* Module IV, AR 21174-21254; *see also* 40 C.F.R. § 271.8(b)(6).

In 1993, both RCRA and the HWA dictated that all permits issued after April 8, 1987 required corrective action for releases of hazardous waste or constituents from any SWMU. 42 U.S.C. §6924(u); NMSA 1978, § 74-4-4.2.B (1992). A SWMU is "any discernible unit at which solid waste has been placed at

any time, from which NMED determines there may be a risk of release of hazardous waste or hazardous constituents, regardless of whether the unit was intended for the management of solid or hazardous waste." 61 Fed. Reg. 19431, 19442-43 (May 1, 1996).

EPA designated the MWL as a SWMU in the 1993 Permit. Specifically, the MWL was listed as SWMU 76 at SNL, as identified in Module IV, Table 2 of the Permit. FoF No. 15; AR 902. As such, it is regulated under 40 C.F.R. 264.101 (incorporated by 20.1.4.500 NMAC) and Module IV of the Permit. *Id.*

Under Module IV and the applicable rules, Sandia is required to investigate and remediate SWMUs. Sandia completed the investigative process for the MWL in September, 1996. Following this process, Sandia recommended no further action be taken at the MWL. NMED rejected this recommendation and informed Sandia of its decision to require corrective action for the MWL. AR 10954-10955, 10977. In 2001, the NMED directed Sandia to conduct a Corrective Measures Study ("CMS") that complied with the requirements set forth in Sections N, O, P, Q and S of Module IV of the Permit. FoF No. 93, AR 829. The purpose of the CMS was to identify and screen, develop, and evaluate potential corrective measures alternatives in to be taken at the MWL. FoF Nos. 96-100, AR 829-830.

The HWMR allow a facility to request modification of an existing permit. 20.4.1.900 NMAC. Modification of the SNL Permit was necessary to establish the

framework to complete corrective action at the MWL. In accordance with this provision, on January 23, 2004, Sandia requested a Class 3 modification of the Permit to select a corrective measure or remedy for the MWL. As discussed above, the Secretary ordered that the Permit be modified to incorporate the CMS and selected a vegetative soil cover with a bio-intrusion barrier as the corrective action remedy for the MWL. FoF No. 108, AR 833.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT NMED HAD JURISDICTION OVER QUESTIONS RELATING TO REGULATION OF THE MWL.

Petitioner contends that the entire administrative proceeding for permit modification was improper because there was no separate RCRA permit for the MWL. According to Petitioner, the absence of a valid permit deprived the Secretary of jurisdiction over the proceedings. Petition at 6-9. The Court of Appeals rejected Petitioner's contention, and correctly held that "the question of permit status is not one of jurisdiction." Opinion ¶ 14. Undaunted, Petitioner asks this Court to overturn the Court of Appeals and reject the principle that "the Secretary has jurisdiction over questions relating to the proper category of permit for the MWL." Opinion ¶ 12.

A. The Court Has Jurisdiction Over Issues Regarding The Proper Permit For The MWL.

Petitioner's first argument is that NMED lacked jurisdiction to modify the Permit. Petitioner's argument rests on an incorrect presumption that the MWL is not a unit of any permit which can be subject to modification. [1] As discussed above, the entire SNL facility received a RCRA permit in 1992. FoF No. 21, AR 816. At that time, New Mexico did not have authority to enforce corrective action pursuant to HSWA. FoF No. 17. As a result, in 1993, EPA issued Module IV, to add HSWA provisions to the SNL facility-wide RCRA Permit. Significantly, the Hearing Officer found, and Petitioner did not challenge, that the MWL "is SWMU 76 at SNL and regulated under 40 C.F.R. 264.101 (incorporated by 20.1.4.500 NMAC)." FoF No. 15. Thus, the Court must base its decision on the premise that the MWL is regulated as a SWMU under Module IV of the SNL Permit.

For the purposes of determining whether NMED lacked jurisdiction, the Court need not reach the issue of whether the MWL requires a separate RCRA

---

[1] Petitioner repeatedly misstates the RCRA permitting process as producing both a Part A permit, and a Part B permit. The application for a RCRA permit consists of two parts: Part A identifies the facility owner and operators and is relevant for interim status; Part B details the operation and sets forth the conditions of operation. *See, e.g., New Mexico ex rel. Madrid v. Richardson*, 39 F.Supp.2d 48, 51-53 (D.D.C. 1999). At the end of the day, a facility is issued a single RCRA permit.

permit. That question is not before the Court.[2] Rather, the action approved by the Secretary is a permit modification to incorporate a corrective action for a SWMU listed in the SNL Permit. The sole relevant inquiry raised by the petition is whether NMED has jurisdiction to modify the SNL Permit and regulate the MWL.

The limits of NMED's jurisdiction are defined by statute. Opinion ¶ 12. As explained by the Court of Appeals, the New Mexico Legislature delegated the authority to administer the HWA to NMED, and EPA authorized New Mexico to regulate mixed waste. *Id.* "Because NMED has jurisdiction to regulate mixed waste under New Mexico law and because the MWL is a mixed waste landfill, the Secretary has jurisdiction, under the New Mexico Hazardous Waste Act, to 'maintain, develop and enforce rules and standards' regarding the MWL." *Id.* (quoting NMSA 1978 § 74-1-7(A)(13)). It follows that the Court of Appeals correctly found that the Secretary had jurisdiction over the permit modification at issue in this case.

Indeed, a review of the Petition reveals that Petitioner's chief complaint is not that NMED lacked jurisdiction over the MWL, but rather that the MWL was not given the proper category of permit. In other words, Petitioner challenges the statutory propriety of the specific regulatory decisions with regard to the MWL. In

---

[2] Though it is not necessary to reach this issue, the Secretary correctly regulated the MWL as a SWMU. *See* Sandia Answer Brief at 18-29; *Watkins*, 969 F.2d at 1128-29.

Petitioner's words, "[t]he question on appeal was whether SNL took the wrong regulatory path in failing to seek a RCRA Part B Permit for the MWL site." Petition at 4. This challenge, however, is not directed at NMED's authority to regulate the MWL or to modify the existing permit, but rather at the correctness of NMED's regulatory approach. *See Dona Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-032, ¶ 8, 140 N.M. 6, 139 P.3d 166. Put simply, this issue is not jurisdictional, and Petitioner can cite to no authority to the contrary.

B. Petitioner Cannot Collaterally Attack The Designation Of The MWL As A SWMU.

The HWMR, which adopt 40 C.F.R. Parts 264 and 270 by reference, require corrective action at SWMUs where releases of hazardous waste or hazardous constituents have or may have occurred. 20.4.1.500 NMAC; 20.4.1.900 NMAC. Specifically, 40 C.F.R. § 264.101 provides that as part of its RCRA permit, the permittee is required to "institute corrective action as necessary to protect human health and the environment for *all releases* of hazardous waste or constituents *from any solid waste management unit* at the facility, regardless of the time at which the waste was placed in such unit." 40 C.F.R. § 264.101; 20.1.4.500 NMAC (emphasis added). The HWMR further provide that "[c]orrective action will be specified in the permit. . . ." 40 C.F.R. § 264.101; 20.1.4.500 NMAC.

Once the MWL was included in the Permit as a SWMU, the applicable regulatory scheme was set. The proper time to challenge the inclusion of the MWL in the Permit as a SWMU was in 1993 when EPA and NMED first made this regulatory decision. *See* 42 U.S.C. § 6976; *see also* NMSA 1978 § 74-4-14; 20.4.1.901.B(10) NMAC. Petitioner, or any other interested party, had a period specified by statute to appeal Module IV. They failed to do so. After the time for appeal had passed, that regulatory decision become final, and Petitioner, along with NMED and Sandia, were bound by it. Petitioner did not file a timely appeal to challenge the inclusion of the MWL in the Permit as SWMU 76, and it should not now be allowed to challenge the substance of that decision in this proceeding.

No matter how Petitioner styles this claim, it is a collateral attack on a permit decision that has been final for over 14 years. Collateral attacks on permit provisions are prohibited under the doctrines of res judicata, statute of limitations, and waiver. *See, e.g., Palumbo v. Waste Techs. Indus.*, 989 F.2d 156, 159-60 (4th Cir. 1993) (disapproving collateral attacks on RCRA permitting decisions); *In re Taft Corners Assocs.*, 632 A.2d 649, 654 (Vt. 1993) (final permits not subject to collateral attack, "whether or not they were properly granted in the first instance"). Once the regulatory decision to designate the MWL as a SWMU became final, NMED was bound to apply the corrective action measures provided in 40 C.F.R.

264.101. Petitioner's argument that the MWL is not properly regulated as a SWMU is untimely and is not properly before this Court in this appeal.

II. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER DID NOT PRESERVE THE ISSUE OF WHETHER THE MWL OPERATED UNDER THE CORRECT REGULATORY FRAMEWORK.

Petitioner next urges this Court to accept certiorari on the grounds that the Court of Appeals erred when it held that Petitioner did not preserve the issue of whether the MWL operated under the incorrect regulatory framework. Issues raised on appeal from an administrative hearing must be preserved before the agency. *See Selmeczki v. N.M. Dep't of Corr*, 2006-NMCA-024, ¶ 23, 139 N.M. 122, 129 P.3d 158. The Court of Appeals correctly held that Petitioner "cites no testimony to the effect that NMED could not modify Sandia's existing Module IV permit or that Sandia should be required to apply for a different permit altogether. Further, [Petitioner] fails to show us where it made an objection to the type of permit that formed the basis for the proceedings." Opinion ¶ 17. Accordingly, the Court of Appeals declined to reach the issue.

As grounds for overturning this holding, Petitioner recycles its jurisdictional argument. As discussed above, the issue of whether the MWL operated under the incorrect regulatory framework is not jurisdictional. Petitioner makes no attempt to identify any part of the record where the issue was preserved. In fact, Petitioner

never raised this issue before the hearing officer, and Petitioner cannot raise a new issue on appeal.

III. THE COURT OF APPEALS CORRECTLY DENIED PETITIONER'S MOTION TO STRIKE PERMIT MODULE IV FROM THE RECORD.

For its final argument, Petitioner contends that the Court of Appeals erred when it denied Petitioner's Motion to Strike.[3] The Court of Appeals explained that "[t]he record reflects that during the administrative hearing, the hearing officer requested that Module IV be included in the administrative record. Module IV was not added to the administrative record during the hearing, due to oversight, and NMED properly supplemented the record to this Court on its own initiative, pursuant to Rule 12-601(C) NMRA and Rule 12-209(C)." Order on Motion, attached hereto as Exhibit 1.

Petitioner contends that the Court of Appeals' ruling was improper because NMED lacked the authority to supplement the record. Petition at 12. When Rules 12-209 and 12-601 are read together, however, it is clear that NMED is authorized to direct, on its own initiative, that any material omission from the record be corrected and to transmit a supplemental record to the Court of Appeals. That is what occurred in the present matter.

---

[3] Petitioner failed to attach to its Petition the Order on Motion in which the Court of Appeals denied the Motion to Strike. This Court should decline Petitioner's invitation to review the Court of Appeals ruling on this basis alone.

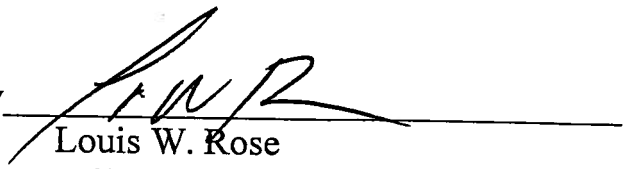
Petitioner next argues that it was improper to supplement the record with Module IV because it was not mistakenly or inadvertently omitted from the record. Petition at 12. In *State v. Antillon*, 2000-NMSC-014, 129 N.M. 114, 2 P.3d 315, this Court explained that "[b]ecause it is in the interest of justice to allow the parties to properly present their claims on appeal, [Rule 12-209(C)] is broadly worded." *Id.* at ¶ 12. Even if Petitioner is correct that Rule 12-209(C) only permits the record to be supplemented with materials that were actually considered in the administrative hearing, that is precisely the situation here. During the hearing, no party doubted the issuance or existence of Module IV. Indeed, this entire proceeding is based on a proposed modification to Module IV. The public notice specifically identified Module IV, as did the CMS Report. References to Module IV are pervasive throughout the documents that comprise the administrative record, as well as the transcript of the hearing. Petitioner quoted Module IV at least twice, and referred to it on numerous other occasions. Given this record, it is not credible for Petitioner to claim ignorance at this late juncture in the proceedings.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.

By 

Louis W. Rose
Jeffrey J. Wechsler
Post Office Box 2307
Santa Fe, NM 87504-2307

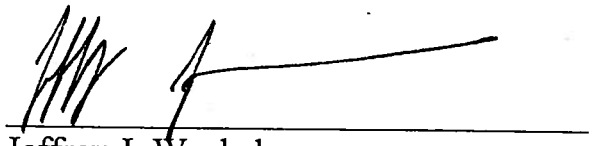
and

Amy J. Blumberg,
Sandia Corporation
Post Office Box 5800
Albuquerque, NM 87185-0141
(505) 284-4547

Attorneys for Sandia Corporation

STATEMENT OF COMPLIANCE

I, Jeffrey J. Wechsler, counsel for Sandia Corporation, hereby certify that this Response to Petition for Writ of Certiorari complies with the type and volume limitations set forth in Rule 12-502(D) NMRA. The Response includes 3,147 words in Time New Roman font, which is within the acceptable range for a response to a petition for writ of certiorari pursuant to Rule 12-502(D)(3) NMRA. I relied on the word counting utility in my word processing program, Microsoft Word for Windows XP, 2000 to make the count reflected herein.

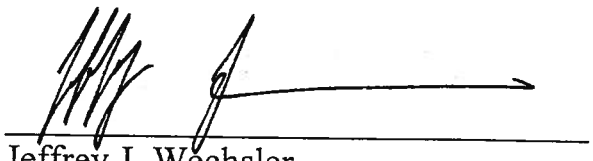


Jeffrey J. Wechsler

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **RESPONSE TO PETITION FOR WRIT OF CERTIORARI** to be mailed on February 15, 2008 to the following:

Nancy L. Simmons, Esq. 120 Girard SE Albuquerque, NM 87106	Tannis L. Fox, Esq. Deputy General Counsel New Mexico Environment Dept. Post Office Box 26110 Santa Fe, NM 87502-6110



Jeffrey J. Wechsler

IN THE COURT OF APPEALS 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 AT SANDIA NATIONAL LABORATORIES, BERNALILLO COUNTY, NEW MEXICO, EPA ID NO. NM5890110518.

CITIZEN ACTION,

Appellant,

No. 25,896
D.C. No. HWB-04-11

v.

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

Appellees.

Celia Foy Castillo
Presiding Judge

Michael D. Bustamante
Roderick T. Kennedy
Judges

_____/

ORDER ON MOTION

This matter is before this Court on the Motion to Strike Notice of Supplementing Administrative Record Proper and for Sanctions or in the Alternative

to Vacate Final Administrative Orders and Remand for Evidentiary Hearing, which was filed by Appellant, Citizen Action, on January 23, 2007, with responses filed by Appellees, Sandia Corporation (Sandia) and New Mexico Environment Department (NMED), on February 12, 2007.

NMED filed a notice with this Court on December 18, 2006, to supplement the administrative record proper with a document titled Module IV. The record reflects that during the administrative hearing, the hearing officer requested that Module IV be included in the administrative record. Module IV was not added to the administrative record during the hearing, due to oversight, and NMED properly supplemented the record to this Court on its own initiative, pursuant to Rule 12-601(C) NMRA and Rule 12-209(C) NMRA. We do not consider the alternative motion requesting remand for an evidentiary hearing because the validity of Module IV was not raised at the administrative hearing, as more fully detailed in our opinion at paragraph 17. Because we deny these motions, we do not address the matter of sanctions.

WHEREFORE, the aforementioned motion has been considered by the entire panel on this case and is hereby **DENIED.**

Celia Foy Castillo
Presiding Judge

IN THE COURT OF APPEALS 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 AT SANDIA NATIONAL LABORATORIES, BERNALILLO COUNTY, NEW MEXICO, EPA ID NO. NM5890110518.

CITIZEN ACTION,

Appellant,

v.

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

Appellees.

No. 25,896
D.C. No. HWB-04-11

Celia Foy Castillo
Presiding Judge

Michael D. Bustamante
Roderick T. Kennedy
Judges

_____/

ORDER ON MOTION

This matter is before this Court on the Motion to Strike Notice of Supplementing Administrative Record Proper and for Sanctions or in the Alternative

to Vacate Final Administrative Orders and Remand for Evidentiary Hearing, which was filed by Appellant, Citizen Action, on January 23, 2007, with responses filed by Appellees, Sandia Corporation (Sandia) and New Mexico Environment Department (NMED), on February 12, 2007.

NMED filed a notice with this Court on December 18, 2006, to supplement the administrative record proper with a document titled Module IV. The record reflects that during the administrative hearing, the hearing officer requested that Module IV be included in the administrative record. Module IV was not added to the administrative record during the hearing, due to oversight, and NMED properly supplemented the record to this Court on its own initiative, pursuant to Rule 12-601(C) NMRA and Rule 12-209(C) NMRA. We do not consider the alternative motion requesting remand for an evidentiary hearing because the validity of Module IV was not raised at the administrative hearing, as more fully detailed in our opinion at paragraph 17. Because we deny these motions, we do not address the matter of sanctions.

WHEREFORE, the aforementioned motion has been considered by the entire panel on this case and is hereby **DENIED.**

Celia Foy Castillo
Presiding Judge