

IN THE SUPREME COURT  
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.

SUPREME COURT OF NEW MEXICO  
**FILED**

FEB 15 2008

*Heather J. Robinson*

CITIZEN ACTION,

Sup. Ct. No. 30,844  
(Ct. App. No. 25,896)

Petitioner/Appellant,

vs.

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

Respondents/Appellees.

---

**THE NEW MEXICO ENVIRONMENT DEPARTMENT'S RESPONSE  
TO PETITION FOR WRIT OF CERTIORARI**

---

Tannis L. Fox  
Deputy General Counsel/  
Special Assistant Attorney General  
NEW MEXICO ENVIRONMENT  
DEPARTMENT  
Office of General Counsel  
P.O. Box 26110  
Santa Fe, New Mexico 87502  
(505) 827-1603

Attorney for NMED

## **Facts Material to the Questions Presented**

Petitioner's Petition for Writ of Certiorari does not fully or accurately set forth the regulatory framework at play in this matter or the permitting history of Sandia National Laboratories' ("SNL") Mixed Waste Landfill ("MWL"). An understanding of both is necessary to address the merits of Petitioner's argument. Below, the New Mexico Environment Department ("NMED") sets forth the relevant legal framework and permitting history.

### **I. STATUTORY AND REGULATORY FRAMEWORK**

The federal Resource Conservation and Recovery Act ("RCRA") governs the storage, treatment and disposal of hazardous waste. *See* 42 U.S.C. §§ 6901-6992k. The State of New Mexico received authorization to administer and enforce the State's hazardous waste program on April 16, 1985. Administrative Record ("AR") 001096. New Mexico administers its program pursuant to the New Mexico Hazardous Waste Act ("HWA"), NMSA 1978, §§ 74-4-1 to -14, and the New Mexico Hazardous Waste Management Regulations, 20.4.1 NMAC, which substantially incorporate the federal RCRA regulations at 40 C.F.R. §§ 260-280.

In 1984, the Hazardous and Solid Waste Amendments ("HSWA") greatly expanded the authority under RCRA to require "corrective action" for clean up of hazardous waste sites. *See* 42 U.S.C. § 6924(u) & (v). Under HSWA, a hazardous waste permit issued by the United States Environmental Protection Agency

(“EPA”) or a State must require “corrective action for all releases of hazardous waste or constituents from any solid waste management unit [or “SWMU”] at a treatment, storage or disposal facility seeking a permit under [RCRA] regardless of the time at which waste was placed in such a unit.” 42 U.S.C. § 6924(u). One effect of HSWA was to require clean up of past contamination that would otherwise not have been subject to clean up requirements under RCRA. *See Corrective Action for Solid Waste Management (SWMUs) at Hazardous Waste Management Facilities*, 55 Fed. Reg. 30,798, 30,799, 30,808 (July 27, 1990); AR 001404.

New Mexico received authorization from EPA to enforce corrective action requirements on January 2, 1996. 60 Fed. Reg. 2,450 (Oct. 17, 1995). Under the HWA, all “[h]azardous waste permits . . . shall require corrective action for all releases of hazardous waste or constituents” from any SWMU. NMSA 1978, § 74-4-4.2(B); *see also* 20.1.4.500 NMAC (incorporating 40 C.F.R. § 264.101 (requiring corrective action)).

Until 1986, the regulatory status under RCRA of “mixed waste,” that is a mixture of both hazardous and radioactive waste, was uncertain because RCRA excludes from the definition of “solid waste” “source, special nuclear or byproduct material” as defined by the Atomic Energy Act (“AEA”). Because “hazardous waste” is defined under RCRA as a subset of “solid waste,” AEA radioactive

material is exempt from the definition of “hazardous waste” and thus exempt from RCRA. *State Authorization to Regulate the Hazardous Components of Radioactive Mixed Wastes Under the Resource Conservation and Recovery Act*, 51 Fed. Reg. 24,504 (July 3, 1986). In 1986, however, EPA clarified that the hazardous component of mixed waste was subject to RCRA regulation, and that States with authorized RCRA programs may apply to EPA for authorization to regulate the hazardous component of mixed waste. *Id.* New Mexico received authority to manage mixed waste effective July 25, 1990. 55 Fed. Reg. 28,397 (July 11, 1990).

## **II. PERMITTING HISTORY OF THE MWL**

In August 1990, SNL submitted a Part A and Part B permit application for the storage of hazardous waste at various operating units at SNL. AR 001394. A RCRA permit application consists of two parts, Part A and Part B. 40 C.F.R. § 270.1(b). Part A qualifies owners and operators of existing hazardous waste management facilities for “interim status” under RCRA. *Id.*; 42 U.S.C. § 6925(e). Interim status allows owners and operators to be treated as having been issued a permit until EPA or a State makes a final determination on a permit application. 40 C.F.R. § 270.1(b). Part B allows owners and operators to receive a permit for the treatment, storage or disposal of hazardous waste, if qualified. *Id.*; *see also* 40 C.F.R. §§ 270.14 - 29.

On August 6, 1992, NMED issued hazardous waste permit number NM5890110518 (“SNL Permit” or “Permit”) to SNL for the storage of hazardous waste; the Permit was comprised of Modules I, II, and III. AR 001083, 001084, 001394. The Permit did not include the SNL MWL as a permitted unit because the MWL had closed in 1988. Because the MWL was closed and no longer operating, and because NMED did not receive authority to manage mixed waste until after the MWL was closed, the MWL was not included in SNL’s Part B permit application to be permitted as an operating unit or in SNL’s Part A permit application to be allowed to operate on interim status. AR 001156.

On August 26, 1993, Module IV of the SNL Permit requiring corrective action under HSWA became effective. AR 021174. EPA, not the State, issued the HSWA module because New Mexico did not obtain HSWA authority until 1996. Under Module IV of the Permit, EPA designated the MWL as SWMU 76 for which corrective action was required. AR 021247.

On January 23, 2004, SNL submitted a request to NMED to modify Module IV of SNL’s Permit to select a remedy for the MWL. AR 001084. NMED held a four day public hearing on a draft modification of the Permit in December 2004. *See* Transcript of Proceedings (“Tr.”) (Dec. 2-3, 8-9, 2004). On May 26, 2005, the NMED Secretary issued a Final Order modifying Module IV to implement a remedy for the MWL. AR 000901-07. In the Final Order, the Secretary: (1)

selected as the remedy a vegetative soil cover with a bio-intrusion barrier; (2) ordered SNL to conduct long term monitoring of the vadose zone and ground water; (3) ordered SNL to develop a comprehensive fate and transport model to analyze future movement of contaminants and their potential to migrate; (4) ordered SNL to develop triggers for future action that require additional testing or implementation of an additional or different remedy; (5) ordered NMED and SNL to ensure that documents relating to the MWL are accessible to the public and that the public has an opportunity to comment on major documents; and (6) ordered SNL to prepare a report every 5 years re-evaluating the feasibility of excavation of the landfill as a remedy (the remedy advocated by Petitioner) and the continued effectiveness of the remedy selected. *Id.*

### **Bases for Denial of Writ**

#### **I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONER DID NOT PRESERVE ITS ISSUE FOR APPEAL**

Petitioner argued for the first time before the Court of Appeals that the MWL should be subject to “closure” requirements under 40 C.F.R. §§ 264.110-120 (incorporated by 20.1.4.500 NMAC) instead of corrective action pursuant to 40 C.F.R. § 264.101 (incorporated by 20.1.4.500 NMAC). Petitioner now argues before this Court that the MWL should be subject to what it refers to as a “Part B permit.” *Petition for Writ of Certiorari (“Pet.”)* at 6. Petitioner, however, does not cite to the RCRA regulations which it believes apply to the MWL. While RCRA

regulations provide for the filing of a “Part B application” in order to obtain a hazardous waste permit, the regulations do not provide for issuance of a “Part B permit.” Either a facility obtains a permit or interim status, as described above. And, as described above, Module IV, which requires corrective action for all SWMUs at SNL including the MWL, is part of the SNL Permit, as required by RCRA and the HWA. 42 U.S.C. § 6924(u); NMSA 1978, § 74-4-4.2(B). By “Part B permit,” NMED assumes Petitioner refers to the closure requirements under RCRA, as it argued before the Court of Appeals.<sup>1</sup>

The Court of Appeals found that Petitioner cited no testimony that NMED could not require corrective action nor raised any objection to NMED requiring corrective action and, therefore, Petitioner had failed to preserve the issue for appeal. Opinion at 2-11.

Petitioner argues, as it did before the Court of Appeals, that it may raise the issue on appeal because subject matter jurisdiction may be raised at any time. Pet. at 9. The Court of Appeals, however, correctly determined that the issue raised by Petitioner -- “the question of permit status” -- “is not one of jurisdiction.” Opinion

---

<sup>1</sup> It is not clear why Petitioner has argued so strenuously for application of the closure requirements instead of corrective action because the undisputed expert testimony and the finding of the Hearing Officer was that the requirements for corrective action are substantially equivalent to the requirements for closure. AR 001156-58; AR 000840. Thus, requiring closure instead of corrective action would not change the remedy selected by NMED for the MWL.

at 9. The court reasoned that “NMED has jurisdiction to regulate mixed waste under New Mexico law and because the MWL is a mixed waste landfill, the Secretary [of NMED] has jurisdiction, under the New Mexico Hazardous Waste Act . . . .” *Id.* at 7-8. Subject matter jurisdiction of an administrative agency is defined by statute. *See Martinez v. N.M. State Eng’r Office*, 2000-NMCA-074, ¶ 22, 129 N.M. 413, 9 P.3d 657. Under the HWA, NMED has jurisdiction over the permitting of hazardous waste facilities and over corrective action. *See NMSA* 1978, §§ 74-4-4.2 (permitting authority) and 74-4-4.2(B) (corrective action authority). Therefore, Petitioner’s issue – that NMED should have required a different permitting path than corrective action – does not involve NMED’s subject matter jurisdiction and may not be raised for the first time on appeal.

## **II. PETITIONER’S CHALLENGE TO EPA’S 1993 DETERMINATION THAT THE MWL IS SUBJECT TO CORRECTIVE ACTION IS UNTIMELY**

Petitioner’s principal argument is that the MWL is subject to the closure requirements, not corrective action. However, the determination that the MWL is subject to corrective action was made on August 26, 1993 when EPA issued Module IV of the SNL Permit requiring corrective action for the MWL. EPA’s determination was required to have been appealed within 30 days to the Environmental Appeals Board. 40 C.F.R. § 124.19(a) (1993); AR 021104. EPA’s 1993 corrective action determination is final and not reviewable. 40 C.F.R. §

124.19(a) (1993). Petitioner cannot now challenge the 1993 EPA determination.

Moreover, EPA's determination to require corrective action set in motion a course of action undertaken by SNL and NMED now spanning 14 years. SNL has conducted numerous investigations, reports and studies and has conducted extensive air, vadose zone and ground water monitoring, all of which has been thoroughly reviewed and scrutinized by NMED. *See, e.g.*, AR 001121-27, 001138-45, 001162-67, 001179-90. Petitioner's objection to the 1993 EPA determination that the MWL is subject to corrective action represents a collateral attack on the Permit, after years of work have been completed, and may not be allowed at this late date. *Accord Amigos Bravos v. Molycorp, Inc.*, 166 F.3d 1220 (10<sup>th</sup> Cir. 1998) (collateral attack on environmental permit not allowed).

### **III. THE DETERMINATION THAT THE MWL IS SUBJECT TO CORRECTIVE ACTION IS CORRECT**

On the merits, the determination that the MWL is subject to corrective action is correct. As stated above, the HWA requires that hazardous waste permits require corrective action for SWMUs. NMSA 1978, § 74-4-4.2(B). State regulations as well require corrective action in permits:

The owner or operator of a facility 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 solid waste management unit at the facility, regardless of the time at which waste was placed in the unit.

20.4.1.500 NMAC (incorporating 40 C.F.R. § 264.101(a)). On its face, the corrective action requirements apply to the MWL. SNL is a “facility seeking a permit for the treatment, storage or disposal of hazardous waste” because it is a facility required to have a permit for storage of hazardous waste. A “SWMU” is

[a]ny discernible unit at which solid wastes have been placed at any time, irrespective of whether the unit was intended for the management of solid or hazardous waste. Such units include any area at a facility at which solid wastes have been routinely and systematically released.

55 Fed. Reg. at 30,808; AR 001404. The MWL is a solid waste management unit because it is a discernible unit, *i.e.*, a landfill, at which hazardous and mixed waste have been placed and were routinely released. Under the plain meaning of the regulation, the MWL is subject to the corrective action requirements.

NMED issued the Permit to SNL for the storage of hazardous waste. *See* AR 004364-4517. The MWL, as stated above, was closed when the Permit was issued and therefore is not a unit that was or is permitted to operate under the Permit. *See id.* Therefore, the MWL is not subject to closure requirements for operating units. Likewise, NMED did not have authority to regulate mixed waste until after the MWL closed and, therefore, NMED did not have authority to regulate the MWL until after its closure.

The MWL, however, is subject to corrective action because corrective action is required for all facilities with permits no matter when a release of hazardous waste occurs. Thus, when EPA issued Module IV of the Permit in 1993, EPA

designated the MWL as a SWMU subject to corrective action.

Since EPA issued SNL's HSWA permit, NMED obtained authorization to administer corrective action in the State and to enforce Module IV of the SNL Permit. SNL applied for and NMED issued a modification to the HSWA Module to implement the final remedy for the MWL.

Prior to HSWA, EPA and the States had limited authority to require clean up at hazardous waste facilities. One purpose of HSWA was to require clean up of contamination regardless of when a release occurred. The MWL provides a prime example of the need for HSWA because of the regulatory gap that NMED would have faced in requiring clean up of the MWL. HSWA thus provides the regulatory mechanism to ensure that the MWL is remediated to protect human health and the environment.

#### **IV. THE COURT OF APPEALS CORRECTLY DETERMINED THAT SUPPLEMENTING THE RECORD WAS PROPER**

Petitioner claims that the Court of Appeals "failed to address" its objection to NMED supplementing the record with a copy of Module IV of the SNL Permit. *See Pet.* at 11; *see also id.* at 5. This statement is inaccurate. The Court of Appeals did address Petitioner's objection in an Order on Motion. Therein, the court found that:

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) NMSA and Rule 12-209(C) NMRA.

Order on Motion, p. 2 (Dec. 19, 2007) (attached).

Petitioner argues that the court erred in allowing supplementation of the record with Module IV, and that instead “the provenance and significance of Module IV should have been remanded to the Hearing Officer . . . .” Pet. at 12. However, the validity and significance of Module IV was never at issue during the hearing before NMED. During the hearing, Paul Robinson, who acted both as Petitioner’s representative at the hearing and testified as Petitioner’s RCRA expert, referred on many occasions in his testimony to the requirements of “Module IV” of the SNL Permit. *See* Tr. 733, 750, 753, 811, 827, 878, 887. During his testimony, Mr. Robinson identified “Sections N, O, P, Q and S of Module IV (HSPA requirements) of the permittees’ Resource Conservation and Recovery Act permit” as “relevant requirements that apply to the CMS,” referring to the MWL Corrective Measures Study. Tr. 811 (parenthetical in original). The Hearing Officer asked Mr. Robinson where she could find “Sections N, O, P, Q and S of Module IV,” and Mr. Robinson replied they would be in “the Sandia National Labs Resource Conservation and Recovery permit . . . .” Tr. 878. The Hearing Officer asked if Module IV was in the record, and the following exchange occurred:

Ms. Fox: Madam Hearing Officer, we don’t believe that it is, but we can provide a copy for the record.

Ms. Pruitt: That would be great.

Mr. Rose: And, Madam Hearing Officer, my guess is you could probably take administrative notice of the permit, since it's in the Department's files, but --

Ms. Pruitt: I don't want to take administrative notice of it. I want to look at it.

Mr. Rose: Well, you could look at it, even if you took administrative notice of it, as opposed to it being an exhibit in the record.

Ms. Pruitt: Okay.

Tr. 879. While Modules I, II and III of the Permit had been included in original record, AR 004364-4517, Module IV had not been. As the Court of Appeals found, NMED inadvertently neglected to supplement the record with Module IV before the NMED Secretary (because the validity and significance of Module IV was not at issue). NMED supplemented the record with Module IV before the Court of Appeals pursuant to Rule 12-601(C), which substitutes an administrative agency for the district court, and Rule 12-209(C), which allows the district court to supplement the record if material is omitted by "error or accident," when Petitioner first questioned the existence and validity of Module IV in its appeal.

Petitioner complains that NMED counsel signed the notice supplementing the record. This argument, also raised before the Court of Appeals, is frivolous. Under the appellate rules, NMED is substituted for the district court. The NMED Hearing Clerk supplemented the record with Module IV and prepared the Index to

Administrative Record cataloguing the supplementation. The NMED Hearing Clerk is authorized by the Secretary of NMED to prepare the record. NMED counsel filed the pleading giving notice of the supplementation and attaching the Index. NMED counsel is authorized by the Secretary of NMED to file pleadings on his behalf. NMED's supplementation of the record was proper, as the Court of Appeals determined.<sup>2</sup>

### **Conclusion**

For the foregoing reasons and for the reasons set forth in the Court of Appeals' Opinion and Order on Motion in this matter, Petitioner's Petition for Writ of Certiorari should be denied.

---

<sup>2</sup> Counsel for Petitioner states that Petitioner was required to obtain a copy of Module IV by filing a request under the Inspection of Records Act ("IPRA"). Pet. at 5-6. The record shows otherwise. NMED filed its supplement with Module IV on December 18, 2006. On December 14, 2006, prior to filing the supplement, NMED emailed Petitioner's counsel a copy of Module IV. *See* NMED's Response to Citizen Action's Motion to Strike Notice of Supplementing the Record, Ex. B. NMED emailed Petitioner's counsel a copy a second time on January 11, 2007. *See id.* (Counsel for Petitioner had previously sent NMED an IPRA request, dated November 7, 2006, requesting general permit documents for the MWL, although not specifically requesting Module IV. *See id.* at Ex. A. NMED responded to the IPRA request on November 20, 2007, making all requested documents in existence available for immediate inspection. *See id.*)

Respectfully submitted,

NEW MEXICO ENVIRONMENT  
DEPARTMENT

Tel Fox

---

Tannis L. Fox  
Deputy General Counsel  
Office of General Counsel  
P.O. Box 26110  
Santa Fe, New Mexico 87502  
(505) 827-1603

Attorney for NMED

Certificate of Service

I certify that a copy of the forgoing pleading was mailed on February 15, 2008 to the following:

Nancy L. Simmons  
2001 Carlisle Blvd. NE Suite E  
Albuquerque, New Mexico 87110

Louis W. Rose  
Jeffrey Wechsler  
Montgomery & Andrews, PA  
P.O. Box 2307  
Santa Fe, New Mexico 87504-2307

Amy J. Blumberg  
Sandia Corporation  
P.O. Box 5800  
Albuquerque, New Mexico 87185-0141

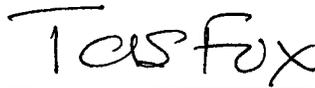
Tel Fox

---

Tannis L. Fox

**Statement of Compliance**

Undersigned counsel hereby certifies that NMED's Response to Petition for Writ of Certiorari ("Response") complies with the type and word limitations set forth in Rule 12-502.D of the Appellate Rules of Procedure. The Response is 3181 words in Times New Roman 14 point font, which is within the acceptable limit for a response to a petition for writ of certiorari pursuant to Rule 12-502.D(3). The word count was made by the Word Count program in my computer, using Microsoft Office Word 2003.



---

Tannis L. Fox  
Attorney for NMED

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **IN THE MATTER OF REQUEST FOR A CLASS 3**  
3 **PERMIT MODIFICATION FOR CORRECTIVE**  
4 **MEASURES FOR THE MIXED WASTE LANDFILL**  
5 **AT SANDIA NATIONAL LABORATORIES,**  
6 **BERNALILLO COUNTY, NEW MEXICO,**  
7 **EPA ID NO. NM5890110518.**

COURT OF APPEALS  
STATE OF NEW MEXICO  
GINA MESTAS

2007 DEC 19 AM 10:11

FILED

8 **CITIZEN ACTION,**

9 Appellant,

No. 25,896

D.C. No. HWB-04-11

10  
11 v.

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

15 Appellees.

16 **Celia Foy Castillo**  
17 Presiding Judge

18 Michael D. Bustamante  
19 Roderick T. Kennedy  
20 Judges

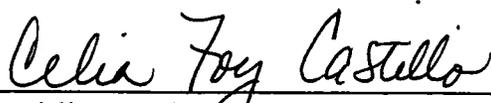
21  
22 **ORDER ON MOTION**

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

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

5 NMED filed a notice with this Court on December 18, 2006, to supplement the  
6 administrative record proper with a document titled Module IV. The record reflects  
7 that during the administrative hearing, the hearing officer requested that Module IV  
8 be included in the administrative record. Module IV was not added to the  
9 administrative record during the hearing, due to oversight, and NMED properly  
10 supplemented the record to this Court on its own initiative, pursuant to Rule  
11 12-601(C) NMRA and Rule 12-209(C) NMRA. We do not consider the alternative  
12 motion requesting remand for an evidentiary hearing because the validity of  
13 Module IV was not raised at the administrative hearing, as more fully detailed in our  
14 opinion at paragraph 17. Because we deny these motions, we do not address the  
15 matter of sanctions.

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

18   
19 Presiding Judge