



COURT OF APPEALS OF NEW MEXICO
FILED

IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

DEC 17 2012

Wendy F Jones

IN THE MATTER OF THE CLASS 2)
MODIFICATION FOR SHIELDED)
CONTAINERS FOR REMOTE-HANDLED)
TRANSURANIC WASTE AT THE)
WASTE ISOLATION PILOT PLANT)
U.S. EPA No. NM4890139088)

No. 32499



DOCKETING STATEMENT

Southwest Research and Information Center and Margaret Elizabeth

Richards (collectively, "Citizen Appellants"), by their counsel, make the following

Docketing Statement pursuant to Rule 12-208 NMRA.

1. Nature of the proceeding: This is an appeal pursuant to § 74-4-14

NMSA 1978 from the Final Determination, Class 2 Modification Request, WIPP

Hazardous Waste Facility Permit, EPA I.D. Number NM4890139088, dated

November 1, 2012 (the "Final Determination"), by the New Mexico Environment

Department ("NMED") concerning use of Shielded Containers for management

and disposal of remote-handled ("RH") transuranic ("TRU") waste at the Waste

Isolation Pilot Plant ("WIPP"). NMED's determination was made pursuant to a



Permit Modification Request (“PMR”) submitted by the Permittees¹, dated July 5, 2012 and Hazardous Waste Management Regulations, 20.4.1 NMAC.

2. Date of the Order on Review: The date of the Final Determination is November 1, 2012. A Notice of Appeal was filed in this Court on November 16, 2012, which filing is timely in accordance with § 74-4-14 NMSA.

3. Statement of the Case: WIPP is a federal government repository for defense-related TRU waste, operated pursuant to Environmental Protection Agency certification and a Permit under the New Mexico Hazardous Waste Act, § 74-4-1 *et seq.* NMSA 1978 (“HWA”). The TRU waste that is disposed of at WIPP is classified as either contact-handled (“CH”) waste, with a surface dose rate lower than 200 mrem/hr., or RH waste, with a surface dose rate from 200 mrem/hr. to 1,000 rem/hr.

On July 5, 2012, Permittees submitted a PMR pursuant to 20 NMAC 4.1.900, entitled “Addition of a Shielded Container.” The PMR sought Permit modifications to authorize Permittees to manage and dispose of RH TRU waste in a new type of container, which would contain RH waste and shield the radiation so that the surface dose rate would not exceed 200 mrem/hr., which container, if the

¹ The PMR was submitted by the Permittees, U.S. Department of Energy (“DOE”) and Washington TRU Solutions LLC. By the time NMED issued its Final Determination, Washington TRU Solutions LLC had been succeeded as Permittee by Nuclear Waste Partnership LLC. Citizen-Appellants refer herein to all such entities as the “Permittees.”

modification were granted, would be authorized to be introduced to areas of the WIPP facility from which RH waste had previously been banned. Permittees requested 22 specific modifications in Permit language, affecting Permit Parts 3 and 4 and Permit Attachments A1, A2, A4, C1, D, E, G3, and H1. Modified language was presented in 21 pages, and there were attachments concerning the evaluation of drum age criteria for sampling internal gases. Permittees requested that the PMR be granted pursuant to Class 2 procedures, a simplified procedure that does not involve a public hearing. Pursuant to 40 C.F.R. § 270.42(b)(2), Permittees gave notice of public meetings and a 60-day public comment period, ending September 10, 2012.

Appellant Southwest Research and Information Center ("SRIC") submitted timely comments, stating, inter alia, that:

1. The request is incomplete under the Hazardous Waste Management Regulations, 20.4.1 NMAC,
2. The PMR fails to consider that the RH waste may shift in transit, so that the radioactive surface dose rate of a container could exceed the limit of 200 mrem/hr. for CH waste,
3. There was no description of where the new shielded containers would be disposed of or in what quantity or of the effect on CH disposal capacity,

4. There is no adequate explanation of the need for the permit modification, which in fact arises out of Permittees' failure to use RH disposal capacity that could have been available in early years of WIPP's operation,
5. Permittees do not intend to account properly for the RH waste in shielded containers against the repository limits for RH waste,
6. The PMR claims increases in efficiency with shielded containers, but actual use of shielded containers will probably increase the number of shipments needed,
7. There was no valid explanation of how damaged or contaminated shielded containers would be managed,
8. Another need for shielded containers that is not mentioned in the PMR is for Permittee DOE to use such containers to dispose of Greater-than-Class-C commercial radioactive waste at WIPP, even though such waste is prohibited by federal law,
9. The request does not meet the requirements of the HWA and the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA"),
10. The modification would not protect public health and the environment, because it would cause an increase in the number of shipments of RH waste, and increased radiation dosage would endanger workers and the public,

11. The PMR raises a series of interrelated questions that require careful treatment in the public hearings called for under Class 3 modification procedures,
12. Substantial public concern about management of RH waste requires Class 3 procedures and a public hearing,
13. Regulations specify that a modification that causes a 25% increase in container storage capacity is a Class 3 modification, and this request causes such an increase,
14. Regulations specify that a modification that requires management of waste in containers using additional or different management practices is a Class 3 modification, and this request so requires,
15. Different handling and stacking requirements are needed for shielded containers, but they are not contained in the PMR,
16. Shielded containers incorporate new elements not used in CH waste containers, which may need to be regulated by the permit.

Approximately 200 members of the public commented as well, most of whom requested a public hearing under Class 3 procedures.

NMED extended its period of consideration until November 4, 2012. On November 1, 2012, NMED issued its Final Determination, authorizing the proposed modifications to go into effect pursuant to Class 2 procedures almost

entirely as proposed by Permittees. A Response to Comments document was also released. Citizen-Appellants timely filed a Notice of Appeal on November 16, 2012.

4. Statement of the Issues Presented: Several issues are presented for judicial review pursuant to § 74-4-14(C) NMSA. Applicable regulations state that a PMR should be denied by the permitting agency if it is (a) incomplete, (b) fails to comply with applicable requirements, or (c) fails to protect human health or the environment. (40 C.F.R. § 270.42(b)(7)²). Further, an application proposed for Class 2 procedures must be denied or reclassified as Class 3 if there is (a) significant public concern or (b) the modification is complex so that the more extensive Class 3 procedures are required. (40 C.F.R. § 270.42(b)(6)(1)(C)(1)).

Issues presented are the following:

1. Whether the PMR is incomplete for failure to explain why the modification is needed. Under 40 C.F.R. § 270.42(b)(iii) a modification request must “explain[] why the modification is needed.” Permittees clearly need this modification to make up for the RH disposal capacity that Permittees have lost in WIPP operations over the years. The authorized method of emplacing RH waste, using RH canisters emplaced in the walls of WIPP

² Most of the federal hazardous waste regulations have been adopted by NMED for its hazardous waste program. See, e.g., 20.4.1.900 NMAC, adopting 40 C.F.R. Part 270. Citizen-Appellants herein cite directly to the adopted federal regulations.

rooms, requires that RH waste be emplaced in a room before CH disposal operations take place. Permittees, however, proceeded to emplace CH waste in three disposal panels before emplacing RH waste, sacrificing the unused RH disposal capacity. They now can dispose of only about 3500 m³ of RH waste, although WIPP is authorized to dispose of 7080 m³ of RH waste.

Consequently, they have filed the PMR, seeking a second disposal method for RH waste. Permittees' failure to discuss this underlying need for the modification also results in their failure to discuss the impact of the modification on CH waste disposal capacity and schedule.

2. Whether the PMR is incomplete, and fails to protect health, safety and the environment, for failure to discuss how the surface dose rate limit of 200 mrem/hr. would be maintained at WIPP after initial shipment (when dose rate is measured) at a site hundreds or thousands of miles away. NMED refers to "packaging requirements to minimize shifting" (Comment Response ("CR") 4), but such requirements are not contained in the PMR and are not in the modified Permit.
3. Whether the PMR is incomplete, and fails to protect health, safety and the environment, for failure to contain new container-stacking procedures for stacking 3-packs of shielded containers. Stacking of shielded containers three-high will not meet the Permit's stability requirements, and Permittee

DOE intends to develop new procedures for stacking, but such requirements are not contained in the PMR and are not in the modified Permit.

4. Whether the PMR is incomplete, and fails to protect health, safety and the environment, for failure to contain new overpacking procedures for damaged or contaminated shielded containers. The PMR and the Permit, as modified, call for shielded containers to be overpacked and disposed of in containers that are only authorized to contain CH waste—an invalid method for management of RH waste. NMED has stated that the Permittees are developing a new procedure for overpacking of shielded containers (CR2). However, new overpacking requirements are not contained in the PMR and are not in the modified Permit.
5. Whether the PMR is incomplete, and fails to protect health, safety and the environment, in omitting to discuss events that might lead to a breach of a shielded container and the consequences of such a breach, which would have greater consequences than a release of CH waste.
6. Whether the PMR is incomplete, and fails to protect health, safety and the environment, for failure to place limits upon the quantity of RH waste in shielded containers that may be stored in areas from which RH waste was previously barred.

7. Whether the PMR was required to be considered under Class 3 procedures, with a public hearing, because it raises complex issues or generates significant public concern. Previously, NMED determined that a nearly identical application to introduce shielded containers is too complex for the abbreviated Class 2 procedures. (Letter, Martin to Ziemanski and Sharif, Dec. 22, 2011). NMED in a later letter stated again that a nearly identical PMR to introduce shielded containers requires classification as a Class 3 modification. (Letter, Martin to Ziemanski and Sharif, Jan. 31, 2012). The Final Determination here on review constitutes a reversal of that expressed agency position without any explanation from the agency.
8. Whether Class 3 procedures are required because the PMR comes within the specific terms of 40 C.F.R. § 270.42, Appx. I, F.1.a, which states that a PMR calling for modification or addition of container units resulting in greater than 25% increase in the facility's container storage capacity requires Class 3 procedures. Before the modification, Permittees were limited to disposing of 3545 m³ of RH waste. After the modification, Permittees are limited to disposing of 7080 m³ of RH waste.
9. Whether Class 3 procedures are required because the PMR comes within the specific terms of 40 C.F.R. § 270.42, Appx. I, F.3.a, which states that a PMR calling for storage of different waste in containers that require additional or

different management practices from those authorized in the permit requires Class 3 procedures. The PMR states that it involves "different waste in a particular unit." (at 7). It is clear that the new shielded container is a "new payload container" that will call for new "packaging requirements to minimize shifting" (CR 4), will be configured in a new 3-pack design with unique management methods, will require overpacking by new methods not yet developed, and will be stacked in the repository under new procedures not yet developed. In addition, NMED has stated that a nearly identical PMR "will necessitate additional procedures and equipment for unloading, transporting, and overpacking remote handled transuranic waste in shielded containers" and "will likely necessitate changes to the permit to authorize additional or different management practices" and therefore requires Class 3 procedures. (Letter, Martin to Ziemanski and Sharif, Dec. 22, 2011). The Final Determination here on review constitutes a reversal of that expressed agency position without any explanation from the agency.

10. Whether the level of public concern requires Class 3 procedures.

Approximately 200 individuals have requested a public hearing on the PMR. Previously NMED stated, as to a nearly identical PMR, that public concern expressed by fewer than 100 individuals requires Class 3 procedures:

"Substantial public concern has also been demonstrated with respect to the

current PMR proposing the addition of shielded containers.” (Letter, Martin to Ziemanski and Sharif, Dec. 22, 2011). The Final Determination here on review constitutes a reversal of that expressed agency position without any explanation from the agency.

5. Authorities relied upon: Citizen-Appellants rely upon the applicable statutes, regulations and caselaw establishing the principles of judicial review of administrative decisions:

1. The Hazardous Waste Act states that a major modification cannot be approved without an opportunity for a public hearing. § 74-4-4.2(H) NMSA 1978.
2. The Hazardous Waste Act states that the Secretary shall hold a public hearing on a minor modification if there is significant public interest. § 74-4-4.2(I) NMSA 1978.
3. A Hazardous Waste Management Regulation, § 20.4.1.900 NMAC, adopts 40 C.F.R. § 270.42, which states, inter alia:
 - (a) An application for a Class 2 modification must describe the exact changes to be made to the permit conditions and supporting documents and explain why the modification is needed;
 - (b) Within 90 days after receipt of the modification request the Secretary

must (A) approve or (B) deny the request or (C) determine that the modification request must follow procedures for a Class 3 modification for the reason that

(i) there is significant public concern about the proposed modification; or

(ii) the complex nature of the change requires the more extensive procedures of Class 3

or (D) approve the PMR as a temporary authorization, or (E) notify the permittee that he will decide on the request within 30 days. After 30 days the Secretary must make a decision as listed in (A) - (D).

(c) The Secretary may deny or change the terms of a Class 2 PMR if

(i) the PMR is incomplete;

(ii) the PMR does not comply with 40 C.F. R. Part 264; or

(iii) the conditions of the PMR fail to protect human health and the environment. (§ 270.42(b)(7)).

(d) For Class 3 modifications listed in Appendix I to the Rule, the permittee must submit a PMR that identifies that the modification is a Class 3 modification. (§ 270.42(c)(1)). Appendix I lists as Class 3 modifications:

(i) Modification or addition of container units resulting in a greater than 25% increase in the facility's container storage capacity (with exceptions not here relevant) (F.1.a.), and

(ii) Storage of different wastes in containers that require additional or different management practices from those authorized in the permit (with exceptions not here relevant) (F.3.a.).

(e) For modifications not listed in Appendix I, the regulation gives guidelines on classification, stating that Class 2 procedures are intended for modifications involving "(A) common variations in the types and quantities of the wastes managed under the facility permit, (B) technological advancements, and (C) changes necessary to comply with new regulations, where these changes can be implemented without substantially changing design specifications or management practices in the permit." (§ 270.42(d)(ii)).

4. The Hazardous Waste Act, § 74-4-14(C) NMSA 1978, states the standard of judicial review:

"Upon appeal, the court of appeals shall set aside the action only if it is found to be:

1. arbitrary, capricious or an abuse of discretion;
2. not supported by substantial evidence in the record; or

3. otherwise not in accordance with law.”

5. The meaning of a statute is an issue of law that is judicially reviewed de novo. *Oil Transport Co. v. N.M. State Corporation Commission*, 110 N.M. 568, 571, 798 P.2d 169 (1990); *Southwest Research & Information Center v. State*, 133 N.M. 179, 185, 62 P.3d 270 (Ct. App. 2002). It is arbitrary and capricious for an agency to follow an erroneous interpretation of the applicable law. *Phelps Dodge Tyrone v. N.M. Water Quality Control Commission*, 140 N.M. 464, 472, 143 P.3d 502 (Ct. App. 2006).
6. The Court will generally defer to an agency’s reasonable interpretation of its own ambiguous regulations. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Commission*, 133 N.M. 97, 104, 61 P.3d 806 (2002); *Gila Resources Information Project v. N.M. Water Quality Control Commission*, 138 N.M. 625, 629, 124 P.3d 1164 (Ct. App. 2005).
7. The hearing requirement is central to the Hazardous Waste Act. *Southwest Research & Information Center v. State*, 133 N.M. 179, 187, 62 P.3d 270 (Ct. App. 2002); *Joab, Inc. v. Espinosa*, 116 N.M. 554, 558, 865 P.2d 1198, 1202 (Ct. App.), *cert. denied*, 116 N.M. 801 (1993). In a complex case it is important to have findings of fact made by a hearing officer. *Atlixco Coalition v. Maggiore*, 125 N.M. 786, 965 P.2d 370 (Ct. App. 1998).

8. A determination made by the Secretary as to significant public interest is reviewable for abuse of discretion. *Southwest Research & Information Center v. State*, 133 N.M. 179, 188, 62 P.3d 270 (Ct. App. 2002). A decision is an abuse of discretion if it is not supported by factfindings or is contrary to logic and reason. *Oil Transport Co. v. State Corporation Commission*, 110 N.M. 568, 572-73, 798 P.2d 169 (1990).
9. A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis when viewed in light of the whole record; it is the result of an unconsidered, willful, and irrational choice of conduct and not the result of the winnowing and sifting process. An action will be considered arbitrary if there is no rational connection between the facts found and the choices made, or necessary aspects of consideration of relevant factors are omitted. *Bass Enterprises Production Co. v. Mosaic Potash Carlsbad Inc.*, 148 N.M. 516, 531, 238 P.3d 885 (Ct. App. 2010), *cert. denied*, June 21, 2010. *See also*: *In re Rhino Environmental Services*, 138 N.M. 133, 137, 117 P.3d 939 (2005); *Gila Resources Information Project v. N.M. Water Quality Control Commission*, 138 N.M. 625, 629, 124 P.3d 1164 (Ct. App. 2005); *Atlixco Coalition v. Maggiore*, 125 N.M. 786, 793, 965 P.2d 370 (Ct. App. 1998); *Garcia v. N.M. Human Services Department*, 94 N.M. 178, 608 P.2d 154 (Ct. App. 1979). An arbitrary and

capricious act is a willful and unreasonable action, without consideration and in disregard of facts or circumstances; it is one lacking a standard or norm and not governed by any fixed rules. *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 713, 885 P.2d 628 (1994). A determination by the Secretary is arbitrary and capricious if it was unreasonable and irrational, *Oil Transport Co. v. State Corporation Commission*, 110 N.M. 568, 572-73, 798 P.2d 169 (1990), or failed to consider the facts and circumstances, *McDaniel v. Board of Medical Examiners*, 86 N.M. 447, 449, 525 P.2d 374 (1974), or does not have a reasonable basis, *Santa Fe Exploration Co. v. Oil Conservation Commission*, 114 N.M. 103, 835 P.2d 819 (1992).

10. The Secretary must state reasons for his decision to enable judicial review.

Citizen Action v. Sandia Corp., 143 N.M. 620, 626-27, 179 P.3d 1228 (Ct. App. 2007), *cert. denied*, 143 N.M. 666, 180 P.3d 673 (2008); *Atlixco Coalition v. Maggiore*, 125 N.M. 786, 791-93, 965 P.2d 370 (Ct. App. 1998); *Green v. New Mexico Human Services Department*, 107 N.M. 628, 631 (Ct. App. 1988).

11. The reviewing court may not supply a reasoned basis for the agency's action that the agency itself has not given. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Commission*, 133 N.M. 97, 101-02, 61 P.3d 806 (2002);

Atlixco Coalition v. Maggiore, 125 N.M. 786, 792-93, 965 P.2d 370 (Ct. App. 1998).

12. Agency action is arbitrary and capricious if one case is treated differently from another case with similar facts, and no rational explanation is offered by the agency for the difference in treatment. *Sais v. N.M. Department of Corrections*, 2012 NMSC 9 (March 22, 2012) (*released for publication*); *Kibbe v. Elida School District*, 128 N.M. 629, 633-34, 996 P.2d 419 (1999). New Mexico courts use principles of judicial review similar to those used in review of decisions of federal agencies. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Commission*, 133 N.M. 97, 102, 61 P.3d 806 (2002); *Atlixco Coalition v. Maggiore*, 125 N.M. 786, 792-93, 965 P.2d 370 (Ct. App. 1998). Thus, an administrative agency may not change its position on a regulatory issue without offering a reasoned explanation of the change. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 57 (1983); *Citizens Awareness Network v. U.S. Nuclear Regulatory Commission*, 59 F.3d 284, 291 (1st Cir. 1995); *Menkes v. Department of Homeland Security*, 662 F.Supp.2d 62, 68 (D.D.C. 2009), *aff'd*, 2011 U.S. App. LEXIS 4483 (D.C. Cir., Mar. 8, 2011). *See also*: *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996).

6. Recording of the proceedings: No public hearing was held; therefore, no record was taken.

7. Related or prior appeals: None.

Respectfully submitted,

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Dated: 17 December, 2012.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2012, a true and accurate copy of this Docketing Statement was served by first class mail upon counsel for the Defendant-Appellee:

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A copy of this Docketing Statement was served by first class mail upon the Hearing Clerk of the New Mexico Environment Department:

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