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IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

SOUTHWEST RESEARCH AND INFORMATION CENTER and MARGARET ELIZABETH RICHARDS,	)	
Appellants,	)	
v.	)	**Case No. 32-499**
NEW MEXICO DEPARTMENT OF ENVIRONMENT,	)	
Appellee.	)	
IN THE MATTER OF THE APPLICATION FOR A CLASS 2 MODIFICATION FOR SHIELDED CONTAINERS FOR REMOTE-HANDLED TRANSURANIC WASTE AT THE WASTE ISOLATION PILOT PLANT.	)	

BRIEF OF INTERVENOR APPLICANT UNITED STATES DEPARTMENT OF ENERGY

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STATEMENT OF COMPLIANCE

This brief complies with the limitations of Rule 12-213(F)(3). The brief was prepared in Times New Roman 14 point type. According to Microsoft Office WORD 2007, the brief contains 7266 words.

SUMMARY OF PROCEEDINGS

A. Nature of the Case

The United States Department of Energy ("DOE") operates the Waste Isolation Pilot Plant ("WIPP") facility pursuant to a Resource Conservation and Recovery Act ("RCRA") permit issued by the New Mexico Environment Department ("NMED").[1] Record Proper ("RP") 02799-4464. In relevant part, the permit allows for the disposal of two categories of transuranic waste: remote-handled and contact-handled.[2] RP 02817. Under the permit, the categories are defined by the radiation dose rate at the external surface of the waste container. If the surface dose rate is below 200 millirem per hour, the container is contact-handled waste. If the dose is above that level, the container is remote-handled waste. *Id.* The permit imposes different requirements for each classification.

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[1] The WIPP permits are issued to both DOE and the company acting as DOE's management and operating contractor for WIPP. When the permit modification was requested, the contractor was Washington TRU Solutions LLC. The current contractor is Nuclear Waste Partnership, LLC. For the sake of simplicity, this motion will refer only to DOE, rather than to both DOE and its contractors.

[2] For the purpose of this brief, "waste" will be used to refer to transuranic waste mixed with a hazardous waste regulated under the Resource Conservation and Recovery Act. Transuranic waste is defined as waste containing a specific level of certain alpha-emitting transuranic isotopes that are not high-level radioactive waste or within three specific exemptions. Permit 1.5.6. RP 02817.

DOE applied to NMED for a permit modification that would allow the use of a new container, referred to as a "shielded container." RP 01541-01615. Because the walls of the shielded container include a layer of lead, it is more effective than previously-authorized containers in maintaining a low dose rate at its external surface. RP 01545-01546. Thus, in some instances where an unshielded container containing transuranic waste would be classified under the WIPP permit as remote-handled waste, a shielded container containing the same waste could be classified as contact-handled waste.

NMED approved the requested modification on November 12, 2012. RP 02795. Southwest Research and Information Center and Margaret Elizabeth Richards (jointly referred to as "Appellants") have appealed NMED's decision to this Court. Appellants claim that the modification does not protect health and the environment and was issued without required administrative procedures.

B. NMED AND EPA REGULATORY AUTHORITY AT WIPP

1. Authorization of New Mexico's RCRA Permitting Authority at WIPP

Under section 3006 of the Resource Conservation and Recovery Act ("RCRA"), states may request the Environmental Protection Agency ("EPA") to "authorize" a qualified state hazardous waste program. 42 U.S.C. § 6926. To receive authorization, a state regulatory program must be equivalent to and

consistent with the federal program, and must provide for adequate enforcement. 42 U.S.C. § 6926(b). Once authorized, a state may carry out its program "in lieu of the Federal program under this subchapter in such state and [] issue and enforce permits for the storage, treatment or disposal of hazardous waste." *Id.*

EPA authorized New Mexico's RCRA hazardous waste permitting authority in 1985. 50 Fed. Reg. 1515 (Jan. 11, 1985). Pursuant to this authorization, New Mexico issues hazardous waste facility permits for WIPP and other DOE facilities in New Mexico under the New Mexico Hazardous Waste Act ("HWA," §§ 74-4-1-14, NMSA 1978). NMED's hazardous waste facility permits have "the same force and effect as" a federally-issued permit. 42 U.S.C. § 6926(d).

The scope of NMED's authority is limited by the scope of RCRA's definition of hazardous waste to any "solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics" may pose a serious risk to human health or the environment if not properly managed. 42 U.S.C. § 6903(5). The RCRA definition of "solid waste" expressly excludes radioactive waste, such as transuranic waste, that is "source, special nuclear, or byproduct material as defined by the Atomic Energy Act." *Id.* § 6903(27). Such materials are instead regulated by the federal government under the Atomic Energy Act.

Much of the transuranic radioactive waste being disposed of at WIPP is combined with waste regulated as "hazardous waste" under RCRA. NMED regulates the hazardous portion of any transuranic mixed waste disposed of at WIPP, while federal agencies retain regulatory authority over the radioactive portion of such waste under the Atomic Energy Act and section 8 of the WIPP Land Withdrawal Act ("WIPP Act"). Pub. L. No. 102-579, 106 Stat. 4777.

2. EPA's Regulatory Authority at WIPP

In section 8 of the WIPP Act, Congress required EPA to issue final regulations regarding the disposal of spent nuclear fuel, high-level radioactive waste, and transuranic waste. Congress also gave EPA the authority to develop the criteria that implement the final radioactive waste disposal standards specifically for WIPP. In addition, EPA must determine whether WIPP may be re-certified every five years until the facility is decommissioned. Finally, the WIPP Act required EPA to determine whether WIPP complies with other federal environmental and public health and safety regulations. In part, these include EPA's regulations at 40 C.F.R. Pt. 191, Environmental Radiation Protection Standards for Management and Disposal of Spent Nuclear Fuel, High–Level and Transuranic Radioactive Wastes, and 40 C.F.R. Part 194, Criteria For the Certification and Re-Certification of the Waste Isolation Pilot Plant's Compliance With the 40 C.F.R. Part 191 Disposal Regulations.

C. Remote-Handled and Contact-Handled Transuranic Waste at WIPP

The WIPP Act authorizes DOE to dispose of transuranic waste at WIPP. Public Law 102-579. By law, only transuranic waste generated by "atomic energy defense activities" may be disposed of at WIPP. Section 2(21). This waste, which is stored at DOE facilities throughout the country is shipped by DOE to WIPP for disposal. The WIPP Act set the capacity of the facility at 6.2 million cubic feet of transuranic waste. Section 7(a)(3).

The WIPP Act divides transuranic waste into two categories, depending on the radiation dose rate at the external surface of the waste container. If the external surface dose rate is below 200 millirem per hour, the waste is classified as contact-handled. Section 2(3). If the dose is above that level, the waste is classified as remote-handled. Section 2(12). Containers designated as contact-handled waste can be handled by workers without additional radiological controls. For containers designated as remote-handled waste, remotely operated mechanical equipment in shielded rooms must be used for operations.[3] *Compare* Permit Section A1-1d(2)

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[3] DOE makes the determination of the surface dose rate prior to the shipment of a waste container to WIPP, since it also affects the management of the waste at the generator site and transportation requirements. Permit Section 2.3.1.1 requires DOE to require generator/storage sites to implement the applicable waste characterization requirements of the Waste Analysis Plan. RP 02837-38. Similarly, DOE's radiological criteria, the Waste Acceptance Criteria, require continued

with Section A1-1d(3). RP 2995-3001. The Act established a limit for the volume of remote-handled waste that may be disposed of at WIPP: the total amount of remote-handled waste shall not exceed 5,100,000 curies. Section 7(a)(2)(B).

D. NMED Permits

In 1999, NMED issued a hazardous waste facility permit to DOE. Although Congress clearly envisioned that the WIPP facility would handle both contact-handled and remote-handled waste, the initial permit allowed the disposal of contact-handled waste only. In June of 2002, DOE submitted a request to NMED asking the state to modify the hazardous waste facility permit to allow receipt and disposal of remote-handled transuranic mixed waste at WIPP. In December 2003, Congress required DOE to pursue this modification and to seek a modification of certain permit-imposed requirements concerning hazardous waste characterization. Section 311 of the Energy and Water Development Appropriations Act for Fiscal Year 2004, Pub. L. No. 108-137, 117 Stat. 1827. In 2006, after a lengthy review process, NMED approved these modifications to the WIPP permit.

The permit uses the same definitions of remote-handled and contact-handled waste as the WIPP Act. RP 02817. The permit limits the amount of contact-handled and remote-handled waste that can be disposed of at WIPP. Part 4 of the

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radiological characteristics to be documented for each container prior to authorizing shipment to WIPP.

permit allocates 5,244,900 cubic feet of the authorized disposal capacity at WIPP to contact-handled waste and 93,405 cubic feet to remote-handled waste. Permit Table 4.1.1. RP 02873. The permit authorizes disposal of waste in eight underground disposal units that are referred to as panels. Section 4.5 requires that the underground disposal units meet the requirement of 20.4.1.500 NMAC (incorporating 40 C.F.R. Part 264, Subpart X). RP 02873. In accordance with the permit, the remote-handled waste is placed into bore holes in the walls of each panel. The contact-handled waste is then placed on the floor of the panels.

Part 3 of the permit restricts the volume of contact-handled and remote-handled waste that can be managed in the Waste Handling Building and Parking Area Container Storage Units where the containers are readied for disposal. RP 02861, 02864. The container units must all meet the requirements of 20.4.1.500 NMAC (incorporating 40 C.F.R. Part 264, Subpart I).

The permit also specifically identifies the containers authorized for the management, storage, and disposal of contact-handled and remote-handled waste at WIPP. RP 02980-83.

E. The Shielded Container Permit Modification

1. EPA Process

DOE began the process of seeking all the necessary approvals to use shielded containers at WIPP before 2007. In that year, DOE submitted a request to

EPA for approval to use shielded containers that, based on the external surface dose rate, would enable DOE to manage and dispose of remote-handled waste as contact-handled waste pursuant to the WIPP permit. *See* Final Draft, Planned Change Request for Shielded Containers for Remote-Handled Transuranic Waste (Dec. 29, 2010) (prepared by an EPA contractor to facilitate EPA's review of DOE's request to use shielded containers) ("EPA Report"). RP 00001-80.

DOE is responsible for packaging transuranic waste at the DOE facilities where it is currently stored and transporting it to WIPP for disposal. For waste at the generator facilities that is classified as remote-handled waste, DOE packages the waste into canisters, which are ultimately placed into holes bored into the walls of the disposal panels at WIPP. Each canister, when fully loaded, can weigh up to 8,000 lbs, and will have an external surface dose rate higher than 200 millirems per hour. RP 00012. The shielded containers would allow DOE to use a different approach for some remote-handled waste streams.

Each shielded container is about the size of a 55-gallon drum. *Id.* Its walls consist of a one-inch layer of lead sandwiched between two carbon steel layers. *Id.* A 30-gallon drum of waste is placed inside the shielded container. The weight of the container, including the contents, is limited to 2,260 lbs by the terms of the

container certification from the Nuclear Regulatory Commission ("NRC").[4] *Id.* The lead shielding reduces the external surface dose rate as compared to the canisters currently in use at WIPP.

Under DOE's proposal, a portion of the remote-handled waste streams held at DOE's generator facilities that must be sent to WIPP for disposal would be packaged into shielded containers, rather than the unshielded canisters described above. RP 00012. The shielded containers would be used only where the external surface dose rate will not exceed 200 millirems per hour after the container is fully loaded.[5] *Id.* *See also* RP 00040-41. The dose rate would be confirmed for each shielded container. Once packed, the shielded container would be placed into a HalfPACT shipping container (also approved by NRC and certified by DOE in accord with the regulations of the Department of Transportation) and transported to WIPP. RP 00015. Each HalfPACT container would be packed with 3 shielded

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[4] Section 16(a) of the WIPP Act provides that the NRC must approve any shipping container before it can be used for the transportation of transuranic waste to WIPP.

[5] As explained in the EPA Report, this limitation will exclude many of the waste streams held at DOE's facilities from even being considered for packaging in a shielded container. For many waste streams, the level of radioactivity is so high that, even if the waste were placed in a shielded container, the container's external surface dose rate would still exceed 200 millirems per hour. RP 00040. Accordingly, the modification will not change the process used for the transport and disposal of much of the remote-handled waste destined for WIPP.

containers. *Id.* At WIPP, the shielded containers could be managed and disposed of as contact-handled waste based on the external surface dose rate. RP 00012.

On March 25, 2011, EPA announced its proposed decision to approve the use of shielded containers. RP 00081. EPA concluded that DOE had complied with all requirements of the NRC and DOT and had successfully completed all the safety analyses required by EPA. Therefore, authorizing the use of the shielded containers would not "significantly affect facility compliance with 40 C.F.R. Pt. 194 [WIPP certification requirements]." *Id.* The proposed approval, however, was limited by the condition that "prior to shipping to WIPP, DOE implements a consistent, complex-wide procedure to ensure that shielded containers remain below the [dose level for contact-handled waste]." *Id.*

After allowing a 60-day comment period, EPA gave its final approval to DOE's request and authorized the use of shielded containers.[6] This was issued on August 8, 2011. EPA imposed the requirement, discussed in the proposal, that DOE must implement a monitoring program to ensure that the shielded containers remain below the surface dose limit applicable to contact-handled waste at WIPP

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[6] EPA's final approval does not appear to be in the administrative record submitted to the Court, although it was cited by NMED in its Response to Comments document. RP 04467. EPA's final decision is available at http://www.epa.gov/radiation/news/wipp-news.html.

before any shipments could be made to WIPP. EPA explained that the monitoring program would be evaluated as part of EPA's waste characterization inspection and approval process. EPA observed that the current requirements for radiation control, which require regular radiation measurements for all waste packages, would protect employees from exposure to excess radiation. Finally, EPA noted that its approval was independent of any permit modification approval that DOE needed to obtain from NMED.

2. NMED Process

DOE filed a permit modification request with NMED in September 2011, seeking authorization to add shielded containers to the list of authorized containers and to make several other unrelated changes. RP 00120. On December 22, 2011, NMED issued a letter stating that the portion of the modification request addressing the shielded containers would be considered under the more demanding procedures applicable to a Class 3 modification. RP 00871-72. NMED retracted that letter a few days later. RP 00874. On January 31, 2012, NMED denied the permit modification request with respect to the shielded containers after finding that its technical review had identified a number of inadequacies in the request. RP 00879. NMED approved the other unrelated modifications requested based on its Class 2 procedures. *Id.*

On July 5, 2012, DOE submitted to NMED a "Class 2 Permit Modification Request." RP 01541-615. The request, which had been revised to address the concerns expressed by NMED, provided for three changes:

(1) the authorization of a new shielded container for managing a portion of the waste inventory at DOE facilities that would otherwise be classified as remote-handled waste;

(2) a description of how the volume of waste disposed of in the shielded containers would be tracked; and

(3) related changes to waste handling descriptions.

RP 01545.

DOE's application made clear that the modification would not change management practices at WIPP or affect the volume of remote-handled waste that can be stored at the site. The shielded containers will be managed and disposed of according to the permit requirements applicable to contact-handled waste because the external surface dose rate is below 200 millirem per hour. RP 01546. The changes in the waste handling descriptions are to incorporate references to the shielded containers into the existing procedures for managing and disposing of contact-handled waste. RP 01550-51.

To ensure that the modification would not increase the volume of remote-handled waste at WIPP, the modification provides that the volume of the contents

of the shielded containers will be designated as *remote-handled* waste in the WIPP Waste Information System. RP 01548. This designation will ensure that the volume in the shielded containers will be counted against the volume and curie limits for remote-handled waste set by the permit and the Act. Therefore, the use of the shielded containers will not require any changes to the reporting process established to ensure that WIPP does not exceed the limits imposed on remote-handled waste or cause any exceedance of those limits.

As required by the applicable regulations, DOE provided public notice of the proposed modification and held a public meeting to address questions raised by those who chose to attend. In addition, DOE provided notice of the process for submitting comments to NMED. RP 04466-67.

NMED considered the permit modification request and the comments received in light of the applicable regulations. For the most part, New Mexico has incorporated by reference EPA's regulations for permit modifications. 20.4.1.900 NMAC ("Except as otherwise provided, the regulations of the EPA set forth in 40 CFR Part 270 through July 1, 2008 are hereby incorporated by reference."). This incorporation includes 40 C.F.R. § 270.42, "Permit modification at the request of the permittee."

On November 1, 2012, NMED issued its decision approving the permit modification. RP 01921. NMED simultaneously released its Response to Comments. RP 04465.

ARGUMENT

I. STATEMENT OF ISSUES

1. Whether Appellants' central arguments are premised on an inaccurate description of the consequences of the modification.

2. Whether Appellants have demonstrated that NMED acted unreasonably in finding that the request for permit modification sufficiently explained the need for the permit modification.

3. Whether Appellants have demonstrated that NMED failed to respond reasonably to Appellant's argument that the request for permit modification failed to show that the surface dose level of the shielded containers would not exceed the level allowed for contact-handled waste.

4. Whether Appellants have shown that NMED failed to reasonably address their claim that the permit does not contain valid protections in case a shielded container is damaged.

5. Whether Appellants have shown that NMED approved the permit modification request even though DOE failed to adequately examine the consequences of a breach of a shielded container.

6. Whether Appellants have demonstrated that NMED acted unreasonably in concluding that the requested permit modification could be approved using Class 2 procedures, rather than the more stringent Class 3 procedures.

II. STANDARD OF REVIEW

Under N.M.S.A. 1978, § 74–4–14(C), this Court may set aside NMED's action approving the modification to the WIPP permit "only if it determines the action was (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." *Southwest Research & Information Ctr. v. State*, 133 N.M. 179, 183, 62 P.3d 270, 276 (N.M. App. 2002). Appellant bears the burden of demonstrating that such relief is warranted. *Dona Ana Mut. Domestic Water Consumers Ass'n v. New Mexico Public Regulation Com'n*, 140 N.M. 6, 9, 139 P.3d 166, 169 (N.M. 2006).

III. APPELLANTS DO NOT ACCURATELY DESCRIBE THE CONSEQUENCES OF THE MODIFICATION

In seeking authorization for the use of shielded containers to manage and dispose of waste that would otherwise be remote-handled waste, DOE had to address two separate regulatory issues. First, DOE had to ensure that all waste was properly registered in the WIPP Information System so that all waste in shielded containers will be counted towards the remote-handled waste capacity and curie

limits. Second, DOE had to meet the permit requirements that allow the designation of a container as contact-handled waste for the purpose of management and disposal.

In arguing that the use of shielded containers will increase the amount of remote-handled waste that can be sent to WIPP by 1665%, Br. at 35, Appellants simply ignore the actual terms of the modification. Because the modification requires that the volume of waste in the shielded containers will be recorded as remote-handled waste in the Information System, RP 01548, the use of these containers will not affect the overall volume of such waste at WIPP.

Section 7(a)(3) of the WIPP Act established the maximum capacity for WIPP as 6.2 million cubic feet. The Act did not allocate that total between remote-handled and contact-handled waste. The permit, however, set the maximum volume for remote-handled and contact-handled waste respectively at 93,050 cubic feet and 5,244,900 cubic feet. Table 4.1.1. RP 02873. The contents of the shielded containers will be recorded as remote-handled waste and counted towards the 93,050 cubic feet allowed for remote-handled waste. RP 01548. Therefore, the

claim that the authorization of these containers will increase the volume of remote-handled waste that can be disposed of at WIPP is simply wrong.[7]

Appellants also contend that the modification will allow DOE to store remote-handled waste in areas of WIPP limited to contact-handled waste. *See* Brief at 35. This contention is contrary to the fact that the permit, consistent with the WIPP Act, uses *only* the external surface dose rate to distinguish between contact-handled and remote-handled waste at WIPP. A shielded container with an external surface dose rate not greater than of 200 millirems per hour can be managed and disposed of as contact-handled waste at WIPP, regardless of the dose rate of the inner container.

IV. NMED REASONABLY CONCLUDED THAT THE PERMIT MODIFICATION REQUEST PROPERLY IDENTIFIED THE PURPOSE OF THE MODIFICATION

A request for a permit modification must "[e]xplain[] why the modification is needed." 40 C.F.R. § 270.42(b)(1)(iii). In the permit modification request, DOE explained that the modification to add shielded containers to the list of authorized

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[7] The permit sets a separate limit for remote-handled and contact-handled waste in each panel. Table 4.1.1. RP 02873. Again, the fact that the volume of the waste in the shielded containers is recorded as remote-handled waste and counted towards the total allowed for remote-handled waste in that panel precludes any argument that the use of shielded containers will result in an increase in the volume of remote-handled waste contained in the panel.

containers in section 3.3.1 of the permit will make operations simpler and more efficient for both the generator sites and for WIPP itself. RP 001553-54. Shielded containers may allow generators to avoid the need for additional facilities that would be necessary to handle the much larger containers otherwise required for the packaging of remote-handled waste. *Id.* The use of shielded containers that meet the WIPP standards for contact-handled waste also simplifies shipping. *Id.*

In its Response to Comments, NMED explained that it accepted DOE's explanation that the modification would provide additional flexibility for DOE at WIPP and at the generator sites. NMED explained that "management flexibility is part of a reasonable justification for the modification, provided permit requirements are met." RP 04471 (Response to Comment 14). *See also* RP 04472 (Response to Comment 14).

Appellants argue that NMED should have rejected DOE's explanation as "a legal deficiency." Br. at 17. According to Appellants, the "real" purpose of the modification is to compensate for remote-handled capacity that has been lost over the years. *Id.* at 13-17. They contend that, over the years, DOE filled the floor space of several panels with contact-handled waste before the bore holes for remote-handled disposal were filled, thereby making the empty holes inaccessible. Appellants claim that the actual explanation for the request to authorize shielded containers is to allow DOE to compensate for this lost capacity by "emplacing

shielded containers of RH waste on the floors of disposal rooms among the containers of CH waste." *Id.* at 15. Appellants claim that this could violate permit limits for remote-handled waste for each panel and reduce the space available for the disposal of contact-handled waste. *Id.*

In the Response to Comments, NMED considered and rejected Appellants' objections. The use of shielded containers has no effect on the amount of remote-handled that can be disposed of in each panel. RP 04467 (Response to Comment 5). As explained above, *supra* 12, 15-17, the volume of the shielded containers will be recorded as remote-handled waste and counted towards the authorized capacity for such wastes in each panel. Therefore, the use of these containers will not increase the volume of remote-handled waste in the panel. RP 04469 (Response to Comment 8). While Appellants may be correct that, at some point, DOE may have to request a modification to the remote-handled volume limits, that speculative future possibility is irrelevant to the merits of the modification actually requested. RP 04467.

Additionally, Appellants' argument ignores DOE's timeline in seeking the use of the shielded container. As discussed in Section E, *supra*, DOE has been pursuing approvals for use of the shielded container beginning before 2007 with the NRC and EPA, soon after the permit was modified for acceptance of RH waste.

DOE only sought the subject permit modification after receiving approval from EPA in 2011.

Finally, as NMED concluded, Appellants' claim that shielded containers could displace some unshielded contact-handled containers that otherwise would have occupied floor space in the panel is also irrelevant. RP 04469 (Response to Comment 8). The shielded containers can be disposed of by placement on the panel floor as long as the container's external surface dose rate meets the permit's standard for contact-handled waste. The permit does not allot space to particular kinds of containers. DOE has flexibility in managing the space, as long the volume of remote-handled waste, including the contents of the shielded containers, and the volume of contact-handled waste do not exceed the maximums allowed for the particular panel under the permit. *Id. See also* RP 04485 (Response to Comment 49).

NMED's responses are reasonable. Appellants' arguments are based on an inaccurate analysis of the consequences of the modification approved by NMED. Accordingly, their claim that that NMED decision to accept DOE's reasons for requesting the modification was unreasonable should be rejected.

V. NMED REASONABLY REJECTED APPELLANTS' CLAIM THAT THE PERMIT MODIFICATION WAS DEFICIENT BECAUSE THE REQUEST DID NOT SHOW HOW THE SURFACE DOSE RATE LIMITS WOULD BE ENFORCED.

Appellants claim that the permit modification request was deficient because it failed to address how DOE intends to ensure that the external surface dose rate of the shielded containers classified as contact-handled waste will remain below 200 millirems per hour during the management and disposal of the shielded containers at WIPP. They point to the fact that the request for modification refers to the dose rate at the time of shipment, but does not address how DOE will ensure that the dose is the same when the container arrives at WIPP and during the management and disposal process. Br. at 19. Appellants also cite to a DOE statement that changes in radiation levels at the external surface of a container may change if there is damage to the packaging or the radiation point shifts within the container. *Id.* at 20 (citing RP00018). The statement explains that potential problems due to shifting of the radiation point within the container will be addressed by loading instructions in DOE's Handling and Operations Manual. *Id.*

NMED responded to Appellants' comment raising this issue by explaining that, under the permit, "all characterization is done at the generator sites where there are packaging requirements to minimize shifting for containers approved by the permit." RP 04466 (Response to Comment 4). Appellants dismiss this reply as

inadequate, but fail to explain what additional steps NMED could or should have taken, given the specific scope of its authority at WIPP. Appellants complain that the packaging requirements for the shielded containers are addressed by DOE's Handling and Operations Manual, which is not part of the permit. Br. at 20. They do not, however, point to any statute or regulation that authorizes NMED to impose requirements for packaging that is performed at the generator sites. *See* RP 04484 (Response to Comment 5) ("The Permit does not regulate activities at the generator sites.").

Appellants are seeking to charge NMED with responsibility for issues that are within the authority of EPA and other federal agencies. *See* 40 C.F.R. § 194.8 (approval process for waste shipment from waste generator sites for disposal at the WIPP). In fact, the DOE statement quoted by Appellants was taken from the EPA Report prepared to support EPA's approval of the use of shielded containers. RP 00018.

Appellants, in their comments to NMED and their brief to this Court, never acknowledge that EPA has addressed the same objection they raise here: that the surface dose of a shielded container could be increased by events during shipping and handling. As discussed above, EPA conditioned its approval of the use of the shielded containers on DOE's implementation, prior to shipping, of a procedure for ensuring that the external surface dose for the containers would remain below the

standard for contact-handled waste. *Infra* at 10. Appellants have not addressed what additional steps may be necessary or explained the basis for NMED's authority to further address the issue. Under these circumstances, their complaint that NMED should have imposed additional conditions should be rejected.

VI. NMED REASONABLY REJECTED APPELLANTS' CLAIM THAT THE MODIFIED PERMIT ALLOWS UNSAFE CONTAINER MANAGEMENT

The permit limits the stacking of containers in the disposal panels in order to maintain stability. *See* Permit, Attachment A2-2b – Geologic Repository Process Description. RP 03079. In the request for modification, DOE explained that the shielded containers would not be stacked more than *two* high in order to maintain stability. RP 01549. Appellants assert that, because the permit allows contact-handled containers to be stacked *three* high, the permit authorizes an unsafe condition. Br. at 25-26.

NMED explained that the permit allows, but does not require, contact-handled containers to be stacked up to three-high. "It is important to understand that the language as written, allows [DOE] to develop *procedures* to determine a stacking height as appropriate depending on certain containers or combination of containers." RP 04480 (Response to Comment 34) (emphasis in original). NMED's explanation is consistent with Permit Attachment A2, especially when the attachment is read as a whole.

In section A2-1, the permit states: "The CH TRU mixed waste containers may be stacked up to three high across the width of the room." RP 03068. Section A2-2b elaborates on this cursory statement:

> The emplacement of CH TRU mixed waste into the HWDUs will typically be in the order received and unloaded from the Contact Handled Packaging. There is no specification for the amount of space to be maintained between the waste containers themselves, or between the waste containers and the walls. *Containers will be stacked in the best manner to provide stability for the stack (which is up to three containers high) and to make best use of available space.*

RH 03079 (emphasis added). This language establishes that NMED was correct in stating that the permit allows DOE to decide how different containers should be stacked, as long as no stack exceeds three containers. The approach chosen must best promote the goals of stability and efficient use of space. In the permit modification request, DOE explained that for shielded containers, a stack of two will best promote stability. No more is required.

VII. NMED REASONABLY RESPONDED TO APPELLANTS' CLAIM THAT THE PERMIT CALLS FOR INVALID PROCEDURES IF A SHIELDED CONTAINER IS DAMAGED

Appellants claim that the modified permit requires "invalid overpacking procedures." Br. at 27.[8] This concern focuses on the potential that a shielded

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[8] If a container is damaged, it may be "overpacked," which means placing the damaged container into another container that the permit identifies as appropriate for overpacking.

container could be damaged. NMED concluded that the permit provides an adequate response if such an event occurs.

Appellants' first claim is that the modified permit calls for a damaged shielded container to be overpacked, but then specifies overpacking containers that are only authorized to hold contact-handled waste. The allegation that this amounts to the requirement of invalid procedures is easily rebutted. As NMED recognized, DOE did not say that all damaged shielded containers would be overpacked in these unshielded containers. RP 04473 (Response to Comment 16). Instead, DOE specified overpacking in unshielded containers only for damaged shielded containers with "surface contamination issues or container integrity issues" for which the external surface dose rate remains below 200 millirems per hour. RP 01548.

DOE did recognize that there is a possibility that there could be a breach of the shielding that would result in a surface dose rate for the container that is higher than 200 millirems per hour and that, where the shielded container is being managed as contact-handled waste, the breach could occur in an area of WIPP where only contact-handled waste is allowed. RP 01548. Such areas lack the shielding and remotely operated equipment present in areas authorized for the management of waste containers with surface dose rates above the contact-handled standard. DOE explained that, in those circumstances, the damaged container

would have to be managed in the area where the breach occurred to avoid the spread of contamination that would result from an attempt to move it. Any radiological release would be addressed in accord with the facility radiological program,[9] which is outside the scope of NMED's permitting authority. *Id.*

As NMED observed, the comments focusing on this issue "do not express concern regarding co-detection monitoring or RCRA issues with respect to hazardous waste release or release detection." RP 04473 (Response to Comment 16). For this reason, it is appropriate to rely on the program for radiation control to address any breach of the shielding. Finally, NMED noted that, in approving the use of shielded containers, EPA had concluded that the use of shielded containers would not affect WIPP's compliance with the relevant EPA regulations for the management and disposal of radioactive waste at WIPP. *Id.*

Appellants have failed to substantiate their claim that NMED has required practices that are contrary to the terms of the permit. Therefore, the Court should reject their argument.

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[9] DOE's radiation protection program at WIPP complies with 10 C.F.R. Pt 835—Occupational Radiation Protection.

VIII. WHETHER APPELLANTS HAVE SHOWN THAT THE PERMIT MODIFICATION REQUEST FAILED TO ADEQUATELY EXAMINE THE CONSEQUENCES OF A BREACH OF A SHIELDED CONTAINER

Appellants next suggest that the permit modification request failed to adequately analyze the effects of potential releases from shielded containers as allegedly required by 40 C.F.R. Pt. 264 subpart X. Br. at 30-32. Although Appellants assert that they raised this claim in their comment to NMED, the record pages they cite do not mention this regulation at all. *See* Br. at 30 (citing RP 01651-52).[10] Instead, this section of the comment submitted by the Center simply restates their position that shielded containers should not be handled as contact-handled waste regardless of the external surface dose rate. RP 01652. NMED accurately addressed the issues raised by the comment cited by Appellants by dividing it into three parts, which are presented as Comments 22-25 of the Response to Comment document. NMED explained why Appellants' comment did not raise valid issues with respect to the approval of the use of shielded containers.

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[10] Appellants also fail to acknowledge that Subpart X only applies to the underground disposal units at WIPP, not the surface facilities as argued. *See* Br. at 32.

First, NMED rejected the comment that DOE had failed to establish that the use of shielded containers would protect the public if the waste within the container exceeded the standard for contact-handled waste. NMED explained that the shielded containers can be managed as contact-handled waste only if the external surface dose rate meets the established contact-handled standard. RP 04475 (Response to Comment 22). Additional studies based on a dose rate that may exist in the interior of the container would not be relevant.

In response to Comment 23, NMED explained that Appellants' concern that using shielded containers, which have a smaller volume than other containers that may be used for remote-handled waste, could result in an unsafe increase in the number of containers shipped to WIPP was not relevant. The permit does not restrict the number of containers that can be used. RP 04475-76.

Next, NMED dismissed the suggestion that DOE should have studied whether additional procedures should be required for shielded containers, even where those containers meet the permit standard for contact-handled waste. In Response to Comment 24, NMED explained that where the shielded containers met the standard for contact-handled waste, additional studies were not necessary. RP 04476.

Finally, in Response to Comment 25, NMED rejected Appellants' suggestion that NMED should be more assertive in regulating radioactivity.

NMED correctly concluded that issues focused on the management of radioactivity should be addressed by EPA during its facility inspections. RP 04476.

VI. NMED PROPERLY CONCLUDED THAT THE PERMIT MODIFICATION REQUEST SHOULD BE PROCESSED UNDER CLASS 2 PROCEDURES

A. The Classification Regulations

NMED has incorporated into its own regulations EPA's rules establishing the procedure for evaluating a permittee's request for a modification to its permit. EPA's regulations classify different types of modifications as Class 1, 2, or 3. 40 C.F.R. § 270.42, App. I. For each Class, the Agency established specific procedures for the consideration of a requested modification by the Director. 40 C.F.R. § 270.42(a)-(c).

In relevant part, modifications to the permit provisions that identify the specific containers authorized for use are Class 1 or 2 modifications unless the change: (1) will increase the facility's container storage capacity by more than 25%; or (2) will allow the storage of different wastes in containers "[t]hat require additional or different management practices from those authorized by the permit." 40 C.F.R. § 270.42, App. I(F)(1), (3)(a). If either of these exceptions applies, the modification is subject to the Class 3 procedures. *Id.* In addition, the permitting authority may subject a Class 2 modification to more extensive Class 3 procedures if: "(1) there is significant public concern about the proposed modification; or (2)

the complex nature of the change requires the more extensive procedures of Class 3." 40 C.F.R. § 270.42(b)(6)(i)(C).

For both Class 2 and 3 modifications, the permittee is required to (1) publish notice of the proposed permit modification; (2) make the modification and supporting materials available for public inspection; (3) hold a public meeting to discuss the modification; and (4) allow a 60-day period for the submission of comments by the public to the Director. In addition, for a Class 3 modification, after the Director receives the proposed modification, he must comply with EPA's general permitting requirements under 40 C.F.R. Pt. 124. *Id.* at § 270.42(c)(6). Subpart G of section 124 requires that the Director prepare a draft permit decision, allow for public comment, and hold a public hearing upon request. *Id.* § 124.208.

B. NMED Properly Relied on the Class 2 Procedures to Add a New Container to the Permit as the Exceptions That Would Require the Use of Class 3 Procedures Do Not Apply.

1. The Permit Modification Request Did Not Call for an Increase in Storage Capacity.

Appellants are simply wrong in suggesting that Class 3 procedures were required by 40 C.F.R. § 270.42, App. I(F)(1) because the use of shielded containers will increase WIPP's storage capacity for remote-handled waste. As explained above, for waste identified as remotely-handled on DOE's waste inventory for the generator sites, the shielded container allows the waste to be packaged, shipped

and managed at WIPP as contact-handled waste, since the surface dose rate of the container will not exceed 200 millirems per hour. DOE has agreed to account for the volume of the waste in the shielded containers in the WIPP Waste Information System as remote-handled waste to ensure that neither the permit limit set for total remote-handled waste, or the statutory curie limit. Therefore, since the shielded containers meet the CH dose limits, the use of these containers in the contact-handled storage areas will have no effect on WIPP's storage capacity, which is defined by the permit and has not been changed. *See* RP 04479 (Response to Comments 31-32).

2. The Permit Modification Request Did Not Require Different Management Practices.

Class 3 procedures are required if a permit modification would provide for the "storage of different wastes in containers . . . that require additional or different management practices from those authorized in the permit." In the permit modification request, at 8, DOE explained that it first focused on the nature of the waste that would be inside the shielded container. Absent the shielding, the waste would be classified as remote-handled waste. Because remote-handled waste had not been previously managed in the CH Bay,[11] DOE concluded that the waste to be

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[11] This is an area used for the management and storage of contact-handled waste prior to disposal. Permit Part 3 and Table 3.1.1.

placed inside the shielded container was a "different waste" as that term is used by EPA's rule. RP 01552.

There are no different management practices required to manage the shielded container, however. The shielded container itself, regardless of its contents, is classified as contact-handled waste as long as the external surface dose rate is below 200 millirems per hour. Therefore, shielded containers with the proper surface dose rate can be managed using the permit's *existing* procedures applicable to contact-handled waste. *Id.* For this reason, the requirement for Class 3 procedures does not apply. *See also* RP 04479 (Response to Comment 33).

3. NMED properly decided against exercising its discretionary authority to require Class 3 Procedures.

Appellants argue that, even if the permit modification request meets the standards for a Class 2 proceeding, NMED should have exercised its discretionary authority to require Class 3 procedures because "there is significant public concern about the proposed modification." 40 C.F.R. § 270.42(b)(6)(i)(C).

First, Appellants argue that the volume of comments establishes that the public concern requires that Class 3 procedures should have been used. Br. at 42. The WIPP permit and questions pertaining to the presence of remote-handled waste at WIPP have always raised significant public concern. NMED, however, properly narrowed its consideration to the comments that actually addressed the

specific modification at issue: the authorization of shielded containers. A number of these commenters, including the Center, raised objections based on the incorrect assumption that the permit required that the shielded containers be managed as remote-handled waste, regardless of their surface dose rate. Moreover, there had already been substantial public involvement through the public meeting held by DOE as required by the Class 2 procedures and the submission of written comments, which NMED answered. NMED reasonably decided that there were no "remaining issues that have not been adequately addressed." RP 04483 (Response to Comment 41).

Second, Appellants argue that NMED has previously decided that the addition of shielded containers to the WIPP permit required Class 3 procedures. Br. at 42-43. Appellants point to a letter from NMED dated December 22, 2011 (RP 00871-72), in which NMED determined that it was appropriate to process DOE's prior request for a permit modification to authorize shielded containers using Class 3 procedures. NMED, however, retracted that letter a few days later. RP 00874. On January 31, 2012, NMED denied that permit modification request after finding that its technical review had identified a number of inadequacies in the request. RP 00879.

Appellants are incorrect in assuming that, because NMED determined once that Class 3 procedures should be required, such procedures must be used every

time. NMED's decision here was based on a different request that addressed the deficiencies identified by NMED in the prior proceeding. Thus, there is no reason for Appellants to assume that NMED should make the same decision on the issue of which procedures should be used.

CONCLUSION

NMED's permit modification decision should be affirmed.

Respectfully submitted,

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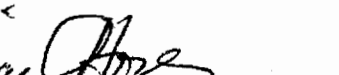

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I certify that a copy of the foregoing brief was served by first class mail on July 1, 2013, upon:

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