ENTERED

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

SOUTHWEST RESEARCH AND INFORMATION CENTER, et al.,

Appellants,

v.

NEW MEXICO ENVIRONMENT DEPARTMENT,

Appellee.

No. 32,499

COURT OF APPEALS OF NEW MEXICO
FILED

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ANSWER BRIEF
OF THE NEW MEXICO ENVIRONMENT DEPARTMENT

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STATEMENT OF COMPLIANCE PURSUANT TO RULE 12-213(G) NMRA

This brief complies with Rule 12-213(F)(3) NMRA. The brief was prepared using a proportionally-spaced typeface, Times New Roman. The body of the brief, including headings and footnotes, but not including the Table of Contents, the Table of Authorities, the Statement of Compliance, the signature block, or the Certificate of Service, contains 9647 words. The word-count information was obtained from a word processing program, Microsoft Office Word 2010.

SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE

A. *Introduction*

This case is the appeal of a modification to the hazardous waste facility permit for the Waste Isolation Pilot Plant, an underground repository for the disposal of transuranic radioactive waste mixed with hazardous waste, located near Carlsbad, in Eddy County, New Mexico. The facility is owned by the United States Department of Energy ("DOE") and operated by DOE and Nuclear Waste Partnership LLC ("NWP"), a private contractor to DOE (collectively, the "Permittees"). The New Mexico Environment Department ("Department") approved the modification on November 1, 2012, in accordance with the provisions of the New Mexico Hazardous Waste Act ("HWA"), NMSA 1978, §§ 74-4-1 to 74-4-14 (2006), and the Hazardous Waste Management Regulations issued thereunder, 20.4.1 NMAC (Oct. 5, 1978, as amended through June 14, 2000). The modification allows the Permittees to store, handle, and dispose of mixed transuranic radioactive and hazardous waste at WIPP in "shielded containers," which are cylindrical steel containers fortified with a layer of lead. The Southwest Research and Information Center, a nonprofit organization, and Margaret Elizabeth Richards, a private citizen (collectively, "Southwest Research"), challenge the permit modification on both substantive and procedural grounds.

B. *Hazardous Waste Statutes*

The permit modification challenged in this appeal is governed by the HWA, which is the state analogue to the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901 to 6992k. Congress passed RCRA in 1976 to "to provide nationwide protection against the dangers of improper hazardous waste disposal." H.R. Rep. No. 94-1491, at 11 (1976). Congress substantially rewrote the law in 1984.[1] RCRA provides for the U.S. Environmental Protection Agency ("EPA") to regulate the generation, transportation, treatment, storage, and disposal of hazardous wastes. 42 U.S.C. §§ 6921 to 6939e. Section 3005(a) of RCRA provides that a hazardous waste treatment, storage, or disposal facility must have a permit, issued by EPA or an authorized state, in order to operate. 42 U.S.C. § 6925(a). The RCRA hazardous waste program is largely a delegated program. Section 3006(b) of RCRA provides that EPA can authorize a state to administer and enforce its hazardous waste program "in lieu of the Federal program." 42 U.S.C. § 6926(b). An authorized state can "issue and enforce permits for the storage, treatment, or disposal of hazardous waste." *Id.* To be authorized, a state program must be "equivalent to the Federal program," provide for "adequate enforcement," and meet other minimum criteria. *Id.*

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1 The Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 98 Stat. 3221 (1984).

The New Mexico Legislature enacted the HWA in 1978 to implement RCRA. The express purpose of the HWA is a broad one: "to help ensure the maintenance of the quality of the state's environment; to confer optimum health, safety, comfort and economic and social well-being on its inhabitants; and to protect the proper utilization of its lands. NMSA 1978, § 74-4-2 (1978). Modeled on RCRA, the HWA provides for the New Mexico Environmental Improvement Board ("Board") to promulgate, and the Department to implement, regulations for the generation, transportation, storage, treatment, and disposal of hazardous wastes. *See* NMSA 1978, §§ 74-4-4, 74-4-4.2, 74-4-4.3, 74-4-9, 74-4-10, 74-4-10.1. The HWA also requires the Board to adopt regulations requiring a hazardous waste treatment, storage, or disposal facility to have a permit, and establishing procedures for the issuance of permits. NMSA 1978, § 74-4-4(A)(6), (7) (2010). The HWA specifies that prior to the issuance of a permit or a "major modification" to a permit, the Department must afford "an opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing." NMSA 1978, § 74-4-4.2(H) (2006). Conversely, for a "minor permit modification," a hearing is necessary only "if the secretary determines that there is significant public interest in the minor modification." *Id.* § 74-4-4.2(I). In accordance with the HWA mandate, the Board has adopted the Hazardous Waste

Management Regulations, 20.4.1 NMAC, largely by incorporating the federal RCRA regulations at 40 C.F.R. §§ 260 to 270, 273, 279.

With its hazardous waste program under the HWA in place, the State of New Mexico received EPA authorization to implement its hazardous waste program under the HWA in lieu of the federal program on January 25, 1985. 50 Fed. Reg. 1515 (Jan. 11, 1985). The State received EPA authorization to regulate the hazardous component of mixed waste, that is, waste containing both hazardous and radioactive components, on July 25, 1990. 55 Fed. Reg. 28397 (July 11, 1990).

C. *Hazardous Waste Facility Regulations*

The federal and State regulations include a host of requirements, designed to protect public health and the environment, applicable to facilities that treat, store, and dispose of hazardous wastes. 40 C.F.R. Part 264, incorporated by 20.4.1.500 NMAC. These regulations include general requirements applicable to all facilities, such as personnel training, security, and inspection of hazardous waste systems. *Id.* Subpart B. They require the preparation of a contingency plan to address unplanned emergencies. *Id.* Subpart D. They require groundwater monitoring for land disposal facilities or "units" such as landfills and surface impoundments. *Id.* Subpart F. They require corrective action to address releases of hazardous waste constituents into the environment. *Id.* §§ 264.100, 264.101. They require a closure

plan for properly closing the facility after operations cease and, if necessary, caring for the facility after closure. *Id.* Subpart G. The regulations also include detailed requirements for specific categories of hazardous waste management units, such as container storage areas, tanks, landfills, waste piles, surface impoundments, and incinerators. *Id. passim.*

The regulations include a catch-all provision for facilities that do not fit within any of the enumerated categories. *Id.* Subpart X. Such facilities are called "miscellaneous units." *See* 40 C.F.R. § 260.10, incorporated by 20.4.1.100 NMAC (defining "miscellaneous unit" by exclusion). The requirements of this provision are relatively less specific than the requirements for other categories of hazardous waste facilities (e.g., hazardous waste landfills or incinerators). The regulations allow the permitting authority flexibility in choosing appropriate permit conditions from the requirements for other categories of hazardous waste units. 40 C.F.R. § 264.601, incorporated by 20.4.1.500 NMAC.

D. *Permitting Regulations*

The federal and State regulations contain detailed requirements for the permitting of hazardous waste facilities, including public participation in permitting actions. 40 C.F.R. Part 270, incorporated by 20.4.1.900 NMAC. Most important for this case are the regulations on permit modifications made at the request of the permittee. 40 C.F.R. § 270.42, incorporated by 20.4.1.900 NMAC.

These regulations establish a hierarchy of permit modifications, depending on how substantially the modification changes the facility or its operations. Class 1 permit modifications are for "minor changes that keep the permit current with routine changes to the facility or its operations." 40 C.F.R. § 270.42(d)(2)(i), incorporated by 20.4.1.900 NMAC. Class 1 modifications "do not substantially alter the permit conditions or reduce the capacity of the facility to protect human health or the environment." *Id.* Class 2 permit modifications are for changes to enable a permittee to respond to "[c]ommon variations in the types and quantities of the waste managed under the facility permit"; advances in technology; and "new regulations where those changes can be implemented without substantially changing the design specifications or management practices in the permit." 40 C.F.R. § 270.42(d)(2)(ii), incorporated by 20.4.1.900 NMAC. Class 3 permit modifications "substantially modify the facility or its operation." The regulations classify many specific types of permit modifications as Class 1, 2, or 3. 40 C.F.R. § 270.42, Appendix I, incorporated by 20.4.1.900 NMAC.

The regulations specify differing levels of public participation for each class of permit modification. For a Class 1 permit modification, the permittee must send a notice of the modification to the Department and to all persons on the facility mailing list maintained by the Department. 40 C.F.R. § 270.42(a)(1), incorporated by 20.4.1.900 NMAC. Members of the public may request that the Department

review and deny the modification. *Id.* For a Class 2 modification, the permittee must send a modification request to the Department. 40 C.F.R. § 270.42(b)(1), incorporated by 20.4.1.900 NMAC. The permittee must send a notice to all persons on the facility mailing list and to appropriate units of State and local government, and publish a copy of the notice in a major local newspaper of general circulation. 40 C.F.R. § 270.42(b)(2), incorporated by 20.4.1.900 NMAC. The permittee must also hold a public meeting on the modification request. 40 C.F.R. § 270.42(b)(4), incorporated by 20.4.1.900 NMAC. And the public must be allowed a period of sixty days to comment on the modification request. 40 C.F.R. § 270.42(b)(5), incorporated by 20.4.1.900 NMAC. For a Class 3 modification, much the same procedures apply as for a Class 2 modification, with the addition that members of the public are given the opportunity for a public hearing. 40 C.F.R. § 270.42(c), incorporated by 20.4.1.900 NMAC. The regulations also allow the Department Secretary to determine that a Class 2 modification request should follow the procedures for a Class 3 modification request if the Secretary finds that "[t]here is significant public concern about the proposed modification," or if the "complex nature of the change requires the more extensive procedures of Class 3." 40 C.F.R. § 270.42(b)(6)(i)(C), incorporated by 20.4.1.900 NMAC.

The Board has also adopted additional procedural regulations, not incorporated from the federal regulations, for permitting. 20.4.1.901 NMAC. The

regulations make minor additions to the permit modification procedures. 20.4.1.901.B NMAC. They harmonize the requirements of the HWA section 74-4-4.2(H) (affording an opportunity for public hearing on a "major modification" of a permit) with the requirements of the federal regulations at 40 C.F.R. § 270.42(c) (affording an opportunity for public hearing on a "Class 3" permit modification) by providing that Class 1 and 2 permit modifications under the federal regulations are "minor modifications" under the HWA. 20.4.1.901.B(6) NMAC. The regulations also provide detailed procedures for public hearings. 20.4.1.901.F NMAC.

E. *WIPP Land Withdrawal Act*

Another statute, the Waste Isolation Pilot Plant Land Withdrawal Act, Pub. L. No. 102-579, 106 Stat. 477 (1992), *as amended by* Waste Isolation Pilot Plant Land Withdrawal Amendment Act, Pub. L. No. 104-201, 110 Stat. 2422 (1996) ("WIPP Act")[2] establishes a unique regulatory scheme for WIPP. Originally enacted in 1992, the WIPP Act permanently withdrew the WIPP site from public use and reserved the site for the use of DOE "for the construction, experimentation, operation, repair and maintenance, disposal, shutdown, monitoring, decommissioning, and other authorized uses associated with" a repository for disposal of weapons-related radioactive waste. *Id.* § 3. Although the WIPP Act placed management responsibility over the withdrawn lands with DOE, *id.* § 4, it

2 The WIPP Act is not codified in the United States Code.

also gave substantial regulatory authority over the repository to EPA, *id.* § 8. It required EPA to promulgate disposal regulations for WIPP. *Id.* § 8(b). EPA issued the regulations in 1996. 40 C.F.R. Part 191. The WIPP Act also requires EPA to certify, every five years, that WIPP is in compliance with those regulations. WIPP Act § 8(f).

II. SUMMARY OF THE FACTS

A. *The Waste Isolation Pilot Plant*

The Waste Isolation Pilot Plant, or WIPP, is an underground repository for the disposal of transuranic radioactive waste[3] and transuranic radioactive waste mixed with hazardous waste ("TRU mixed waste").[4] WIPP is located 26 miles east of Carlsbad in Eddy County, New Mexico, 2150 feet below the surface in the Salado Formation, a massive salt bed. The salt bed was selected for the repository, in part, because it has low permeability and therefore impedes groundwater flow. *Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091, 1094 (10th Cir. 2007).

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3 Transuranic or TRU waste refers to waste composed of radioactive elements having an atomic weight greater than uranium, a half-life greater than 20 years, and alpha radioactivity greater than 100 nanocuries per gram. WIPP Act § 2(18).

4 Mixed waste refers to waste that contains both hazardous waste regulated under RCRA and radioactive waste regulated under the Atomic Energy Act of 1954. 40 C.F.R. § 266.10, incorporated by 20.4.1.700 NMAC. The hazardous waste regulations apply to mixed waste. *New Mexico v. Watkins*, 969 F.2d 1122, 1132 (D.C. Cir. 1992).

WIPP began operating to receive shipments of transuranic waste in March 1999.[5] DOE and its contractors transport the waste to WIPP from several of the sites that make up the DOE nuclear weapons complex. These "generator sites" include the Argonne National Laboratory in Illinois, the Hanford Site in Washington, the Idaho National Laboratory, Los Alamos National Laboratory in New Mexico, Oak Ridge in Tennessee, and the Savannah River Site in South Carolina; past generator sites have also included Lawrence Berkeley National Laboratory in California, Lawrence Livermore National Laboratory also in California, the Nevada Test Site, Rocky Flats Environmental Technology Site in Colorado, and Sandia National Laboratories in New Mexico.

Waste shipments are received at WIPP, unloaded, surveyed, and conveyed underground to the disposal area in the repository. **[5 RP 02995-03001]**. The disposal area is divided into eight excavated "Underground Hazardous Waste Disposal Units," designated as Panels 1 through 8. **[5 RP 03067; *see also* 5 RP 03136 (diagram of the disposal area, including Panels 1 through 8)]**. Each panel consists of seven rooms approximately 300 feet long, 33 feet wide, and 13 feet high. **[5 RP 02970; *see also* 5 RP 03098 (diagram of typical panel showing**

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5 WIPP began receiving transuranic waste before the Department had issued a hazardous waste permit for the facility. The waste shipments received prior to issuance of the permit contained only transuranic waste that was not mixed with hazardous waste. *See New Mexico v. Richardson*, 39 F. Supp. 2d 48 (D.D.C. 1999) (denying injunctive relief to halt those shipments).

separate rooms and typical waste emplacement)]. Waste containers are emplaced on the floor of the rooms, sometimes stacked two or three tiers high, or emplaced into horizontal borings in the room walls. **[5 RP 03068]**. As the waste is emplaced, the room is backfilled with magnesium oxide, which controls the solubility of the radioactive elements. **[5 RP 03069]**. Panels 1 through 5 have received the final volumes of waste. **[5 RP 02873]**. Two additional panels, Panels 9 and 10, have not yet been designed. **[5 RP 03067]**.

WIPP receives two broad categories of mixed transuranic waste, contact-handled waste (often called "CH waste") and remote-handled waste (often called "RH waste"). Contact-handled waste is waste within a container having a surface dose that does not exceed 200 millirem per hour. **[5 RP 02817]**. It can be handled manually without personnel protective equipment. Remote-handled waste, conversely, is waste within a container having a surface dose that exceeds 200 millirem per hour. **[5 RP 02817]**. It must be handled remotely using machines. **[*See* 5 RP 02998-03001]**. Contact handled waste is emplaced on the floor of the rooms, while remote-handled waste is emplaced in borings in the walls. **[5 RP 3068]**.

DOE and its contractors transport waste to WIPP on tractor-trailers holding large shipping containers or casks of different configurations. These shipping containers include TRUPACT-II, TRUPACT-III, HalfPACT, and RH-TRU 72-B

shipping cask. **[5 RP 02987, RP 02990; *see also* 5 RP 03026 (diagram of TRUPACT-II); 5 RP 03058 (diagram of TRUPACT-III); 5 RP 03027 (diagram of HalfPACT); 5 RP 03044 (diagram of RH-TRU 72-B cask); 5 RP 03042 (diagram of RH-TRU 72-B cask mounted on trailer)]**. These shipping containers or casks hold smaller waste containers, packaged at the generator sites, that are used for the storage and ultimate disposal of the wastes at WIPP. The following waste containers, approved by the Department, have been used for the storage and disposal of contact-handled waste at WIPP: standard 55-gallon drums; 85-gallon drums; 100-gallon drums; ten-drum overpacks; standard waste boxes; and standard large boxes. **[5 RP 02865-02866; 5 RP 02980-02982; *see also* 5 RP 03022-03025, 5 RP 03035 (diagrams)]**. The following waste containers, also approved by the Department, have been used for the storage and disposal of remote-handled waste: standard 55-gallon drums; and RH TRU canisters. **[5 RP 02865-02866; 5 RP 02982-02983; *see also* 5 RP 03037 (diagram)]**.

B. *The WIPP Permit*

The Environment Department issued the initial hazardous waste facility permit, No. NM4890139088-TSDF, to DOE and Westinghouse Waste Isolation Division (predecessor to NWP)[6] on October 27, 1999, pursuant to the HWA,

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6 The DOE contractor for WIPP has changed several times over the years of its operation. **[*See* 5 RP 02971-02973 (describing the history of those changes)]**.

NMSA 1978, § 74-4-4.2(C). The permit authorizes the Permittees to store and dispose of mixed transuranic waste at WIPP, subject to various conditions. WIPP is regulated as a "miscellaneous unit" under the permit. 40 C.F.R. Part 264, Subpart X, incorporated by 20.4.1.500 NMAC. Accordingly, the permit imposes conditions governing general facility operations, including emergency procedures and a contingency plan; storage of waste containers; disposal of waste in the geologic repository; groundwater monitoring; closure of the facility when operations cease; post-closure care of the facility; and corrective action to address releases of hazardous waste or hazardous constituents into the environment.

On November 25, 2002, the Department approved a Class 2 permit modification request to allow HalfPACT shipping containers, ten-drum overpacks, 85-gallon drums, and 100-gallon drums to be managed at WIPP. **[3 RP 01552-01553]**. On October 26, 2006, following Class 3 procedures and a public hearing, the WIPP permit was modified to allow the receipt and disposal of remote-handled mixed transuranic waste at the facility. The first shipment of remote-handled transuranic waste arrived at WIPP on January 23, 2007. On April 15, 2011, the Department approved a Class 2 permit modification request to allow TRUPACT-III shipping containers, and standard large boxes to be managed at WIPP. **[3 RP 01553]**.

The original 1999 permit set maximum volumes of waste that could be

stored and disposed of at WIPP. Those limits were revised in the 2006 modification. As modified, the permit sets the total maximum volume for storage of contact handled waste at 183.1 cubic meters (6466.3 cubic feet), and for storage of remote-handled waste at 11.0 cubic meters (387.7 cubic feet). **[5 RP 02861]**. The permit also sets maximum volumes for disposal for each of Panels 1 through 8, with a total maximum volume of 148,500 cubic meters (5,244,900 cubic feet) of contact-handled waste, and 2635 cubic meters (93,050 cubic feet) of remote-handled waste. **[5 RP 02873]**.

Most recently the permit was again modified on November 1, 2012 to allow shielded containers to be received at WIPP for storage and disposal – the modification that is the subject of this appeal. A shielded container is cylindrically-shaped, approximately 36 inches in height and 22 inches in diameter, with a capacity of 30 gallons. The wall of the container consists of an outer 1/8-inch layer of carbon steel, a middle one-inch layer of lead, and an inner 3/16-inch layer of carbon steel. The shielding blocks gamma radiation. **[1 RP 00123]** The top and bottom of the container are made of carbon steel, three inches thick. An empty container weighs approximately 1726 pounds. **[3 RP 01545; *see also* 5 RP 03062, 3 RP 01595 (diagrams)]**. The Permittees have not yet begun receiving waste in shielded containers at WIPP.

III. COURSE OF THE PROCEEDINGS

This appeal is the culmination of a lengthy permit modification process, which formally began nearly two years ago.

A. *The 2011 WIPP Permit Modification Request*

On September 29, 2011, the Permittees submitted to the Environment Department a Class 2 permit modification request for the WIPP hazardous waste permit, as provided in 40 C.F.R. § 270.42(b)(1), incorporated by 20.4.1.900 NMAC. **[1 RP 00090-00661]**. The modification request sought to change the permit terms addressing ventilation of the underground facility, revise the groundwater monitoring plan, and allow disposal of mixed waste in shielded containers. **[1 RP 00090]**.

Pursuant to its authority under the WIPP Act, on August 8, 2011 EPA had proposed to approve the use of shielded containers at WIPP as meeting the requirements of the disposal regulations.[7] **[1 RP 00001-00085]**. In addition, on June 10, 2009 the Nuclear Regulatory Commission had approved the shipment of shielded containers in HalfPACT shipping containers. **[3 RP 01548]**.

On October 5, 2011, the Permittees caused a public notice to be published in the *Albuquerque Journal* and the *Carlsbad Current-Argus*, notifying the public of the permit modification request, and they mailed a copy of the notice to interested

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7 EPA has not yet taken final action on this proposal.

persons on the facility mailing list maintained by the Environment Department, as required by 40 C.F.R. § 270.42(b)(2), incorporated by 20.4.1.900 NMAC. **[2 RP 00674-00684]**. DOE held a public meeting on the proposed modification on October 25, 2011, in accordance with 40 C.F.R. § 270.42(b)(4), incorporated by 20.4.1.900 NMAC. **[2 RP 00677]**. A sixty-day public comment period occurred from October 5, 2011 through December 5, 2011, during which time members of the public could submit written comments to the Department. The Department received eighty comments from the public; seventy-seven of the comments, including one from Southwest Research, addressed shielded containers. **[2 RP 00685-00870]**. On January 31, 2012, the Department issued a written response to each of the comments it had received. **[3 RP 01325-01330]**.

On January 31, 2012, the Department approved, with some changes, the permit modification for ventilation and groundwater monitoring, but it denied the permit modification request for shielded containers. The Department stated that the permit modification request was incomplete because additional portions of the permit would need to be revised to conform to the permit modification. In particular, revisions were necessary to Part 3 of the permit (Container Storage), Attachments A1 (Container Storage), A2 (Geologic Repository), C1 (Waste Characterization Sampling Methods), D (Contingency Plan), E (Inspection Schedule), and G (Closure Plan). **[2 RP 00878-00879]**. On February 2, 2012, the

Department sent the Permittees an electronic message with detailed questions and comments on the permit modification request. **[3 RP 01533-01536]**.

B. *The 2012 WIPP Permit Modification Request*

On July 5, 2012, the Permittees submitted to the Department a revised Class 2 permit modification request seeking, again, to allow shielded containers containing mixed transuranic waste to be stored, managed, and disposed at WIPP. **[3 RP 01541-01615]**. The revised modification request addressed the issues that the Department had raised in its February 2, 2012 electronic message.

On July 12, 2012, the Permittees caused a public notice to be published in the *Albuquerque Journal*, the *Carlsbad Current-Argus*, and the *Santa Fe New Mexican*, notifying the public of the permit modification request, and they mailed a copy of the notice to interested persons on the facility mailing list, as required by 40 C.F.R. § 270.42(b)(2), incorporated by 20.4.1.900 NMAC. **[3 RP 01637-01644]**. DOE also held a public meeting on the proposed modification on August 14, 2012, in accordance with 40 C.F.R. § 270.42(b)(4), incorporated by 20.4.1.900 NMAC. **[3 RP 01632-01633]**. A sixty-day public comment period was held from July 12, 2012 through September 10, 2012, during which time members of the public could submit written comments to the Environment Department. The Department received 206 comments from the public, including one from Southwest Research. **[3 RP 01646-01918]**. Nearly all the public comments

requested a public hearing. Most of the comments were pre-printed "form letters." On November 1, 2012, the Department issued a written response to each of the comments it had received ("Response to Comments"). **[1 SRP 04465-04489]**.

On November 1, 2012, the Environment Department granted the permit modification request, with a minor change. **[4 RP 01921-02788]**. The only change, which was requested by the Permittees, added a footnote to section 3.3.1.8 of the permit clarifying that the term "shielded container" referred to the specific type of container depicted graphically in the figure at page A1-37 of the permit. **[5 RP 02866, RP 03062; *see also* 3 RP 01665-01667 (Permittee's request)]**. On November 16, 2012, Southwest Research filed a timely notice of appeal challenging the permit modification under the HWA, NMSA 1978, § 74-4-14(A) (1992).

ARGUMENT

I. STANDARD OF REVIEW

Under the HWA, this Court is to set aside an action of the Secretary "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." NMSA 1978, § 74-4-14(C); *see also Regents of the Univ. of Cal. v. N.M. Water Quality Control Comm'n*, 2004-NMCA-073, ¶ 8, 136 N.M. 45, 94 P.3d 788, 791. These three grounds will be addressed in turn.

As to the first ground, "[a]n action is arbitrary or capricious if it is unreasonable, irrational, . . . and does not result from a sifting process," or "if there is no rational connection between the facts found and the choices made." *Regents of the Univ. of Cal.*, 2004-NMCA-073, ¶ 35 (internal quotations omitted). Similarly, a decision by an administrative agency "is arbitrary and capricious if it is unreasonable or without rational basis, when viewed in light of the whole record." *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2005-NMCA-139, ¶ 16, 138 N.M. 625, 629, 124 P.3d 1164, 1168. However, "[e]ven if a different conclusion might have been reached from the facts, the choice made is not arbitrary or capricious if exercised honestly and upon due consideration." *Regents of the Univ. of Cal.*, 2004-NMCA-073, ¶ 35 (internal quotations omitted). An agency abuses its discretion when its decision is contrary to logic and reason. *Oil Transp. Co. v. N.M. Corp. Comm'n*, 110 N.M. 568, 573, 798 P.2d 169 (1990).

As to the second ground, "[s]ubstantial evidence supporting administrative agency action is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Regents of the Univ. of Cal.*, ¶ 29. The court should "review the whole record, considering evidence both favorable and unfavorable, to determine the sufficiency of the evidence." *Id.* The record should be reviewed "in the light most favorable to the decision of the [agency]." *N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, ¶ 30, 141 N.M. 41, 51,

150 P.3d 991, 1001. The reviewing court "do[es] not substitute [its] judgment for that of the [agency]." *Plains Elec. Generation & Transmission Coop., Inc v. N.M. Pub. Util. Comm'n*, 1998-NMSC-038, ¶ 7, 126 N.M. 152, 155, 967 P.2d 827, 830. The court "do[es] not reweigh the evidence but decide[s], on balance, whether there was substantial evidence to support the agency's decision." *Regents of the Univ. of Cal.*, 2004-NMCA-073, ¶ 29.

As to the third ground, an agency action is not in accordance with law "if the agency unreasonably or unlawfully misinterprets or misapplies the law." *N.M. Mining Ass'n*, 2007-NMCA-010, ¶ 11. Interpretation of the statute is a question of law that the court reviews *de novo*. *Smith v. Bernalillo County Bd. of Comm'rs*, 2005-NMSC-012, ¶ 18, 137 N.M. 280, 285 110 P.3d 496, 501. However, the courts "give deference to an agency's interpretation of its own regulations." *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n*, 2006-NMCA-115, ¶ 25, 140 N.M. 464, 471, 143 P.3d 502, 509; *Gila Res.*, ¶ 16, 138 N.M. at 698, 124 P.3d 1168. The courts also "afford administrative agencies considerable discretion to carry out the purposes of their enabling legislation." *Phelps Dodge Tyrone*, 2006-NMCA-115, ¶ 25.

II. THE PERMIT MODIFICATION SHOULD BE UPHELD

The Court should uphold the Environment Department's approval of the modification to the WIPP hazardous waste permit to allow the storage,

management, and disposal of shielded containers at the WIPP facility. The modification is supported by an adequate explanation of need and substantial evidence in the record. Especially when viewed in the light of other conditions in the permit, and in the light of protections required under other provisions of law, the modified permit is adequate to protect public health and the environment. Southwest Research has not shown that approval of the permit modification is in any way arbitrary or capricious. Finally, the Secretary has considerable discretion in deciding whether to hold a public hearing on a permit modification. He did not abuse that discretion in approving the permit modification without a public hearing, and his decision was fully in accordance with law.

A. *The Permit Modification Is Based on an Adequate Explanation of Need*

Southwest Research begins by arguing that the permit modification request does not adequately state why the modification is needed. **[BIC 13-18 (Point I)]**. But that is not the case.

Southwest Research is correct that the regulations require a permit modification to be based on need. The regulations provide that for a Class 2 permit modification, "the permittee must submit a modification request to the [Department] that . . . [e]xplains why the modification is needed." 40 C.F.R. § 270.42(b)(1)(i), incorporated by 20.4.1.900 NMAC. The Permittees clearly

included such an explanation in the permit modification request.

The explanation evolved from the Permittees' 2011 permit modification request to their 2012 request. In their original September 2011 permit modification request, the Permittees included a very brief discussion of why the permit modification was needed. They stated simply that a permit modification allowing shielded containers was "expected to reduce the time and personnel necessary for the packaging of [remote handled transuranic] mixed waste at generator sites and the management of that waste at the WIPP facility." **[1 RP 00126]**. The Department was not satisfied with this initial explanation, however, and it was one of the reasons for initially denying the modification request. The Department, in its February 2, 2012 electronic message to the Permittees, stated that "[t]he time and personnel reductions should be more thoroughly presented, both at the WIPP and generator sites . . ., including personnel reduction [and] and savings associated with the characterization process." **[3 RP 01535]**. Consequently, in their July 2012 revised permit modification request, the Permittees more thoroughly elaborated why the permit modification was necessary, explaining that the use of shielded containers would make the management and disposal of remote-handled waste more efficient for two logical reasons. **[3 RP 01553-01554]**.

First, the Permittees explained that shielded containers will allow remote-handled waste to be sent to WIPP in fewer shipments. Instead of RH-TRU 72-B

shipping casks, which are currently used to transport all remote-handled waste to WIPP, shielded containers will be transported in HalfPACT shipping containers. A HalfPACT shipment would comprise three HalfPACT containers mounted on a trailer. Each HalfPACT can hold three shielded containers, each with a capacity of 30 gallons. By comparison, a RH-TRU 72-B shipment comprises one cask loaded horizontally on a trailer. The RH-TRU 72-B cask can hold three 55-gallon or three 30-gallon drums. **[3 RP 01553-01554]**. Thus, a HalfPACT shipment of shielded containers can transport 270 gallons of waste; whereas a RH-TRU 72-B shipment can transport only 165 gallons of waste.

Second, the Permittees explain that shielded containers will allow waste containers to move from unloading to final emplacement much more quickly. Two HalfPACTs each containing three shielded containers (180 gallons of waste) can be unloaded and emplaced for disposal in about two hours. An RH-TRU 72-B cask (165 gallons of waste) takes eight to ten hours. **[3 RP 01554]**.

This improved efficiency should actually increase safety. Fewer shipments reduces the risk of traffic accidents, and shorter time handling waste containers reduces the risk of worker accidents or worker exposure to hazardous or radioactive wastes.

Significantly, in the permit modification request the Permittees certify that these explanations are true, accurate, and complete, acknowledging that there are

significant penalties at law for giving false information. **[3 RP 01541]**. The Permittees' explanation constitutes substantial evidence supporting the need for the modification.

Southwest Research nevertheless dismisses these explanations as unsubstantiated. **[BIC 13]**. It argues that the unstated need for the permit modification is to make up capacity for the disposal of remote-handled waste, capacity that was lost due to inefficient disposal practices in the past. In Panels 1 through 5, the wall space that could have been used to dispose of remote-handled waste was not used to its full capacity. The floor space of those panels was filled with contact-handled waste, blocking access to the wall space. Thus, DOE needs additional capacity to dispose of its remaining inventory of remote-handled waste. **[BIC 13-15]**. Southwest Research further argues that the disposal of remote-handled waste in shielded containers will cause the Permittees to exceed the limits for remote-handled waste in the remaining Panels 6 through 10. But Southwest Research misconstrues those limits.

Whether waste received at WIPP is managed as contact-handled waste or remote-handled waste is determined not by any intrinsic property of the waste itself, but by the surface radiation of the waste container. Section 1.5.1 of the permit defines "Contact-handled Transuranic Mixed Waste" to mean "transuranic mixed waste with a surface dose rate not greater than 200 millirem per hour." **[5**

RP 02817]. Conversely, section 1.5.2 of the permit defines "Remote-handled Transuranic Mixed Waste" to mean "transuranic mixed waste with a surface dose rate of 200 millirem per hour or greater." **[5 RP 02817]**. These definitions, moreover, are Congress' definitions; they are reproduced verbatim from the WIPP Act. *See* WIPP Act § 2(3) (definition of "contact-handled transuranic waste"); *id.* § 2(12) (definition of "remote-handled transuranic waste"). Thus, the waste shipped to WIPP in shielded containers will fall within the permit definition of Contact-handled Mixed Transuranic Waste. There will be no increase in the quantity of remote-handled waste shipped to WIPP, and no chance of exceeding the limits for remote-handled waste in Panels 6 through 10.

Thus, the modification request contains the requisite explanation of why the modification is needed, and the Permittees certify that the explanation is true, accurate, and complete. The permit modification is fully in accordance with law, and it is supported by substantial evidence in the record.

B. *The Modified Permit Contains Adequate Provisions to Protect Public Health and the Environment*

Southwest Research next presents a parade of potential problems that could occur with the management of shielded containers at WIPP. Because the permit modification does not, in its view, satisfactorily address these potential problems, Southwest Research argues that the permit modification is arbitrary and capricious.

But these arguments are without merit.

The permit as modified does not specifically address every possible contingency that might occur at the WIPP facility, nor can it. But that does not mean the permit modification is arbitrary and capricious. Taken as a whole, the permit conditions adequately protect public health and the environment.

1. Shifting of Waste in Shielded Containers During Shipping

The first potential problem Southwest Research raises is the possibility that wastes in shielded containers may shift during transport or on-site handling, causing the surface dose rate of 200 millirem per hour to be exceeded. **[BIC 18-24 (Point II)]**. The permit modification, Southwest Research argues, is arbitrary and capricious because it does not address this potential problem.

The possibility of waste shifting during shipping such that the surface dose would be exceeded is entirely speculative; there is nothing in the administrative record to suggest that it should be a significant concern. As stated in the Department's Response to Comments on the proposed permit modification, the DOE generator sites are subject to packaging requirements to minimize any shifting of wastes. **[1 SRP 04466-04467]**. Although Southwest Research states that "the prospect for shifting contents causing exceedence of the 200 mrem/hr. limit is a serious likelihood," **[BIC 19 (citing 1 SRP 04467)]**, it offers no support for this contention. It cites the Department's response to comments, but that

document contradicts its contention. Southwest Research further states that the Department "acknowledges that the waste contents may shift in shipment or on-site management, increasing the surface dose rate." **[BIC 19 (citing 1 SRP 04466)]**. That "acknowledgement" is simply a statement that there are packaging requirements to "minimize shifting."

Based on the hypothetical shifting of wastes and resulting elevated surface dose rate, Southwest Research concludes that the modified permit "fails to protect health, safety, and the environment" because it does not address a significant "safety risk." **[BIC 20, 21]**. This conclusion, again, is without any support in the record, and it disregards the many safeguards that are in place to prevent such risk from occurring. Most importantly, the WIPP facility is subject to federal regulations for occupational radiation protection. 10 C.F.R. Part 835. These regulations expressly apply to DOE activities. *Id.* § 835.1(a). They place responsibility for compliance squarely on DOE and its contractors. *Id.* § 835.3(b), (c). They require DOE activities to adhere to the bedrock principle that human exposure to ionizing radiation must be "as low as reasonably achievable (ALARA)." *Id.* § 835.101(c). They require the development and implementation of "written procedures" to ensure compliance. *Id.* § 835.104. They establish occupational dose limits for employees. *Id.* § 835.202. They require individual monitoring using personal dosimeters to ensure compliance with the dose limits.

Id. § 835.402. They also require air monitoring if radiation exposure is likely to be above specified levels. *Id.* § 835.403. These regulations belie Southwest Research's argument that the modified permit fails to protect health, safety, and the environment because it does not address the hypothetical possibility that the surface dose limit for contact-handled waste might be exceeded during transport or handling of shielded containers. Procedures to minimize such risks and to protect the health of workers are already in place.

2. Unstable Stacking of Shielded Containers

The next potential problem that Southwest Research raises is the possibility that three assemblies of shielded containers might be stacked vertically, which would be dangerously unstable. **[BIC 25-26 (Point III)]**. According to Southwest Research, the modified permit would "allow" such unstable stacking and is therefore arbitrary and capricious. **[BIC 25-26]** This argument is not correct.

It is true that the modified permit, in Attachment A2, section A2-2b (page A2-13), generally provides that containers may be stacked "up to three containers high." **[5 RP 03079]**. Although it does not specifically cite section A2-2b, Southwest Research relies on this provision for its argument. But when quoted in full, section A2-2b says something quite different from what Southwest Research implies: "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." **[5 RP 03079 (emphasis added)]**. By allowing containers to be stacked up to three-high in some circumstances, the modified permit allows the Permittees flexibility to configure and stack waste containers in a way that uses space efficiently, depending on the type and size of the containers available for emplacement at that time. But the modified permit expressly forbids the stacking of containers in an unstable manner. Thus, the permit does not "allow" shielded containers to be stacked three-high. The permit adequately addresses the "problem" that Southwest Research complains of.

3. Improper Overpacking of Damaged Shielded Containers

The next potential problem that Southwest Research raises is the purportedly improper overpacking of shielded containers that are damaged or leaking. **[BIC 27-29 (Point IV)]**. "Overpacking" of containers refers to the placing of a damaged or leaking container in a larger container to prevent wastes from being released into the environment. **[6 RP 03575]**. Southwest Research argues that the modified permit would allow damaged or contaminated shielded containers to be overpacked in a container that is "authorized" only to hold contact-handled waste but not remote-handled waste. According to Southwest Research, by allowing this unauthorized overpacking, the modified permit fails to protect health, safety, and the environment. **[BIC 28]**. Again, this argument is without merit.

Management of containers at WIPP is governed primarily by Part 3 and

Attachment A1 of the modified permit. **[5 RP 02858-02869, 5 RP 02974-03062]**. Section 3.3.1 of the permit designates several types of containers for storage of mixed transuranic waste at WIPP. **[5 RP 02865-02866]**. These containers, as we have seen, are standard 55-gallon drums, standard waste boxes, ten-drum overpacks, 85-gallon drums, 100-gallon drums, RH TRU canisters, standard large boxes, and shielded containers. **[5 RP 02865-02866]**. Section 3.3.1 of the modified permit prohibits storage of mixed transuranic waste in any container not so designated. **[5 RP 02865]**. Section A1-1b of the modified permit sets forth a more detailed description of these containers. **[5 RP 02980-02983]**. Section A1-1b(1) states that "Contact handled (CH) TRU mixed waste containers will be either" 85 gallon drums, 100-gallon drums, ten-drum overpacks, standard large boxes, or standard waste boxes. **[5 RP 02980-02981]**. Section A1-1b(2) states, somewhat differently, that "Remote-Handled (RH) TRU mixed waste containers *include* RH TRU Canisters, . . . shielded containers, . . . and 55-gallon drums." **[5 RP 02982 (emphasis added)]**.

As Southwest Research correctly states, section 3.3.1.8 of the modified permit provides that "[s]hielded containers may be overpacked into a standard waste box or ten drum overpack." **[BIC 28 (citing RP 01923)]**. But Southwest Research is not correct in stating that, under section A1-1b(1) of the permit, these containers are authorized to hold only contact-handled waste. **[BIC 28 (*see* 5 RP**

02980-02981)]. As explained above, section A1-1b(2) of the modified permit merely states that remote-handled waste containers "include" RH TRU canisters, shielded containers, and 55-gallon drums. **[5 RP 02982]**. Section A1-1b(2) is not written to be an exhaustive list; other designated containers could be used for storing remote-handled waste depending on the circumstances. Thus, allowing a shielded container – even one that is so damaged it meets the definition of remote-handled waste – to be overpacked in a standard waste box or a ten-drum overpack does not in any way contravene section A1-1b(2) of the modified permit. Moreover, the modified permit, in section D-4d(1), adequately addresses this issue. It provides for the use of overpack containers in the event of a leak or spill. **[6 RP 03575]**. And it provides that "[o]verpack containers will be compatible with the hazards of the materials involved." **[6 RP 03575]**

Further, nothing in the permit or in the record suggests that the listing in the permit of certain types of containers as used for contact-handled waste on the one hand (section A1-1b(1)), or remote-handled waste on the other (section A1-1b(2)), is based on protection of health or the environment. Indeed, section A1-1b(2) of the permit provides for the storage of remote-handled waste in ordinary 55-gallon steel drums. **[5 RP 02982; *see also* [5 RP 02981 (description), 5 RP 03022 (diagram)]**. Thus, there is no support for Southwest Research's argument that the modified permit, by allowing damaged or contaminated shielded containers to be

overpacked in standard waste boxes or ten-drum overpacks, fails to protect health or the environment.

Ultimately, damaged or leaking shielded containers will be managed in accordance with the waste handling procedures set forth in section A1-1d(4) of the modified permit. *See* **[5 RP 03001-03002]**. If there is an emergency, the contingency plan provisions set forth in section D-4d(1) of the modified permit will apply, including the requirement to overpack a spilled or leaking container using a compatible overpack container. **[6 RP 03574-03575]**. If there is a spill, the contingency plan provisions in sections D-4d(4), D-4d(6), and D-4i may also apply. **[*See* 6 RP 03579-03583, 6 RP 03593]**. These permit provisions appropriately allow the operators a degree of flexibility to respond to specific situations. They are adequate to protect public health and the environment.

4. Breach of Shielded Containers

The final potential problem that Southwest Research raises is the possibility that a shielded container may be breached and the environmental consequences of such a breach, which Southwest Research argues have not been adequately assessed. **[BIC 30-34 (Point V)]**. It argues in rather vague terms that the hazardous waste management regulations require the Permittees to conduct "a thorough analysis of potential releases affecting human health and the environment." **[BIC 31]**. Southwest Research complains that there has been no

evaluation of the possible consequences of the use of shielded containers, and no protective measures. **[BIC 33]**. But there is no substance to this argument.

The Environment Department issued the hazardous waste facility permit for WIPP in 1999, and WIPP has been operating for the disposal of mixed transuranic waste since 2001. The Department modified the WIPP permit to allow the facility to receive remote-handled mixed waste in 2006, and WIPP has been receiving such waste for disposal since 2007. The WIPP operation was thoroughly assessed as part of those permitting actions. The November 1, 2012 permit modification, which is the subject of this appeal, changed only the type of containers that are managed at WIPP. It did not change the type of waste that may be handled at WIPP, nor did it change the quantity of waste that may be handled at WIPP. The type of assessment that Southwest Research proposes would be unnecessary and inappropriate. The modified permit contains innumerable measures to protect public health and the environment, including provisions specifically written to protect public health and the environment from hazards associated with remote-handled mixed waste. **[*See, e.g.*, 5 RP 02866 § 3.3.1.8, 5 RP 02983 § A1-1b(2), 5 RP 03001-03002 § A1-1d(4), 6 RP 03560 § D-1d]**.

Nevertheless, a technical assessment of the planned change to use shielded containers was conducted. Pursuant to its oversight authority under the WIPP Act, the EPA Office of Radiation and Indoor Air, through a private contractor,

conducted a review of the planned change. **[1 RP 00001-00080]**. Based on this report, EPA has preliminarily concluded:

> The Agency's review finds that DOE has met EPA's stated requirements for approval of the shielded container assembly. [DOE] has successfully demonstrated that handling RH waste in shielded container assemblies does not pose greater operational hazards than those encountered in the handling of standard CH waste drums. [Performance assessment] results also show that even in the bounding case (in which all RH waste is placed in shielded containers) cumulative releases from the facility are unaffected over the 10,000 [year] performance period.

[1 RP 00084].

Thus, when viewed in light of the whole record, the permit as modified adequately protects public health and the environment from the risks associated with the management and disposal of shielded containers at WIPP. *See Gila Res. Info. Project*, 2005-NMCA-139, ¶ 16 (whether agency action is arbitrary and capricious is determined "when viewed in light of the whole record"). Southwest Research has not shown any basis for concluding that the permit modification is arbitrary and capricious.

C. *The Permit Modification Lawfully Followed Class 2 Procedures*

The Secretary has considerable discretion in deciding whether to hold a public hearing on a permit modification, and that decision should not be disturbed absent an abuse of discretion. *Sw. Research & Info. Ctr. v. New Mexico*, 2003-NMCA-012, ¶ 39, 133 N.M. 179, 188, 62 P.3d 270, 279. In this case, the

Secretary determined that the permit modification request should follow Class 2 procedures – which do not require a public hearing – rather than Class 3 procedures – which do require a hearing. *See* 40 C.F.R. § 270.42(b), (c), incorporated by 20.4.1.900 NMAC. The Secretary did not abuse his discretion in making that determination, and the determination was fully in accordance with law.

Southwest Research relies heavily on an initial letter from Department Secretary David Martin to the Permittees on December 22, 2011, stating that the permit modification request for shielded containers would be processed using Class 3 procedures. **[2 RP 00871-00872]**. However, less than a week later, on December 28, 2011, the Secretary sent the Permittees a second letter, expressly retracting the December 22, 2011 letter. RP00874. Thus, the December 22, 2011 letter was effectively null *ab initio*. It is without force or effect. Although the letter did not explain the rational for the Secretary's decision not to hold a hearing, that rational was more fully explained in a January 31, 2012 letter from the Secretary to the Permittees, **[RP 00879]**, and in the Department's Response to Comments, **[1 SRP 04477-04479, 1 SRP 04482-04483]**. *See Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 13, 133 N.M. 97, 102, 61 P.3d 806, 811 ("a court may uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned") (internal quotations omitted).

Southwest Research argues on three grounds that Class 3 procedures should have been applied. None of those grounds are persuasive. Each is addressed below.

1. No Increase in Volume

First, Southwest Research argues that Class 3 procedures should have been followed because the permit modification effectively increases the capacity of the storage areas for remote-handled waste by more than twenty-five percent. **[BIC 34-37 (Point VI)]**. Southwest Research points out, correctly, that the hazardous waste regulations require Class 3 procedures for a modification "[r]esulting in greater than 25% increase in the facility's container storage capacity." **[BIC 34-35 (citing 40 C.F.R. § 270.42, Appendix I, cl. F.1.a, incorporated by 20.4.1.900 NMAC)]**. Southwest Research's argument is based on a faulty premise, however.

In fabricating its argument, Southwest Research assumes that some (or potentially all) of the storage capacity for contact-handled waste could be filled by waste in shielded containers, and that those shielded containers would contain remote-handled waste. Thus, Southwest Research concludes, the storage capacity for remote-handled waste would effectively increase. But this assumption ignores the permit definitions of Remote-handled Transuranic Mixed Waste and Contact-handled Transuranic Mixed Waste. Waste in shielded containers is by definition

contact-handled waste. *See* **[5 RP 02817]**.[8] There is no effective increase in the permitted storage capacity for remote-handled waste. The Department made these points in its Response to Comments. **[1 SRP 04467]**.

2. No Change in Waste Management Practices

The Center next argues, somewhat similarly, that Class 3 procedures were mandated because the modification results in the storage of different wastes at WIPP resulting in different waste management practices. **[BIC 38-42 (Point VII)]**. Southwest Research cites another provision of the regulations, which requires Class 3 procedures for a modification that results in "[s]torage of different wastes in containers . . . that require additional or different management practices from those authorized in the permit." **[BIC 38 (citing 40 C.F.R. § 270.42, Appendix I, cl. F.3, incorporated by 20.4.1.900 NMAC)]**. Southwest Research's argument is without support in the record.

In reviewing the permit modification request, he Department concluded that the modification would not result in different waste management practices from those in the permit, as stated in its Response to Comments. **[1 SRP 04479]**. That conclusion was a reasonable one, based on a reasonable application of the permitting regulations, and is entitled to deference. *Gila Res. Info. Project*, 2005-

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8 The permit definition of "Contact-handled Transuranic Mixed Waste" is set forth *supra*, at. 24.

NMCA-139, ¶ 16.

In disputing the Department's conclusion, Southwest Research alludes to several purported changes in waste management practices resulting from the addition of shielded containers. **[BIC 39-40]**. But none of them has substance. First, Southwest Research mentions the weight and composition of the shielded container. **[BIC 39]**. But that is not a waste management practice. Second, Southwest Research states that shielded containers require special packaging requirements to minimize shifting. **[BIC 39]**. But that is a matter for the generator sites; it does not affect the waste management practices authorized in the WIPP permit. Third, Southwest Research asserts that the shipping container "contains numerous elements not used in shipping CH waste and is managed differently from CH waste shipments." **[BIC 39]**. It cites the permit modification request for this conclusion. **[BIC 40]**. But Southwest Research does not explain how the waste management practices are different from those authorized in the permit. Indeed, the permit modification request states that "the shielded containers will be processed as CH TRU mixed waste using CH TRU mixed waste handling equipment and operating procedures." **[3 RP 01549]**. Fourth, Southwest Research states that a leaking or contaminated shielded container "3-pack must be disassembled for overpacking," and it cites the Department's Response to Comments. **[BIC 40]**. . However, the Response to Comments simply states that a

damaged shielded container will be managed according to the existing permit requirements, including sections A1-1c(1) and A1-1d(2). **[1 SRP 04473]**. Fifth, Southwest Research states that an overpacking method specific to shielded containers must be developed. **[BIC 40]**. . But that will not change the overpacking procedures set forth in section D-4d(1) of the permit. **[RP 03575]**. Sixth, Southwest Research states that a stacking system specific to shielded containers must be developed. **[BIC 40]**. Again, that will not change the stacking requirements in section A2-2b of the permit. **[5 RP 03079]**. None of the proposed changes is a "different management practice[] from [that] authorized in the permit." *See* 40 C.F.R. § 270.42, Appendix I, cl. F.3, incorporated by 20.4.1.900 NMAC.

Moreover, the Department has treated similar permit modification requests as Class 2 permit modifications in the past. The November 25, 2002 permit modification to allow HalfPACT shipping containers, ten-drum overpacks, 85-gallon drums, and 100-gallon drums to be managed at WIPP was a Class 2 permit modification. **[3 RP 01552-01552]**. Likewise, the April 15, 2011 permit modification to allow TRUPACT-III shipping containers and standard large boxes to be managed at WIPP was also a Class 2 modification. **[3 RP 01552-01552]**. The Department seeks to implement the permitting regulations consistently and to apply the same class of procedures to similar modification requests. *See Muwekma*

Ohlone Tribe v. Salazar, 708 F.3d 209. 216 (D.C. Cir. 2013) (agency action is arbitrary and capricious if the agency treats similar situations differently without sufficient reason).

3. No Significant Public Interest

Finally, Southwest Research argues that Class 3 procedures are mandatory because of significant public interest in the permit modification. **[BIC 42-44 (Point VIII)]**. Southwest Research cites the hazardous waste regulations allowing the Secretary to follow Class 3 procedures if he or she finds that "[t]here is significant public concern about the proposed modification." **[BIC 42 (citing 40 C.F.R. § 270.42(b)(6)(i)(C)(*1*)]**. But Southwest Research does not show that the Secretary has abused his discretion. *Sw. Research*, 2003-NMCA-012, ¶ 39 (the Secretary's determination whether to hold a public hearing because there was "significant public interest" is reviewable "only for abuse of discretion").

Public concern about this permit modification was fairly limited. Although the Department received comments from 206 members of the public, it received substantive comments only from two organizations, Southwest Research, and Nuclear Watch New Mexico. **[3 RP 01645-01664]**. The vast majority of the comments – some 173 of them – were preprinted form letters containing very little substance. **[3 RP 01670-RP1687, 3 RP 01690-01691, 3 RP 01693-01858, 3 RP 01861-01864, 3 RP 01877-01881, 3 RP 01886, 3 RP 01888-01889, 3 RP 01905-**

01906, 3 RP 01909-01910, 3 RP 01915-01918]. Another 16 of the comments were typed or handwritten copies, or near copies, of the form letters. **[3 RP 01668-01669, 3 RP 01689, 3 RP 01692, 3 RP 01860, 3 RP 01865-01866, 3 RP 01869, 3 RP 01875-01876, 3 RP 01882, 3 RP 01890, 3 RP 01892, 3 RP 01894-01896, 3 RP 01901-01904]**. The form letters merely stated:

> I am very concerned about shielded containers. They would expand the space available at WIPP for remote-handled waste that is dangerous to transport, store, and dispose. Despite what the Department of Energy says, shielded containers could not be handled like contact-handled waste because damaged or leaking containers could be too radioactive to over-pack.
>
> The shielded containers request once again is not a proper class 2 permit modification. I request a public hearing and that shielded containers be a class 3 modification so that there would be more extensive public comment and an opportunity for a hearing.

[3 RP 01668-01903, *passim*]. Another 12 of the comments, though not form letters, were similarly lacking in substance. **[3 RP 01688, 3 RP 01859, 3 RP 01867-01868, 3 RP 01870-01872, 3 RP 01884, 3 RP 01887, 3 RP 01891, 3 RP 01893, 3 RP 01911-01914]**. The Secretary reasonably determined that these rote form letters and other non-substantive comments do not indicate significant public concern over the permit modification request. That decision was not an abuse of his discretion.

As a practical matter, it is important to keep in mind that a hearing on a contested permit modification is an adversarial evidentiary proceeding involving

multiple parties before an administrative hearing officer; it typically entails publication of a public notice, pre-hearing briefs and motions, evidentiary objections, numbered exhibits, sworn testimony of witnesses including expert witnesses, cross examination and often redirect and re-cross examination of witnesses, a written transcript prepared by a professional court reporter, closing arguments, post-hearing briefs, proposed findings and conclusions, and a hearing officer's report. *See* 20.4.1.901.F NMAC (Hazardous Waste Management Regulations – Permitting Procedures); 20.1.4 NMAC (Permit Procedures) (Dec. 1, 1997). It often consumes many months – sometimes up to a year – before the Secretary makes a final decision. It is costly and time-consuming, and places a strain on the Department's limited resources. If the Department held a hearing every time a few dozen individuals submitted mass-produced form letters with sparse substantive comment asking for a hearing, the Department would soon be overwhelmed. As this Court stated in a very similar context, "[t]he fact that there is [or was] great public interest in the WIPP facility in general, the original granting of the permit, or various bigger changes that have taken or will take place does not mean that there must be a hearing for every administrative detail concerning the facility. *Sw. Research*, 2003-NMCA-012, ¶ 39.

The Department certainly recognizes the importance of public participation in its decisions on hazardous waste facility permits. In this case, there was public

notice, a public meeting, and an opportunity for the public to submit comments on both the 2011 proposed permit modification and the 2012 proposed permit modification; and the Department carefully considered the public comments it received. *See* discussion *supra*, at 14-18. In sum, "[t]here was abundant public participation in the proceedings leading up to the [modified] permit." *Sw. Research*, 2003-NMCA-012, ¶ 40. Public participation has not been denied.

Under the circumstances, the Secretary acted within his discretion in determining that there was not significant public concern about the permit modification to warrant Class 3 procedures and a public hearing. Southwest Research has not shown that he abused that discretion.

III. CONCLUSION

For the foregoing reasons, the Court should dismiss the appeal and uphold the Department's decision approving the permit modification under Class 2 procedures.

Respectfully submitted,

NEW MEXICO ENVIRONMENT
DEPARTMENT:

Dated: July 1, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2013, a copy of the foregoing Answer Brief of the New Mexico Environment Department was sent by first class mail, postage prepaid, to the following:

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