IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

Oral argument requested



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| SOUTHWEST RESEARCH AND INFORMATION CENTER AND MARGARET ELIZABETH RICHARDS, Citizen Appellants, | ) | |
| vs. | ) | |
| STATE OF NEW MEXICO ENVIRONMENT DEPARTMENT, Appellee, | ) | |
| IN THE MATTER OF THE CLASS 2 MODIFICATION FOR SHIELDED CONTAINERS FOR REMOTE-HANDLED TRANSURANIC WASTE AT THE WASTE ISOLATION PILOT PLANT U.S. EPA No. NM4890139088 | ) | No. 32,499 |

# REPLY BRIEF FOR CITIZEN APPELLANTS

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## Table of Contents

## Statement

This brief complies with the limitations of Rule 12-213(F), NMRAP. The body of the brief contains 4,398 words of proportionately spaced type, according to data obtained from Microsoft Office WORD 2007.

## Table of Authorities

**Cases: New Mexico:** **page:**



**Cases: other jurisdictions**



**Statutes:**



**Regulations:**

## Argument

To maintain the authority of administrative agencies, courts limit review to inquiring whether the agency acted pursuant to its delegated role. This inquiry, however, requires the agency to state reasons for its action and bars courts from sustaining agency action on grounds other than those articulated by the agency. *Southwest Energy Efficiency Project v. N.M. Construction Industries Commission*, No. 31,383, slip op., 2013 N.M. App. LEXIS, at 5 (N.M. Ct. App. April 4, 2013). Here, these principles require the reversal of the permit modification authorizing shielded containers.

## Point I

### The PMR fails to explain the need for the modification.

The applicant for a permit modification must explain "why the modification is needed." (40 C.F.R. § 270.42(b)(iii)[1]). To determine whether Permittees have done so, one must know the scope of the modification. Here, specifically: Do shielded containers enable Permittees to defeat the Permit's, and the WIPP Act's, quantified limits upon disposal of RH waste? Appellees present conflicting answers to this question. If the scope of the modification is as the Environment Department ("NMED") describes it, Permittees clearly have *not* shown "why the modification is needed" nor attempted to do so.

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[1] New Mexico has adopted this federal regulation. 20.4.1.900 NMAC.

The Permit contains maximum capacity limits for the disposal of RH and CH waste in each underground disposal panel. (Table 4.1.1, RP 01571[2]). In panels 1 through 8 (now permitted) the limit for RH waste is 2,635 $m^3$, calculated based on canister disposal in the walls of the rooms. Assuming panels 9 and 10 are the same size as panels 1 through 8, the RH capacity limit for the repository will be 3,545.18 $m^3$. (See Citizen Appellants' ("CA") Br. 14-15). There is also a repository limit of 7080 $m^3$ of RH waste (Permit Att. B, at B-13), and Section 7(a)(2)(B) of the Waste Isolation Pilot Plant Land Withdrawal Act, Pub. L. 102-579, as amended by Pub. L. No. 104-201 (the "WIPP Act") contains a limit of 5.1 million Curies for RH waste. The permitted limit for CH waste is much more than for RH waste—148,500 $m^3$. (RP 01571).

Permittees' RH waste inventory of 5,336 $m^3$ (RP 01660) substantially exceeds their RH disposal limit. They lost RH disposal capacity by emplacing CH waste in the floors of panels 1 through 3, blocking canister disposal of RH waste in the walls. If the modification enables Permittees to dispose of RH waste in shielded containers, *without counting such disposal against the RH waste limits in Table 4.1.1*, Permittees might be able to dispose of their RH waste inventory—and more.

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[2] Citations to the Record Proper are in the form "RP _____".

Does the modification do that? The permit modification request ("PMR") states that waste in shielded containers would be RH waste:

> "The shielded container will be used to package RH TRU mixed waste that is approved for shipment to the WIPP facility for disposal and meets the surface dose requirements, once packaged, of CH TRU mixed waste." (RP 01545).

As modified, the Permit so states:

> "Shielded containers contain RH TRU mixed waste, but the shielding will allow it to be managed and stored as CH TRU mixed waste." (RP 01923).

Moreover, in the PMR Permittees expressly stated that waste in shielded containers must come within existing RH waste disposal limits:

> "The volume of waste emplaced in shielded containers will remain designated as RH TRU mixed waste in the [WIPP Waste Information System] and will be counted against the RH TRU mixed waste underground hazardous waste disposal unit disposal limits in the Permit." (RP 1554).

In agency proceedings, NMED gave assurances that RH volume limits would apply to disposal of RH waste in shielded containers: "The Permit has established RH limits that shall not be exceeded." (Response 10, RP 04470). SRIC noted that the PMR states that RH waste in shielded containers would

> "remain designated as RH waste in the WIPP Waste Information System (WWIS). The emplaced volume will be counted against the RH TRU mixed waste volume limits specified in the Permit." (Comment 12, RP 04470).

NMED responded, expressing the need to ensure that

> "the RH mixed waste volume (as accounted for in the WIPP Waste Information System) does not exceed the permitted capacity specified in Table 4.1.1." (Response 12, RP 04470).

NMED expressly stated:

> "The cited RH waste disposal capacity limitations apply to both RH waste in canisters and RH waste in shielded containers." (Response 32, RP 04479).

Again, NMED stated:

> "The changes proposed do not alter the fact that the waste in the shielded containers will be counted toward the RH waste volume limits." (Response 40, RP 04482).

After NMED ruled, Citizen-Appellants sought a stay from NMED, emphasizing that NMED had stricken language stating that RH waste in shielded containers would "be counted towards the volume limit associated with RH TRU mixed waste." (Motion for Stay at 6, Nov. 16, 2012). NMED promptly issued a letter of correction, stating that the language had been stricken "inadvertently" and renewing its assurances:

> "This letter serves as notification that the permit has been corrected and now reads 'For the purpose of this Permit, shielded containers will be managed stored, and disposed as CH TRU mixed waste, but will be counted towards the volume limits associated with RH TRU mixed waste.'" (RP 02796).

However, some statements by NMED implied that emplaced RH waste might exceed panel limits, *i.e.*,

> ". . . assuming that all the allocated bore holes for RH waste would be utilized and additional RH waste would be emplaced using the shielded

containers, thus increasing the amount of RH waste potentially managed in each room . . ." (Response 14, RP 04471).

Therefore, Citizen Appellants pressed for the regulatorily-required explanation of the "need" for the modification. (CA Br. 13-18).

Here, NMED totally reverses itself and states that the RH waste limits in Table 4.1.1 *do not apply* to RH waste in shielded containers, because—NMED now asserts—those containers constitute CH waste:

> "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. . . . 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." (NMED Br. 24-25).

Under NMED's new position, the panel limits in Table 4.1.1, the repository limit in Attachment B, and the statutory limit upon Curie content in § 7(a)(2)(B) of the WIPP Act—*would not apply* to disposal of RH waste in shielded containers. Such a reading drastically changes the fundamental rules for waste management and disposal at WIPP.

In contrast, Appellee U.S. Department of Energy ("DOE") *denies* that the modification has the effect that NMED insists upon:

> "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." (DOE Br. 12-13)

Thus, DOE states that the Table 4.1.1 panel limits, the Attachment B repository limit, and the WIPP Act § 7(a)(2)(B) Curie limit *do apply* to disposal of RH waste in shielded containers. (*See also* DOE Br. 15-17, 19, 31).

DOE states that it may seek relief from the RH volume limits—in a future PMR. (DOE Br. 19). But the current PMR seeks no such change:

> "The topic of inventory, and its relationship to the capacity of the WIPP repository to dispose of up to 7,080 cubic meters of RH TRU waste, is best discussed in another forum because this PMR does not alter the volume to accommodate any more or less RH TRU mixed waste than what is currently allowed by the Permit." (RP 01548).

Clearly, as NMED construes the modification, Permittees have expressly declined to explain "why the modification is needed" (40 C.F.R. § 270.42(b)(iii)), stating that they seek no such modification.

But NMED just as clearly seeks this Court's affirmance of a modification to eliminate RH volume limits on shielded containers. Such modification has never been subject to public comment—because in agency proceedings NMED categorically stated that waste in shielded containers *would* count against RH limits. The public has had no opportunity to comment upon or to request a public

hearing on a modification to delete volume limits on high-intensity RH waste in shielded containers. Such a proposal would elicit very significant public concern and require a public hearing.

This Court may not credit "post hoc rationalizations" interpreting agency action, first advanced on appeal. *Talk America, Inc. v. Michigan Bell Tel. Co.*, 131 S.Ct. 2254, 2263 (2011); *Martin v. OSHA,* 499 U.S. 144, 156 (1991); *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 50 (1983); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *Southwest Energy Efficiency Project v. New Mexico Construction Industries Commission*, 2013 N.M. App. LEXIS 43, at 11-12 (April 4, 2013). *See: SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Under the *Chenery* doctrine this Court cannot sustain NMED's action based on its new appellate-level interpretation. NMED's dramatic enlargement of the scope and impact of the modification in its appellate brief, after public proceedings and after NMED has ruled, is clearly contrary to law, arbitrary, and capricious. (*See* 40 C.F.R. § 270.42(b), (c); § 74-4-4.2(H) NMSA (1978)). Permittees have not attempted to state "why [such a] modification is needed." (40 C.F.R. § 270.42(b)(iii)). NMED's action must be vacated.

## Point II

### Permittees fail to address the risk of shifting waste.

Waste may shift in sealed containers, causing a surface dose rate that originally fell below the 200 mrem/hr. limit for management as CH waste to exceed that limit, requiring the container to be managed as RH waste. (CA Br. 18-24). The shielded container would then be stranded in an unlawful location at WIPP, and its processing would stop. The prospect should concern NMED, because the waste is mixed waste (*i.e.*, both hazardous and radioactive), and there is no apparent plan to manage such waste. NMED simply asserts that shifting of contents is not a "significant concern" (NMED Br. 26), but EPA and DOE recognize that shifting is a serious risk. (RP 00018).

DOE argues that NMED cannot address this problem, because NMED cannot regulate waste packaging at generator sites. (DOE Br. 22). It suggests that EPA has exclusive authority over approval of waste shipments, citing 40 C.F.R. § 194.8. (DOE Br. 22-23). But under the WIPP Act EPA has jurisdiction over compliance with 40 C.F.R. Part 191, and New Mexico has concurrent jurisdiction over hazardous waste compliance. (WIPP Act, §§ 8, 9(a)). Thus, *both* EPA and NMED impose requirements for waste characterization and preparation at generator sites.

NMED's requirements include prohibitions of various unstable wastes, such as liquid waste, pyrophorics, incompatible wastes, explosives, compressed gases, ignitables, corrosives, and reactive wastes. (Permit Att. C, at C-9, C-10). Permittees must require the sites to implement these requirements. (*id.* C-1).

It is well within NMED's authority to require that contents of mixed waste containers be physically stable, so that they do not shift, unexpectedly exceeding radiation limits for managing CH waste and requiring management as RH waste. *United States v. New Mexico*, 32 F.3d 494 (10th Cir. 1994), upheld NMED's requirements to measure and monitor radioactive emissions from an incinerator, to ensure compliance with standards for hazardous waste management: "[I]t does not appear that the state is attempting to substantively regulate radioactive waste through this condition." (at 498). Rather, the provision was "merely another tool for New Mexico to implement its statutory and regulatory hazardous waste provisions." (*id.*). To require mixed waste packages to be stable comes within this decision.

DOE suggests that NMED action to ensure stability might conflict with EPA requirements (DOE Br. 22-23), but it cannot be argued that any NMED stability requirements would conflict with EPA's objectives. NMED cites 10 C.F.R. Part 835 (NMED Br. 27), but those general DOE regulations take nothing from NMED's authority over the WIPP-specific problem of waste containers that shift

from CH to RH emission levels. NMED's unexplained refusal to address this recognized problem, which clearly affects repository safety, is arbitrary and capricious. (CA Br. 21-24).

## Point III

## The Permit authorizes unsafe stacking.

Stacking of three-pack assemblies of shielded containers three-high is admittedly unstable (PMR at 5, RP 01549), but the Permit allows it. (CA Br. 25-26). Appellees urge that Permit Section A2-2b requires that the stack be stable (NMED Br. 28-29; DOE Br. 24), but NMED did not refer to that provision in agency proceedings. (at RP 04480). Permit Section A2-2b only requires that containers be stacked "in the best manner to provide stability."

The Court may not sustain NMED's action on grounds that the agency did not employ. (See cases cited at p. 7, *supra.*). NMED has not determined that a general direction to stack containers "in the best manner" adequately protects against a practice that Permittees categorically termed unsafe in their PMR. (RP 01549). Clearly, when a practice is unsafe, it does not protect health, safety, and the environment (40 C.F.R. § 270.42(b)(7)(iii)) to make it an option. The Court cannot assume otherwise. NMED did not explain its inaction, and the decision must be vacated. (See CA Br. 21-24).

## Point IV

## The Permit calls for invalid overpacking.

A damaged shielded container will probably emit radiation at 200 mrem/hr. or greater, requiring it to be managed as RH waste. (Response 17, RP 04473). Citizen Appellants contended that the Permit may not direct that a damaged shielded container be overpacked in another container—a standard waste box or ten-drum overpack—which is only authorized for CH waste. (CA Br. 27-29).

NMED now claims that the designated overpack containers *are authorized to contain RH waste*. (NMED Br. 31-32). This theory was not previously advanced and so is impermissible under *Chenery*. Moreover, it is flatly wrong. Permit Section 3.1.1.9 states:

> "The Permittees shall store RH TRU mixed waste in casks, canisters, or drums in the RH Complex as described in Permit Attachment A1, Section A1-1c(1)." (at 3-3).

Permit Section A1-1c(1) describes RH waste storage, referring only to these containers:

> RH-TRU 72-B cask, a shipping container.
>
> CNS-10-160B cask, a shipping container.
>
> Facility canister, a disposal container.
>
> Facility cask, used for transport from the RH Complex to the underground.

55-gallon drums, which may contain RH waste when contained in the CNS-10-160B cask.

The standard waste box and ten drum overpack are not mentioned.

Permit Section A1-1d(3), describing RH TRU Mixed Waste Handling (at A1-19), lists containers authorized to manage RH waste, specifying the same containers. Again, the standard waste box and ten drum overpack are not mentioned. Further, Table A1-3, listing maximum gross weights of RH containers, lists only the RH TRU Canister, the 55-gallon drum, and the Facility Canister. (at A1-33).

NMED's claim that a 55-gallon drum, standing alone, is an authorized container for RH waste (NMED Br. 31) is also incorrect. The Permit authorizes use of 55-gallon drums to hold RH waste only *within* a cask, a canister, or the RH Complex Hot Cell. (Permit Att. A1 at A1-20, A1-21).

NMED suggests that Permit Sections A1-1d(4), D-4d(1), D-4d(4), D-4d(6), and D-4i authorize use of the ten-drum overpack and the standard waste box for RH waste. (NMED Br. 32). These sections do not mention those containers. Citizen Appellants pointed out that the contingency plan makes no provision for management of RH waste in a damaged sealed container (CA Br. 28), and Appellees do not contest this point.

DOE, unlike NMED, does not argue that a standard waste box or a ten-drum overpack is authorized to receive RH waste. It claims that Permittees proposed overpacking with such CH containers *only* when a damaged shielded container still comes within the 200 mrem/hr. limit. (DOE Br. 25). Actually, the PMR *assumes* (contrary to fact: RP 04474) that the 200 mrem/hr. limit will not be exceeded: "Because the surface dose rate is less than 200 mrem/hr., this overpacking will occur in the CH Bay and not in the RH Bay . . ." (RP 01548-49). And DOE claims that Permittees would not expect a damaged container emitting in excess of 200 mrem/hr. to be overpacked. (DOE Br. 25-26). But Permittees' proposed Permit language does *not* restrict overpacking to containers emitting less than 200 mrem/hr. (RP 01564), and NMED adopted this language. (RP 01923).

DOE does not respond to the point (CA Br. 28-29) that it has a more detailed plan to manage a damaged shielded container, which might have been included in the Permit. It suggests that the overpacking problem only involves radioactivity (DOE Br. 26), but a damaged mixed waste container can release hazardous waste, which is NMED's responsibility. The Permit clearly calls for placing RH waste in CH containers, an arbitrary, unconsidered, and dangerous provision.

## Point V

## Permittees have not analyzed potential releases.

Citizen Appellants argued that 40 C.F.R. § 270.14(b)(8) and 40 C.F.R. § 264.601 require a full analysis of potential releases of waste from shielded containers. (CA Br. 30-34). In response to the September 2011 PMR, nearly identical to the present one, NMED determined that compliance with 40 C.F.R. § 264.601(c)(6) was required:

> "As another example, the Department will need to evaluate whether the proposed modification complies with 40 CFR § 264.601(c)(6), which addresses the potential for health risks caused by human exposure to waste constituents. These issues are more properly addressed as a Class 3 modification." (RP 00872).

NMED now tells the Court that such analysis is "unnecessary and inappropriate." (NMED Br. 33). Thus, NMED has plainly reversed its position on a fundamental issue without explaining its reasons. NMED's mute "retraction" of its December 22, 2011 comments (RP 00874-75) only underscores the lack of explanation. NMED's action cannot be sustained. (CA Br. 33-34; *State Farm,* 463 U.S. 29, 43 (1983)).

NMED now asks the Court to disregard 40 CFR § 264.601(c)(6) because EPA conducted an analysis. But NMED has not determined that EPA's analysis satisfies 40 CFR § 264.601(c)(6), and this argument is another meritless "post hoc rationalization." (See cases cited at p. 7, *supra.*). EPA's examination is also

nonfinal (NMED Br. 34), but, most importantly, NMED has not adopted it, and this Court may not do so for NMED.

## Point VI

### Class 3 procedures are required by the increase in waste storage.

Citizen Appellants showed that NMED should have employed Class 3 procedures, because the modification increased RH container storage capacity by more than 25%. (CA Br. 36; 40 C.F.R. § 270.42, Appx. I, F.1.a). The modification increases the storage space for RH waste from 11.0 $m^3$ to 194.1 $m^3$, to include all capacity previously limited to CH waste. (CA Br. 35).

NMED says that there is "no effective increase in the permitted storage capacity for remote-handled waste," arguing that the contents of shielded containers are CH waste. (NMED Br. 36-37). This theory is another latter-day concept, opposite to the agency's position during administrative proceedings, and cannot be credited. (See the cases cited at p. 7, *supra*.).

DOE says that use of shielded containers "will have no effect on WIPP's storage capacity." (DOE Br. 31). But WIPP's storage capacity *for RH waste* is increased dramatically. CH and RH waste are different wastes with specific management needs:

> "Even though both RH TRU mixed waste and CH TRU mixed waste contain the same hazardous waste, they are considered to be different waste by the Permittees because they are managed and stored differently (remotely versus not remotely) and have different RCRA requirements applied to them

> (remote inspection versus visual inspection). Remote handled TRU mixed waste without sufficient shielding cannot be managed and stored in the CH TRU storage unit since the CH TRU mixed waste storage unit is not equipped to perform the needed remote management. Likewise, CH TRU mixed waste cannot be managed and stored in the RH TRU storage unit since visual inspection would be impractical." (RP 01552).

The modification allows storage of RH waste in a unit where it was previously barred (RP 01551), increasing RH storage capacity by 16 times. Class 3 procedures were required.

## Point VII

### Different wastes and different procedures call for Class 3 treatment.

Class 3 procedures are also required when a PMR calls for storage of "different waste in containers . . . that require additional or different management practices from those authorized in the permit." (40 C.F.R. § 270.42. Appx. I, F.3.a). Permittees concur that the modification involves "different waste in a particular unit." (RP 01551). But NMED and DOE now assert that it involves no "additional or different management practices." (Appx. I, F.3.a).

In December 2011 NMED ruled otherwise, stating that Class 3 procedures were required for a substantially identical PMR, since it "would require complex changes to the operation of the facility," "will necessitate additional procedures and equipment for unloading, transporting, and overpacking remote handled transuranic waste in shielded containers" and "will likely necessitate changes to the permit to authorize additional or different management practices." (RP 00872).

NMED then "retracted" that letter without any explanation. (RP 00874-75).

In January 2012 NMED changed its mind again and ruled that Class 3 procedures are required:

> "[N]umerous sections in Part 3, Attachment A1, A2, C1, D, E and G must be revised to conform to the permit modification. In addition, 40 CFR 270.42(b), Appendix I, item F.3.a states changes of storage of different wastes in containers that do not require additional or different management practices from those authorized in the permit are Class 2 changes. The use of shielded containers does not fit this category as the facility will not be using different waste but will be using different containers." (RP 00878, RP00879).

Now NMED reverses itself again and opposes Class 3 procedures, again without explanation. NMED argues here that "the modification would not result in different waste management practices from those in the permit." (NMED Br. 37. *See also* DOE Br. 32). Actually, what NMED said in agency proceedings is importantly qualified: NMED then "determined that management practices will not change *beyond those presented in the modification.*" (RP 04479)(*emphasis supplied*).

Shielded containers would plainly introduce changes in (a) the container itself and the three-pack, (b) waste packaging methods, (c) overpacking procedures, and (d) container stacking. (RP 01545, 01549). NMED asserts that container management is only different at the generator site (NMED Br. 38), but the unloading process at WIPP is also different. (RP 01549). Particulars of waste packaging, overpacking, and container stacking of shielded containers require

further development. (See Points II, III, IV, *supra.*). Contrary to NMED's claim (NMED Br. 39), they will be different from those for CH waste.

NMED says that it has used Class 2 procedures for introduction of new waste containers (NMED Br. 39-40), but no cited instance involved a container for RH waste, much less introduction of RH waste where only CH waste had been allowed.

This PMR involves "different waste in containers . . . that require additional or different management practices" and calls for Class 3 procedures. See NMED's decisions dated December 22, 2011 and January 31, 2012 on substantially identical modification requests. (RP 00871, 00878). After several unexplained reversals, the Court may not credit NMED's latest position. (*State Farm,* 463 U.S. 29, 43 (1983); CA Br. 33-34).

## Point VIII

## Significant public concern requires Class 3 procedures.

Appellees assert that NMED's Secretary properly exercised his discretion to deny a public hearing, despite receiving more than 200 requests. (NMED Br. 40-43; DOE Br.32-34). Class 3 procedures, including a public hearing, are required when there is "significant public concern about the proposed modification." (40 C.F.R. § 270.42(b)(6)(i)(C)(*1*)). Previously, in December 2011, NMED stated that a nearly identical PMR required a public hearing when requested by approximately

80 public comments. (RP 00871-72). Then it retracted its decision (RP 00874-75), but it so ruled again in January 2012. ( RP 00878-79).

Now NMED has changed its mind again about a public hearing. NMED's letter of retraction contains no reasons and deserves no weight. (RP 00874-75). NMED's Record statements assert only that this PMR involves container management (Response 38, RP 04482) and that NMED has addressed public concerns in written comments. (Response 41, RP 04483). NMED argues here that there are "no remaining issues." (NMED Br. 33). To the contrary, there are many unanswered concerns, including application of RH disposal limits to RH waste in shielded containers, stability of shielded containers, overpacking procedures, and stacking rules. It is arbitrary and an abuse of discretion to say that all public concerns have been resolved.

DOE emphasizes that some of the 200 public commenters used similar form letters (DOE Br. 40-41), but the letters raise genuine problems and cannot be ignored. Most importantly, the NMED Secretary gave no explanation, nor did he cite to the use of form letters, in denying a public hearing. (Response 26, RP 04477). This meritless argument is simply another of "appellate counsel's post hoc rationalizations." (See the cases cited at p. 7, *supra.*).

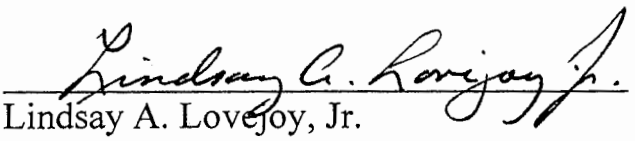
NMED acknowledges that the "WIPP permit and questions pertaining to the presence of remote-handled waste at WIPP have always raised significant public

concern." (NMED Br. 32). That fundamental fact somehow got lost as NMED maneuvered to accommodate DOE's modification request, despite having twice determined that it is too complex and fraught with compliance issues for the abbreviated Class 2 process. (RP 00871-72; RP 00878-79). The Court cannot sustain NMED's unexplained reversal. (*State Farm,* 463 U.S. 29, 43 (1983); CA Br. 33-34). The Court should recall NMED to its primary obligation of protecting the public and should direct NMED to follow Class 3 procedures.

## Conclusion

NMED's Final Determination is arbitrary, capricious, and an abuse of discretion. Agency determinations repeatedly lack explanation, and many reverse previous agency positions without any explanation. The Court cannot affirm based on appellate counsel's latter-day theories. The decision must be vacated and remanded.

Respectfully submitted,



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**Considerations requiring oral argument:**

This review proceeding involves the application, and the modification, of a complex Hazardous Waste Act permit. It also involves the application of complex regulations issued under that Act. To assist the Court in understanding the history of that Permit, its previous modifications, and the effect of the modification in issue upon that Permit, oral argument would be extremely useful.

It should also be noted that the Environment Department's brief reflects a position regarding the modification that is different from that taken by that agency in administrative proceedings, a matter that the Court may see a need to clarify in oral presentations.

## CERTIFICATE OF SERVICE

I hereby certify that on this 23d day of July, 2013, a true and accurate copy of this Reply Brief for Citizen Appellants was served by first class mail upon counsel for the Appellees:

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