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IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

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

BRIEF IN SUPPORT OF CITIZEN APPELLANTS' MOTION FOR STAY

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Preliminary Statement

Citizen Appellants request that the Court stay the effectiveness of the permit modification in issue, to avoid irreparable harm pending the completion of judicial review.

Citizen Appellants sought a stay from the New Mexico Environment Department ("NMED"), which was refused by an order dated December 18, 2013. Citizen Appellants requested consent to this motion from Appellees NMED and U.S. Department of Energy ("DOE") on August 6, 2013, and no response has been received. Appellee DOE has advised that a shielded container shipment may take place at any time after September 1, 2013.

Factual Background

Permittees[1] filed a permit modification request ("PMR") dated July 5, 2012. (RP 01541[2]), seeking approval of the use of shielded containers for remote-handled ("RH") transuranic ("TRU") waste. The PMR was approved on November 1, 2012, pursuant to the abbreviated Class 2 procedure, which includes no public hearing. (RP 01921).

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

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

The PMR sought modifications identical, except in minor details, to those sought in an earlier PMR dated September 29, 2011 (RP 00090), which NMED, by the same secretary, ruled was too complex for Class 2 procedures, and for which NMED deemed Class 3 procedures and a public hearing to be necessary, and therefore denied. (See letters dated December 22, 2011 and January 31, 2012, RP 00871, 00878). NMED has never given a reasoned explanation why it subsequently decided that Class 3 procedures, including a public hearing, are not required here.

Citizen Appellants show herein that (1) there is a likelihood that Citizen Appellants will prevail on the merits of this appeal, (2) irreparable harm will occur if a stay is not granted, (3) a stay will not cause substantial harm to other persons, and (4) a stay will not harm the public interest. *Tenneco Oil Co. v. Water Quality Control Commission,* 105 N.M. 708, 710, 736 P.2d 986 (Ct. App. 1986).

1. Likelihood of success on the merits.

Citizen Appellants are likely to prevail on their appeal. A PMR should be denied if it is (a) incomplete, (b) fails to comply with applicable requirements, or (c) fails to protect human health or the environment. 40 C.F.R. § 270.42(b)(7)(i)-(iii). A PMR proposed for Class 2 procedures must be denied or reclassified as Class 3 if there is (a) significant public concern or (b) the modification is complex.

40 C.F.R. § 270.42(b)(6)(i)(C)(*1*), (*2*). These criteria call for vacating NMED's decision.

Two categories of TRU waste are authorized for disposal at the DOE's Waste Isolation Pilot Plant ("WIPP"): Contact-handled ("CH") waste is defined as waste with a surface radiation dose no greater than 200 millirems per hour ("mrem/hr."); remote-handled ("RH") waste is TRU waste with a surface dose rate of 200 mrem/hr. and up to 1000 rem/hr. (Waste Isolation Pilot Plant Land Withdrawal Act, Pub. L. No. 102-579, as amended by Pub. L. No. 104-201(the "WIPP Act") §§ 2(3), 2(10)).

Management of RH waste is one of the most sensitive issues in WIPP permitting. When WIPP first received waste in 1999, RH waste was prohibited. The initial PMR to authorize RH waste was filed in 2002, revised in 2005, underwent Class 3 procedures, required 16 days of settlement conferences, went to public hearing, and reached a decision on October 16, 2006. Complex questions were raised by RH waste's markedly higher radiation and hazardous chemicals. (*See* In re *Application for a Class 3 Modification to the Hazardous Waste Facility Permit for the Waste Isolation Pilot Plant*, No. HWB 06-01 (M), Hearing Officer's Report at 12-13 (Sept. 13, 2006)). Similar issues are presented here.

a. Failure to explain why the modification is needed.

Under 40 C.F.R. § 270.42(b)(iii) a PMR must "explain[] why the modification is needed." The scope of the explanation obviously depends upon the nature of the modification sought. Here, the modification allows RH waste to be packaged in shielded containers, designed to reduce the surface dose rate below 200 mrem/hr., the maximum for CH waste. Further, the Permit contains volume limits upon the quantity of RH waste that can be disposed of in each underground waste panel. (Table 4.1.1, RP 01571). There are also limits of 7,080 m^3 (Permit Att. B at B-13[3]) and 5.1 million Curies (WIPP Act § 7(a)(2)(B)) of RH waste for the entire repository.

NMED takes the position in this Court that the modification means that any RH waste packaged in shielded containers shall be considered CH waste for purposes of these RH disposal limits. (NMED Br. 24-25[4]). In NMED's view, shielded containers enable the Permittees to avoid entirely the Permit and WIPP

[3] The text of the Permit, which is contained in NMED files and is subject to official notice in agency proceedings, is available on line commencing at: www.nmenv.state.nm.us/wipp/documents/TOC.pdf (April 6, 2013). In permit proceedings a NMED hearing officer may take judicial notice of matters so noticed in New Mexico courts, such as NMED records. Section 20.1.4.400(A)(4) NMAC. Similarly, this Court may take notice of its own records. *Southwest Research & Information Center v. State,* 2003 NMCA 12, P12, 133 N.M. 179, 62 P.3d 270 (filed 2002). Judicial notice may be taken at any stage of the proceedings. Section 11-201(D) NMRA.

[4] Briefs in the principal appeal are cited as "CA Br." and "CA Reply Br." for briefs of Citizen Appellants and "NMED Br." and "DOE Br." for briefs of Appellees.

Act limits upon disposal of RH waste. NMED's assertion contradicts the Permit language that NMED approved: "Shielded containers *contain RH TRU mixed waste*, but shielding will allow it to be managed and stored as CH TRU mixed waste." (RP 01923)(*emphasis supplied*).

It bears upon the "need" for the modification that Permittees face a shortage of disposal space for RH waste. Permittees have deliberately sacrificed RH disposal capacity in WIPP operations over the years. Disposal of RH waste, as authorized in 2006 (and planned long before that), employs canisters emplaced in the walls of WIPP rooms. Under the canister system, because of the significant radioactivity and to protect workers, RH waste must be emplaced in a room before CH waste is disposed of there. Permittees, however, emplaced CH waste in three entire disposal panels (of a total of 10 panels) before emplacing any RH waste, sacrificing unused RH disposal capacity in 21 rooms. Even when emplacing RH canisters, Permittees have not used available RH capacity. In Panels 1 through 5 they emplaced only 462 RH canisters, containing 411.18 m^3 of waste.[5] (RP 01924). Panels 6, 7, and 8 have a total RH capacity of 2,060 canisters, or 1,834 m^3 (*id.*). Presumably, Panels 9 and 10 will be the same size as Panels 1 through 8 and will have a capacity of 1,460 canisters, or 1,300 m^3. As a result, Permittees can now dispose of only 3,545.18 m^3 of RH waste in canisters—well short of the total

[5] Each canister may contain 0.89 m^3 of waste. (RP 01660).

repository limit of 7080 m^3. DOE estimates that its total inventory of RH waste is 5,336 m^3. (RP 01660).

A recent report by the DOE Inspector General discusses the RH capacity shortage:

> "We also found that EM has underutilized WIPP's approved disposal capacity for RH TRU waste. Specifically, as of the end of 2012, EM had used only 299 m^3 of RH TRU disposal capacity of the potential 1,023 m^3 capacity. This equates to a loss of 71 percent of RH waste disposal capacity available to date. . . . Assuming current waste emplacement practices, WIPP may run out of RH waste disposal capacity. Specifically, we found that EM estimates that it has approximately 3,538 m^3 of RH TRU waste to dispose of and that WIPP currently has a remaining RH disposal capacity of 2,912 m^3. This potential lack of disposal capacity exists without factoring in about 1,500 m^3 of additional RH waste that may eventually require disposal at WIPP." DOE Inspector General, *Audit Report, The Office of Environmental Management's Disposition of Transuranic Waste,* OAS-L-13-09 (May 2013) at 3.

In this situation, NMED asserts in this Court that RH waste, once placed in shielded containers, becomes CH waste, so that such waste will only be counted against the disposal capacity limits for *CH* waste—*i.e.,* 148,500 m^3, which is the CH waste capacity for Panels 1 through 8. (RP 01924). Thus, NMED says that the permit modification authorizes a massive RH disposal capacity increase—a big change in the Permit, potentially violating the WIPP Act limits on RH waste disposal.

However, Permittees have offered no explanation of "why [such a] modification is needed," as the regulations require. (40 C.F.R. § 270.42(b)(iii)).

This is clear, because DOE, a Permittee, disagrees with NMED and maintains that RH waste in shielded containers *would* be subject to the Permit's RH waste disposal limits; thus, such containers could not be used to make up for the lost RH disposal capacity. (DOE Br. 12-13, 15-17, 19, 31). Since Permittees seek no change in RH capacity limits, Permittees make no explanation of the supposed need for such a change, *i.e.*, they do not discuss the costs of using shielded containers to make up the lost disposal capacity and the impact on other parts of the WIPP program, such as delays and safety concerns. ("[T]his 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). DOE acknowledges that it may someday need relief from the RH disposal limits, but it seeks none now and expressly does not address the possible need for such relief. (DOE Br. 19).

Thus, as to NMED's interpretation of the modification, Permittees have not stated "why [such a] modification is needed." (40 C.F.R. § 270.42(b)(iii)). Without that explanation, NMED may not approve the modification. "The Department is required to act in accordance with its own regulations." *Atlixco v. Maggiore,* 1998-NMCA-134, P15. *See also: Johnson v. Oil Conservation Commission,* 1999-NMSC-21, P16, 127 N.M. 120, 978 P.2d 327; *Atlixco Coalition v. County of Bernalillo,* 1999-NMCA-88, P16, 127 N.M. 549, 984 P.2d 796; *New Mexico State Racing Commission v. Yoakum,* 113 N.M. 561, 564, 829 P.2d 7, 10

(Ct. App. 1991). It is arbitrary and capricious to disregard applicable law. *Phelps Dodge Tyrone v. N.M. Water Quality Control Commission,* 2006-NMCA-115, P33, 140 N.M. 464, 143 P.3d 502.

In addition, NMED's interpretation of the modification has never been the subject of public procedures, because in agency proceedings NMED *denied* that the modification increased RH disposal limits. (*See* RP 01554, 04470, 04479, 04482, 02796, discussed at CA Reply Br. 3-4). 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); *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).

NMED's dramatic enlargement of the scope and impact of the modification in its appellate brief, after public proceedings and after NMED granted the PMR, is clearly contrary to law, arbitrary, and capricious. (*See* 40 C.F.R. § 270.42(b), (c); § 74-4-4.2(H) NMSA (1978)). NMED's action must be vacated.

b. Failure to address shifting of contents of shielded containers.

There are other material omissions. The fundamental assumption for use of shielded containers is that radiation at the shielded container surface is less than 200 mrem/hr. Although most CH waste containers have a surface dose rate well below 200 mrem/hr. (RP 00066; see CR 5[6], RP 04467), the surface dose rate for many shielded containers of RH waste can be assumed to approach 200 mrem/hr., requiring "a greater level of scrutiny." (RP 00066). This radiation will be measured at the time of shipment. (RP 01546). Shifting of waste during shipping or handling could cause the dose rate to increase further. (RP 00018; Anastas Aff. ¶9). If the surface dose rate exceeds 200 mrem/hr., the waste container would be in violation of the Permit, its processing must stop, and the container would be stranded at WIPP with no compliant method to remove or return it[7]. NMED recognizes that "packaging requirements to minimize shifting" exist (CR 4, RP 04466), but these are not contained in the PMR or the modification. Thus, an important factor in the orderly and safe management of RH waste has been ignored.

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[6] NMED's November 1, 2012 Response to Comments is cited by the abbreviation "CR."

[7] Permit Section A1-1c(1) states that separate bays of the Waste Handling Building are set aside for CH waste and RH waste. "The RH TRU mixed waste is handled and stored in the RH complex of the WHB unit . . . " (at A1-9).

In light of its obligations to "protect human health and the environment" (40 C.F.R. §§ 264.601(c), 270.42(b)(7)(iii)), to confine RH waste management to the RH Bay, and to "respond in writing to all significant comments," 40 C.F.R. § 270.42(b)(6)(vi), NMED's unexplained refusal to address this issue is arbitrary and capricious. Agency action unsupported by discussion of the material issues cannot be sustained. *Citizen Action v. Sandia Corp.,* 2008-NMCA-31, P18-19,143 N.M. 620, 179 P.3d 1228 (filed 2007); *Gila Resources Information Project v. N.M. Water Quality Control Commission,* 2005-NMCA-139, P33-38, 138 N.M. 625, 124 P.3d 1164; *Atlixco Coalition v. Maggiore,* 1998-NMCA-134, P15-28, 125 N.M. 786, 965 P.2d 370; *Green v. New Mexico Human Services Department,* 107 N.M. 628, 631, 762 P.2d 915 (Ct. App. 1988).

DOE argues that only the U.S. Environmental Protection Agency ("EPA"), not NMED, can regulate waste packaging at generator sites. (DOE Br. 22). Actually, under the WIPP Act New Mexico has concurrent jurisdiction over hazardous waste compliance. (WIPP Act, §§ 8, 9(a)). NMED's requirements include prohibitions of 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 impose these requirements on waste generator sites. (*id.* C-1). NMED can require that contents of mixed waste (*i.e.*, radioactive and hazardous) containers be physically stable, so

that they do not unexpectedly exceed radiation limits for managing CH 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, action the court viewed as "merely another tool for New Mexico to implement its statutory and regulatory hazardous waste provisions." (*id.*).

c. Failure to ban three-high stacking of shielded containers.

The Permit allows stacking of CH containers up to three-high in disposal rooms. (Permit Section A2-1). Permittees concede, however, that "in order to meet the stacking stability requirements of Permit attachment A2, Section A2-2b," 3-packs of shielded containers cannot safely be stacked three-high. (RP 01549). Thus, stacking 3-packs three-high clearly "fail[s] to protect human health and the environment." (40 C.F.R. § 270.42(b)(7)(iii)). NMED states that DOE will develop new procedures for stacking 3-packs of RH waste in shielded containers. However, the PMR does not contain these procedures, nor does the modification. (CR 34, RP 04480). An issue of safety has plainly been ignored.

Appellees maintain that Permit Section A2-2b requires that the stack be stable (NMED Br. 28-29; DOE Br. 24). That section only requires that containers be stacked "in the best manner to provide stability." NMED did not refer to that provision in agency proceedings (CR 34, at RP 04480), and it 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. The Court may not sustain NMED's action on grounds that the agency did not employ. (See cases cited at page 8, *supra.*).

d. Failure to provide for overpacking of shielded containers.

In general, if a CH waste container leaks or becomes contaminated, it may be overpacked as a remedy. (Permit Section A1-1d(2)). Under the modification, Permit Section 3.3.1.8 states that "[s]hielded containers may be overpacked into a standard waste box or ten drum overpack." Critically, a shielded container will contain RH waste, and a standard waste box ("SWB") or a ten drum overpack ("TDOP") is only authorized to contain CH waste. (See Permit Section A1-1b(1)). NMED concedes that a leaking shielded container will probably exceed 200 mrem/hr. (CR 17, RP 04473-74). There is no basis for NMED to assume that a SWB or a TDOP can safely receive and store RH waste and be managed as CH waste. NMED says that Permittees are designing a procedure for overpacking of damaged shielded containers. (CR 2, CR 16, RP 04465, 04473). However, no such procedure is incorporated in the PMR or the modification. To designate these CH containers as overpacks for a shielded container of RH waste is arbitrary and capricious.

In this Court, NMED now claims that the SWB and TDOP *are authorized to contain RH waste*. (NMED Br. 31-32). This theory was not previously advanced and so is impermissible under *Chenery*. (See cases cited at page 8, *supra*.). Moreover, it is flatly wrong. Permit Section 3.1.1.9 directs that RH waste shall be stored 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) makes no reference to the SWB or the TDOP. Permit Section A1-1d(3), describing RH TRU Mixed Waste Handling (at A1-19), lists containers authorized to manage RH waste; again, the SWB and TDOP are not mentioned.

DOE claims that Permittees proposed overpacking with the SWB and TDOP *only* when a damaged shielded container still comes within the 200 mrem/hr. limit. (DOE Br. 25). Actually, the PMR *assumes* (contrary to fact: CR 17, RP 04474) that the 200 mrem/hr. limit will not be exceeded. (RP 01548-49). DOE now claims that Permittees would not expect to overpack a damaged container emitting in excess of 200 mrem/hr. (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). The overpacking provision is an arbitrary, unconsidered, and dangerous provision.

e. Failure to analyze potential releases.

The PMR is also incomplete for failure to discuss potential releases of radionuclides and contamination of WIPP. Such analysis is required by 40 C.F.R. §§ 264.601 and 270.14(b)(8). New shielded containers for RH waste, with 1726 pounds of shielding and 3-packs, with new packaging elements (PMR at 1, RP 01545), to be managed in the CH Bay, where RH waste was formerly prohibited, have not been examined in any previous application.

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) required it to evaluate "the potential for health risks caused by human exposure to waste constituents." (RP 00872). NMED now states that such analysis is "unnecessary and inappropriate." (NMED Br. 33). To disregard the applicable regulations, calling for an analysis of releases, is arbitrary and capricious. *Phelps Dodge Tyrone*, 2006-NMCA-115, P33.

NMED offers no explanation for its change in position. NMED has plainly reversed its position on a fundamental issue without explanation:

> "An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis . . . ." *Greater Boston Television Corp. v. FCC*, 143 U. S. App. D. C. 383, 394, 444 F.2d 841, 852 (1970) (*footnote omitted*), *cert. denied*, 403 U.S. 923 (1971)." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 57 (1983).

NMED's action cannot be sustained.

NMED now asks the Court to disregard 40 CFR § 264.601(c)(6) because EPA conducted an analysis. (NMED Br. 33-34). 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 page 8, *supra*.).

f. Failure to require Class 3 procedures.

Moreover, Class 3 procedures, which include a public hearing, are required when a PMR raises complex issues or generates significant public concern. 40 C.F.R. § 270.42(b)(6)(i)(C)(*1*), (*2*). The management and disposal of RH waste is one of the most sensitive questions involved in the permitting of mixed waste disposal at WIPP. When WIPP was first permitted in 1999, it was not authorized to receive RH waste in any form. In 2002 Permittees first sought a permit modification, allowing the introduction of RH waste.[8] Extended proceedings,

[8] The history of the initial RH permitting proceeding is related at: http://www.nmenv.state.nm.us/wipp/finaldat1006.pdf (April 6, 2013). After the 2002 PMR was filed, NMED issued several Notices of Deficiencies and conducted two months of negotiations pursuant to 20.4.1.901.A(4) NMAC with Permittees; three citizen organizations, including Appellant Southwest Research and Information Center; and the State Attorney General's Office. These discussions led to a partial agreement, specifying, inter alia, the definition of RH waste, the locations at WIPP where RH waste was permitted to be stored, time limits for storage of RH waste in RH TRU canisters, and the quantity of RH waste to be disposed of in the underground disposal rooms, which comprise ten underground disposal "panels." After that partial agreement, a four-day public hearing addressed remaining issues. NMED issued an order on October 16, 2006, determining how RH waste would be introduced to WIPP.

including negotiations with citizen groups and public hearings, led to authorization of RH waste management and disposal under detailed permit provisions. Thus, RH waste was allowed to be managed only in heavily armored shipping casks and disposal canisters and was required to be stored and handled only in a separate, elaborately shielded and monitored section of the WIPP Waste Handling Building ("WHB"), called the RH Bay. Further, disposal of RH waste is allowed only with elaborate safety measures, involving remote placement of RH wastes in special shielded facility casks, remote transport from the surface to the disposal level, and remote emplacement in the walls of WIPP disposal rooms. In addition, capacity limits were placed upon (a) RH waste stored in WIPP's parking area, (b) RH waste stored in WIPP's WHB RH Bay and (c) RH waste disposed of in each underground disposal panel. The present PMR does away with most of those safeguards for management of RH waste and replaces them with a single new device—the shielded container. Plainly, if the introduction of such safeguards called for a public hearing, their removal (as to RH waste in shielded containers) does as well.

NMED previously determined that public concern required Class 3 procedures for the September 2011 PMR:

> "Under 40 CFR § 270.42(b)(6)(i)(C)(1), the Department Secretary may determine that the modification request must be processed as a Class 3 modification because there is substantial public concern about the requested modification. There is a long history of substantial public concern regarding

> the storage and disposal of remote handled (RH) waste at WIPP. Substantial public concern has also been demonstrated with respect to the current PMR proposing the addition of shielded containers. More than 80 people have submitted written comments for the record regarding this PMR. Many of those comments specifically addressed the proposed modification for remote handled waste." (RP 00871-72).

NMED later retracted the December 22, 2011 letter but said nothing that cast doubt upon its finding of substantial public concern. (RP 00874). Approximately 200 individuals requested a public hearing on the present PMR. (RP 01645-01920). The public remains concerned and is entitled to Class 3 procedures. The New Mexico Hazardous Waste Act, § 74-4-4.2H and I, also requires a public hearing.

NMED has offered no reasoned explanation for its departure from previous determinations that a public hearing is required. Its refusal to call for Class 3 procedures cannot be sustained. (*State Farm,* 463 U.S. 29, 57).

g. Failure to require Class 3 procedures for increase in RH storage.

Specific regulations call for a public hearing. Under 40 C.F.R. § 270.42 Appx. I, a PMR requires Class 3 procedures if it results in a greater than 25% increase in the facility's container storage capacity. (40 C.F.R. § 270.42 Appx. I, F.1.a.). Here, the modification increases the WHB storage capacity 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 argues here that the contents of shielded containers are CH waste and that, therefore, there is "no effective increase in the permitted storage capacity

for remote-handled waste." (NMED Br. 36-37). This theory contradicts NMED's position during administrative proceedings and cannot be credited. (See cases cited at page 8, *supra.*). In fact, the PMR discuses at length how RH waste in shielded containers will be processed through the CH Bay using, in some respects, CH waste management procedures. (RP 01549). Yet the modification states that the contents of shielded containers are "RH TRU mixed waste." (RP 01564).

DOE argues that the modification "will have no effect on WIPP's storage capacity." (DOE Br. 31). But WIPP's storage capacity *for RH waste* is increased dramatically. Permittees concede that RH wastes are "different wastes" (RP 01551) and point out that CH and RH waste are different wastes with specific management needs. (RP 01552). The modification allows storage of RH waste in the CH Bay, where it was previously barred (RP 01551), increasing RH storage capacity by 16 times in the WHB. The capacity increase far exceeds the 25% capacity increase that requires that a modification receive Class 3 treatment. (40 C.F.R. § 270.42, Appx. I, F.1.a).

h. Failure to require Class 3 procedures for changes in RH waste management.

In addition, Class 3 procedures are required if a PMR would authorize 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.).

The reference to "different waste" includes wastes already managed in another part of the facility—as, here, RH waste is already managed in the RH Bay at WIPP—which are to be introduced to a unit not previously permitted for such wastes. (EPA, *Permit Modifications for Hazardous Waste Management Facilities*, 53 Fed. Reg. 37912, 37927 (Sept. 28, 1988)). Class 3 procedures are required

> " . . . where the introduction of a different waste at a unit will require different or additional management practices, design, or processes to properly manage the waste—for instance, if the waste is reactive or ignitable—and the permit conditions does not anticipate that such wastes will be managed in the unit. These circumstances require a Class 3 permit modification." (*id.*).

Before the modification, RH waste was prohibited from management or storage in the CH Bay, and under the modified Permit RH waste in shielded containers is allowed to be managed and stored there. Thus, the modification involves "waste (RH TRU mixed waste) [that] is approved for management in the RH Complex and not in the CH Bay, and therefore, as discussed below, it is a different waste in a particular unit." (PMR at 7, RP 01551).

The modification calls for numerous changes in waste management. The shielded container is "a new payload container" with multiple layers of lead and steel, weighing nearly a ton. (RP 01545). Management of RH waste in shielded containers relies upon RH-specific "packaging requirements to minimize shifting" (CR 4, RP 0466). The 3-pack package is an innovation as well and is managed differently from CH waste shipments. (RP 01549). In event of contamination or a

release, the 3-pack must be disassembled for overpacking. (See CR 16, RP 04472-73). Overpacking will be different, because it must contain the more intense radiation from RH waste. Shielded containers will be stacked for disposal in some new manner that creates a stable waste stack. Contrary to Permittees' wishful language, RH waste in shielded containers is plainly not "waste that will be managed and stored as CH waste." (Permit Section E-1b(1)). It is arbitrary and capricious to disregard the regulatory language calling for Class 3 procedures. *Phelps Dodge Tyrone*, 2006-NMCA-115, P33.

Moreover, NMED determined that the nearly identical September 2011 PMR sought waste management changes and so called for Class 3 procedures:

> "The requested modification would require complex changes to the operation of the facility. For example, the PMR likely will necessitate additional procedures and equipment for unloading, transporting, and overpacking remote handled transuranic waste in shielded containers. . . .
>
> Additionally, the regulations provide that a permit modification for a container unit that will 'require additional or different management practices from those authorized in the permit' must be treated as a Class 3 modification. 40 CFR § 270.42, Appendix I, Item F.3.a. The Department has concluded that the requested modification will likely necessitate changes to the permit to authorize additional or different management practices for containers with remote handled waste." (RP 00872[9]).

[9] NMED retracted the December 22, 2011 letter in a letter dated December 28, 2011. (RP 00874). At no time has NMED offered any reason for such retraction.

On January 31, 2012, NMED ruled again that the requested modifications made Class 2 procedures inapplicable, and Class 3 procedures are required under Appx. I, F.3.a:

> "During its technical review of the modification request for shielded containers, the Department noted that numerous 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 00879).

NMED has now changed its mind, but it has offered no reasoned explanation, and the Court may not sustain its unexplained reversal. (*State Farm*, 463 U.S. 29, 57).

2. Failure to stay the decision may cause irreparable injury.

Citizen Appellants request a stay of the modification until this Court renders its decision. Without a stay, Permittees could introduce RH waste in shielded containers for an unknown period without any quantity limit. The repository would be exposed to risks for which the Permit provides no solution. Once emplaced, waste could not be extracted without great difficulty.

As discussed above, during operations, a shielded container's contents may shift, so that its surface dose rate exceeds 200 mrem/hr. Such a container could no longer be managed and disposed of as CH waste, but no shipping container or method exists to return it to its source. The container would be stranded at WIPP

in continuing violation of the Permit. Moreover, a shielded container may suffer a release or contamination and require remediation, even though its surface dose rate exceeds 200 mrem/hr. Further, an improperly stacked shielded container may topple, causing a release of waste. Again, such a container is not CH waste, cannot be overpacked in a CH container, and cannot be stored, disposed of, or shipped in any container available at WIPP. NMED's statement that "Permittees are responsible for subsequent consequences if the permit is violated" (CR 17, RP 04473-74) is no answer, since Permittees have supplied no solution. A defective container stranded at WIPP would be an ongoing danger to workers and the public—clearly irreparable injury.

In addition, the PMR proposes no precautions to protect WIPP workers from the higher radiation dose emitted by shielded containers, compared to CH waste containers. The modified Permit would not require that shielded containers be dispersed when emplaced; Permittees could dispose of shielded container in concentrated groups, enhancing radiation exposure and further endangering workers. (Channell Aff. ¶¶ 7-12).

Without a stay, and under the modification as construed by NMED, Permittees could dispose of practically unlimited amounts of RH waste in shielded containers, exceeding panel limits contained in Table 4.1.1 of the Permit, which

limits were negotiated and agreed upon among NMED, Permittees, and citizen groups in the 2006 proceeding.

Most of these risks could be effectively dealt with under Class 3 procedures, including technical review, negotiations, and a full hearing, where NMED, Permittees and citizen groups would be represented, witnesses could explain the risks and methods for dealing with them, and a hearing officer could propose Permit provisions to meet each issue. (Anastas Aff. ¶¶ 3, 6; Channell Aff. ¶¶ 4, 12). To be sure, the actual likelihood that a shielded container shipped pending appeal will leak, or topple, or its contents will shift, cannot be forecasted. But if NMED, with the Court's consent, allows shielded containers to be shipped to WIPP, managed at, and disposed of at WIPP without adequate safeguards, necessary precautions will not be implemented. (Anastas Aff. ¶¶ 3-21; Channell Aff. ¶¶ 4-12).

Importantly, to allow the modification to go into effect will unfairly influence the Court's decision on the merits of the appeal. If there is no stay, and RH waste is shipped to WIPP in shielded containers, in ruling on the merits of the appeal the Court will be left to choose between (a) allowing NMED's decision to stand and (b) vacating NMED's decision approving the modification—but then contending with the difficulties of requiring the removal and return to the generator

sites of shielded container waste shipped while the appeal is pending. Removal of disposed waste containers is likely to be extremely difficult, if not impossible.

The history of efforts to remove waste disposed of at WIPP is instructive. Acting promptly, Permittees have been able to remove single containers of waste brought to WIPP by mistake. But when multiple containers were unlawfully disposed of over a period of time, difficulties prevented retrieval of the waste.

Specifically, in 2007, DOE retrieved and returned a single 55-gallon drum erroneously sent to WIPP from Idaho National Laboratory ("INL"). The drum was contained within a SWB received on June 25, 2007 and emplaced on June 27. INL discovered that it had sent the wrong drum on July 16, 2007. NMED ordered its retrieval on August 3, and it was retrieved and returned on August 18, 2007. Again, in 2008, DOE retrieved a single SWB sent to WIPP from Los Alamos National Laboratory ("LANL"), which contained a drum that was mistakenly sent. The SWB was emplaced on May 28, 2008, and the error was soon discovered. DOE retrieved the SWB and returned it to LANL on June 12. (Hancock Aff. ¶¶ 7-8).

In contrast, when larger numbers of containers were disposed of over several months, they have not been retrieved. In 2004 it was determined that INL had sent WIPP more than 100 containers that had not been properly sampled. The drums were disposed of in Panel 1—which had then been closed—and Panel 2. Retrieval

would have required removal of the explosion-isolation barrier that closed Panel 1, which Permittees estimated would require 452 days. NMED decided that retrieval would not be required. More recently, in 2007 it was found that 121 drums sent from LANL contained excessive liquids. Again, NMED required a retrieval plan but ultimately decided to leave the drums in place. (Hancock Aff. ¶¶ 9-10).

Here, absent a stay, shielded container waste would not be sent singly or by mistake. Rather, Permittees could intentionally send multiple containers over many months. Such a program would create a *fait accompli*, a case of unlawful waste which would be costly and perhaps impossible to retrieve, placing severe pressure on the Court retroactively to label the action as lawful.

Permittees are now emplacing waste in Room 2 of Panel 6. When Room 2 is filled, waste will be disposed of in Room 1, and then the Panel will be closed with a bulkhead and other measures to block ventilation. Closure is scheduled to occur in March 2014. From then, retrieval of improperly shipped waste would require the removal of the bulkhead and likely require suspension of all shipments to WIPP while the retrieval is accomplished. (Hancock Aff. ¶ 11). The Court would be boxed in and could not vacate NMED's improper approval of the modification without entering a contentious debate about the removal and return of illegally disposed waste. If the Court should not act now to preserve the status

quo, it would, in effect, tie its own hands for the decisional stage. A stay is required to prevent such an injustice.

3. A stay will not cause significant injury to Permittees.

The only injury to Permittees from a stay might be some delay in introducing RH waste in shielded containers. During the stay they would be free to introduce the same RH waste in currently-authorized RH canisters, as they have done almost 700 times (Hancock Aff. ¶ 12). Although there were general claims of an increase in efficiency with the sealed container method, no facts have been brought forth to support that claim. (CR 12, RP 04470-71, CR 14, RP 04471, CR 15, RP 04471-72, CR 43-46, RP 04483-84.).

4. A stay is consistent with the public interest.

There is very little risk to the public interest if a stay is granted. As stated above, Permittees can continue to operate WIPP and dispose of RH waste under a stay. The only bar would be to use of shielded containers for disposal of RH waste. The *benefit* to the public interest would be that no stranded containers would be created, and, hopefully, after a public hearing, any future authorization for shielded containers would be predicated upon full compliance with applicable standards, including established limits upon RH disposal capacity and safe methods to deal with unplanned events, such as shifting waste, container releases, and contamination.

5. Applicable precedent supports preliminary relief.

Closely in point is *New Mexico v Watkins,* 783 F.Supp. 628 (D.D.C. 1991). There, the court found violation of the Federal Land Policy & Management Act, 42 U.S.C. § 1714(a), in federal management of the WIPP project. It was shown that radioactive waste, sought to be introduced by DOE, might become irretrievable in a practical sense, causing irreparable injury. The court preliminarily enjoined DOE from introducing waste, finding that the introduction of waste could create a *fait accompli*, constraining Congress's subsequent decisiomaking:

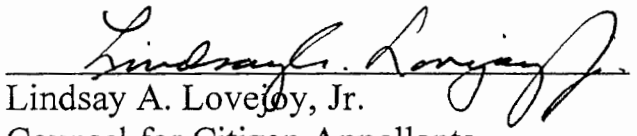
> "If a preliminary injunction is not issued and the DOE is allowed to proceed with its test phase, 'the DOE will be able to introduce radioactive waste which may become unretrievable by reason of collapse of the underground facility, impending collapse, or loss of required clearance, before a final order can issue.' Plaintiff's Motion for Preliminary Injunction; Parker Affidavit paras. 31, 44-45, 47; Fernandez Affidavit paras. 9, 21, 22. This further constitutes irreparable injury because Congress would not be able to act under the same circumstances as when the WIPP site was under a previous withdrawal which expressly stated that no hazardous waste could be stored at the site until Congress makes a determination to permanently withdraw the site for such purpose." 783 F.Supp. at 633.

The district court made the injunction permanent, 783 F.Supp. at 633, and the Court of Appeals affirmed, *New Mexico v. Watkins,* 969 F.2d 1122 (D.C. Cir. 1992). Here, likewise, absent a stay, the introduction of waste under questioned authorization threatens to become irreversible, improperly influencing this Court's decisionmaking. Such unjust consequences should be prevented by a stay of the permit modification.

Conclusion

For the reasons set forth herein, the Court should issue its order, staying effectiveness of the November 1, 2012 determination approving the PMR for shielded containers until the Court acts upon the pending appeal, and then awaiting further orders of the Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2013, a true and accurate copy of the foregoing Brief in Support of Citizen Appellants' Motion for Stay was served by first class mail upon counsel for the Appellees:

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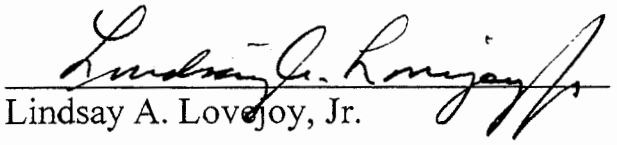

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