Allen, Pam, NMENV

From: Maestas, Ricardo, NMENV
Sent: Thursday, February 12, 2015 11:07 AM
To: Allen, Pam, NMENV
Subject: FW: Ruling
Attachments: ENV_DEFENSE-#687717-v1-OPINION_--_APPEAL_FROM_THE_NEW_MEXICO_ENVIRONMENT_DEPARTMENT.PDF

From: Kliphuis, Trais, NMENV
Sent: Tuesday, July 22, 2014 3:43 PM
To: Maestas, Ricardo, NMENV
Subject: Fwd: Ruling

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From: "Basabilvazo, George - DOE"
Date:07/22/2014 3:05 PM (GMT-07:00)
To: "Kliphuis, Trais, NMENV"
Subject: Ruling

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OPINION -- APPEAL FROM THE NEW MEXICO ENVIRONMENT DEPARTMENT

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Attorneys representing NMED, the federal Department of Energy (DOE), and Southwest Research and Information Center (Southwest Research) presented their respective views in the June 26, 2014, hearing.

{2} All parties agreed in the hearing that the WIPP site was closed and that it was not possible to estimate, with any degree of certainty, when the site would open. Southwest Research indicated that the site may never again be reopened given the extent of the contamination of the site. Based on the facts known to date, the extensive amount of investigation and analysis devoted to resolving the issues and the amount of money being allocated by Congress for recovery and opening, NMED was confident that the site would open at some point. DOE also expressed confidence that the site would open, but likely not before 2015 or 2016.

{3} Southwest Research's position at the hearing was that it was premature to make a decision on the propriety of the shielded container-related modification given the many uncertainties, including, without limitation, what caused the radiation leak, whether a decision must be made to close WIPP permanently, whether, if WIPP is opened at some point, the opening will be subject to material changes in drums or shielded containers, in procedures for storage, and in infrastructure requiring a redesign of the WIPP site and its functions. Southwest Research requested that this Court remand the matter to NMED with instructions to revisit the approval of the

{5} This Court required the June 26, 2014, hearing because it was clear that the February 2014 incidents and the ongoing extensive investigations and analyses were a matter of important and ongoing public interest. After the discussions at the hearing, the Court has determined to address the merits of the issues on appeal.

{6} In the Opinion that follows, we affirm NMED's approval of the permit modification request to allow WIPP to accept shielded containers. In issuing this Opinion, we point to four important circumstances. First, when this case was submitted to the Court, the February 2014 incidents had not yet occurred. The parties have devoted considerable time and expense to this case, which involves issues that may recur concerning the permit modification process. Second, other than the uncertainty that will not be fully quelled until the numerous investigations into the February 2014 incidents are complete and the conclusions reported, there is nothing before the Court at this time indicating that there will be any changes at WIPP that will impact the issues before this Court. The facts at this point do not indicate that either the fire or the leak was in any way related to a shielded container or its storage at the WIPP site. Third, based on the statements and representations of NMED and DOE, implementation of changes at WIPP may require a permit modification or modifications that may include necessary material changes concerning the storage of shielded containers. Fourth, regardless, NMED has assured the Court that, as

102-579, 106 Stat. 4777 (1992), as amended by Pub. L. No. 104-201, 110 Stat. 2422 (1996). WIPP is federally owned and is operated by DOE and a private contractor, Nuclear Waste Partnership LLC (collectively, the Permittees), pursuant to a permit issued in 1999, and modified in 2006, by the Secretary of NMED.

{9} The permit is governed by the New Mexico Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to -14 (1977, as amended through 2010), and the New Mexico Hazardous Waste Management Regulations. *See* § 74-4-3(D), (F) (stating that, in the context of the Hazardous Waste Act, "director" and "secretary" are synonyms meaning the secretary of NMED and "division" or "department" means NMED); *see also* NMSA 1978, § 74-1-8(A)(13) (2000) (stating that the Environmental Improvement Board shall adopt rules applicable to the management of hazardous waste); § 74-4-4(A) (same); 20.4.1.1 to .3 NMAC (6/14/2000) (stating that the hazardous waste management regulations applicable to the storage of hazardous waste were adopted by the Environmental Improvement Board pursuant to the Board's statutory authority). Throughout this Opinion, we refer to the actions of the director or the secretary as those of NMED. The Hazardous Waste Act comports with its federal analog, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 to 6992k (2006), and therefore, NMED is authorized to administer and enforce the

{11} The permit limits the total amount of contact-handled and remote-handled waste that can be disposed of at WIPP to 148,500 cubic meters of contact-handled waste and 2,635 cubic meters of remote-handled waste. The permit also limits the amount of each type of waste that can be placed in WIPP's eight respective panels.

{12} In March 2011, the United States Environmental Protection Agency (the EPA) announced its decision to approve DOE's request to place a portion of its remote-handled waste in specially designed shielded containers on the floor of the disposal rooms at WIPP rather than in the boreholes. By its letter, the EPA explained that once remote-handled waste was properly loaded into the shielded containers, it may be treated as contact-handled waste. The EPA explained that DOE's request to use the shielded containers was intended to "enhance the efficiency of facility operations[.]" The EPA's letter acknowledged, however, that DOE would "separately need a hazardous waste permit modification from [NMED]" in order to implement its proposed use of the shielded containers at WIPP.

Permit Modification Requests

{13} Permittees may submit permit modification requests to NMED, and the secretary is charged with issuing a decision thereupon. *See* § 74-4-4.2(D), (G)(2) (stating that "a permit may be modified at the request of the permittee" and that decision is within the purview of the secretary). Depending on the nature of the

modification is needed, and providing other materials required by regulations. *See* 40 C.F.R. § 270.42(b)(1), (c)(1). Likewise, among other things, they each require the permittee to give public notice of the modification request that includes the announcement of a sixty-day comment period and announcement of the date, time, and place for a public meeting to be held within the comment period and in the vicinity of the permitted facility. *See* 40 C.F.R. § 270.42(b)(2)-(5), (c)(2)-(5).

{15} Within ninety days of a Class 2 request, NMED must take one of five actions on the modification request, that is, NMED, in relevant part, may (1) approve the request (with or without changes), (2) deny the request, or (3) determine that the request must follow the procedures for a Class 3 modification request. 40 C.F.R. § 270.42(b)(6)(i)(A)-(C). The regulations enumerate the following bases upon which NMED may deny or change the terms of a Class 2 permit modification request: (1) "[t]he modification request is incomplete[,]" (2) "[t]he requested modification does not comply with the appropriate . . . requirements[,]" or (3) "[t]he conditions of the modification fail to protect human health and the environment." 40 C.F.R. § 270.42(b)(7). Likewise, the regulations enumerate the following bases upon which NMED may determine that the Class 2 modification request must follow Class 3 procedures: "(1) [t]here is significant public concern about the proposed modification; or (2) [t]he complex nature of the change requires the more extensive

an overview of the modification request, the Permittees described the requested change, in relevant part, as one to add "a new gamma shielded container for managing remote-handled . . . waste as contact[-]handled . . . waste since it meets the surface dose rate of [contact-handled] . . . waste[.]" In response to the permit modification request, Southwest Research and a number of members of the public responded by sending letters to NMED expressing concern about the proposed use of shielded containers and requesting that the modification be considered a Class 3 modification request instead of a Class 2 modification request.

{18} By a December 22, 2011, letter, NMED notified the Permittees that it was "appropriate for [NMED] to process the modification request as a Class 3 permit modification" because there was substantial public concern about the requested modification and because the complex nature of the changes required the more extensive Class 3 procedures. But in a December 28, 2011, letter, NMED retracted the December 22, 2011, letter and then, by a letter dated January 31, 2012, NMED issued a decision in which, among other things, it denied the request to add provisions for shielded containers. The denial, which will be discussed in greater detail as necessary later in this Opinion, was based primarily on the deficiencies and "technical inadequacies" in the modification request.

DISCUSSION

Standard of Review

{21} This Court may set aside the Secretary's decision if it is arbitrary and capricious or an abuse of discretion, not supported by substantial evidence, or otherwise not in accordance with the law. Section 74-4-14(C). "The burden is on the parties challenging the agency order to make this showing." *N.M. Attorney Gen. v. N.M. Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 9, 309 P.3d 89 (internal quotation marks and citation omitted). In seven of their eight points, Appellants argue that the Secretary's decision was arbitrary and capricious. "A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2005-NMCA-139, ¶ 16, 138 N.M. 625, 124 P.3d 1164 (internal quotation marks and citation omitted). In their final point, Appellants argue that NMED abused its discretion. "An agency . . . abuses its discretion when its decision is contrary to logic and reason." *Oil Transp. Co. v. N.M. State Corp. Comm'n*, 1990-NMSC-072, ¶ 25, 110 N.M. 568, 798 P.2d 169. The appellate courts generally accord deference to an agency's determination of a factual matter within its specialized expertise and do not substitute judgment for that of the

shielded containers, (2) to increase the efficiency of the shipment of remote-handled waste, and (3) to increase the efficiency with which remote-handled waste is managed, processed, and handled at WIPP. According to the Permittees' modification request, generator sites[2] were turning to the use of shielded containers because the containers were "expected to reduce the time and personnel necessary for the packaging of" remote-handled waste at generator sites. Additionally, shipping remote-handled waste in shielded containers would permit three times the amount of waste per shipment than remote-handled waste in non-shielded containers. And, in terms of the waste processing time, use of the shielded containers, which allow the remote-handled waste to be handled as contact-handled waste, "is inherently less complex" than handling it as remote-handled waste. Thus, for example, the Permittees explained that a pallet of shielded containers "can be managed from unloading to disposal in about two hours versus the eight to ten hours needed for" handling remote-handled waste in a non-shielded container. The Permittees also stated that, in terms of the remote-handled waste disposal limits, the remote-handled waste stored in the shielded containers would be characterized as, and count against, the limits applicable to remote-handled waste. NMED argues that the Permittees'

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[2] Generator sites are places from which the waste originates; waste is originally placed in containers at these sites.

clearly supported by evidence in the record. At most, Appellants' argument illustrates a possible advantage the Permittees will gain from using the shielded containers, but we are not persuaded that it illuminates an ulterior motive by the Permittees for the requested modification. NMED determined that the Permittees' statement of need was justified by the reasons stated, substantiated by data, and constituted an "adequate statement" of the need. And Appellants have not demonstrated otherwise. *See N.M. Attorney Gen.*, 2013-NMSC-042, ¶ 9 (stating that the appellant bears the burden of demonstrating reversible error in the agency's decision).

{27} Appellants also argue that the use of shielded containers could violate the panel limits on remote-handled waste. Appellants tie this argument to a separate issue—whether the use of shielded containers will allow the Permittees to exceed the permitted limit of remote-handled waste that may be stored at WIPP. Appellants argue that NMED reverses itself in stating that the remote-handled waste limits do not apply to remote-handled waste in shielded containers because those containers constitute contact-handled waste. But Appellants' argument confuses NMED's position regarding the limit of remote-handled waste that WIPP may receive with its position regarding the management of remote-handled waste in shielded containers by the Permittees.

a surface dose rate not greater than 200 millirems per hour can be managed by WIPP as contact-handled waste. *See* Pub. L. No. 102-579, § 2(3), 106 Stat. at 4777 (stating that contact-handled waste is that with a surface dose rate not greater than 200 millirems per hour). In effect, this allows the Permittees to store remote-handled waste within shielded containers on the floors of the panels within the panel limits applicable to contact-handled waste. As explained by NMED, in response to public comments, the limits applicable to each panel will remain unchanged. To the extent that Appellants view the modification request as reflecting an underlying "need" or intention to modify or eliminate remote-handled waste limits, Appellants' view is unsupported by the record and, therefore, is unpersuasive.

{30} In sum, NMED concluded that the Permittees adequately stated the need for the modification. And Appellants have not demonstrated that NMED's conclusion in that regard was arbitrary and capricious. *See N.M. Attorney Gen.*, 2013-NMSC-042, ¶ 9 (stating that the appellant bears the burden of demonstrating reversible error in the agency's decision); *Gila Res. Info. Project*, 2005-NMCA-139, ¶ 16 ("A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." (internal quotation marks and citation omitted)). Therefore, this issue provides no basis for reversal.

serious risk." In support of this argument, Appellants cite a portion of a final draft report titled "Review of DOE Planned Change Request for Shielded Containers for Remote-Handled . . . Waste."

{33} The report, prepared for the EPA by an independent contractor, summarized the contractor's "technical review of the shielded container [planned change request]." The report indicates that before the EPA would approve the use of shielded containers, the United States Nuclear Regulatory Commission and the Department of Transportation must approve the shipping container design, and a safety analysis must be prepared by DOE. DOE was allowed, pursuant to applicable regulations, to "self-certify that the shielded container [met] the [applicable] requirements[.]" DOE demonstrated compliance with the requirements by conducting a series of "analyses, tests, and evaluations performed on the shielded container to demonstrate" that the packaging design met relevant requirements.

{34} Based on its review of DOE's self-certification testing, the EPA submitted several comments to DOE for clarification or resolution. The comments and responses were detailed in the report prepared by the independent contractor. Appellants' argument that the EPA and DOE "recognize that shifting is a serious risk" is based upon one such comment by the EPA.

{36} Subsequently, the EPA announced that it "propose[d] to allow the emplacement of shielded container[s] . . . at WIPP, on the condition that, prior to shipping the shielded containers to WIPP, DOE implement[ed] a consistent complex-wide procedure to ensure that the shielded containers remain below the . . . 200 millirem[s] per hour dose limit for contact-handled waste." This condition was met, and the EPA gave its final approval on August 8, 2011.

{37} NMED responded to public comments regarding shifting by noting that the EPA's final approval of the use of shielded containers was contingent upon DOE addressing this concern. NMED also explained that shifting was not a serious concern because DOE "generator sites are subject to packaging requirements to minimize any shifting of wastes." Generator sites' shipping requirements include standards requiring the use of specific containers and measurement devices before the waste is placed within any container. Further, NMED argues DOE and its contractors are responsible for adhering to federal regulations applicable to the shipment of waste. Thus, NMED argues there are significant safeguards in place to minimize the risk of shifting.

{38} Appellants' citation to the EPA's questions of DOE does not show that the possibility of waste shifting led to an abuse of discretion due to a serious risk to human health and the environment that should have led NMED to deny the permit

. . ., shielded containers will not be stacked more than two high[.]" And they compare that statement with the modified permit, which states, in relevant part, that "[c]ontainers 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." According to Appellants, the parenthetical statement allowing containers to be stacked "up to three containers high" fails to protect human health and the environment because it allows Permittees to stack the containers in an unstable formation.

{40} NMED and DOE respond that the permit's requirement that the containers be stacked in "the best manner to provide stability" prohibits unstable stacking. Thus, to the extent that stacking the containers in a two-high stack is to provide the best stability, the Permittees are required by the permit to stack the containers no more than two high. NMED argues further that because "the modified permit expressly forbids the stacking of containers in an unstable manner[,]" the alleged problem identified by Appellants is resolved by the language of the modified permit.

{41} Appellants argue that this Court cannot rely on the foregoing explanation provided by NMED because, in response to a public comment regarding the stacking concern, NMED did not expressly state "that a general direction to stack containers 'in the best manner' adequately protects against" unstable stacking. Therefore,

{43} Based on the requirement in the modified permit that the containers must be stacked in the best manner to provide stability, we cannot say that NMED's approval of the modified permit was arbitrary or capricious. NMED has broad discretion in interpreting the applicable regulations, including 40 C.F.R. § 270.42(b)(7)(iii). *See N.M. Attorney Gen.*, 2013-NMSC-042, ¶ 10 (recognizing that deference is accorded to an agency's interpretation of a regulation that it is charged with administering). That NMED did not exercise its discretion to deny the permit reflects its view that the requirement that the Permittees stack the containers in "the best manner to provide stability" adequately protected human health and the environment. We will not substitute our judgment for that of NMED in this regard. *Plains Elec. Generation & Transmission*, 1998-NMSC-038, ¶ 7 (stating that the appellate courts defer to the agency's decision when reviewing decisions requiring expertise in highly technical areas and that our judgment will not be substituted for that of the agency).

{44} Further, we note that in response to a public comment as to the inherent flexibility in the modified permit, NMED emphasized that the up-to-three-high language will allow "the Permittees to develop procedures to determine a stacking height as appropriate depending upon certain containers or combination of containers."

because standard waste boxes and ten drum overpack containers that are "authorized only to receive [contact-handled] waste" are "not authorized to contain [remote-handled] waste." Thus, Appellants argue, were a shielded container damaged in a manner that caused it to have a surface dose rate greater than 200 millirems per hour, thus requiring it to be managed as remote-handled waste, the modified permit "contains no lawful procedure to manage" it. Appellants state that "[o]n its face, a [p]ermit provision requiring a damaged shielded container . . . to be overpacked in a container authorized only to contain [contact-handled] waste fails to protect health, safety[,] and the environment and is arbitrary and capricious." (Emphasis omitted.)

{48} Appellants' argument in this regard requires examination of two distinct overpacking circumstances. The first is overpacking shielded containers that, although damaged, have a surface dose rate of less than 200 millirems per hour. The second is how the Permittees intend to handle a shielded container with damage that causes the container to have a surface dose rate in excess of 200 millirems per hour. These contingencies were addressed separately in the modification request.

{49} In regard to the first contingency, the Permittees stated:

> In the unlikely event that shielded containers have surface contamination or container integrity issues which may require decontamination/repair/patch/overpacking, the Permittees may overpack the shielded container into a standard waste box or ten drum overpack. Because the surface dose rate is less than 200 [millirems per hour], this overpacking will occur in the [contact-handled b]ay . . . and not in the

{51} Based on the foregoing, we conclude that the record contradicts Appellants' assertion that "[t]he permit clearly calls for placing [remote-handled] waste in [contact-handled] containers[.]" Further, Appellants have not shown, by argument or authority, that the Permittees' plan to rely on radiological control programs to dictate how to mitigate a container breach that causes the shielded containers to have surface dose rate higher than 200 millirems per hour is inadequate. Accordingly, we do not consider that issue in this appeal. *See N.M. Attorney Gen.*, 2013-NMSC-042, ¶ 9 (recognizing that it is the appellant's burden to demonstrate that an agency's decision should be reversed).

{52} In sum, based on our review of the record, we reject Appellants' argument that NMED authorized an unlawful overpacking practice. Having reviewed and considered all of the relevant evidence in the record pertaining to the overpacking issue, we are unable to conclude that NMED's decision to grant the modified permit was arbitrary or capricious. *See Gila Res. Info. Project*, 2005-NMCA-139, ¶ 16 ("A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." (internal quotation marks and citation omitted)).

it enumerates a number of factors to be considered in meeting the foregoing requirements. 40 C.F.R. § 264.601(a)-(c). Section 264.601 in Title 40 of the Code of Federal Regulations does not govern modification requests, which, as as discussed throughout this Opinion, are governed by 40 C.F.R. § 270.42.

{55} Appellants argue that NMED's decision arbitrarily and capriciously "disregarded" the terms of 40 C.F.R. § 264.601, which, Appellants state, is the governing regulation. Appellants further argue that NMED acted arbitrarily and capriciously by "revers[ing] itself as to the need for evaluation of the impacts of the proposed modification under" 40 C.F.R. § 264.601. *See* 20.4.1.500 NMAC (adopting 40 C.F.R. Part 264). On these bases, Appellants argue that NMED's decision must be reversed.

{56} Pursuant to 40 C.F.R. § 270.42(b)(7)(ii), NMED "may deny or change the terms of a Class 2 permit modification request" if "[t]he requested modification does not comply with the appropriate requirements of 40 C.F.R. Part 264[.]" Thus, whether to deny a modification request on the basis of lack of compliance with 40 C.F.R. § 264.601, is within NMED's discretion. As a factual basis underlying its argument that NMED's action disregarded the terms of 40 C.F.R. § 264.601, Appellants state that had NMED examined the issue of a possible breach of shielded containers, the examination would have revealed the need "to limit the quantity of

it may be managed safely within the contact-handled waste areas under the permit's protocol provided that its surface dose rate does not exceed 200 millirems per hour. {58} Appellants do not, by argument or evidence in the record, demonstrate that higher external dose rates that they contend are "likely" to be associated with the shielded containers required examination of a possible breach and the consequences thereof of the shielded containers. Nor, in their reply brief do Appellants respond to NMED's arguments regarding the "[i]nnumerable 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 . . . waste." *See Delta Automatic Sys., Inc. v. Bingham*, 1999-NMCA-029, ¶ 31, 126 N.M. 717, 974 P.2d 1174 (explaining that failure to respond in a reply brief to arguments raised in an answer brief constitutes a concession of the matter). Among those measures are overpacking shielded containers, as discussed earlier in this Opinion, installation of "[o]ne or more filter vents" in the "shielded container lid to prevent the escape of radioactive particulates and to prevent internal pressurization"; specific protocols applicable to the management, storage, and placement of the shielded containers, and security and radiological checks and shipping documentation reviews of the shielded containers that arrive at WIPP. Having reviewed NMED's citations to evidence in the record pertaining to these safety measures, and having not been presented with

modification complies with 40 C.F.R § 264.601(c)(6), which addresses the potential for health risks caused by human exposure to waste constituents." Six days later, NMED retracted the December 22 letter. Subsequently, on January 31, 2012, NMED issued its final decision as to the September 29, 2011, modification request, denying the permit modification request to add provisions for shielded containers. The January 31, 2012, letter did not refer to 40 C.F.R. § 264.601 as a basis for its denial. Rather, NMED's denial was based on "technical inadequacies" that could not be corrected by NMED and approved with changes because NMED lacked sufficient information to make the required changes.

{61} Appellants cite federal and state case law for the proposition that it is arbitrary and capricious for an agency to change course without explanation, or treat one case differently from another case with similar facts. *See, e.g., Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-47 (1983) (holding that a federal agency's rescission of part of a federal regulation was arbitrary and capricious where the agency failed to present an adequate basis and explanation for the rescission); *Sais v. N.M. Dep't of Corr.*, 2012-NMSC-009, ¶ 17, 275 P.3d 104 (holding that "[a] worker's termination may be arbitrary and capricious if one employee is treated differently compared with others who are similarly situated and no rational explanation is offered for the difference"). Based on that proposition,

the requirements of 40 C.F.R. § 264.601, thus alleviating the need for NMED, in its discretion, to deny the modification request pursuant to that regulation. *See* 40 C.F.R. § 270.42(b)(7)(ii) (stating that NMED "may deny or change the terms of a Class 2 permit modification request" if "[t]he requested modification does not comply with the appropriate requirements of 40 C.F.R. Part 264"); *Plains Elec. Generation & Transmission*, 1998-NMSC-038, ¶ 7 (stating that the reviewing court defers to the agency's decisions when reviewing decisions requiring expertise in highly technical areas and will not substitute our judgment for that of the agency).

II. Appellants' Arguments Regarding the Need for Class 3 Instead of Class 2 Proceedings

{63} In their remaining arguments, Appellants raise three points, in each of which Appellants urge reversal of NMED's decision that was rendered pursuant to Class 2 procedures and a remand of this case for Class 3 proceedings. We consider each of Appellants' three points in turn. And we conclude that none provides a basis for reversal.

A. Storage Capacity

{64} Appellants' first argument regarding the need for Class 3 instead of Class 2 proceedings stems from the regulatory requirement that a modification request that will result "in greater than [a twenty-five percent] increase in the facility's container storage capacity" requires Class 3 proceedings. *See* 40 C.F.R. app. § 270.42(F)(1)(a)

arbitrarily or capriciously or that it improperly disregarded 40 C.F.R. app. § 270.42(F)(1)(a).

{66} Furthermore, to be clear, the volume of the shielded containers counts toward the limit of remote-handled waste that may be shipped to and stored within WIPP. In terms of WIPP's ability to manage its limited volume of remote-handled waste, the shielded containers have the effect of increasing the areas of WIPP where remote-handled waste can be stored. That is, rather than storing the remote-handled waste exclusively within the panel boreholes, the Permittees may, under the modified permit, store remote-handled waste in shielded containers on the panel floors. Yet, there is no evidence in the record to support a view that the Permittees' ability to use the space differently will increase WIPP's storage capacity by more than twenty-five percent. Without evidence to support it, Appellants' argument in this regard provides no basis for reversal.

B. Waste Management Practices

{67} Appellants argue that Class 3 procedures were required because the use of shielded containers constitutes "[s]torage of different wastes in containers . . . [t]hat require additional or different management practices from those authorized in the permit[.]" 40 C.F.R. app. § 270.42(F)(3)(a); *see* 20.4.1.900 NMAC (adopting 40 C.F.R. Part 270). Appellants argue that NMED arbitrarily and capriciously

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 . . . does not anticipate that such wastes will be managed in the unit." *Id.* In the context of WIPP, the term "unit" means the eight underground disposal units referred to throughout this Opinion and in the permit as "panels."

{70} Appellants argue that Class 3 procedures were required because the Permittees stated in their modification request that "[t]he shielded container will contain hazardous waste already approved for disposal at the WIPP facility; however, that waste ([remote-handled waste]) is approved for management in the [remote-handled c]omplex and not in the [contact-handled b]ay, and therefore, . . . it is a different waste in a particular unit." Appellants characterize the foregoing as a concession by the Permittees that Class 3 procedures were required; however, the Permittees' acknowledgment of the fact that the modification includes "different waste in a particular unit" is not dispositive. As indicated, in the preceding paragraph, "different waste" may lead to Class 2 or Class 3 procedures; the determining factor is whether "additional or different management practices from those authorized in the permit" are required. *See* 40 C.F.R. app. § 270.42(F)(3). Following the "different waste" statement, the modification request continued, providing the following relevant explanation of why Class 2 procedures were applicable here.

intense radiation from [remote-handled] waste"; and (6) "[a] still-unknown, but shielded-container-specific, stacking system will be used in [placing] shielded containers in the underground." Appellants' fifth and sixth points are not accompanied by authority, evidence, or citations to the record proper and will not be considered.

{72} Appellants' first through fourth management-practices points are not supported by the record. As to Appellants' first point, we do not believe, and Appellants do not show by argument, authority, or evidence in the record, how their recitation of the shielded containers' weight and composition may be considered a "management practice" or otherwise requires a new management practice. Concerning Appellants' second point, that shielded containers are subject to particular packaging requirements, Appellants provide no record support for their view that this affects management practices or requires new management practices at WIPP. To the contrary, the record reflects that the shielded-container-specific packaging requirements govern the generator sites where the packaging will occur. As to Appellants' third point, contrary to their argument that the shielded containers must be managed differently from contact-handled waste, the record reflects that shielded containers do not need to be managed differently from contact-handled waste; rather, they may be managed using contact-handled waste equipment and operating

statement as to why the modification request should follow Class 2 procedures, in their July 5, 2012, modification request the Permittees provided two full pages explaining why the modification request required Class 2 procedures. Among other things, as indicated earlier, the Permittees addressed the issue whether different waste management practices were required, concluding that they were not. Appellants have not demonstrated that NMED erred in agreeing with the Permittees in this regard. *See N.M. Attorney Gen.*, 2013-NMSC-042, ¶ 9 (recognizing that it is the appellant's burden to demonstrate that an agency's decision should be reversed). Moreover, as we have noted, owing to the difference in the respective modification requests, we do not believe that comparing NMED's responses to them demonstrates that NMED acted arbitrarily and capriciously. *See Sais*, 2012-NMSC-009, ¶¶ 17, 21, 27 (stating that where there is a "meaningful distinction between" the differently decided cases, disparate treatment of them does not constitute an abuse of discretion).

C. Public Concern

{75} As indicated earlier in this Opinion, in making a decision as to a Class 2 modification request, NMED is required to consider all written comments submitted to NMED during the public comment period and must respond in writing to all significant comments in the decision. 40 C.F.R. § 270.42(b)(6)(vi). NMED points to the fact that of the 206 comments that it received, 173 were pre-printed form letters

where "200 citizens express[ed] the need for a public hearing" as to the July 5, 2012, modification request, NMED, acting contrary to logic and reason, found "a lack of public concern[.]"

{77} In regard to this argument, as in regard to others that we have already discussed, we do not find Appellants' reliance on NMED's December 22, 2011, letter that did not pertain to the present modification request and that was retracted six days after it was issued, persuasive. In NMED's January 31, 2012, final decision on the matter of the September 29, 2011, modification request, technical inadequacies, rather than public concern over the use of shielded containers or the need for a public hearing, was the basis for denying the modification request. Furthermore, without evidence to the contrary, we assume that the public's concern, like that of NMED, reflected the technical and informational inadequacies of the September 29, 2011 modification request. We do not conclude that the views expressed in NMED's later-retracted December 22, 2011, letter, which was written in response to a technically inadequate modification request, is informative or persuasive in regard to NMED's decision in regard to the present modification request.

{78} Although we recognize that issues surrounding WIPP and modifications to the permit are of general public interest and concern owing to the health and environmental implications of waste storage within our state, Appellants have not

CONCLUSION

{79} Based on our review of the record in this case, we are not persuaded that NMED erred in approving the July 5, 2012, modification request to permit the addition of shielded containers at WIPP. We affirm NMED's approval of the permit modification.

{80} **IT IS SO ORDERED.**

JONATHAN B. SUTIN, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

LINDA M. VANZI, Judge

NEW MEXICO COURT OF APPEALS SURVEY

How are we doing at the Court of Appeals? Please answer the following questionnaire by circling the appropriate number and mailing it to Sharon Jones, Court of Appeals, P.O. Box 2008, Santa Fe, NM 87504.

I. CLERK'S OFFICE AND SUPPORT STAFF

1. Were you satisfied that those in the clerk's office or other support staff treated you courteously?

Very Satisfied				***Very Dissatisfied***
5	4	3	2	1

2. Bearing in mind that Court support staff cannot answer legal questions, were you satisfied that the clerk's office or other staff provided you with accurate information?

Very Satisfied				***Very Dissatisfied***
5	4	3	2	1

3. Please indicate the type of contact you had with the clerk's office staff primarily (check all that apply): ☐ In Santa Fe ☐ In Albuquerque ☐ In Person ☐ By Phone

4. Please rate each item based upon the services you wish to receive from the clerk's office. A rating of **5** is **most** important; a rating of **1** is **least** important.

_____ Timely mailing of orders
_____ Timely issuance of mandates
_____ Availability of case materials
_____ Friendly response
_____ Polite response
_____ Accurate answers to questions about the status of the case
_____ Answers to questions about the Court's procedure
_____ Other (please explain) _____

II. DISPOSITION OF APPEALS

5. Are you satisfied that your case was decided in a fair and impartial manner?

Very Satisfied				***Very Dissatisfied***
5	4	3	2	1

6. Regardless of whether or not the case was decided in your favor, were you satisfied that the Court's opinion reflected that the Court understood and clearly ruled on the issues raised on appeal?

A. For fully briefed cases

Very Satisfied				***Very Dissatisfied***
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B. For summary calendar cases

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