Court of Appeals of New Mexico
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IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

NEW MEXICO ENVIROMENT DEPARTMENT HAZARDOUS WASTE BUREAU CLASS 3 PERMIT MODIFCATION REQUEST: CLARIFICATION OF TRU MIXED WASTE VOLUME REPORTING, PERMIT MODIFICATION TO THE WIPP HAZARDOUS WASTE FACILITY PERMIT NO. NM4890139088-TSDF,
Plaintiff-Appellee,
v. **No. A-1-CA-37894**
NEW MEXICO ENVIRONMENT DEPARTMENT HAZARDOUS WASTE BUREAU,
Defendant-Appellant.

REPLY BRIEF, RESPONDING TO APPELLEES NMED, DOE, AND NWP, ON BEHALF OF SOUTHWEST RESEARCH AND INFORMATION CENTER AND NUCLEAR WATCH NEW MEXICO, Appellants-Intervenors

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Preliminary statement

It is regrettable that the Court is confronted by the regulator and the regulated parties, urging in tandem that the federal laws governing an important federal nuclear facility should be ignored and violated, leaving protection of the health and safety of New Mexicans to private citizen groups. Appellees advance extreme and illegitimate arguments. They claim that Congress, which had only data showing the number of waste drums needing disposal, in 1992 set the 6.2 million ft^3 volume limit using some unknown method of calculating the volume of so-called "actual waste." They say that the container-volume method used for 19 years, with concurrence of Appellees, must be abandoned, and DOE given a blank check to report the amount of waste it brings to WIPP—effectively, no limit at all.

Appellees rely upon the determinations of a Hearing Officer, who ruled that in enacting the WIPP Land Withdrawal Act, Pub. L. No. 102-579 ("LWA"),

a. Congress assumed that WIPP waste would be put into 55-gallon drums that were assumed to be full of waste;
b. If Congress knew that the drums were only half full, it would have authorized the excavation of a larger WIPP;
c. Congress intended to dispose of a defined volume of TRU waste, not a stated number of containers;

d. If Congress knew that, after 850,000 drums were disposed of, many drums were not full and waste was left over, it would have authorized WIPP for a larger number of drums;

e. Congress intended that the "actual volume"—undefined—of waste disposed of would determine completion of the "mission" of WIPP.

None of these assumptions has any basis.

Appellees contort the law, seeking to avoid examination of the true meaning and force of the laws governing WIPP. NWP asserts that Appellants should have summarized the evidence on the issues above for the Court **[NWP 1]**, when the bald fact is that there is no evidence to support those assumptions. NMED suggests that the Court somehow lacks "jurisdiction" to interpret federal law. [**NMED 13-14]**. All Appellees tell the Court that the proceeding below found that DOE had agreed to, and would be bound by, a new method to calculate waste volume, when witnesses for *both* NMED and NWP testified that this is not so, and the matter was undisputed at the hearing. **[see BIC 10, 11, 34]**. Appellees assert that DOE somehow has statutory authority to regulate the volume of waste against the 6.2 million ft^3 limit, parroting the Hearing Officer's totally unsupported conclusion. **[101 RP 0025478 FF 214]**. And all parties, including NMED, tell the Court to ignore the Consultation and Cooperation ("C&C") Agreement, executed by the Governor and the Attorney General and the DOE Secretary pursuant to

Congressional mandate, Pub. L. No. 96-164, § 213, as if it were just a piece of paper. **[NMED 23, NWP 19-20, DOE 19-20]**.

While DOE, NWP, and NMED would substitute argument and the cloak of the public interest for a respect for the law and the facts, the public interest and Appellees' interest utterly diverge. DOE's and NWP's only interest here is to promote their agenda of WIPP expansion in violation of the legal limits that were agreed to between DOE and the State of New Mexico decades ago and then enacted by Congress.

The public interest, instead, lies in adherence to the words of Congress and the precedents governing judicial review of regulatory action. It lies in adherence to the rule that "the [Secretary's] decision stands or falls on its express findings and reasoning." *Atlixco Coal. v. Maggiore,* 1998-NMCA-134, ¶ 21, 125 N.M. 786, 793, 965 P.2d 370, 377. It lies in the established standards of review:

> "Normally an agency rule would be arbitrary or capricious if the agency . . . failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).

Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n, 2003-NMSC-005, ¶ 12, 133 N.M. 97, 102, 61 P.3d 806, 811.

This dispute is legal, not factual. The main question is: Is the modification, which gives DOE unlimited authority to state the quantity of waste disposed of by

DOE at WIPP, lawful under the Land Withdrawal Act and the Resource Conservation and Recovery Act, 42 U.S.C. § 6921 *et seq.* ("RCRA")?

Most of the essential facts are undisputed. Nevertheless, in many instances, such as **[101 RP 025438-025483, FF 27, 132, 149, 212, 213, 215**], there is no support, legal or factual, for the Hearing Officer's statements. Appellants have duly pointed that out. **[BIC 16-18]**.

I. DOE's interpretation creates a statutory conflict.

Appellees say there is no conflict here between federal statutes. **[NMED 8]**. But it is undisputed that, applying the same 6.2 million ft^3 capacity limit, DOE's interpretation would increase WIPP's capacity by 30% over the capacity measured under RCRA standards. **[101 RP 0025463 FF 137]**. With the adoption of the PMR, as Appellees interpret it, there is a claimed conflict between two federal statutes, which must be resolved as the Supreme Court directs:

> When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "'to give effect to both.'" A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "'a clearly expressed congressional intention'" that such a result should follow.

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018) (*citations omitted*).

On examination, DOE's interpretation is not credible. We show herein that:

a. RCRA requires NMED to enforce the 6.2 million ft^3 volume limit adopted in the Permit.

b. The 6.2 million ft^3 limit stated in the LWA is measured by container volume.

c. DOE has no authority to declare a different interpretation of the 6.2 million ft^3 limit.

II. The RCRA permit imposes a 6.2 million ft^3 capacity limit, based on container volume.

The assertion that “the maximum design capacity of the WIPP repository, as it pertains to the NMED issued RCRA permit . . . is not based on 6.2 million cubic feet of waste as authorized by Congress in the LWA” **[NWP 11]** is baseless. The statement that the 6.2 million ft^3 limit in DOE’s Part A RCRA application refers to “TRU waste, not containers” **[NMED 13]** is indefensible. The Permit, as it existed for 19 years before the PMR, contains in Part A (Attachment B) the volume limit of 175,600 m^3, which is equivalent to 6.2 million ft^3—obviously derived from the LWA limit.

NMED issued the Hazardous Waste Act (§ 74-4-1 et seq. NMSA 1978 (“HWA”)) Permit pursuant to EPA’s delegation of RCRA authority, which requires NMED to base permitting upon a determination of the volume of waste. *See, e.g.*, 40 C.F.R. § 264.601(a)(1) (Waste volume must be included in permitting a miscellaneous unit.). The entire 1998 HWA permitting process involved DOE’s request for a permit to dispose of 6.2 million ft^3 of waste in containers in Panels 1 through 10. **[98 RP 024825].**

NMED stands firm for measuring waste volume based on the outer container. Thus, LWA references to the continued effectiveness of RCRA are not irrelevant. **[DOE 18; NWP 17]**.

It is said that NMED does not regulate radioactive waste at WIPP. **[NMED 9; DOE 5]**. But all TRU waste at WIPP is managed as mixed waste, *i.e.*, containing both RCRA hazardous constituents and transuranic radionuclides. **[NWP 7, DOE 3]**. NMED regulates *all* TRU waste at WIPP.

The assertion that "Appellants' own witness admitted on the stand that the PMR will have no impact [*sic*] human health and the environment" **[DOE 13; NWP 4]** cites Mr. Zappe's testimony. Mr. Zappe was not Appellants' witness. Appellants presented George Anastas to testify on whether the PMR would adversely affect health and the environment, and his evidence was extensive. **[10/25/18 Tr. 126-175]**. The Hearing Officer ignored it, a clear error.

Appellees disparage the scope of RCRA, contending that RCRA is concerned only with whether the waste will fit in the rooms. Thus, NWP asserts that the RCRA permit "establishes capacities based on the dimensional footprint of the unit where waste is to be emplaced." [**NWP 11-12]**. DOE asserts that NMED only sets a volume limit to "assure safe management of the waste during emplacement and closure." **[DOE 6 and see 13]**. Indeed, NMED itself states that its concern is to "ensure that the physical capacity limit of each HWDU as

permitted is not exceeded" **[NMED 11]**, abjuring its responsibilities to protect human health and the environment.

But NMED's task under RCRA and the HWA is not simply to shoehorn unlimited amounts of waste into DOE's disposal site but to determine the quantity that can be disposed of consistently with the protection of human health and the environment. **[BIC 25-26]**. Elsewhere, NMED concedes as much. **[NMED 8-9]**. Thus the volume limit in the permit. DOE's scheme, and NMED's acquiescence, to override RCRA's volume limit misconceives the scope of the environmental concerns under RCRA. The claim that the PMR "does not give DOE the green light to exceed the LWA TRU waste capacity limit stipulated by Congress" **[NMED 11]** ignores reality and the evidence.

III. On examination, the conflict disappears, because the LWA volume limit refers to containers.

In fixing the 6.2 million ft^3 volume limit, Congress could only have meant to measure it by the volume of waste containers. The 6.2 million ft^3 volume figure appeared in the 1980 Final Environmental Impact Statement ("FEIS") and was expressly "container volume." **[103 RP 205571, 025578]**. The 1981 Record of Decision ("ROD"), based on the FEIS, authorized disposal of 6.2 million ft^3 of waste. **[103 RP 025583, col. 1]**. In 1987 DOE and the State agreed on the C&C Second Amendment, stating the volume limit of 6.2 million ft^3 and citing the ROD. [**53 RP 013260]**. In the Final EIS of 1990 DOE emphasized that a "fullness

factor" is *not used* in calculating the number of drums that equal 6.2 million ft^3; instead, the drum volume itself is the measure. **[103 RP 025587]**. And in 1991, Congress discussed disposal of 6.2 million ft^3 of waste contained in 850,000 drums. The 6.2 million ft^3 figure appears in the LWA. Committee reports expressly state that ½% of total capacity is 4,250 55-gallon drums **[103 RP 0256639, 025665]** and that 1% is 8,500 drums **[103 RP 025626]** (thus 100% is 850,000 drums). DOE admits that the committee reports referred to waste volume in drums—"barrel limitations." **[DOE 15]**.

It defies belief that in 1992 Congress landed upon the exact 6.2 million ft^3 limit, out of the clear blue sky and totally without reference to the history of waste volume measurement based on containers. As DOE stated in its 1997 SEIS-II **[103 RP 025717**; **103 RP 025731-32]**, there was *no valid data* describing what DOE and the Hearing Officer now term the "actual volume" of waste inside containers, assuming such data could even be developed.

DOE now tells the Court that LWA § 6(c)(1) "did not state how this capacity limit would be calculated or specify a limit on the number of drums . . . " **[DOE 15]**. But the previous subsection, LWA § 6(b)(2), incorporates the terms and conditions of the no-migration determination, which limits test phase waste to "8,500 drums or 1 percent of the capacity of the repository." 55 Fed. Reg. 47700, 47720 (Nov. 14, 1990). The proposition that, for measurement of the precisely-

stated 6.2 million ft^3 LWA volume limit, Congress *had no intent at all*—is unsupported and absurd.

NMED says that in the no-migration determination "EPA was simply saying 1% of the volume was equivalent to the total volume of 8,500 drums." **[NMED 16]**. EPA did set a limit. But the question here is what *Congress* said. In § 6(b)(2) Congress stated that, for tests, EPA's limit of 1% of total volume, which is 8,500 drums (thus 100% is 850,000 drums), applies[1]. NMED's assertion that "nowhere in the pre-amended or amended statute does the LWA dictate the method of volume calculation" **[NMED 18]** simply ignores the express language of LWA § 6(b)(2). *See also* § 7(a)(1)(B) and § 7(a)(2)(A).

Appellees argue that the 1996 LWA amendments deleted the test phase provisions, including § 6(b)(2). **[DOE 15, NMED 14]**. This fact takes nothing from its value as proof of the meaning of the 6.2 million ft^3 limit. And, when the 1996 amendments were before Congress, a letter from Mary D. Nichols, EPA Assistant Administrator for Air and Radiation, to New Mexico Attorney General Tom Udall, dated May 15, 1996, was placed in the Congressional Record. It states:

> The proposed legislation does not alter the . . . capacity limits of either remote- or contact-handled wastes set forth in the LWA.

[1] For the test phase the limit stated in § 6(c)(1)(B) applies also, capping test phase waste at ½% of total capacity, or 4,250 drums.

Cong. Rec. S6590, col. 1 (June 20, 1996); Cong. Rec. H9812, col. 2 (Aug. 1, 1996).

It is said that DOE did not anticipate the overpacking required in waste preparation, so that it deserves relief from the 6.2 million ft^3 volume limit. **[NWP 5; DOE 7, 12]**. But 6.2 million ft^3 is a *statutory* limit; NMED may not break the law to accommodate DOE. Moreover, the practice of overpacking was well known from the start—not something DOE "learned during the operation" **[DOE 7]**. As DOE requested, the Permit has always included overpacks **[10/25/18 Tr. 104:11-24; Tr. 189:24-25]**. There was no "unintended consequence" **[NWP 6]**; the supposed "underutilization" **[NWP 7]** was DOE's own act.

Appellees point out that the LWA does not mention void space, dunnage, and so forth in its definition of TRU waste **[NWP 14; DOE 3]**; DOE argues that Congress might have added language in 1996, stating that waste should be measured by container volume **[DOE 16]**, but no one brought these issues to Congress's attention, and there was agreement then and for another 13 years that container volume shall be used.

More importantly, the PMR here did not ask to apply a fill factor or to discount overpacks; DOE requested, and NMED granted, *a blank check*—something Congress plainly did not accept, because it put a specific limit into the statute. Under DOE's interpretation, the statutory limit is meaningless, because

DOE can change its methods of calculation without any oversight or restriction.[2] NMED's own witness so stated. **[10/24/18 Tr. 103:11-19, Tr. 104:6-16, Tr. 127:16-24, Tr. 132:20-25]**. Mr. Kehrman of NWP said so as well. **[10/23/18 Tr. 146:22-24]**.

IV. DOE has no authority to interpret or enforce the terms of the LWA.

There is only a statutory conflict if DOE's interpretation has legal force. But the assertion that DOE has "responsibility to track and report . . . the volume of TRU waste disposed of at the WIPP relative to the capacity limit" **[DOE 19]** is false and unsupported. DOE cites only the Hearing Officer's FF 27, listing statutes said to give DOE authority to regulate waste volume. But none of the statutes mentions WIPP, and they contain no such authority. **[see BIC 17-19]**. NMED cites the DOE Organization Act, Pub. L. No. 95-91. **[NMED 9-10]**. That law predates WIPP and does not mention WIPP.

As Appellants have explained **[BIC 28-29]**, an agency's authority to regulate is not inferred from vague or general language; it must be entirely clear. Thus,

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2 When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'
'The question is,' said Alice, 'whether you can make words mean so many different things.'
'The question is,' said Humpty Dumpty, 'which is to be master — that's all."
— Lewis Carroll, Through the Looking Glass

Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001)." *Epic Sys. Corp. v. Lewis,* 138 S. Ct. 1612, 1626-27 (2018).

NWP quotes extracts from LWA § 3. **[NWP 21]**. That section refers to the withdrawal of the WIPP site from the public land laws and states:

> Such lands are reserved for the use of the Secretary [of Energy] for the construction, experimentation, operation, repair and maintenance, disposal, shutdown, monitoring, decommissioning, and other authorized activities associated with the purposes of WIPP as set forth in section 213 of the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1980 (Pub. L. 96-164; 93 Stat. 1259, 1265), and this Act.

Thus, the reservation is expressly for activities set forth in the 1980 Authorization Act and the LWA itself. Neither statute authorizes DOE to regulate the volume of waste against the LWA limit.

NWP urges deference to DOE under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), which calls for deference to a statutory "interpretation of the agency charged with administering the statute." **[NWP 21]**. But DOE has no authority to administer the 6.2 million ft^3 volume limit.

V. A supposed conflict among two federal statutes must be resolved by affirming NMED's RCRA authority.

The LWA imposes a capacity limit of 6.2 million ft^3, and compliance is measured by container volume. Appellants have shown in detail how the LWA

was drafted based upon information about container volumes, how it was applied that way for nearly 20 years without any question from any party, how DOE submitted container-volume data to EPA in support of DOE's compliance demonstration, and how EPA agreed with such data in applying the LWA, rendering such interpretation conclusive. **[BIC 8-9, 24-26]**. There has been no response to this conclusive history.

Still, Appellees strain to support the Hearing Officer's conclusion that the statutory volume limit—6.2 million ft^3—in LWA § 7(a)(3) means one thing when DOE applies it and another thing when NMED applies it—yet is "*unambiguous*." **[NWP 11; DOE 16-17]**.[3]

The 6.2 million ft^3 is not ambiguous, when properly understood as part of the whole statute—including the references to the no-migration determination, which state that volume is based on containers. **[BIC 31-38]**. There is no statutory conflict, and no basis to impose DOE's interpretation.

[3] An "ambiguity is . . . created when provisions are reasonably and fairly susceptible to two constructions." *Lawson v. Schwartz*, 2013-NMCA-086, ¶ 21, 308 P.3d 1033, 1039.

VI. The Hearing Officer's speculations about what Congress was told or thought is totally without any support and bogus.

The Hearing Officer's Report has 222 numbered paragraphs, explaining his ruling. The following elements of the Hearing Officer's reasoning are not defended here, or are defended only weakly, by any party:

1. The Hearing Officer's assumption that it is WIPP's mission to contain the entire DOE TRU waste inventory;
2. The idea that the LWA is silent on the method to calculate waste volume;
3. The assertion that Congress assumed that the waste drums were full;
4. The assertion that DOE is authorized by law to calculate the volume of waste emplaced in WIPP;
5. The idea that DOE has now committed to a method to calculate waste volume;
6. The assumption that the RCRA permit has no environmental purpose;
7. The idea that the statutory maximum capacity number has two different meanings, and that Congress so intended,
8. The assertion that a number with two meanings is not ambiguous, and
9. The assertion that major safety problems have no relevance to public health and the environment.

Each of these propositions underpins the result reached by the Hearing Officer and the Secretary. Each of them is an error, *i.e.*, arbitrary and capricious or contrary to law. Thus, the Hearing Officer recounts that Congress in 1992 assumed that the waste containers were *full* **[101 RP 0025477 FF 212]**, that Congress would have called for a bigger WIPP if it had known that the containers were not full, or if WIPP were filled but did not have room for 6.2 million ft^3. But nothing is cited for these propositions. These statements are pure speculation, with no support in any evidence or history.

Moreover, they are demonstrably untrue. DOE flatly stated in 1980 that the waste volume data stated container volumes **[103 RP 205578]**, and DOE said in the 1997 SEIS-II that

> there is considerable uncertainty concerning how much of a container's volume is made up of TRU waste and how much is void space. Many of the containers would include a great deal of void space, particularly for RH-TRU waste; the actual volume of waste in a drum or cask, therefore, may be much less than the volume of the drum or cask.

[103 RP 025717]. DOE knew that the drums were not full and so stated publicly. Congress did not assume otherwise.

The statement that DOE has committed to a specific method of waste measurement **[101 RP 0025465 FF 149, 101 RP 0025478-9 FF 215]** is also clear error. DOE has not agreed to follow any particular method of calculating waste volume and can change its method at will. (*supra* at 10-11).

The Hearing Officer's statement that WIPP's mission is to accommodate all of DOE's TRU waste **[101 RP 0025440 FF 10]** is also clear error. It is expressly a "pilot plant" authorized to receive only a fixed volume of waste, and Congress understood that there is more TRU waste than WIPP can accommodate. **[BIC 38]**.

These errors are fundamental to the Hearing Officer's Report and the Secretary's decision to grant the PMR. Agency action must stand or fall on the basis of the agency's reasoning. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Commission,* 2003-NMSC-005, ¶ 11, 133 N.M. 97, 61 P.3d806; *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 20, 125 N.M. 786, 965 P.2d 370. Approval of the PMR is based on unsustainable assumptions and must be vacated.

VII. DOE can offer no reasoned explanation for its new interpretation because the new interpretation is unlawful.

DOE and NWP present purported benefits that might justify departure from the way they have heretofore calculated waste volume. **[NWP 7-9; DOE 7-9]**. They present none of the downside considerations, such as the risk of accidents, underground fires, or explosions in waste drums, which increase with the expansion of WIPP's waste capacity and the extension of its operational period.

These pros and cons are matters that go into a legislative determination of the capacity and duration of a waste repository. They do not matter here, because a "new policy" must be "permissible under the statute." *FCC v. Fox TV Stations*,

Inc., 556 U.S. 502, 515 (2009). Congress has determined that the capacity of WIPP shall be 6.2 million ft^3, and to exceed that limit is unlawful.

VIII. The Hearing Officer failed to address an important aspect of the problem: The C&C Agreement.

The C&C Agreement was made pursuant to the Authorization Act, Pub. L. No. 96-164, § 213, which directs DOE to reach agreement with the State defining the State's role in overseeing WIPP. The agreement contains the 6.2 million ft^3 capacity limit. The LWA does not amend the C&C Agreement except as specifically stated. LWA § 21. The Agreement itself recites that it is "binding [and] enforceable." **[52 RP 013234, Article XI.B]**.

NWP asserts that Appellants lack standing to assert a violation of the C&C Agreement. **[NWP 19]**. Appellants have understood that the public undertakings of our high State officials are meant to benefit the citizens. The idea that the New Mexico Governor and Attorney General may execute, and broadcast, agreements that guarantee the limits upon waste volume allowed at WIPP, and that citizens would later invoke those limits and be told to mind their business, offends our sense of honor. Absent some contrary public disclosure, Appellants rely on the C&C Agreement as written and published.

The capacity limit of 6.2 million ft^3 is contained in the C&C Agreement; which states that it is derived from the 1981 ROD, which in turn is based upon the 1980 FEIS, which is based on container volume and has the same 6.2 million ft^3

limit. The agreement should be enforced, as an independent legal basis to vacate the Order.

IX. The Hearing Officer failed to consider important evidence: safety problems at WIPP.

NMED is duty-bound under 40 C.F.R. § 264.601 and § 270.42(c)(6) to consider the effect of the PMR on human health and the environment. NWP maintains that the PMR will have no effect on safety. **[NWP 27]**. But DOE's proposed calculations would increase the capacity of WIPP by 30% and extend its operating period commensurately, increasing the likelihood of further dangerous incidents. George Anastas's testimony bears directly on such issues. The Hearing Officer recognized its importance to the safety of future WIPP operations but dismissed it as "undeveloped." **[101 RP 0025482 FF 220]**. This is clearly wrong. The safety problems at WIPP are overtly being ignored by NMED, contrary to the duty to "ensure protection of human health and the environment." 40 C.F.R. § 264.601.

X. This proceeding suffers from a fatal flaw: The Hearing Officer was disqualified to act.

The Hearing Officer's compromised position infects the entire proceeding. The specific problem is that the Hearing Officer has an interest in satisfying NMED, to obtain additional assignments under his long-term contract. Therefore, he may tend to favor NMED in his rulings. Counsel's claims regarding avoidance

of conflicts of interest **[NMED 30-31]** cannot refute the clear constitutional violation.

Appellants obtained the Hearing Officer's contract under the Public Records Act and brought it to the Court's attention at the first opportunity. Thus they acted "as soon as [they] discovered the facts," *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 819 (1986). This was timely. Moreover, the Due Process Clause trumps the state Procurement Code. **[NMED 28-31]**. The decision must be vacated.

Conclusion

For the reasons set forth herein and in Appellants' opening brief, the Secretary's Order should be vacated.

Respectfully submitted,

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August 31, 2020

CERTIFICATE OF SERVICE

The undersigned certifies that on August 31, 2020 he served the foregoing document upon counsel of record pursuant to the Court's electronic service and filing procedures.

/s/ Lindsay A. Lovejoy, Jr.
Lindsay A. Lovejoy, Jr.