IN THE COURT OF APPEALS
FOR THE STATE OF NEW MEXICO

Oral argument requested

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 CHIEF FOR CITIZEN APPELLANTS

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This brief complies with the limitations of Rule 12-213(F), NMRAP. The body of the brief contains 10,807 words of proportionately spaced type, according to data obtained from Microsoft Office WORD 2007.

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Summary of Proceedings

The Waste Isolation Pilot Plant ("WIPP") is a federally-owned underground repository for defense-related transuranic ("TRU") radioactive waste. It was constructed and opened pursuant to the Waste Isolation Pilot Plant Land Withdrawal Act, Pub. L. No. 102-579, as amended by Pub. L. No. 104-201(the "WIPP Act"). Section 2 of the WIPP Act defines two categories of TRU waste eligible for emplacement at WIPP: Contact-handled ("CH") waste is defined as TRU waste with a surface radiation dose rate no greater than 200 millirems per hour (mrem/hr.) (§ 2(3)); remote-handled ("RH") waste is TRU waste with a surface dose rate in excess of 200 mrem/hr. and up to 1000 rem/hr. (§ 2(10)). WIPP is authorized to receive specified quantities of CH and RH TRU waste under the WIPP Act. ((§§ 7(a)(2)(B), (3))

On October 27, 1999, Appellee New Mexico Environment Department ("NMED") issued a Hazardous Waste Act (§§ 74-4-1 through 74-4-14 NMSA 1978) permit (as issued and amended, the "Permit") for WIPP. Under the Permit, all waste brought to WIPP is to be managed as TRU "mixed" waste, *i.e.*, waste that is radioactive and is also contaminated with hazardous chemicals. (Permit Section 4.2.2.2.[1]). Waste began to be introduced pursuant to the Permit later in 1999. As

[1] 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

issued, the Permit prohibited introduction of RH TRU waste. (Permit Section II.C.3.h (1999), cited at RP 04476).

In 2002 Permittees[2] first sought a permit modification, allowing the introduction of RH TRU waste.[3] NMED thereafter 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 ("SRIC"); 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

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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,* 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.

[2] 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."

[3] The history of the initial RH permitting proceeding is related at: http://www.nmenv.state.nm.us/wipp/finaldat1006.pdf (April 6, 2013).

issued an order on October 16, 2006, determining how RH waste would be introduced to WIPP.

NMED's 2006 action authorized disposal of RH waste in canisters inserted into boreholes in the walls of the underground disposal rooms. NMED also adopted RH waste disposal volume limits for each panel, which were based upon the quantity of RH waste that could be emplaced in boreholes. (Permit Table 3.1.1). Canister disposal required that RH waste be emplaced in boreholes before CH waste is placed on the floor of a disposal room. In 2006, when RH waste was first authorized, Permittees were nearing final emplacement of CH waste in panel 3; thus, Permittees had bypassed the disposal rooms in panels 1, 2, and 3 for disposal of RH waste, and the RH disposal capacity of those 21 rooms was lost.

In 2007 Permittee U.S. Department of Energy ("DOE") submitted a Planned Change Request to the U.S. Environmental Protection Agency ("EPA"), pursuant to EPA's certification of WIPP under 40 C.F.R. Part 191, Subpart B, and the WIPP Act, seeking authority to dispose of RH waste in a new container system, called "shielded containers," which would be emplaced for disposal on the floor of the underground disposal rooms among containers of CH waste. EPA reviewed the new disposal method and approved it on August 8, 2011, subject to Permittees' adoption of a uniform method of measuring radiation emitted by shielded

containers and also subject to further action by NMED under the Permit. (RP 00081-85[4]).

On September 29, 2011, Permittees filed a Permit Modification Request ("PMR") with NMED, seeking, inter alia, authorization to store and dispose of RH TRU waste in shielded containers. (RP 00120). For that purpose, the PMR sought changes in Permit Sections 3.3.1.8, 4.3.1, A1-1b(2), A1-1d(3), A1-1d(4), A2-2a(1), A2-2b, A4-3, C1-1a, C1-1a(1), D1-d, D-1e(1), E-1b(1), G3-4a, Attachment H1, and Tables 4.1.1, A1-2, and C1-8. (RP 00120, 00143-00160). Permittees sought consideration of the PMR under Class 2 procedures, pursuant to 20.4.1.900 NMAC, 40 C.F.R. § 270.42. SRIC commented on the September 2011 PMR (RP 00859-65), as did numerous other members of the public (RP 00685-858).

NMED on December 22, 2011 ruled that the September 2011 PMR was too complex for abbreviated Class 2 procedures and required Class 3 procedures, which include a public hearing. (RP 00871-73.[5]). NMED noted that shielded containers would require "complex changes" in WIPP's operations, including "additional procedures and equipment for unloading, transporting, and overpacking" of waste in shielded containers. NMED also indicated the need to

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

[5] NMED retracted the December 22, 2011 letter in a letter dated December 28, 2011. (RP 00874-75). NMED has offered no reason for such retraction. NMED's determinations contained in the December 22, 2011 letter were restated, in substance, in NMED's letter dated January 31, 2012. (RP 00878-80).

evaluate the container system pursuant to 40 C.F.R. § 264.601(c)(6), which requires that a permit protect human health and the environment from releases of waste constituents:

> "Further, under 40 CFR § 270.42(b)(6)(i)(C)(2), the Department Secretary may determine that the modification request must be processed as a Class 3 modification because the complex nature of the changes require the more extensive 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. As another example, the Department will need to evaluate whether the proposed modification complies with 40 CFR § 264.601(c)(6), which addresses the potential for health risks caused by human exposure to waste constituents. These issues are more properly addressed as a Class 3 modification.
>
> 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)

NMED also stated that the level of public concern necessitated Class 3 procedures:

> "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)

Thus, NMED called for Class 3 procedures.

On January 31, 2012, NMED again ruled that the extensive nature of the modifications and the express terms of 40 C.F.R. § 270.42 made Class 2 procedures inapplicable:

> "Under 20.4.1.900 NMAC (incorporating 40 CFR § 270.42(b)(7)), the Department may deny a Class 2 permit modification request if the modification request is incomplete; it does not comply with applicable requirements; or it fails to protect human health and the environment. 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 [*sic*] 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.
>
> Numerous public commenters identified similar issues with the modification request. Furthermore, the Department does not have sufficient information to correct the technical inadequacies in the application and approve the modifications 'with changes' under 20.4.1.900 (incorporating 40 CFR § 270.42(b)(6)(i)(A)). Consequently, the Department is denying the permit modification request to add provisions for shielded containers." (RP 00878).

Also on January 31, 2012, NMED responded to comments, stating that the shielded container request had significant technical inadequacies that no participant could rectify:

> "NMED denied the shielded container portion of the PMR. NMED was unable to approve the shielded container modification "with changes" as allowed under 20.4.1.900 NMAC (incorporating 40 CFR § 270.42(b)(6)(i)(A)) because none of the commenters, including the Permittees, proposed sufficiently detailed changes to rectify the technical

> inadequacies identified. Furthermore, NMED was unable to reclassify this modification request to follow the procedures for Class 3 modifications specified in 20.4.1.900 NMAC (incorporating 40 CFR § 270.42(b)(6)(i)(C)) because the request was not approvable as submitted." (RP 01325).

The matter rested until July 5, 2012, when Permittees submitted a new Class 2 PMR for the addition of a shielded container. (RP 01541). The July 2012 PMR sought changes nearly identical to those in the September 2011 PMR to the same Permit Sections: 3.3.1.8, 4.3.1, A1-1b(2), A1-1d(3), A1-1d(4), A2-2a(1), A2-2b, A4-3, C1-1a, C1-1a(1), D1-d, D-1e(1), E-1b(1), G3-4a, Attachment H1, and Tables 4.1.1, A1-2, and C1-8. (RP 01541, 01570-01588). It also included minor additional changes to Permit Sections D-4d(1) and D-4d(6) (RP 01584).

Again, Appellant SRIC submitted detailed comments. (RP 01645-57). Comments were submitted by more than 200 other members of the public, largely critical of the proposal. (RP 01668-01920).

NMED on November 1, 2012 issued its Final Determination, approving the shielded container PMR under Class 2 procedures. (RP 01921). NMED's determination was accompanied by Responses to Comments. (RP 04465).

Argument

This case involves two overall questions: First, was the PMR in compliance with the applicable regulations, so that NMED could lawfully grant the PMR without acting arbitrarily and capriciously or contrary to law?

Second, was decisionmaking under abbreviated Class 2 procedures contrary to law, because the PMR was required to be considered under the fuller procedures for Class 3 permit modifications, which include a public hearing?

a. Standards of review

This Court demonstrated in *Southwest Research & Information Center v. State,* 2003 NMCA 12, 133 N.M. 179, 62 P.3d 270 (filed 2002), that judicial oversight extends to WIPP permit modifications, which are reviewed under principles generally applicable to agency action.

The New Mexico Supreme Court has emphasized that review of agency action requires strict enforcement of prohibitions on decisions that are arbitrary, capricious or not in accordance with law, principles codified under the Hazardous Waste Act at § 74-4-14(C) NMSA 1978.

Such review includes several rules: First, NMED must rule on the material issues and state the reasoning behind its decision. *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).

The Court may not supply a reasoned basis for NMED's action that NMED itself has not given. *Atlixco v. Maggiore,* 1998-NMCA-134, P20, *quoting from Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 43 (1983). *See also: Gila Resources Information Project,* 2005-NMCA-139, P33-38.

The requirement of a reasoned basis means that NMED may not change its position on a regulatory question without giving a reasoned explanation for the change. *State Farm,* 463 U.S. at 57; *Citizens Awareness Network v. U.S. Nuclear Regulatory Commission,* 59 F.3d 284, 291 (1st Cir. 1995); *Menkes v. Department of Homeland Security,* 662 F.Supp.2d 62, 68 (D.D.C. 2009), *aff'd,* 637 F.3d 319 (D.C. Cir. 2011). *See also: Smiley v. Citibank (S.D.), N.A.,* 517 U.S. 735, 742 (1996).

The arbitrary and capricious standard can be expressed in several ways. A ruling is arbitrary and capricious if it is unreasonable or without a rational basis when viewed in light of the whole record; if it is the result of an unconsidered, willful, and irrational choice of conduct; if there is no rational connection between the facts found and the choices made; or if necessary aspects of consideration of relevant factors are omitted. *Bass Enterprises Production Co. v. Mosaic Potash Carlsbad Inc.,* 2010-NMCA-35, P45, 148 N.M. 516, 238 P.3d 885. *See also: City of Rio Rancho v. Amrep Southwest Inc.,* 2011-NMSC-37, P48, 150 N.M. 428, 260

P.3d 414; *Attorney General v. Public Regulation Commission,* 2011-NMSC-034, P18, 150 N.M. 174, 258 P.3d 453; In re *Rhino Environmental Services,* 2005-NMSC-24, P13,138 N.M. 133, 117 P.3d 939; *Oil Transport Co. v. State Corporation Commission,* 110 N.M. 568, 573, 798 P.2d 169, 174 (1990); *Gila Resources Information Project,* 2005-NMCA-139, P16; *Atlixco v. Maggiore,* 1998-NMCA-134, P24; *Garcia v. N.M. Human Services Department,* 94 N.M. 178, 179, 608 P.2d 154 (Ct. App. 1979). Further, if an agency treats one case differently from another with similar facts, and offers no reasoned explanation, its action is arbitrary and capricious. *Sais v. N.M. Department of Corrections,* 2012 NMSC 9, P17, __ N.M. __, 175 P.3d 104; *Kibbe v. Elida School District,* 2000-NMSC-6, P17, 128 N.M. 629, 996 P.2d 419.

The meaning of a statute is an issue of law that is judicially reviewed de novo. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Commission,* 2003-NMSC-5, P13, 133 N.M. 97, 61 P.3d 806; *Oil Transport Co.,* 110 N.M. at 571-72, 798 P.2d at 172; *Southwest Research,* 2003-NMCA-12, P24. It is arbitrary and capricious to apply an erroneous interpretation of the applicable law. *Phelps Dodge Tyrone v. N.M. Water Quality Control Commission,* 2006-NMCA-115, P33, 140 N.M. 464, 472, 143 P.3d 502, 510.

The Secretary's determination as to significant public interest is reviewable for abuse of discretion. *Southwest Research,* 2003-NMCA-12, P39. An agency

decision is an abuse of discretion if it is not supported by factfindings or is contrary to logic and reason. *Oil Transport Co.,* 110 N.M. at 572-73, 798 P.2d at 173.

b. The applicable law.

Applicable law is contained in the Hazardous Waste Act and its regulations: A "major modification" cannot be approved without an opportunity for a public hearing. § 74-4-4.2(H) NMSA 1978. Also, a public hearing shall be held on a "minor modification" if there is significant public interest. § 74-4-4.2(I) NMSA 1978.

A Hazardous Waste Management Regulation, 20.4.1.900 NMAC, adopts a federal regulation, 40 C.F.R. Section 270.42, under which a PMR may fall into Class 1, 2, or 3, which are ascending levels of importance and complexity. Only a Class 3 modification is subject to a public hearing.

By rule, a Class 2 PMR must describe the exact changes to be made to the permit conditions and supporting documents and explain why the modification is needed. (§ 270.42(b)(i)-(iii)). Within 90 days after receipt of a Class 2 PMR the Secretary must (A) approve or (B) deny the request or (C) determine that the request must follow procedures for a Class 3 modification because (i) there is significant public concern about the proposed modification; or (ii) the complex

nature of the change requires the more extensive procedures of Class 3.[6] (§ 270.42(b)(6)(i)(A)-(C)).

The Secretary may deny, or change the terms of, a Class 2 PMR if (i) the PMR is incomplete; (ii) the PMR does not comply with 40 C.F.R. Part 264; or (iii) conditions of the PMR fail to protect human health and the environment. (§ 270.42(b)(7)).

Appendix I to § 270.42 lists certain permit modifications and the class to which they belong. Class 3 modifications include (i) modification or addition of container units resulting in a greater than 25% increase in the facility's container storage capacity (with exceptions not relevant) (F.1.a.), and (ii) storage of different wastes in containers that require additional or different management practices from those authorized in the permit (with exceptions not relevant) (F.3.a.).

For modifications not listed in Appendix I, the regulation gives guidance, stating that Class 2 procedures are intended for modifications involving "(A) common variations in the types and quantities of the wastes managed under the facility permit, (B) technological advancements, and (C) changes necessary to comply with new regulations, where these changes can be implemented without

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[6] The Secretary may also (D) approve the PMR as a temporary authorization, or (E) notify the permittee that he will decide on the request within 30 days. After 30 days the Secretary must make a decision as listed in (A) - (D). (40 CFR § 270.42(b)(6)(i)(D), (E), 270.42(b)(6)(ii)).

substantially changing design specifications or management practices in the permit." (§ 270.42(d)(ii)).

Point I

The PMR fails to disclose Permittees' need for the proposed modification.

The PMR fails to disclose the need for the requested modification, a deficiency that should have led to its denial.[7] Under 40 C.F.R. § 270.42(b)(iii) a modification request must "explain[] why the modification is needed." Review of NMED's determination is based upon the arbitrary and capricious standard.

Although the PMR claims efficiencies for shielded containers, Permittees have never substantiated such claims. (*See* Responses 14, 15, 23, 43, RP 04471, 04472, 04475-76, 04483). NMED has accepted Permittees' general statements about the supposed need for flexibility at generator sites. (*e.g.*, Response 15, RP 04472).

In fact, Permittees need this modification to enable them to make up for the RH disposal capacity lost due to their strategy to proceed with CH waste disposal. Disclosure of the need for additional RH waste disposal capacity is awkward for Permittees, because to use that capacity Permittees must violate certain Permit terms. Specifically, the Permit contains limits, under which Permittees may dispose of TRU mixed waste in underground disposal panels "not to exceed the

[7] Citizen Appellant SRIC advanced this claim before NMED. (RP 01648, 01651).

maximum capacities specified in Table 4.1.1." (Permit Section 4.1.1.2.). Table 4.1.1 contains RH waste disposal capacity limits for each panel. (RP 01924). To make up for lost RH disposal capacity, Permittees will need to violate those limits.

When NMED modified the Permit to authorize emplacement of RH waste in 2006, it directed that RH waste canisters be emplaced in the walls of WIPP rooms, as had been planned. (Order, Oct. 16, 2006[8]). RH waste canisters must be emplaced in the walls before CH waste is disposed of on the floor of a room. At that time, NMED also set limits upon the volume of RH waste that could be disposed of in each underground panel; the limits were based upon the quantity of RH waste that could be emplaced in the walls of the rooms. (RP 01924).

By the time NMED authorized RH disposal, Permittees had already emplaced CH waste in panels 1 through 3, foregoing the RH disposal capacity in those panels. Even when allowed to emplace RH canisters, Permittees did not use all available RH capacity: In panels 4 and 5 Permittees emplaced only 462 RH canisters, containing 411.18 m^3 of waste.[9] (Table 4.1.1, RP 01924). Panels 6, 7, and 8 have a total capacity limit of 2060 canisters, or 1834 m^3 (*id.*). Presumably, panels 9 and 10 will be the same size as panels 1 through 8 with a capacity limit of 1460 canisters, or 1300 m^3. Thus, Permittees can dispose of only 3,545.18 m^3 of

[8] http://www.nmenv.state.nm.us/wipp/finalorder101606.pdf (April 6, 2013).

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

RH waste in canisters—well short of the repository limit of 7080 m^3. (Permit Att. B at B-13). Had Permittees disposed of RH waste in canisters before CH disposal in each room, they could have disposed of about 6497 m^3 (730 x 10 x 0.89 m^3) of RH waste. Significantly, DOE's estimated inventory of RH waste is 5336 m^3. (RP 01658-60).

The PMR seeks leave to use a second RH disposal method: emplacing shielded containers of RH waste on the floor of disposal rooms among the containers of CH waste. Since underground space is a fixed quantity, the new method would cost some CH disposal space, delay some CH disposal, and also create issues of public health and safety. Such disposal could also violate the panel limits on RH waste disposal.

The PMR says nothing about Permittees' inventory of RH waste and the need to dispose of it. Thus, Permittees avoid discussing the additional RH disposal capacity they need; alternative methods for disposal of that quantity of RH waste; risks of shielded containers compared with other disposal methods; costs of shielded container disposal in CH waste disposal space lost, emplacement delays, and other costs; or the schedule for use of RH capacity and the impact on the CH disposal schedule. They also avoid discussing the need to consider the panel disposal limits in disposing of additional RH waste.

For its part, NMED does not acknowledge that Permittees face a shortage of RH disposal capacity. (See Response 8, RP 04468; Response 11, RP 04470; Response 49, RP 04485.). NMED simply states that the PMR "adequately" addresses the need for the modification. (Response 20, RP 04475; Response 21, RP 04475.).

NMED states that, using shielded containers, the panel limits on emplacement of RH waste will be respected. (*e.g.*, Responses 1, 8, 9, 10, 12, 32, 40, 48, 49 at RP 04465-85). However, NMED explains that this is so because RH waste in shielded containers can be regarded as *CH waste*:

> "The requirements for ensuring the table limits are unchanged because, as already discussed, the waste in shielded containers will meet the CH waste criteria and may be managed in accordance with CH waste criteria." (Response 8, RP 04469).

Permittees use similar language[10]. Indeed, NMED expressly says that Permittees may dispose of RH waste in canisters (up to the panel limits) and then emplace *additional* RH waste in shielded containers:

> "There would not be a reduction in time and personnel by implementation of this modification assuming that all the allocated boreholes for RH waste would be utilized and additional RH waste would be emplaced using the shielded containers, thus increasing the amount of RH waste

[10] Permittees state that "changes in the maximum storage capacity or amount of storage area indicated in Permit Part 3, Section 3.1.1 and Section 3.1.2 or disposal volumes in Permit Part 4, Section 4.1.1, are not necessary since shielded containers will be managed, stored, and disposed within the existing operating envelope established for CH TRU mixed waste in the Permit." (RP 01547).

> potentially managed in each room and the time necessary at the generator site needed to manage RH waste." (Response 14, RP 04471)

NMED refused to respond to an explicit comment that Permittees intend to bring

> "as many RH canisters as possible and additional RH waste in shielded containers. . . . [T]he reality is that shielded containers would increase the amount of RH waste being stored at and disposed of at WIPP." (Comment 15, RP 04472).

Evidently, NMED intends to allow Permittees to emplace RH waste in shielded containers exceeding the panel limits on disposal of RH waste. But the need to do so is not stated in the PMR.

It is NMED's responsibility to determine whether Permittees have correctly stated the need for the modification pursuant to 40 C.F.R. § 270.42(b)(iii); thus, NMED itself must determine the need that the modification serves. Both NMED and the public are entitled to a clear, quantified statement of why this modification is needed, so that all parties can address how well shielded containers serve that need and can point out the implications of the modification upon other terms of the Permit. NMED has failed to require this. Its action cannot be sustained.

Title 40 C.F.R. § 270.42(b)(iii) requires a clear statement of the need for a modification. Failure to provide such a statement is a legal deficiency. "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); *Saenz v. New Mexico Department of Human Services,* 98 N.M. 805, 808, 653 P.2d 181, 184 (Ct. App. 1982); *Hillman v. Health & Social Services Department,* 92 N.M. 480, 481, 590 P.2d 179, 180 (Ct. App. 1979); *Pellman v. Heim,* 87 N.M. 410, 411, 534 P.2d 1122, 1123 (Ct. App. 1975). It is arbitrary and capricious to disregard applicable law. *Phelps Dodge Tyrone,* 2006-NMCA-115, P33.

Point II

Permittees have failed to show how the surface dose rate limits would be enforced.

The PMR is also deficient for failure to show how the critical surface dose rate limit for shielded containers would be maintained during the management and disposal of the RH waste that they contain.[11] NMED's approval of the PMR in this respect is subject to review under the arbitrary and capricious standard.

The fundamental assumption of the PMR is that RH waste in shielded containers can be managed as CH waste, since its surface dose rate will not exceed 200 mrem/hr., the criterion for management as CH waste. (PMR at 1-2, RP 01545-46; WIPP Act, § 2(3)). The distinction between CH waste and RH waste is fundamental at WIPP, because the two waste types present vastly different risks,

[11] Citizen Appellant SRIC advanced this claim before NMED. (RP 01646).

and portions of the facility are clearly demarked for management of either CH or RH waste *only*. Under the modified Permit, shielded containers with RH waste may be stored anywhere in the CH Bay of the Waste Handling Building. (Responses 5, 6, RP 00467-68). But if a shielded container has a surface dose rate in excess of 200 mrem/hr., it is RH waste (WIPP Act § 2(12), Permit Section 1.5.2), and may be stored only in the RH Complex, and not in the CH Bay. (Permit Section 3.1.1.9.; A1-1c(1), at A1-9.). Violation of the Permit constitutes a Hazardous Waste Act violation. (*See* 74-4-10(A) NMSA 1978).

The PMR says that the surface dose rate would only be measured once, at the site where the waste is generated, before shipment to WIPP. (PMR at 2; RP 01546). The surface dose rate for shielded containers will, on average, be much closer to the 200 mrem/hr. limit than for usual CH TRU waste drums, so that the prospect of shifting contents causing exceedence of the 200 mrem/hr. limit is a serious likelihood. (See RP 04467).

NMED and DOE both acknowledge that the waste contents may shift in shipment or on-site management, increasing the surface dose rate. NMED points out that Permittees have certain "packaging requirements to minimize shifting for containers already approved by the permit" (RP 04466). DOE states that the problem will be addressed by specific loading instructions in the Handling and Operation Manual:

> "Changes in radiation levels at the surface of the container are dependent on two factors during transportation. One is damage to the packaging . . . The other factor is the location of a point gamma radiation source within the SCA. It is the responsibility of the shipper to ensure that there is adequate bracing within the 30-gallon internal payload container such that the point radiation source doesn't move during transportation to cause a significant increase (20%) in the external radiation levels. . . . [T]he Handling and Operation Manual will be revised to further instruct the shipper to securely fasten and position contents within the 30-gallon internal payload container in a manner to prevent a significant increase in the level of radiation at the external surface of the SCA as a result of movement during transport." (RP 00018).

But, even though NMED and DOE both recognize the problem of waste shifting within the containers, none of DOE's existing packaging requirements to prevent shifting are contained in the PMR, nor in the modified Permit, nor do they even apply to shielded containers. Thus, the PMR must be deemed incomplete, and it fails to protect health, safety and the environment, for failure to address how the critical 200 mrem/hr. limit would be maintained at WIPP.

Permit provisions that include no means of ensuring that the RH-CH distinction is preserved cannot be deemed protective and should be held inadequate under 40 CFR § 270.42(b)(7)(iii). *Compare: Waste Technologies Industries,* 25 E.L.R. 40333 (EPA RCRA permit appeal, Jan. 27, 1995)(Upholding regulators' imposition of permit conditions during a modification, where operating without them would fail to protect human health and the environment.).

On this issue, NMED simply states that, based on characterization at a generator site (Response 4, RP 04466-67), a waste container is managed as CH

waste (Response 5, RP 04467). NMED then refers to Response 16, which recites that Permittees are responsible for violations of the Permit:

> "Without evidence to the contrary, the Department accepts the permit (with revisions), with the understanding that the Permittees are responsible for ensuring compliance with the permit and accepting responsibility for violations of the permit." (Response 16, RP 04473).

To be sure, Permittees are responsible for violations, but NMED may not shut its eyes to the risk. Rather, NMED must deny approval to a modification that "fail[s] to protect human health and the environment." (40 C.F.R. §270.42(b)(7)(iii)). Further, 40 C.F.R. § 270.14(b)(8) requires that a permit application include procedures, structures, or equipment to prevent hazards and to prevent undue exposure of personnel to hazardous waste. In addition, 40 C.F.R. 264.601(c) requires that WIPP, as a miscellaneous unit, be operated and maintained to protect human health and the environment, including consideration of the potential for health risks caused by human exposure to waste constituents.

Here, there is an admitted risk, and DOE is even planning remedial measures. To allow a facility to operate despite the presence of a known safety risk is to disregard a plainly relevant factor—the safety risk—and is therefore arbitrary and capricious. (See the cases cited at pp. 9-10, *supra.*).

Moreover, NMED does not explain why it has decided to require no safeguards. NMED's Secretary is required to "respond in writing to all significant

comments in his or her decision." 40 C.F.R. § 270.42(b)(6)(vi). But NMED fails to explain its reasoning in declining to protect against an admitted risk.

This Court held in *Atlixco v. Maggiore,* 1998 NMCA 134, P17, that agency action unsupported by discussion of the material issues cannot be sustained on review: "Indeed one of the purposes of requiring a statement of reasons is to allow for meaningful judicial review." The reviewing court cannot supply factfindings or reasoning, for "the reviewing court 'may not supply a reasoned basis for the agency's action that the agency itself has not given.'" (*id.*, P20, *quoting State Farm,* 463 U.S. at 43). *See also: Gila Resources Information Project*, 2005-NMCA-139, P33-38. This Court explained further in *Atlixco v. Maggiore*:

> "For the court to supply reasons for the Secretary in this manner is not consistent with the doctrine of separation of powers because it "foists upon the court what is essentially the function of the Executive Branch of government." *McGonigel's, Inc. v. Pennsylvania Liquor Control Bd.,* 663 A.2d 890, 893 (Pa. Commw. Ct. 1995)." (1998-NMCA-134, P20).

Thus, "the task of supplying reasons for its actions is a function of the Executive Branch . . . [T]he Secretary's final order 'cannot be sustained on a ground appearing in the record to which the [Secretary] made no reference; to the contrary, the [Secretary's] decision stands or falls on its express findings and reasoning.'" (*id.*, P21). *See also: Securities & Exchange Commission v. Chenery Corp.,* 318 U.S. 80, 95 (1943)("an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its

action can be sustained."); *Securities & Exchange Commission v. Chenery Corp.,* 332 U.S. 194, 196 (1947)(Court "must judge the propriety of [administrative] action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.").

Further, NMED must grapple with the hard issues:

> "Finally, we interpret the standard of review under Section 74-9-30 as embodying the principle of federal administrative law that an agency's action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand. To meet this standard, the Secretary may not disregard those facts or issues that prove difficult or inconvenient or refuse to come to grips with the result to which those facts or issues lead, nor may the Secretary select and discuss only that evidence which favors his ultimate conclusion or fail to consider an entire line of evidence to the contrary. Allowing the Secretary to ignore material issues raised by the parties in this manner would render their right to be heard illusory." (*Atlixco v. Maggiore,* 1998-NMCA-134, P24; *citations omitted*).

See also: Citizen Action, 2008-NMCA-31, P19; *Green,* 107 N.M. at 631, 762 P.2d at 918.

Thus, NMED must explain its reasoning:

> "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner; and we reaffirm this principle again today." *State Farm,* 463 U.S. 29 at 48-49 (*citations omitted*).

See also: Natural Resources Defense Council, Inc. v. U.S. EPA, 790 F.2d 289, 298 (3d Cir. 1986); *Lake Pilots Association v. U.S. Coast Guard,* 257 F. Supp. 2d 148, 168 (D.D.C. 2003).

Hazardous waste permits have been vacated and remanded where the agency failed to explain a safety-related decision. *See: Ash Grove Cement Co.,* 28 E.L.R. 40732 (EPA RCRA permit appeal, Nov. 14, 1997):

> "Application of omnibus authority involves the exercise of discretion on the part of the Agency, and acts of discretion must be adequately explained and justified. *Motor Vehicles Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 48 (1983)("we have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner").

Here, there is an acknowledged risk that the contents of a shielded container will shift, causing the surface dose rate to exceed 200 mrem/hr.—meaning that the container is RH waste, presents a different level of risk from that originally measured, and violates the terms of the Permit. Apparently, protective measures are under development. But the modified Permit contains no means to prevent or even detect such a violative event. NMED has not explained why it decided to allow shielded containers to go into use without safeguards. NMED's action cannot be sustained.

Point III

The modified Permit allows unsafe container management.

The PMR is incomplete, and fails to protect health, safety and the environment, for failure to include safe container-stacking procedures for 3-packs of shielded containers.[12] NMED's decision in this respect is subject to review under the arbitrary and capricious standard.

Shielded containers would be assembled into "3-packs." (PMR, RP 01549). Permittees stated in their September 2011 PMR that "No waste assemblies will be placed on top of a 3-pack assembly of shielded containers because the narrower cross-section of the 3-pack assembly of shielded containers may make the stack unstable." (RP 00124). In the July 2012 PMR, Permittees stated that, to meet stacking stability requirements of Permit Attachment A2, shielded containers will not be stacked more than *two* high. (RP 01549). However, neither the PMR nor the modified Permit contains any restrictions upon the stacking of, or upon, 3-packs of shielded containers. NMED acknowledges that the modified Permit allows 3-packs to be stacked *three-high* without restriction. (Response 34, RP 04480). Concerning the stability problem, NMED says only as follows:

> "The permit language from section A2-1 allows CH TRU mixed waste containers to be stacked up to three high by stating that waste may be stacked up to three high. It does not require that they be stacked up to three high. It is important to understand that the language as written, allows the Permittees to

[12] Citizen Appellant SRIC advanced this claim before NMED. (RP 01654-55).

develop procedures to determine a stacking height as appropriate depending upon certain containers or combinations of containers." (RP 04480)

NMED's statement fails to answer the point that stacking of three-pack containers is unsafe, yet the Permit allows it. To suggest that Permittees may "develop procedures to determine a stacking height as appropriate" (RP 04480) achieves nothing, where NMED requires no such procedures, no such procedures are contained in the PMR, and they are not in the modified Permit. Thus, the modified Permit clearly allows unsafe practices—*i.e.,* it fails to protect health, safety and the environment. (§ 270.42(b)(7)(iii)).

NMED's action is arbitrary and capricious, because stacking of three-packs of shielded containers is admittedly risky and unstable, and NMED notes that Permittees may develop procedures to avert these dangers, but NMED decides to authorize the unsafe practice without any protective procedures. Relevant factors—a safety risk—have been ignored. (See cases cited at pp. 9-10, *supra.*).

Moreover, as explained in Point II, *supra*, an agency must find the material facts and explain the reasoning behind its decisions. NMED's action, taken without finding relevant underlying facts or explaining NMED's position, cannot be sustained.

Point IV

The modified Permit calls for invalid overpacking procedures.

The PMR is also incomplete, and fails to protect health, safety and the environment, for failure to contain valid overpacking procedures for damaged or contaminated shielded containers.[13] NMED's action in this respect is subject to the arbitrary and capricious standard.

Since a shielded container contains RH waste, leakage of waste or contamination can raise the surface dose rate above the 200 mrem/hr. limit, precluding its management as CH waste. NMED admits the probability that a damaged shielded container could exceed the surface dose limit for CH waste:

> "The commentor is correct that there is a probability that damaged shielded container could have a surface dose rate of 200 millirem per hour or greater." (Response 17, RP 04473).

In that case, the shielded container is RH waste. (WIPP Act § 2(12)). It is a Permit violation to manage or store RH waste (except in an intact shielded container meeting CH waste radiation limits) in the CH Bay. (Permit Section A1-1d(3), RP 01928).

The PMR and the modified Permit call for damaged shielded containers to be overpacked, *i.e.,* by placing the defective container into an intact larger container. But they specify overpacking containers that are *only* authorized to

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[13] Citizen Appellant SRIC advanced this claim before NMED. (RP 01649-50).

contain *CH waste*. Thus, Section 3.3.1.8 of the modified Permit states that "[s]hielded containers may be overpacked into standard waste box or ten drum overpack." (RP 01923). A standard waste box or a ten drum overpack is only authorized to receive CH waste. (Permit Section A1-1b(1)). On its face, a Permit provision requiring a damaged shielded container (constituting *RH waste*) to be overpacked in a container authorized only to contain *CH waste* fails to protect health, safety and the environment and is arbitrary and capricious.

Permittees argue that a release could be managed under Permit Section D-4d(6) (PMR at 5, RP 01549), but that section only involves RH waste management in containers and locations authorized for RH waste before the Permit modification—not problems with shielded containers in areas from which RH waste was previously prohibited. NMED states that existing Permit requirements for damaged containers would apply to shielded containers (Response 16, RP 04473; Response 17, RP 04474), but the pages cited (Permit at A1-5 through A1-15) contain no procedures for dealing with a damaged shielded container holding RH waste.

However, NMED states that the "Permittees have a more detailed and specific technical procedure for container overpacking . . . which includes situations for overpacking a shielded container." (Response 2, RP 04465)(See also Response 16, RP 04473). Nevertheless, NMED has not required Permittees to

disclose such procedures, they are not contained in the PMR nor in the modified Permit. NMED's reference to a supposed additional "procedure," which is not in the record, ignores the fundamental point that the modified Permit contains no lawful procedure to manage defective shielded containers and, instead, authorizes an unlawful procedure. NMED again offers the truism that Permittees are responsible for any violations. (Response 17, RP 04473):

> "The Permittees indicate that current management practices will be used and if these practices proved unsuccessful then the Permittees are responsible for subsequent consequences if the permit is violated." (Response 17, RP 04474).

This statement does not explain NMED's decision to authorize an unlawful practice and wash its hands of the problem.

Approval of such terms is arbitrary and capricious, because it fails to consider relevant factors, *viz:* that the specified overpacks are not authorized to contain RH waste. (See cases cited at pp. 9-10, *supra.*).

Moreover, as explained in Point II, *supra*, an agency must find the material facts and explain the reasoning behind its decisions. Here, NMED has authorized a procedure for managing a damaged shielded container that allows RH waste to be placed in a container authorized only to receive CH waste. No explanation is offered. NMED's action cannot be sustained.

Point V

The PMR fails to examine a breach of a shielded container and its consequences.

The PMR is also incomplete, and fails to protect health, safety and the environment, in omitting to examine a possible breach of a shielded container and the consequences of such a breach.[14] Such examination would indicate the need for safety measures, *e.g.,* to limit the quantity of RH waste in shielded containers in areas where RH waste was previously barred. NMED's action in this respect is reviewed under the arbitrary and capricious standard.

Permitting regulations require:

> "(8) A description of procedures, structures, or equipment used at the facility to:
>
> Prevent hazards in unloading operations (for example, ramps, special forklifts);
>
> Prevent runoff from hazardous waste handling areas to other areas of the facility or environment, or to prevent flooding (for example, berms, dikes, trenches);
>
> Prevent contamination of water supplies;
>
> Mitigate effects of equipment failure and power outages;
>
> Prevent undue exposure of personnel to hazardous waste (for example, protective clothing); and
>
> Prevent releases to atmosphere." (40 C.F.R. § 270.14(b)(8))

[14] Citizen Appellant SRIC advanced this claim before NMED. (RP 01651-52).

Further, 40 C.F.R. Part 264, Subpart X, a regulation specifically applicable to WIPP, a "miscellaneous unit," includes the following requirement:

> "A miscellaneous unit must be located, designed, constructed, operated, maintained, and closed in a manner that will ensure protection of human health and the environment. Permits for miscellaneous units are to contain such terms and provisions as necessary to protect human health and the environment, including, but not limited to, as appropriate, design and operating requirements, detection and monitoring requirements, and requirements for responses to releases of hazardous waste or hazardous constituents from the unit. . . . Protection of human health and the environment includes, but is not limited to:
>
> (c) Prevention of any release that may have adverse effects on human health or the environment due to migration of waste constituents in the air, considering:
>
> (1) The volume and physical and chemical characteristics of the waste in the unit, including its potential for the emission and dispersal of gases, aerosols and particulates;
>
> (2) The effectiveness and reliability of systems and structures to reduce or prevent emissions of hazardous constituents to the air;
>
> (3) The operating characteristics of the unit;
>
> * * *
>
> (6) The potential for health risks caused by human exposure to waste constituents . . . " (40 C.F.R. § 264.601)

Under Subpart X an applicant is required to make a thorough analysis of potential releases affecting human health and the environment:

> "Units covered under today's rule will comply with standards that provide performance objectives for the protection of human health and the environment. The performance objectives require permit applicants to evaluate the potential environmental impacts of the unit or facility and to demonstrate that any releases from the unit will not adversely affect human

health or the environment." (EPA, Hazardous Waste Miscellaneous Units, 52 Fed. Reg. 46946, 46951 (Dec. 10, 1987)).

Thus, "an assessment must be conducted for each medium"—surface water, ground water, and air. (52 Fed. Reg. at 46955).

Performance of the WIPP facility with the proposed shielded containers in use—new containers with 1726 pounds of shielding and 3-packs with new packaging elements (PMR at 1, RP 01545)—and the possible need for additional safeguards have not previously been examined. Before this Permit modification, the CH Bay of WIPP's Waste Handling Building was barred to RH waste, and the Parking Area Unit had specific limits for RH waste. The PMR proposes no limits (other than the quantity limits for all CH waste) on the quantity of RH waste in shielded containers at these locations. In light of the much greater risk from uncontrolled RH wastes, compared with CH waste, the PMR should analyze the risks of the new system for RH waste management and discuss appropriate procedures to prevent hazards, such as limits on the amount of RH waste in shielded containers in areas previously authorized only for CH waste.

Public comments urged a study of each waste handling step and expected radiation doses, to determine appropriate protective measures. (Comment 24, RP 04476). NMED rejected the comment, stating only that "[s]hielded containers will have the same surface dose rate restrictions that CH waste containers have." (Response 24, RP 04476). But, when told that shielded "containers will likely

have external dose rates that are more than an order-of-magnitude greater than the CH waste that is normally handled" (Comment 5, RP 04467), NMED did not disagree. And, regardless of the surface dose rate, contents of a shielded container can be far more radioactive than CH waste and can have significant quantities of hazardous chemicals, creating significantly larger risks in an accident. Such containers are proposed to be brought to locations previously authorized only for CH waste. Yet there has been no evaluation of the possible consequences of such action, as Subpart X requires, and NMED has required no protective measures.

NMED's action is arbitrary and capricious, because it disregards the terms of the governing regulation. *See, e.g., Phelps Dodge Tyrone,* 2006-NMCA-115, P33. See the cases cited at pp. 17-18, *supra.*

Moreover, in response to the September 2011 PMR, NMED determined that it would need to evaluate compliance with 40 C.F.R. § 264.601(c)(6), a process which made the PMR a complex matter requiring Class 3 procedures. (RP 00872). Now NMED has reversed itself, requires no such evaluation, and fails to explain why it now has decided that there is no need for such evaluation.

Agency action is arbitrary and capricious if a case is treated differently from another case with similar facts, and no rational explanation is offered for the difference in treatment. *Sais,* 2012-NMSC-9, P17; *Kibbe,* 2000-NMSC-6, P17. The reviewing court may not supply a reasoned basis for the agency's action that

the agency itself has not given. *Atlixco v. Maggiore*, 1998-NMCA-134, P20; *State Farm,* 463 U.S. at 43; *Chenery II*, 332 U.S. at 196. Thus, an administrative agency may not change its position on a regulatory question without offering its own reasoned explanation for the change. *State Farm,* 463 U.S. at 57; *Citizens Awareness Network,* 59 F.3d at 291; *Menkes,* 662 F.Supp.2d at 68. *See also: Smiley,* 517 U.S. at 742. The Supreme Court stated in *State Farm*:

> "'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,* 444 F.2d 841, 852 (1970)(*footnote omitted*), *cert. denied,* 403 U.S. 923 (1971). We do not accept all of the reasoning of the Court of Appeals but we do conclude that the agency has failed to supply the requisite 'reasoned analysis' in this case." (463 U.S. at 57).

NMED has, without explanation, reversed itself as to the need for evaluation of the impacts of the proposed modification under Subpart X. NMED's action cannot be sustained.

Point VI

The PMR calls for a more than 25% increase in container storage capacity and requires Class 3 procedures.

The PMR was required to be considered under Class 3 procedures, with a public hearing. NMED's action in this respect is subject to review under the arbitrary and capricious standard.

The PMR comes within 40 C.F.R. § 270.42, Appx. I, F.1.a, which states that a PMR calling for modification or addition of container units resulting in greater

than 25% increase in the facility's container storage capacity requires Class 3 procedures.[15]

Although Permittees state broadly that

> "[b]ecause the quantity of RH TRU mixed waste that can be successfully shielded to a surface dose rate of 200 mrem/hr. is small, no increase in the volume of CH or RH TRU mixed waste which is permitted to be stored or emplaced at the WIPP facility is needed to accommodate this volume of waste" (PMR at 3, RP 01547; *see* PMR at 4, RP 01548; Response 12, RP 04470-71),

they assume that "[w]henever transuranic waste is shipped in the shielded container payload container and the resulting surface dose rate is not greater than 200 mrem/hr then it is, by statute and DOE policy, *CH TRU mixed waste.*" (PMR at 2, RP 01546)(*emphasis supplied*). This statement implies that RH waste in shielded containers is, in fact, *CH waste,* subject only to Permit limits on the volume of CH waste.

To the contrary, by the modification space for storage of RH waste has massively increased. Before the PMR, WIPP had container storage capacity for RH waste of 11.0 m^3 and for CH waste of 183.1 m^3. (Permit Table 3.1.1). With authorization to store shielded containers holding RH waste anywhere in the Waste Handing Building where CH waste may be stored, the storage capacity for RH waste has gone from 11.0 m^3 to 194.1 m^3—an increase of 1665%.

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[15] Citizen Appellant SRIC advanced this claim before NMED. (RP 01654).

EPA has explained the rule requiring Class 3 procedures to consider an increase in container storage capacity of 25% or more (40 C.F.R. § 270.42, Appx. I, F.1.a):

> "The 25 percent limit is based on the initial permitted capacity for tank systems or containers. As an example, a facility that has a permit for both tank systems and containers may bring on additional tank systems as Class 2 modifications until the cumulative increase in tank capacity equals 25 percent of the tank capacity specified in the initial permit. Similar changes may be made involving container units, based on the initial container capacity. Once the 25 percent limit is reached, all subsequent modifications involving capacity increases for the specific type of unit must follow the Class 3 process.
>
> Another example that illustrates the limited nature of this Class 2 provision is where a facility's permit specifies extensive container storage, but there is no provision for tank storage. In this case, the container storage operation may be expanded through a Class 2 change (subject to the 25 percent limit), but the addition of tanks is a Class 3 modification since there was no permitted tank capacity." (EPA, Permit Modifications, 53 Fed. Reg. 37912, 37927-28 (Sept. 28, 1988)).

When the Permit was first issued in 1999, it allowed *no* RH waste storage. In 2006, by Class 3 modification, RH storage of 11.0 m^3 was authorized. Now, by this Class 2 modification, NMED would authorize RH container storage capacity to increase from 11.0 m^3 to 194.1m^3 (183.1 m^3 plus 11.0 m^3)—more than 16 times. Clearly, Class 3 procedures were required.

NMED's only explanation is that "the amount of waste in the Waste Handling Building (WHB) will not increase and therefore 40 C.F.R. § 270.42, Appendix I.F.a does not apply." (Response 31, RP 04479. *See also* Response 37, RP 04481). But the WIPP Permit distinguishes sharply between storage of CH

waste and storage of RH waste, and under the modification the amount of container storage *for RH waste* plainly *does* increase by more than 16 times.

Further, Class 3 procedures are required if a change involves treatment of new wastes using a different design or process, as clearly occurs with the advent of shielded containers:

> "Tank system and container changes or additions resulting in a capacity increase of 25 percent or less qualify as Class 2 modifications as long as they do not involve other changes that require a Class 3 modification (i.e., treatment of new wastes using a different tank design or process . . ." 53 Fed. Reg. at 37927)

(See Point VII, *infra.*).

The purpose of the 25% limitation is to allow "modest capacity growth at a facility without the full-scale procedures for major modifications." 53 Fed. Reg. at 37927. Here, the WIPP permit began with *no RH storage capacity*, and now the Permittees have obtained *194.1m^3 of RH storage capacity*. This is much more than a "modest capacity growth" and should have been the subject of public proceedings as a Class 3 modification. NMED's action is arbitrary and capricious, because it disregards the terms of the governing regulation. *See, e.g., Phelps Dodge Tyrone,* 2006-NMCA-115, P33. See the cases cited at pp. 17-18, *supra.*

Point VII

The PMR calls for storage of different wastes in containers that require additional or different management practices and requires Class 3 procedures.

Class 3 procedures are also required under 40 C.F.R. § 270.42, Appx. I, F.3.a, which states that a PMR calling for storage of "different waste in containers . . . that require additional or different management practices from those authorized in the permit" requires Class 3 procedures.[16] NMED's action in this respect is subject to the arbitrary and capricious standard.

The regulatory 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:

> "The use of the term "different wastes" in the Appendix I list refers to changes involving the introduction of hazardous wastes to units that are not permitted to handle these wastes. In other words, the facility may be seeking to accept wastes that were not previously identified in the permit, or it may already be managing the waste but would prefer to shift it to a different treatment, storage, or disposal process." 53 Fed. Reg. at 37927.

Where different management practices are required at the unit, the modification calls for Class 3 procedures, *i.e.*,

> " . . . 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

[16] Citizen Appellant SRIC advanced this claim before NMED. (RP 01654).

conditions does not anticipate that such wastes will be managed in the unit. These circumstances require a Class 3 permit modification." (*id.*).

EPA explained again the purpose of the requirement:

> "To clarify this issue for persons using Appendix I, in today's rule the Agency is using the term "management of different wastes in a unit" to refer to changes involving the introduction of hazardous wastes to units that are not permitted to handle these wastes. . . . [W]here the introduction of different wastes to a unit involves additional or different operating procedures or management practices, there is a greater potential for significant change to the permitted operation; therefore the Class 3 process should be followed since it was designed for those circumstances." (*id.*).

Before the PMR, 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. Permittees concede that 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).

Moreover, different management practices are employed with shielded containers. The shielded container itself is "a new payload container" with layers of lead and steel, weighing nearly a ton. (PMR at 1, RP 01545). Management of RH waste in shielded containers requires shielded-container-specific "packaging requirements to minimize shifting." (Response 4, RP 04466). The 3-pack package contains numerous elements not used in shipping CH waste and is managed differently from CH waste shipments. (*See* PMR at 5, RP01549; PMR Fig. 2, RP

01556; Comment 39, RP 04482). In event of contamination or release from a shielded container, the 3-pack must be disassembled for overpacking. (*See* Response 16, RP 04473). A still-unknown, but shielded-container-specific, overpacking method must contain the intense radiation from RH waste. A still-unknown, but shielded-container-specific, stacking system will be used in emplacing shielded containers in the underground. NMED states that it has "determined that management practices will not change beyond those presented in the modification." (Response 33, RP 04479). However, the changes cited above in packaging, overpacking, and stacking are acknowledged in the PMR and constitute different management practices.

This PMR clearly fits the regulatory definition of a change calling for "[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. 270.42, Appendix I, at F.3.a. NMED's action is arbitrary and capricious, because it disregards the terms of the governing regulation. *See, e.g., Phelps Dodge Tyrone,* 2006-NMCA-115, P33. See the cases cited at pp. 17-18, *supra*.

Moreover, NMED previously determined that the nearly identical September 2011 PMR required Class 3 procedures, stating that it "will necessitate additional procedures and equipment for unloading, transporting, and overpacking remote handled transuranic waste in shielded containers" and "will likely necessitate

changes to the permit to authorize additional or different management practices." (RP 00872). NMED restated that the September 2011 PMR requires Class 3 procedures, because the PMR called for different waste management practices:

> "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 00878, RP00879).

Thus, NMED denied the September 2011 PMR to authorize shielded containers under Class 2 procedures and said that Class 3 procedures are called for.

Now NMED has decided otherwise and holds that Class 2 procedures are called for. NMED says only that (a) NMED "disagrees that use of the shielded containers is complex" (RP 04478), (b) NMED "determined that management practices will not change beyond those presented in the modification" (RP04479), (c) NMED "has determined that the modification does not constitute a significant change to warrant a Class 3 modification determination and public hearing" (RP 04482), and (d) NMED "has determined that the shielded container modification falls within the Class 2 designation in 40 C.F.R. 270.42(b) Appendix 1, Item F.3.b." (RP 04483). These are entirely conclusory statements; there is no reasoned explanation for NMED's departure from its previous determination.

NMED has failed to explain how it has determined that a PMR which, in December 2011 and January 2012, required Class 3 procedures is now so lacking in complexity or public concern that it must be managed through Class 2 procedures. An administrative agency may not change its position on a regulatory issue without offering a reasoned explanation for the change. *State Farm,* 463 U.S. at 57. See Point V, *supra*. NMED's action cannot be sustained.

Point VIII

Class 3 procedures are called for by significant public concern.

NMED is also directed to employ Class 3 procedures when there is a "significant public concern about the proposed modification." 40 C.F.R. § 270.42(b)(6)(i)(C)(*1*). Here, the level of public concern also requires Class 3 procedures.[17] NMED's action in this respect is reviewable for abuse of discretion.

Approximately 200 individuals requested a public hearing on the PMR. (RP 01645-01920). In December 2011 NMED stated, as to a nearly identical PMR, that "more than 80" public comments indicated substantial public concern, requiring Class 3 procedures:

> "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

[17] Citizen Appellant SRIC advanced this claim before NMED. (RP 01655-56).

proposing the addition of shielded containers. More than 80 people have submitted written comments for the record regarding this PMR. Many of these comments specifically addressed the proposed modification for remote handled waste." (RP 00871-72).

On January 31, 2012, NMED repeated this conclusion:

"The Department received written comments on the request from eighty individuals and organizations. A large majority (77) of public comments addressed item 2, the request to add provisions to the permit for shielded containers for remotely-handled radioactive waste. . . .

. . . 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. . . .

Numerous public commenters identified similar issues with the modification request. Furthermore, the Department does not have sufficient information to correct the technical inadequacies in the application and approve the modifications 'with changes' under 20.4.1.900 (incorporating 40 CFR § 27042(b)(6)(i)(A)). Consequently, the Department is denying the permit modification request to add provisions for shielded containers." (RP 00878-79).

Thus, NMED denied the September 2011 Class 2 PMR as to shielded containers based on the significant level of public concern. Here, responding to comments that public concern calls for Class 3 procedures, NMED says only that (a) the Secretary makes the determination whether public concern is significant (Response 26, RP 04477), (b) this modification regards container management, and NMED has determined that it does not merit a public hearing (Response 38, RP 04482), (c) Permittees have held public meetings, and NMED has addressed any

concerns in its Response to Comments (Response 41, RP 04483). These statements simply announce NMED's conclusion to deny a public hearing.

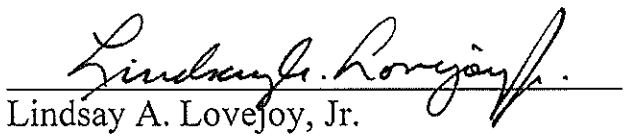
Eighty public comments sufficed to establish public concern about the September 2011 PMR. (RP 00871-72). Appellants submit that, when 200 citizens express the need for a public hearing about the July 2012 PMR, to find a lack of public concern is not supported by factfindings, is contrary to logic and reason (*Oil Transport Co.,* 110 N.M. at 573, 798 P.2d at 174), and constitutes an abuse of discretion. *See: Southwest Research,* 2003 NMCA 12, P39.

Moreover, as stated above in Point V, insofar as the Final Determination decides that there is not substantial public concern, it constitutes a reversal of an expressed agency position without any reasoned explanation. *State Farm,* 463 U.S. at 57. It cannot be sustained on review.

Conclusion

The Final Determination is an arbitrary and capricious decision, constitutes an abuse of discretion, and lacks sufficient agency explanation to be sustained by the Court. In numerous respects, it constitutes an unexplained reversal of NMED's decision concerning a nearly identical PMR. The Final Determination must be vacated and remanded.

Respectfully submitted,



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Considerations requiring oral argument:

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