

IN THE NEW MEXICO COURT OF APPEALS

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE

FILED

AUG 25 2014

Wendy E. Jones

COPY

CITIZEN ACTION NEW MEXICO,

Appellant,

vs.

No. 33,517

NEW MEXICO ENVIRONMENT
DEPARTMENT,

Appellee,

and

SANDIA CORPORATION,

Intervenor-Appellee.

REPLY BRIEF OF APPELLANT
CITIZEN ACTION NEW MEXICO

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Introduction

Appellant Citizen Action New Mexico (CANM) submits this Reply Brief to the Answer Brief submitted by the New Mexico Environment Department ("NMED") in this appeal.

NMED has summarized this case as "a purported appeal...of the January 8, 2014...NMED approval of the Long-Term Monitoring and Maintenance Plan ("LTMMMP")...." This description of this proceeding and appeal misstates the position of CANM and sidesteps the matter before this Court. It is correct that this appeal challenges the January 8, 2014, approval by NMED of the March 2012 LTMMMP (Administrative Record, 00001-00002). However, CANM does not challenge NMED's authority to approve the LTMMMP, and it is not the LTMMMP that is at issue. Rather, it is NMED's procedural use of approval of the LTMMMP to circumvent the important five-year reporting review requirement contained in paragraph five of the Final Order ("Condition 5") which is a stated condition of the Final Order. The March 2012 LTMMMP approved on January 8, 2014, was used by NMED to justify further, lengthy delay in the enforcement of Condition 5 of the Final Order. There is no justification for this action other than disregard and distortion of the explicit wording of the Final Order.

Condition 5 is paragraph five of the Final Order and arguably the most important of the five numbered conditions imposed by NMED

in approving the RCRA¹ permit modification requested by Sandia. Condition 5 bears repeating below because NMED takes the position that the five-year reporting requirement language is ambiguous. NMED asks this Court to give the agency "heightened deference" in the interpretation of the wording. Although the Final Order is poorly drafted, the five-year reporting requirement known as Condition 5 is neither unclear nor ambiguous. Rather, it is precise in its assurance that a number of important issues will be timely addressed by Sandia, that is, every five years. The Final Order granted Sandia's application for a RCRA permit modification subject to certain "changes and conditions," including, in the fifth of such numbered conditions, the following:

5. Sandia shall prepare a report every 5 years, re-evaluating the feasibility of excavation and analyzing the continued effectiveness of the selected remedy. The report shall include a review of the documents, monitoring reports and any other pertinent data, and anything additional required by NMED. In each 5-year report, Sandia shall update the fate and transport model for the site with current data, and re-evaluate any likelihood of contaminants reaching groundwater. Additionally, the report shall detail all efforts to ensure any future releases or movement of contaminants are detected and addressed well before any effect on groundwater or increased risk to public health or the environment. Sandia shall make the report and supporting information readily available to the public, before it is approved by NMED. NMED shall provide a process whereby members of the

¹ The Resource Conservation and Recovery Act, 42 USC § 6901 et seq.

public may comment on the report and its conclusions, and shall respond to those comments in its final approval of the report.

(RP 00766); Final Order P.5, ¶5).

Sandia has not prepared any report pursuant to the Final Order since its issuance in May 2005, and NMED has now extended the five-year report due date until the year 2019. NMED contends that its approval of the LTMMP in January 2014 authorizes this continued delay in the five-year reporting by Sandia. NMED relies on an alleged ambiguity in the Final Order for its position. This argument does not withstand scrutiny.

The Final Order, specifically paragraph five (Condition 5) in the numbered conditions pursuant to which the permit modification was granted, directs Sandia to "prepare a report every 5 years." This explicit wording is immediately followed by a number of specific activities that the five-year reporting is intended to assure will occur. They are, as stated in Condition 5:

- re-evaluating the feasibility of excavation [of the MWL];
- analyzing the continued effectiveness of the selected remedy [the dirt cover "remedy" selected in 2005];
- a review of the documents, monitoring reports and any other pertinent data, and anything additional required by NMED;

- "update [of] the fate and transport model² for the site with current data, and re-evaluate any likelihood of contaminants reaching groundwater."

None of the above activities require or make approval of the LTMMMP as a condition of their performance or fulfillment. Neither a reading of the Final Order in its entirety, nor Condition 5 in isolation, authorizes a waiver of the five-year reporting review requirement as to the above four categories of activities. Stated more succinctly, nothing in the Final Order, including Condition 5 thereof, makes approval of the LTMMMP a condition of starting the running of the due date for the five-year reporting requirement.

Indeed, Condition 5 does not even mention the LTMMMP. Rather, the reference to the LTMMMP is found in paragraph (i.e., condition) three of the Final Order, and only somewhat in passing and without capitalization of letters:

3. NMED and Sandia shall provide a convenient method for the public to review Sandia's Corrective Measures Implementation Plan, Corrective Measures Implementation Report, progress reports, long-term monitoring and maintenance plan, and any other major documents developed by NMED and Sandia for the MWL ("the documents"), including but not limited to, posting the documents on a publicly-accessible website.

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The fate and transport model refers to a report providing data on the status of how much of the different environmental contaminant materials in the landfill, such as tritium and cobalt, have been or will be released to the soil, and how they will be transported through the soil over time. RP 01181 (the Hearing Officer's Report)

The rationale for artificially making the five-year reporting starting date contingent upon approval of the LTMMP, as noted in its Answer Brief at page 14, was not likely constructed by NMED until it received a letter from the Albuquerque-Bernalillo County Water Protection Advisory Board ("WPAB") dated February 24, 2014. The WPAB challenged the NMED position, contending that the five-year reporting clock began running in 2005.

The WPAB letter (together with this appeal) likely prompted a lengthy NMED explanation for its position which essentially is NMED's argument in this appeal. The explanation and rationale is in a fairly recent letter from NMED Environmental Health Division Director Tom Blaine to the WPAB³ dated April 14, 2014, and it is quoted at length in the NMED Answer Brief. Mr. Blaine's letter seeks to validate that which the Final Order does not remotely suggest is appropriate; namely, that approval of a long-term monitoring and maintenance plan, as required by paragraph three of the Final Order, would somehow become a condition precedent to the starting of the clock for the five-year reporting requirement. More likely, NMED found it necessary to construct a rationale, after the fact, for its position that is contained in Mr. Blaine's April 14, 2014, letter. The letter is also well outside the time frame of the administrative record below in this proceeding and

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Appellant Citizen Action New Mexico, at page 19 of its Brief in Chief, noted that the WPAB wrote to the NMED on February 24, 2014, stating its position that the five-year review clock started running in 2005.

thus constitutes extra record material. As this Court noted in the Order filed in this appeal on June 9, 2014, the Court's review authority is limited to evidentiary material that was submitted to NMED during the administrative decision-making process. The letter of Mr. Blaine is outside that decision-making process and cannot be considered as evidentiary material. Now, according to NMED, its approval of a long-term monitoring and maintenance plan, later termed an "LTMMP," an independent requirement among several others in the Final Order according to NMED's own admission, is the triggering event for the starting date for the five-year reporting requirement. This is not what the Final Order says, nor is it what Condition 5 imposes, and it does not require any reconstruction of the written language of the Final Order to reach this conclusion. The NMED Answer Brief itself reinforces Appellant's position: at page 17, the approval of the LTMMP is described as fulfilling "a separate requirement of the Secretary's Final Order." It is not a condition that controls the timing of the five-year review.

The underlying policy rationale for mandating the five-year review of the matters listed with bullet points on page 3 above was underscored both by the hearing officer's report that resulted in the Final Order, and this Court's decision upholding the Final Order in 2008 (*Citizen Action v. Sandia Corporation*, 143 N.M. 620, 179 P.3rd 1228 (Certiorari Denied February 25, 2008)). The hearing officer wrote:

It is particularly important for the public to be able to participate in identifying the triggers for future action, and 5-year evaluations of feasibility of excavation and continued effectiveness of the selected remedy. This will ensure that if the selected remedy is not effective, not properly implemented or maintained, or if new or not-predicted conditions or issues arise, they will be brought to NMED's attention and addressed.

(RP 01208) .

This Court, as Appellant's Brief in Chief states at page 5, in its decision upholding the Final Order, wrote:

The order mandates that every five years, Sandia [shall] provide a report to evaluate the feasibility of excavation and the continued effectiveness of the remedy selected....

Thus, both this Court and the hearing officer whose report served as the foundation for the Final Order cited the five-year evaluation of the feasibility of excavation and the continued effectiveness of the selected remedy as a significant safeguard with respect to the hazard posed by the MWL to the public health and safety. Neither the hearing officer nor this Court understood the position now taken by NMED in this appeal; to wit, that "every five years" means something other than every five years. Further, Appellant has cited⁴ the numerous and quite similar representations made by NMED and Sandia assuring the public as to the significance

⁴ At pages 15 through 17 and on page 19 of its Brief in Chief.

of the five-year review requirement. NMED has now revised its public position.

Black's Legal Dictionary, 6th Edition, defines the word "every" as follows:

Every. Each one of all; all the separate individuals who constitute the whole, regarded one by one. The term is sometimes equivalent to 'all'; and sometimes to 'each.'

NMED's interpretation of the Final Order is outside the agency's authority and does not respect either the lay or legal definition of the word "every," reminiscent of the talents of Squealer in George Orwell's *Animal Farm*, who reportedly could turn black into white with a whisk of his tail.

NMED contends that CANM is late in filing this appeal because the January 8, 2014, decision that is the subject of this appeal was preceded by a letter dated October 14, 2011, to the U.S. Department of Energy (DOE) and Sandia stating the same position taken in the appealed decision. Although NMED concedes that the 2011 letter of NMED was "arguably" not a "final administrative action subject to judicial review pursuant to NMSA 1978 §§ 74-4-14(A)," NMED seeks to similarly categorize its January 8, 2014, approval of the LTMMP and modification of the Final Order as an interlocutory decision in the corrective action process. However, the two administrative activities are quite dissimilar, with the latter LTMMP approval (the subject of this appeal) including explicit wording modifying the Final Order itself.

Several other facts distinguish the October 14, 2011, NMED letter from the January 8, 2014, modification of the Final Order. Although written while a 2007 LTMMMP was pending NMED approval, the October 2011 letter approved the Corrective Measures Implementation Report (the "CMI Report"). As Appellant pointed out at pages 24-25 of its Brief in Chief, *the CMI Report did not include any statement or implication that Condition 5 of the Final Order was being modified.* Further, the 2007 LTMMMP pending at the time did not make any reference to the five-year reporting period being extended. The pending 2007 LTMMMP was also withdrawn by Sandia on December 7, 2012. **(Supplemental RP pp 00375 -00377)** The 2012 LTMMMP approved by NMED on January 8, 2014, in section 1.3 (RP 00122), includes explicit language noting that **"the first five-year period will begin upon NMED approval of this LTMMMP."** [emphasis added] This provided notice to Appellant that NMED had modified the Final Order. No comparable language was contained in the 2007 LTMMMP, and the LTMMMP itself was subsequently withdrawn by Sandia.

Further, obtaining a copy of the October 11, 2011, letter required an Inspection of Public Records Act (IPRA) request by CANM, and a copy was not obtained until May 2012. The October 2011 letter approval of the MWL CMI Report did not constitute adequate notice to a party that might wish to appeal an administrative decision. NMED should be estopped from denying that Appellant had no obligation to appeal a decision made in October 2011 of which it

became aware during the next year only due to its own records inspection request.

In its Answer Brief at pages 1 and 2, NMED understates the toxicity of and the hazards posed by the mixed waste contained in the MWL at Sandia. Dr. Eric Nuttall, professor emeritus of chemical and nuclear engineering at the University of New Mexico for 34 years, has written more than 200 publications and has extensive experience with uranium and nuclear waste sites and remediation technology. **(RP 01180)**. Dr. Nuttall described the MWL as "definitely a highly toxic situation." The wastes in the MWL contain 119 drums of plutonium with a 24,000-year half-life, tons of depleted uranium, a list of over 100 radioactive and carcinogenic organics and chlorinated solvents. The concentration of tritium at the mixed waste land site is 10 times what it was a decade ago and down to greater depths. It has not gone away. Only estimates of the different materials in the MWL were available. **(RP 01014-19; and see RP 01030 for reference to additional specific radionuclides and chemicals in the MWL)**.

Dr. Robert S. Dinwiddie is the former program manager for the NMED Hazardous Waste Bureau, the equivalent of the current Bureau Chief. He has stated that there have been releases from the MWL's unlined pits and trenches that include tritium, cesium and metals. According to Dr. Dinwiddie, "if they go through the solid waste management unit corrective action, they must mediate or remove

those releases." Dr. Dinwiddie has also stated that "NMED has been recalcitrant in ordering [Sandia] to meet the requirements of the regulations to protect the releases." (RP 0096-97).

Registered Geologist Robert Gilkeson stated that:

[T]he wastes disposed of in the dump contaminated the water with cadmium, chromium, nitrates and especially nickel. (00836).

The Sandia MWL 2007 Fate and Transport Model Report (Ho, et al. 2007) on page 14 described the inventory of wastes in the MWL dump to include 61,380 pounds of uranium as uranium-238 (depleted uranium) and 281,000 pounds of lead. Ho, et al. (2007) on page 14 identified uranium as a potential contaminant to water." (RP 00836).

NMED installed new groundwater monitoring wells in 2008 and collected five years of data from those monitoring wells by 2013. NMED was informed by Mr. Gilkeson that the new wells were defective. (RP 01128).

The purpose of the five-year excavation re-evaluation is to consider excavation as a feasible means of protecting the public health and safety and the environment from the unambiguously dangerous contents of the MWL. Condition 5 of the Final Order is clear recognition that the wastes in the MWL are too dangerous not to be excavated at some point if such is feasible. As early as 2001 the Albuquerque Bernalillo County Groundwater Protection Advisory Board ("GPAB" and now called the Water Protection Advisory Board, "WPAB") stated that "[t]here is a need to exercise continued vigilance of the MWL so that problems are identified and addressed

before additional contamination occurs."

(01165 and 01163-64)

NMED further contends that an excavation review based on deficient groundwater monitoring wells would not remedy any danger to public health and safety **(Answer Brief at p. 20)**. The applicable language in the Final Order is to ensure an every five-year review of the feasibility of excavation. There is imminent danger from the toxic wastes in the MWL, and the overwhelming scientific opinion is that the mixed wastes will transport and contaminate the groundwater. There are locations at which the mixed waste at the MWL can be safely placed. **(RP 01016, 01017, 01018-01019)**. The defective groundwater monitoring has increased the likelihood that contaminants reaching the groundwater are not being detected. The defective groundwater monitoring increases the likelihood that the fate and transport model is incorrect and cannot be adequately updated. Excavation could be performed at the present time, and this would protect the groundwater from further releases from the wastes that are in unlined pits and trenches. **(RP 00991)**.

NMED further asserts that CANM's request for relief by enforcement of the five-year excavation review requirement would cause delay and uncertainty for the Long-Term Monitoring and Maintenance Plan ("LTMMMP"). However, the delay and uncertainty with respect to the approval of the LTMMMP was caused by Sandia and

NMED. A 2007 LTMMMP was not approved, and was later withdrawn. The LTMMMP preparation and approval process was delayed by Appellees from 2007 until 2014. **(00456, 00375, 00099, 00001)**. During the 2007 to 2014 time frame, NMED has (1) delayed enforcement of the Final Order five-year reporting requirement for over four years; (2) failed to disclose and withheld significant reports and data that the agency obviously did not want the public to see **(RP 01036-01038)**; (3) allowed a defective groundwater well monitoring network to remain in place; (4) further extended the potential excavation and other important mandated reports for another five years past an already four year delay; and (5) disregarded and obstructed the public participation that the NMED agreed to when it issued the Final Order in 2005. **(RP 00834-00841; 01127-01132)**.

It is not CANM, as NMED claims, but rather NMED that is making a collateral attack on the Sandia Hazardous Waste Permit by failing to enforce Condition 5. NMED claims that ambiguity in the Final Order obligates this Court to give "heightened deference" to NMED and effectively allow the agency to rewrite Condition 5 to define "every five years" to mean something other than that. NMED also contends that "CANM challenges the approval of the LTMMMP" (page 14 of the NMED Answer Brief). This is incorrect. CANM does not challenge NMED's approval of the LTMMMP. Rather, CANM asserts that the agency's approval of the LTMMMP does not permissibly modify the Final Order, which is what is necessary if the five-year reporting

period is to be extended until the year 2019. If permitted, such a back door modification would render the Final Order meaningless, and certainly inconsistent with its meaning as interpreted by the hearing officer who presided over the proceeding leading to the adoption of the Final Order, public pronouncements made both by NMED and Sandia at the time, this Appellant and numerous other interested parties including the WPAB, and this Court in the year 2008.

Since the Final Order was issued in 2005, considerable additional information has confirmed the urgent need to excavate the MWL, if it is feasible to do so; confirmed the inadequacy and ineffectiveness of the dirt cover (selected remedy); evidenced the continuing release of dangerous contaminants from the MWL into the groundwater; demonstrated the ineffectiveness of the groundwater monitoring that has been used; and thus has shown the unreliability of the data used to justify the use of the dirt cover and to approve the LTMMMP. There is now additional evidence that strongly dictates removal of the hazardous wastes from the MWL, and that indicates that the fate and transport model for the MWL is based on incorrect groundwater monitoring data and is flawed. Technical information weighs heavily in favor of immediate compliance with Condition 5 to protect the public health and the environment rather than additional delay.

As stated in Appellant's Brief in Chief, pp. 29-32, NMED

withheld documents and information from CANM and the public during critical periods, before and after the Final Order, during the Court of Appeals review of the dirt cover remedy, and during the reviews of the fate and transport modeling, the CMI Report, and the LTMMMP. By not enforcing the five-year excavation feasibility review requirement and the other significant mandated activities enumerated in Condition 5, NMED is allowing hazardous and radioactive wastes to continue to spread and contaminate our groundwater.

NMED continues to withhold documents from the Court. NMED still has not provided: the 2006 TechLaw, Inc., Report for the Supplemented Record Proper⁵; information from the EPA Project Engineer regarding concerns for the MWL groundwater monitoring wells (**RP 00793**); findings contained in the 2007 EPA Region 6 "Oversight Report" during the period preceding and after the installation of the dirt cover (**RP 00790-793**).

Withholding documents from CANM unfairly limited public participation in the corrective measures process, according to the EPA Office of Inspector General. After the Final Order was issued in 2005, NMED withheld EPA documents (until 2014) and the 2006 TechLaw, Inc., Report (until November 2009) that detailed defects

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New Mexico Environment Department v. Citizen Action New Mexico, D0101CV200702626 (Oct 19, 2007). NMED still has not provided the 2006 TechLaw, Inc., Report as part of the Administrative Record Proper. The report is Exhibit 10 to the 2/24/2014 Docketing Statement.

in both the groundwater monitoring wells of the MWL and the selected remedy, i.e., the MWL dirt cover. Given the information contained in the reports and information furnished to NMED by CANM and experts with EPA Region 6 regarding contamination in the groundwater, NMED should have timely recognized the urgent need to mandate that Sandia undertake the five-year excavation review no later than 2010. Instead, NMED chose to ignore its own Final Order. NMED failed to verify the accuracy of information regarding monitoring data, verify the adequacy of sampling, monitoring and other methods to develop that information, and to ensure proper consideration of information submitted by the public about violations. **(RP 00984, and see 40 CFR 270.15, 270.43).**

The dirt cover was not installed until 2009. During the years prior to its installation, NMED had documentation that strongly pointed to the need to consider excavation of the toxic wastes rather than covering them with dirt. **(RP 00980-00984)**. During the period 2006 to 2008, the lawsuit regarding the cover was pending;⁶ however, NMED did not inform the Court of Appeals of the existence of the 2006 TechLaw and EPA documents written in 2007 that revealed serious flaws in the selected dirt cover remedy and the groundwater monitoring wells. By refusing to enforce Condition 5, NMED continues to stonewall sound technical advice supporting

⁶ *Citizen Action v. Sandia Corporation*, 143 N.M. 620, 179 P.3d 1228, Certiorari Denied, February 25, 2008.

undertaking excavation now rather than later.

CANM and Registered Geologist Robert Gilkeson filed a complaint with EPA Region 6 about the defective groundwater monitoring at the MWL in March 2007. **(RP 00790)**. The EPA Office of Inspector General ("OIG") wrote a 2010 Hotline Report that showed that EPA Region 6 had improperly withheld an "Oversight Report" from CANM and the public. The Hotline Report identified that EPA Region 6 technical concerns for the groundwater monitoring network had been withheld. **(BIC pp.31-32, RP 787-794)**

The Environmental Protection Agency Region 6 Oversight Report revealed serious flaws in the groundwater monitoring network at the MWL. The Oversight Report was completed in December 2007 but was stamped "Confidential" and improperly withheld from CANM and the public until it was obtained as result of a FOIA lawsuit in December 2012. NMED to this date has not supplied the Oversight Report to the Court as a part of the Administrative Record Proper. **(RP 00790)**⁷ Nor has NMED provided, as part of the Administrative Record Proper or a supplement thereto, the four dozen emails and the more than ten versions of the draft document cited in the NMED January 2014 Response to Public Comments for the LTMMMP. **(RP 00035)**

The OIG Hotline Report and the EPA Region 6 Oversight Report and other documents make it evident that the MWL groundwater

⁷ *Citizen Action and David McCoy vs. United States Environmental Protection Agency Region 6 and Environmental Protection Agency Office of Inspector General*, CIV 11-0695 MCA/KBM, filed 10/07/13.

monitoring well network was seriously defective. On March 24, 2014, CANM sent NMED an Inspection of Public Records (IPRA) requesting that the four dozen emails and many drafts of technical documents written by EPA and NMED be furnished to CANM. The August 14, 2014, IPRA response sent to Citizen Action by NMED disclosed that as early as August 10, 2007, EPA Region 6 had furnished NMED a technical evaluation indicating the need for replacement of MWL monitoring wells in place for years. The stated reasons supporting a finding of inadequate monitoring included (1) incorrect sampling; (2), the unlikelihood that contamination would be detected; (3), contamination would be masked; (4), construction defects creating a direct conduit for contamination from the surface to the aquifer; and (5), monitoring wells placed in the wrong locations. Emails from EPA to NMED obtained in the August 14, 2014, IPRA response demonstrate that NMED received and withheld from CANM and the public these documents from EPA Region 6 management. **(Exhibit 11)**.

The EPA OIG Hotline Report pointed out that public participation had been defeated. The emails and numerous technical drafts of an EPA document titled "Mixed Waste Landfill Groundwater Monitoring System Comments" (which is included in Exhibit 11 hereto) provide additional proof that the audit review statement of an EPA Region 6 unidentified staff person made to Inspector General in an October 15, 2008, interview was correct:

... the teams' initial evaluation would have changed the solution at Sandia MWL [meaning the

dirt cover would not have been the "selected remedy".] NMED pushed extremely hard for EPA Region 6 not to even question the past results or the viability of past test results [regarding groundwater monitoring and sampling]. Finally, he stated that [Citizen Action] got shortchanged by Region 6.

(Appellant's Brief in Chief at page 32.

A fate and transport report required by Condition 3 of the Final Order was first submitted by Sandia to NMED in 2005⁸ and again in 2007⁹, and still has not received formal approval by the NMED. No fate and transport report has been provided to the public for review and comment **(RP 01033)**, nor has such a report been updated within the five-year period as required by the Final Order and Condition 5 thereof. **(RP 00766)**.

The 2006 TechLaw Report heavily criticized a fate and transport report prepared by Ho, et al. (the "Ho Report"). **(RP 01033)**. The Ho Report also failed to recognize that the monitoring wells installed at the MWL were not reliable for the detection of groundwater contaminated with PCE and other Volatile Organic Compounds (VOCs) detected in the vadose zone below the dump. **(RP 00837)**. The lawsuit against Citizen Action filed by NMED unsuccessfully sought to prevent Citizen Action from having access to the TechLaw report and its criticisms of the Ho Report and the

⁸.http://www.nmenv.state.nm.us/HWB/Sandia/MWL/Calculation_Set_Design_and_Optimization_of_Vegetative_Soil_C.pdf

⁹http://www.nmenv.state.nm.us/HWB/Sandia/MWL/MWL_Prob_Model_NOD_revision.pdf

dirt cover selected remedy.

At the time the EPA Oversight Report disclosed defects with regard to the groundwater monitoring wells which were in place, the corrective measures implementation plan had not been approved. (RP 00980-00983). The unidentified EPA Region 6 staff member quoted above informed the Inspector General in the same October 15, 2008, interview that NMED was "pushing extremely hard" not to question past results or the viability of past test results [for groundwater monitoring]. (**Appellant's Brief in Chief, page 32**).

The contention of NMED at page 8 of its Answer Brief in support of its position that the NMED version of the five-year report start time is "grounded in reason, science and the data and reports" is contradicted by many qualified experts, including the Albuquerque Bernalillo County Water Protection Advisory Board which concluded after a February 6, 2013, hearing on the LTMMMP **as follows:**

However, given the remedy stipulated in the Final Order, the potential for groundwater contamination of a serious nature (low probability, but high consequence), and the agreed upon need for continued vigilance, monitoring, modeling, and periodic re-evaluation, a legitimate case can be made that the clock on the five-year reports should have started when the Final Order was issued in 2005, which would have required the first five-year report in 2010. In any case, nearly five years have passed since the cover was installed in 2009. **It is the position of the WPAB that a five-year report, including the supporting data collection, modeling and analysis, should be produced in 2014.**" (Bolded original).

(RP 00953, et seq., RP 01164).

The Final Order is a major modification of the hazardous waste permit held by Sandia pursuant to RCRA and the New Mexico Hazardous Waste Act, NMSA 1978 §§ 74-4-1 -14. It was issued with certain conditions found in paragraphs one through five at the end of the Final Order, the last one (Condition 5) probably being the most important. The arbitrary extension of the mandated every five-year review contained in the LTMMMP is in violation of the New Mexico Hazardous Waste Act requirements for a public hearing before a ruling is made on a major modification of a permit. § 74-4-4.2 H. Further, a public hearing is required on a minor permit modification if there is "significant public interest in the minor modification" proposed. § 74-4-4.2 I. **(RP 00848 at 15.)** CANM does not concede that the modification in this instance was "minor" by any means. However, even a minor modification requires a public hearing. No public hearing was afforded prior to the approval of the 2012 in January 2014, notwithstanding numerous public requests.

NMED's assertion that no justification existed for a public hearing for the change to the five-year review requirement is contradicted by the repeated requests of Citizen Action and letters and petitions to NMED from the public for a public hearing. **(RP 00770-00782, 00834, 00846, 00900, 00905, 00921-00923, 00924, 01026, 01083-01093 (approximately 70 petition signatures), 01094-01095, 01096, 01105, 01107, 01125, 01151-01162 (122 petition signatures)).**

Appellant requests that this Court (1) issue an Order declaring that the January 8, 2014, NMED decision approving the March 2012 LTMMP constituted a hazardous waste permit modification as a matter of federal and state law; (2) declare the January 8, 2014, NMED decision invalid; (3) order that NMED enforce the Final Order and Condition 5 thereof, imposing the five-year review; and stay the effective date of the March 2012 LTMMP until such time as Sandia has complied with the Final Order; (4) remand this matter to NMED for administrative proceedings necessary to insure compliance with the Court's Order in this appeal, and compliance with applicable federal and state law; (5) order such further administrative agency action on the part of NMED as the Court deems necessary and proper to insure the provision of adequate opportunity for public comment regarding the matters that are the subject of this appeal, and to ensure continued compliance on the part of NMED and Sandia with the Final Order and applicable state and federal laws and regulations.

Respectfully submitted,



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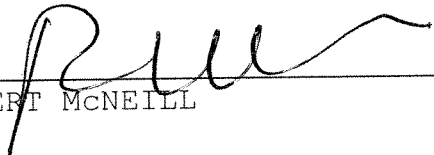
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Certificate of Service

I certify that copies of the foregoing Appellant's Reply Brief were served by first class mail on the New Mexico Environment Department (Assistant General Counsel William G. Grantham and John B. Verheul); and on counsel for Sandia National Laboratory (Montgomery & Andrews, P.A., Jeffrey J. Wechsler, Louis W. Rose, and Lara Katz; and Amy J. Blumberg, Sandia National Laboratories, this 25th day of August, 2014.



ROBERT MCNEILL

-----Original Message-----

From: Mayer.Richard@epamail.epa.gov [<mailto:Mayer.Richard@epamail.epa.gov>]

Sent: Friday, August 10, 2007 3:06 PM

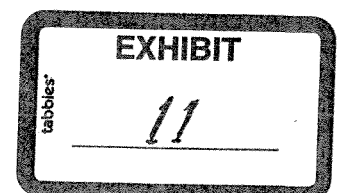
To: Moats, William, NMENV

Cc: King.Laurie@epamail.epa.gov

Subject: Draft Mixed Waste Landfill Groundwater Monitoring Comments per citizens request

Will, the attached comments are draft and may have some changes, although I don't expect major changes. One of the questions pertaining to groundwater flow does not have a comment. I'll be out all of next week, but should be back in office Mon. the 20th. I included two versions, wordperfect (the original) and word (converted from wordperfect). (See attached file: mixedwlandfcomm.doc)The commentors are Chuck Hendrickson, Scott Ellinger, and Rich Mayer.(See attached file: mixedwlandfcomm.wpd)

This inbound email has been scanned by the MessageLabs Email Security System.



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Mixed Waste Landfill Groundwater Monitoring System Comments

Question on Purging of Wells for Sampling: EPA recommends the low-flow purging method for collecting future groundwater samples at the wells around the Mixed Waste Landfill (MWL). This method will reduce the possibility of aerating VOC samples, reduce turbidity of the samples, and minimize damage to the well screen or sand pack. The current method involving higher flow rates (from 2-4 liters per minute) increases the possibility of turbid samples which contain colloids. If low flow sampling is not possible, Sandia should evaluate and propose alternative methods to collect samples with acceptable parameters.

Question on Lack of Knowledge on Speed of Groundwater in two Aquifers: Answer pending.

Question on Nickel Contamination in MW1: EPA reviewed the DVD of the video camera log of MW-1. The video clearly indicates corrosion of the stainless steel well screen, which is composed of nickel, chromium, and iron; the metals found in the well's groundwater samples. Since corrosion problems would mask any nickel or chromium contaminants from the landfill, EPA cannot conclude whether there is contamination in the well from the landfill.

Question on 2 Background Wells Needed, One in each Aquifer: Currently, EPA believes that only one background well is needed in the AF facies, which is considered the uppermost aquifer under RCRA.

Question on using Low Level Tritium Analysis: EPA recommends that a low level tritium analytical method be used in the future (at least periodically). Tritium is a very mobile constituent and should be a good tracer (high quantity was disposed of at the landfill) to determine whether contamination above background levels from the landfill has reached the aquifer. EPA recommends using the Low Level with Electrolytic Enrichment (LLEE) method with detection limits down to about 0.3 pCi/L. This method has been used at LANL for determining groundwater contamination with great success. The University of Miami's Tritium Laboratory can perform this analysis. EPA recognizes that the current analytical method is still protective of the groundwater standard (MCL) of 20,000 piC/L.

Question on Drilling Wells within the Landfill: Monitoring wells are normally located around the perimeter of a landfill. A well inside a landfill would not be part of a monitoring well network to determine if there are releases outside the landfill. Drilling through known contamination will also increase the chances of cross contamination between shallow and deeper zones. Such a well poses a risk of creating a direct conduit for contamination from the surface to the aquifer. RCRA regulations do not require groundwater monitoring within a landfill; rather, the detection monitoring system is to be located at the point of compliance, which is the hydraulically downgradient edge of the unit or waste management area.

Question on Drilling Methods for Well Installation: The preferable drilling method for purposes of ground water sampling is the one that introduces the least amount of foreign matter into the aquifer, for both mechanical (i.e., well damage from pore plugging) and chemical reasons.

Question on Aquifer Characteristics at the MWL: There are two distinct aquifers at the Mixed Waste Landfill, the AF and the ARG. This distinction is evident in the clearly different potentiometric surfaces for the two units. The AF aquifer has very low average hydraulic conductivity (1.81 ft/day) and appears to have some beds with vertical hydraulic conductivity low enough to act as confining beds. EPA recognizes that the ARG facies is more productive and that wells screened in both zones will likely be “controlled” by the ARG facies.

Also, the flow directions are different. The AF aquifer flow direction is to the west-southwest. The ARG aquifer flow direction is the west-northwest.

Also noted is the elevated nitrate contamination (4-5 ppm) that is found in the monitoring wells screened in the uppermost portion of the AF aquifer, but is not found or is in much lower concentrations in the wells (1-1.5 ppm) screened in the ARG aquifer.

Question on Installing Monitoring Wells in the ARG Aquifer: Additional monitoring wells are not needed in the deep ARG aquifer initially. The “uppermost aquifer” under RCRA is considered the AF facies and is where contamination from the landfill will be found initially. EPA recognizes that the AF facies has very low conductivity and is unlikely to be used for production purposes. However, if contamination is found in the AF facies, then vertical delineation of contamination would be required by installing wells in the deeper zones of the aquifer (ARG facies).

EPA Review of the Borehole Well Videos: EPA reviewed the DVD’s of the borehole videos provided by Sandia National Laboratories of monitoring wells BW1, MW1, MW2, MW3, MW5 and MW6. MW1 indicated the most corrosion of the stainless steel screen. MW3 showed much less corrosion, with MW2 and BW1 indicating minimal corrosion. Several of the wells had a brown colored “encrustation like” material on the screen. MW-3 also had a foot long hole in the PVC casing at 40 feet, exposing the annular grout.

Question on the Moats Evaluation: EPA did not review the Moats evaluation due to other factors of the groundwater monitoring system which made the review of that document not pertinent.

Below is EPA’s technical evaluation of each monitoring well at the Mixed Waste Landfill.

BW1: This monitoring well needs to be replaced due to the fact that the water levels have dropped to below the screen interval (verified by video log). The replacement well should be located east (hydraulically upgradient) of the mixed waste landfill and screened with a PVC screen across the water table in the AF facies/aquifer.

MW1: This well should be replaced due to corrosion of the stainless steel screen which will mask certain metal constituents. The corrosion is corroborated by the video log and the exceedances of chromium and nickel. Also, the lower part of the screened interval is filled with sediment. In addition, the well is located mostly upgradient or side gradient of the landfill and is unlikely to detect contamination. A replacement well should be located on the western boundary of the landfill and screened with a PVC screen across the water table in the AF facies.

MW2: The well is cross gradient from the landfill, so it is unlikely to observe releases from the landfill. The camera video log indicates very little corrosion and this is confirmed by no exceedances of chromium and nickel. EPA recommends this well be used to measure groundwater elevation, unless corrosion problems occur later.

MW3: This monitoring well should be replaced due to some corrosion (much less than MW-1) of the stainless steel screen which is verified by the video camera log and the analytical exceedances of chromium and nickel. Also, the water table has dropped almost below the screened interval. Of note, there is a foot long hole in the PVC casing at 40 feet that appears to be the result of efforts to free jammed equipment. The replacement well should perhaps be moved closer to the unit boundary and should be screened with a PVC screen across the water table of the AF facies.

MW4: This well should be plugged to "shut off" the communication between the Alluvial Fan (AF) aquifer and the Ancestral Rio Grande (ARG) aquifer. Both aquifers (AF and ARG) are mixing in this well, with the more productive ARG aquifer providing the bulk of the water and controlling the water level. The RCRA regulations do not require placing a well within the landfill boundary, as is the case with this well. Such a well poses a risk of creating a direct conduit for contamination from the surface to the aquifer, particularly if the locations of the disposal cells are not well known/accurate.

MW5: The intent of this well appears to be monitoring the alluvial fan strata, because the screen is nearly all within that strata. However, the well screen extends slightly into the ARG deposits and according to the water level, is actually monitoring the ARG facies instead of the AF facies. The water level in this well is about 10 feet above the top of the screen, indicating an upward gradient. Also, this well had grout placed inside the well (not the annulus) and it is highly questionable whether this material was fully removed from the screened interval (sand pack) or formation in order to obtain representative groundwater results. A replacement well monitoring the water table AF facies should be located adjacent to the western landfill boundary, approximately 200 feet southeast of the current location.

MW6: This well is acceptable for monitoring the ARG aquifer, although it's location (not a desirable distance, approximately 500 feet west) is not adjacent to the landfill boundary. MW6 is a good as a control point for helping determine flow

directions in that strata. The water level in this well is approximately 15-20 feet above the top of the screen, indicating the confined nature of this aquifer.

Summary, Detection Monitoring Wells Needed: EPA recommends that the Mixed Waste Landfill have three detection monitoring wells at the unit's point of compliance, its western boundary. The wells should be fairly evenly spaced and located to intercept expected potential groundwater releases to the uppermost aquifer, the AF facies. Two of these wells are mentioned above as replacements for wells MW1 and MW3; a third well also needs to be installed approximately 200 feet southeast of MW5.