IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

CITIZEN ACTION NEW MEXICO,

Appellant

vs.

No. 33,517
New Mexico
Environment
Department
HWB SNL 12-7

NEW MEXICO ENVIRONMENT DEPARTMENT,

Appellee,

and

SANDIA CORPORATION,

Intervenor-Appellee.

ANSWER BRIEF OF THE NEW MEXICO ENVIRONMENT DEPARTMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases

Federal Cases

New Mexico Statutes

New Mexico Regulations

Federal Regulations

SUMMARY OF PROCEEDINGS

I. Nature of the Case

This case is a purported appeal by Citizen Action New Mexico ("CANM") of the January 8, 2014, New Mexico Environment Department ("NMED") approval of the Long-Term Monitoring and Maintenance Plan ("LTMMP"), which describes how Sandia National Laboratories ("SNL") will meet the long-term monitoring and maintenance requirements at SNL's Mixed Waste Landfill ("MWL"). However, the specific decision that CANM purports to challenge, NMED's interpretation of a provision in a 2005 Final Order ("2005 Order") issued by the Cabinet Secretary, predates NMED's approval of the LTMMP. That provision in the 2005 Order requires five-year reports re-evaluating the feasibility of excavation and analyzing the continued effectiveness of the selected remedy. At issue is the starting date for the five-year reporting requirement.

II. Summary of Facts

SNL is a federal facility owned by the United States Department of Energy ("DOE"). SNL has conducted research and development of conventional and nuclear weapons, national security measures, and alternative energy sources since 1945. As a result of this research and development, SNL has generated hazardous, radioactive, mixed, and solid wastes. Mixed waste is waste that contains both radioactive and hazardous waste. SNL disposed of low-level radioactive waste and

minor amounts of mixed waste at the MWL from 1959 until 1988. *Citizen Action v. Sandia Corp.*, 2008-NMCA-031, ¶ 2, 143 N.M. 620, 179 P.3d 1228. The regulatory history of the MWL under the Resource Conservation and Recovery Act ("RCRA"), as implemented first by the U.S. Environmental Protection Agency ("EPA") and then NMED, is recounted in *Citizen Action.* This history is quoted extensively in Appellant's brief, and will not be repeated here.

The MWL is currently undergoing corrective action in accordance with 20.4.1.600 NMAC, 40 C.F.R. § 264.101, Module IV of RCRA Permit No. NM5890110518 (the "RCRA Permit" or "Permit"), the NMED Secretary's 2005 Order, and the Class 3 Permit Modifications established by that Order, which set forth certain corrective action requirements. [**RP 00120**]. Corrective action at the MWL is also more generally governed by a 2004 consent order entered into by the SNL and NMED. *See* LTMMP, Section 1.3, [**RP 00122**] (explaining legal and regulatory background to the LTMMP).

The primary purpose of the 2005 Order, issued at the conclusion of a public hearing to consider various proposed remedial options, was to select the final remedy for remediation of the MWL. [**RP 00762-766**]. The remedy selected by the Secretary was a vegetative soil cover with a bio-intrusion barrier, conceived and designed to protect human health and the environment. [**RP 00764-00765**]. The final order also contained provisions addressing a Corrective Measures

Implementation ("CMI") Plan, a CMI Report, progress reports, the LTMMP, and a directive that NMED shall provide an opportunity for public review and comments on these documents prior to NMED's approval. [**RP 00766**]. Finally, the Secretary also ordered that SNL "prepare a report every 5 years re-evaluating the feasibility of excavation and analyzing the continued effectiveness of the selected remedy." [**RP 00766**].

After delays caused in part by CANM's lawsuit, the vegetative soil cover was installed in 2009. [**RP 00104**]. Then on October 14, 2011, NMED approved DOE's *Mixed Waste Landfill Corrective Measures Implementation Report*. NMED's approval specified that the five-year reporting requirement would commence upon NMED approval of the LTMMP. [**RP 00767**]. The letter approving the LTMMP states that "[t]he monitoring systems that are not yet in place need to be deployed prior to the Permittees requesting a modification to the permit for corrective action complete status." [**RP 00002**].

III. Course of the Proceedings

NMED proposed its selected remedy for the MWL in 2004, which prompted the 2004 hearings and the 2005 Order. *Citizen Action*, 2008-NMCA-031, ¶¶ 7, 8. CANM appealed that Order, which this Court upheld in 2008. *Id.* at ¶ 39. Certiorari was denied by the New Mexico Supreme Court, No. 30,844. Thereupon SNL was able to commence installation of the selected remedy, and begin

development of the LTMMP. SNL submitted a proposed LTMMP on September 28, 2007. [**RP 00456**]. This LTMMP was subsequently withdrawn on December 7, 2011 [**RP 00375**], and a revised LTMMP was submitted on March 23, 2012. [**RP 00099**]. After several rounds of public meetings, the LTMMP was approved by the NMED on January 8, 2014. [**RP 00001-00002**]. CANM filed their Notice of Appeal on February 3, 2014, and their Docketing Statement on March 5, 2014. NMED filed the Administrative Record on March 21, 2014. On March 31, 2014, Sandia Corporation moved to intervene as an Appellee, which motion was granted on April 18, 2014. Sandia Corporation and NMED jointly filed their Motion for Clarification of Extra Record Materials on May 21, 2014, to which CANM responded on June 2, 2014. This Court granted that Motion on June 7, 2014. CANM filed its Brief in Chief on June 19, 2014. On June 24 and 27, 2014, CANM and NMED respectively filed separate Motions to Supplement the Administrative Record, each of which was granted on July 16, 2014. On July 25, 2014, NMED filed its Second Motion to Supplement the Administrative Record. The Supplements to the Administrative Record added the complete documents of all public comments submitted (previously only summaries were included), and also added the Hearing Officer's Report and Proposed Findings of Fact and Conclusions of Law from the 2004 hearing.

STANDARD OF REVIEW

Under NMSA 1978, § 74-4-14(C), this Court may set aside NMED's approval of the LTMMP "only if it determines the action was (1) arbitrary, capricious, or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law." *Sw. Research & Info. Ctr. v. State*, 2003-NMCA-012, ¶ 24, 133 N.M. 179, 62 P.3d 270. "In our review of the evidence, we review the whole record, viewing both the favorable and unfavorable evidence in the light most favorable to the administrative decision. We do not substitute our judgment for that of the agency, and we only evaluate whether the record supports the result reached, not whether a different result could have been reached." *San Pedro Neighborhood Assn. v. SF Cnty. BCC*, 2009-NMCA-045, ¶ 11, 146 N.M. 106, 206 P.3d 1011. "Substantial evidence means relevant evidence that a reasonable mind would accept as adequate to support a conclusion." *Id.* (Internal quotation marks and citation omitted). The Appellant bears the burden on appeal of showing that the requested relief is warranted. *Dona Ana Mut. Domestic Water Consumers Ass'n v. New Mexico Pub. Regulation Comm'n*, 2006-NMSC-032, ¶ 9, 140 N.M. 6, 139 P.3d 166.

ARGUMENT

I. Summary of Argument

Section II first demonstrates that the starting date of the five-year reporting requirement is not addressed in the 2005 Order, and is thus ambiguous as to that

point. It goes on to explain why this court should accord NMED's interpretation of this ambiguity a high level of deference. It then explains why the NMED interpretation is well-considered based on the data and reports associated with the 2005 Order, and that it is in accordance with the law.

Section III argues that a challenge to NMED's interpretation of the five-year reporting provision, and CANM's various other complaints, are not properly brought as an appeal of NMED's approval of the LTMMP. It first demonstrates that an appeal of the interpretation at issue is not timely because it was not brought when the order containing the ambiguous language was first issued or when NMED made its interpretation of the provision, in 2011. This section then demonstrates that the Appellant has not satisfied prudential requirements of injury in fact and redressability, and that if the technical deficiencies in groundwater monitoring alleged by the Appellant were true, the relief requested would not address the alleged harm. Finally, this section demonstrates that various other complaints asserted by the Appellant are not properly before the Court as an appeal of the approval of the LTMMP.

II. The NMED Interpretation Should Be Upheld

When a statute or regulation specifies a distinct timeline, or a certain process that an agency must follow, any deviation from that timeline or that process represents an action outside that agency's authority. When, however, such a law is

silent as to the details of how or when a required action under that law is to be performed, the agency is left to use its own expertise to interpret when that action should best be taken.[1] Such agency interpretations are necessary for agencies to carry out the laws they are charged administering, and they are necessary for the smooth functioning of government. NMED's interpretation of the starting date of the five-year reporting requirement in the 2005 Order represents such a situation.

While CANM purportedly seeks judicial enforcement of the 2005 Order by appealing an administrative decision finalized on January 8, 2014, what is really being challenged is the NMED's administrative interpretation of an ambiguity (a silence, really) within that Order, and subsequently within the RCRA Permit as modified.[2]

The 2005 Order modified the RCRA Permit to set forth corrective action requirements for the MWL. [*See* **RP 00762-00766**]. The RCRA Permit was subsequently modified in accordance with the 2005 Order, no additional "enforcement," as requested by CANM, is required – the RCRA Permit has been modified. What the Appellant seeks is for this Court to substitute its own judgment for that of the NMED in interpreting an ambiguity in the Order. Regardless of how many times the Appellant refer to the language of the 2005 Order as "clear,"

1 *See infra* Section II.B.
2 Significantly, nothing in the 2014 LTMMP approval changed NMED's interpretation of the disputed provision. *See infra* Section III.

"unequivocal," and "unambiguous" [*see* **BIC 9, 12, 22, 25, 26**], the plain language of the 2005 Order is devoid of any indication of when or how the five-year reporting requirement is to commence. Once it is clear that the Order is ambiguous as to that point, the entirety of CANM's argument fails, as it is predicated on that point alone. The Appellant's brief makes a number of other tangential arguments, but at the root of each of them is the erroneous assertion that the 2005 Order, and subsequently the RCRA Permit, specifies when and how the five-year reporting requirement is to commence.

In that the 2005 Order is silent as to when the five-year reporting requirement is to commence, it is by its very nature ambiguous, and thus requires agency interpretation. In interpreting an ambiguity in an Order the agency itself issued and is charged with enforcement of, the NMED should be accorded deference. The interpretation is grounded in reason, science, and the data and reports associated with and contemplated by the 2005 Order.

A. The 2005 Order Is Silent as to When the Five-Year Reporting Requirement is to Begin, and Is Therefore Ambiguous

The provision at issue (paragraph 5 of the 2005 Order) in its entirety reads:

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

[**RP 00766**]. On its face, this provision provides no indication of when the first five-year report is due, nor does this paragraph contain any cross reference to other sections of the Order that might provide that information. No regulatory provisions are cited as the basis of the five-year reporting requirement. This requirement derived from a recommendation in the Hearing Officer's Report, which in turn derived from a suggestion by the Albuquerque-Bernalillo County Groundwater Advisory Board. [**RP 01206**]. Nothing in that Report sheds any additional light on the intended start date.

A law is ambiguous if reasonably informed persons can understand the statute as having two or more meanings. *See Styka v. Styka*, 1999-NMCA-002, ¶ 21, 126 N.M. 515, 972 P.2d 16; *Alverson v. Harris*, 1997-NMCA-024, ¶ 8, 123 N.M. 153, 935 P.2d 1165; *Bd. of Educ. for the Carlsbad Mun. Sch. v. State Dep't of Pub. Educ.*, 1999-NMCA-156, ¶ 18, 128 N.M. 398, 993 P.2d 112. The Appellant points out the extensive communication and deliberation that took place within the

NMED, and between SNL and NMED. [*See* **BIC 22-26**]. That such deliberation was warranted only serves to underscore the ambiguity of the start date of the five-year reporting requirement in the 2005 Order. Had it been clear, unequivocal and unambiguous, as asserted by the Appellant, such deliberation would have been unnecessary. In that Appellant interprets the start date differently than the NMED, Appellant only further points out the ambiguity in the Order itself. The Appellant makes no argument, nor do they cite any legal authority to indicate that the silence regarding a start date within the Order results in a clear, unequivocal or unambiguous meaning.

Despite the Appellant's repeated contention that language of Paragraph 5 ordering a report every five years clearly and unambiguously specifies when such reporting was to begin, their brief eventually admits that the NMED was interpreting its own Order in arriving at a 2014 start date for the five-year reporting requirement. [**BIC 23, 25**].

B. The NMED's Interpretation of its Own Order Should Be Given Heightened Deference

Where a statute is silent or ambiguous as to a point, the agency mandated to take action under the statute is given a very high level of deference in their interpretation of that point. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). An agency's interpretation of its own

regulations is generally granted deference unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452 (1997). When a court applies *Auer* deference, as long as the agency's interpretation is a plausible one, the court will grant deference to that interpretation, even if it believes a different interpretation is more reasonable. *Id.* It is well established that an agency's interpretation need not be the only possible reading of a regulation—or even the best one—to prevail. *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880, 178 L. Ed. 2d 716 (2011).

In Mew Mexicco, regulations are passed by state commissions and boards, consistent with statutes authorizing them, with extensive input from both the public and the agency tasked with operating under them. *See, e.g.*, Administrative Procedures Act, NMSA 1978, §§ 12-8-1 to -25 (1969, as amended through 1999). Likewise, the NMED Secretary issued the 2005 Order following a similar process of public input and hearings. In that the order was issued by the Secretary after such a process, the NMED should receive an extremely high level of deference in interpreting the order. Notably, the 2005 Order withstood a challenge in our Supreme Court, and so does not contradict any applicable statute. *Citizen Action*, 2008-NMCA-031. As such, the 2005 Order issued by the NMED and signed by the Secretary should be seen as the equivalent of a regulation for the purpose of applying *Auer* deference to the NMED's interpretation of the ambiguous starting

point for the five-year reporting period.

New Mexico case law, while not directly citing *Auer*, affords agencies similar heightened deference. When an agency that is governed by a particular statute construes or applies that statute, the court will begin by according some deference to the agency's interpretation. *Public Serv. Co. v. New Mexico Pub. Serv. Comm'n,* 1987-NMSC-124, ¶ 12, 106 N.M. 622, 747 P.2d 917. The court will confer a heightened degree of deference to legal questions that "implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function." *Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n,* 1995-NMSC-062, ¶ 11, 120 N.M. 579, 904 P.2d 28; *see also Stokes v. Morgan,* 1984-NMSC-032, ¶ 24, 101 N.M. 195, 680 P.2d 335 ("The special knowledge and experience of state agencies should be accorded deference."). The court should only reverse if the agency's interpretation of a law is unreasonable or unlawful. *See Maestas v. New Mexico Pub. Serv. Comm'n,* 1973-NMSC-096, ¶ 12, 85 N.M. 571, 514 P.2d 847. When the matter before the court is a question of fact, the court will generally defer to the decision of the agency, especially if the factual issues concern matters in which the agency has specialized expertise. *See Attorney Gen. v. New Mexico Pub. Serv. Comm'n,* 1991-NMSC-028, ¶ 25, 111 N.M. 636, 808 P.2d 606. "[I]n resolving ambiguities in the statute or regulations which an agency is charged with administering, the Court generally

will defer to the agency's interpretation if it implicates agency expertise." *Atlixco Coalition v. Maggiore,* 1998-NMCA-134, ¶ 30, 125 N.M. 786, 965 P.2d 370.

The Hazardous Waste Bureau ("HWB") of the NMED is charged with providing regulatory oversight and technical guidance to New Mexico hazardous waste generators and treatment, storage, and disposal facilities as required by law. *See* Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to -14 (1977, as amended through 2010). The necessity and value of monitoring reports and feasibility studies as required by the 2005 Order falls squarely within their purview. *Id.* The HWB thus possesses the specialized, scientific, legal, and administrative expertise to interpret any ambiguity within the five-year reporting requirement. As outlined by the Appellant, in 2011 the HWB deliberated over several months the proper due date for the first five-year report. [**BIC 24-26; RP 00767-00768**]. As an agency interpreting an ambiguity that clearly implicates its technical and regulatory expertise, the NMED (acting in this case via the HWB) should be afforded an extremely high level of deference as to its interpretation.

Notably, the Appellant cites no authority for their assertion that the NMED's act of interpreting the five-year reporting requirement should be subject to public comment and hearing. Rather, they attempt to subject the agency's action to such a requirement by conflating the interpretation of an ambiguity with the modification of a permit. [*See* **BIC 21**]. Clearly, no such alleged modification has taken place,

and the NMED acted within its authority in interpreting the five-year reporting requirement in the 2005 Order.

To the degree CANM asserts that NMED is improperly modifying the Permit issued to SNL, this appeal represents an impermissible collateral attack on that Permit. Rather than attack the validity of the Permit, CANM challenges the approval of the LTMMP, incorrectly claiming that the Permit has been modified by the interpretation of the five-year reporting requirement. While this interpretation does not reflect a modification of the permit in any way (the permit is not being modified), this Court has held in the past that the Secretary has the discretion to make minor modifications to permits issued under the Hazardous Waste Act without holding public hearings. *See Sw. Research & Info. Ctr. v. State*, 2003-NMCA-012, ¶ 39, 133 N.M. 179, 62 P.3d 270. ("The fact that there is great public interest ... does not mean that there must be a hearing for every administrative detail concerning the facility.")

C. The NMED Interpretation Is Reasonable, And Was Well-Considered Based Upon The Data and Reports Associated With the 2005 Order

The NMED's rationale for not beginning the five-year reporting period until approval of the LTMMP is outlined in the April 14, 2014 letter from NMED Environmental Health Division Director Tom Blaine to the Albuquerque-Bernalillo County Water Protection Advisory Board ("WPAB"):

The five-year review provision requires that "the report shall include a review of the documents, monitoring reports, and any other pertinent data, and anything additional required by NMED." It also requires that "Sandia shall update the fate and transport model for the site with current data, and re-evaluate any likelihood of contaminants reaching groundwater." The mechanism for defining the monitoring reports and other pertinent data that will be the subject of the five-year review was the approval of the LTMMP. It therefore follows logically that the first report should be due five years after approval of the LTMMP.

The objective of the LTMMP is to ensure that the final remedy is protective of human health and the environment. The LTMMP defines monitoring, inspection, maintenance, repair, reporting, and physical and institutional control requirements for the MWL. The approved LTMMP thus establishes monitoring of the MWL that will allow the five-year period of data collection necessary for analyzing the remedy's effectiveness and for re-evaluating the need for excavation, as required under the Final Order. Without this additional monitoring data generated under the LTMMP, the Permittees would not be able to comply with the requirement to "update the fate and transport model for the site with current data, and re-evaluate any likelihood of contaminants reaching groundwater."

Since approval of the chosen remedy on May 26, 2005 (vegetative cover plus monitoring), little new information other than groundwater monitoring data is available to assess whether the remedy remains effective. The LTMMP calls for sampling other media (air, soil, soil-vapor, biota) to ensure protection of human health and the environment. Now that the LTMMP is in place, Permittees and the Department can acquire the data needed for the five-year reports.

To summarize, requiring a five-year report and re-evaluation at this time would be premature due to the very recent approval of the LTMMP, as well as the lack of new data upon which the report must rely. Requiring such a report in 2014 provides no additional protections to human health or the environment, including New Mexico's groundwater. Protecting these resources remains our primary concern.

[**RP 01167-01168**]. This is a reasonable rationale for the NMED's interpretation of the five-year reporting requirement. Further, the letter goes on to explain that "Experienced NMED technical staff have reviewed groundwater monitoring information at the MWL and concluded that no significant impacts are likely to occur ... [t]hese reports are, and have been, available on the NMED web site." [**RP 01168**]. It is clear then that this is not a matter NMED took lightly, or that it made this interpretation in haste, and that NMED's interpretation is not arbitrary, capricious, and is in accordance with the law. CANM's main point then seems to be simply that they do not agree with it. In asking the Court to order NMED to change its interpretation, CANM is essentially asking the Court to do what it has consistently declined to do in the past – to substitute its judgment for that of the agency acting in a matter in which it has specific, specialized expertise (the regulation and monitoring of a hazardous waste site). *See, e.g., San Pedro Neighborhood Assn.*, 2009-NMCA-045, ¶ 11.

III. Appellant's Asserted Claims Are Not Properly Raised as an Appeal of the Approval of the LTMMP

For the reasons discussed above, NMED's interpretation of its own order is due deference and is not subject to second-guessing by the Court. Moreover, even assuming arguendo that CANM's arguments regarding the purported unambiguousness of the five-year review provision have merit – a point which

NMED does not concede – the January 2014 approval of the LTMMP provides no occasion to appeal NMED's interpretation of that provision. Nor does the approval of the LTMMP provide occasion for CANM to raise the other inchoate complaints contained in its brief.

CANM states that "[t]he NMED decision which lead to this appeal occurred on January 8, 2014, when NMED approved the Long Term Monitoring and Maintenance Plan ..." **[BIC 1]**. CANM asserts repeatedly, without explanation, that the 2014 approval of the LTMMP "disregarded" the five-year review provision of the Secretary's Final Order. [*See, e.g.*, **BIC 5, 9, 10, 11, 12, 18, 34**]. To the contrary, NMED's decision to approve the LTMMP did not disregard the five-year review provision. Rather, the approval fulfilled a separate requirement of the Secretary's Final Order. CANM attempts to seize upon the January, 2014 approval of the LTMMP for some action the Court could construe as a final administrative decision that would create jurisdiction for the purposes of appeal. The issues CANM attempts to raise, however, did not arise from the approval of the LTMMP, and are therefore not properly before the Court.

A. Appellant's Appeal of NMED's Interpretation of the Five-Year Review Provision is not timely.

The 2005 Order, as explained *supra*, was clearly silent regarding the start date of the five-year reporting requirement. While CANM appealed that Order on

various other grounds, they failed to ask this Court in that instance to specify when that requirement would commence. *See Citizen Action*, 2008-NMCA-031. Framing the current appeal as a failure to enforce a provision of that Order does not correct the untimeliness, because approval of the LTMMP is not the appropriate vehicle to enforce the five-year provision.

The interpretation of the 2005 Order challenged by the Appellant was made in NMED's October, 14, 2011 letter approving the Mixed Waste Landfill Corrective Measures Implementation ("CMI") Report. This became known to Appellant no later than May, 2012. [**BIC 23-24**]. Arguably, neither the 2011 approval of the CMI Report nor the 2014 approval of the LTMMP is a "final administrative action" subject to judicial review pursuant to NMSA 1978, § 74-4-14(A). Both approvals may be seen as interlocutory decisions in the corrective action process. See *Bennett v. Spear*, 520 U.S. 154, 177-78, 117. S.Ct. 1154, 1168 (1997) (holding that tentative or interlocutory decisions do not mark the consummation of the decision making process and are not final agency actions subject to review.) However, even if the approval of such submissions is a final agency action, the decision to which the appellant objects (i.e. the interpretation of the five-year provision) was made in the 2011 CMI approval, not the 2014 LTMMP approval. Having failed to bring an appeal in 2011 (or in 2012 when they purportedly first became aware of NMED's interpretation), CANM has waited

until the January, 2014 approval of the LTMMP for some action the Court could construe as final for the purposes of appeal. However, the only specific provision in the LTMMP appellant points to (Section 1.3) simply recites that the interpretation of the five-year provision had already been made by NMED in 2011. [**BIC 27**].[3] The Appellant's attempts to obtain judicial review of a decision made in 2011 by couching it as an appeal to the 2014 LTMMP approval must therefore fail.

B. Appellant Has Not Asserted Any Injury in Fact Caused by Approval of the LTMMP That Would Be Redressed by the Relief Sought.

Even though the New Mexico Constitution does not include a "cases and controversies" provision for limiting judicial review, our courts have held that the judicial power to resolve disputes in a government built upon a foundation separating the legislative, executive, and judicial functions should be "guided by prudential considerations," such as standing, ripeness, and mootness. *See, e.g., New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 16, 149 N.M. 42, 243 P.3d 746. Thus, despite the absence of constitutional constraints that exists at the federal level, "at least as a matter of judicial policy if not of jurisdictional necessity, our courts have generally required that a litigant demonstrate injury in

3 Appellant erroneously asserts that "NMED relies on Section 1.3 of the March 2012 LTMMP for its authority to disregard Condition 5 of the Final Order." **[BIC 20]**. This is incorrect in at least two ways. First, NMED does not purport to rely on Section 1.3 for any authority; quite the opposite, Section 1.3 simply describes a decision already made by NMED. Second, NMED does not "disregard" condition 5; as explained *supra*, NMED interprets that provision in order to give it meaningful effect.

fact, causation, and redressability to invoke the court's authority to decide the merits of a case." *ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, 144 N.M. 471, 476, 188 P.3d 1222, 1227.

The Appellant has failed to demonstrate that they are injured by the approval of the LTMMP, or that any purported injury would be redressed by the remedies they seek. CANM asserts that "the NMED approval of the March 2012 LTMMP, and NMED's rationale as to the effect of such approval on the Final Order, endangers the public health and safety and expose the public to health and environmental dangers that the five-year reports are expressly intended to monitor and prevent." [**BIC 21**]. Thus, the Appellant's implicit argument seems to be that immediate production of a five-year review report would protect public health. But elsewhere the Appellant asserts that groundwater monitoring wells have been, and continue to be, deficient or improperly placed and therefore incapable of gathering relevant data. [*See* **BIC 28, 30-31**, *see also* **RP 00821, 00847, 00849-00854**]. If that were the case, it is difficult to see how a report relying on data from these wells would remedy any danger to public health and safety.

NMED does not agree with CANM's technical critiques of the groundwater monitoring system. Instead, as documented in the LTMMP, the groundwater monitoring system, as improved in 2008 when certain wells were abandoned and new wells constructed, is sufficient to detect any groundwater contamination from

the MWL, and will be supplemented as necessary due to declining water levels. See LTMMP, Section 3.5.1 [**RP 00153-00155**]. Moreover, groundwater monitoring reports analyzed by technical experts show no current or imminent harm. [*See* **RP 01168, n.3**]. However, the LTMMP addresses other environmental media that should be evaluated in the five year reviews and are not otherwise required to be assessed. In particular, the LTMMP specifies locations and methods for monitoring volatile organic compounds in the vadose zone (i.e., in the soil above the water table) which are critical to assessing contaminant migration. See LTMMP, Section 3.4.1. [**RP 00148-00150**]. Implementation of this vadose zone monitoring, along with continued groundwater and other monitoring as specified in the LTMMP, will allow the creation of meaningful and robust five-year reviews.

For the reasons above, the relief requested by the Appellant would do nothing to remedy any harm alleged. The Appellant seeks a stay of the LTMMP – apparently in its entirety, without limitation – until a five-year report is generated. The Appellant also seeks further public process, resulting in further delay and uncertainty without an active LTMMP in operation. The combined results of these actions would be (1) generation of a five-year review based on incomplete and insufficient data, (2) delay of the monitoring activities specified by the LTMMP which would enable a proper five-year review if implemented, and (3) the absence of an instrument by which NMED can require and enforce the maintenance

provisions of the LTMMP, which are also designed to protect public health and the environment. The Appellant has therefore failed to demonstrate that it is injured by NMED's interpretation, or that such injury would be redressed by the relief sought.

C. Appellant's other Purported Bases of Appeal are Without Merit.

In addition to their main argument that approval of the LTMMP somehow disregards the five-year review provision, CANM raises a variety of complaints that are not directly related to the purported subject (the LTMMP) under appeal, are erroneous, irrelevant, subject to claim preclusion under *Citizen Action v. Sandia Corp.*, or otherwise without merit.

First, the Appellant asserts that the MWL has been improperly classified and should be considered a "regulated unit" pursuant to 40 C.F.R. § 264.90(a)(2) and therefore the Permittees should be required to obtain a post-closure care permit for it. [**BIC 32-33**]. However, the classification of the MWL was not at issue in the LTMMP approval process. More importantly, this Court has already determined that CANM failed to preserve this issue in the prior litigation regarding remedy selection. See *Citizen Action v. Sandia Corporation,* 2008-NMCA-031, ¶¶ 15-17 (holding that CANM failed to preserve issue of whether the MWL had been operated under the incorrect regulatory framework for more than a decade). CANM is therefore precluded from raising the issue now.

Second, the Appellant asserts that the LTMMP changed the number, location and depth of the wells in the groundwater monitoring well network, and that this should have necessitated a modification of the Permit. [**BIC 28**]. This assertion is incorrect both legally and factually. As discussed *supra,* the LTMMP did not change the groundwater monitoring well network, rather it is based on the network as developed up until 2008. See LTMMP, Section 3.5.1 [**RP 00153-00155**]. More fundamentally, even if the LTMMP did result in a change to the groundwater monitoring well network, this would not necessitate a permit modification because the existing network is not specified in the Permit in the first place. Although the requirement to submit a LTMMP *is* contained in the Permit pursuant to the 2005 Order, corrective action at the MWL, including groundwater monitoring, is generally governed by a 2004 consent order. *See* LTMMP, Section 1.3, [**RP 00122**] (explaining legal and regulatory background to the LTMMP). The provisions cited by Appellant at 40 C.F.R. § 270.42 Appendix I [**BIC 28**], which are applicable to *permitted* ground water monitoring systems, are not applicable here.[4] This does not mean that NMED's approval of the groundwater

4 Appellant's attempt to rely on the Expanded Public Participation Rule, 60 Fed. Reg. 63,417 (Dec. 11, 1995) is also unavailing. [**BIC 22**]. The provisions of that rule govern public participation *where* a Class 3 permit modification is performed; they do not dictate *when* Class 3 modifications are required. The Appellant cites no authority for the proposition that the Expanded Public Participation Rule applies to corrective action where a permit modification is not required. In fact, the rule applies to initial permit applications and renewals involving significant changes at the facility. It expressly does not apply to permit modifications under 40 C.F.R. § 270.42 (which the appellant elsewhere argues is applicable, [*see* **BIC 28**], or to applications for post closure care permits with corrective action.

monitoring well network will escape public review and comment. Commenters, including CANM, were able to and did comment on this topic in the context of agency review of the LTMMP and other major documents required by the Final Order. Moreover, there will be further opportunity for comment, a public hearing and judicial review once Permittees request a determination by NMED that the MWL corrective action is complete. *See* 68 Fed. Reg. 8757, 8761-62 (Feb. 23, 2003) (providing that determinations that corrective action is complete should generally be accomplished through a "Class 3" modification to the RCRA permit). However, during the course of corrective action, while RCRA regulations mandate opportunities for public involvement at various points in the decision-making process, not all technical matters – such as determination of groundwater monitoring well networks – are necessarily subject to a requirement for a permit modification (and an attendant opportunity for a public hearing).[5]

Third, Appellant discusses the results of a report issued by the U.S. EPA's Office of Inspector General ("OIG") regarding EPA Region 6's handling of MWL issues. [**BIC 30-32**]. While NMED disputes the anonymous accusations in the report that it allegedly "pressured" the EPA to take any particular position, the report is irrelevant with respect to the contents of the LTMMP and NMED's

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See 40 C.F.R. § 124.31(a).

5 *See generally* RCRA Public Participation Manual, Chapter 4, Public Participation in RCRA Corrective Action Under Permits and §3008(h) Orders, available at: http://www.epa.gov/wastes/hazard/tsd/permit/pubpart/chp_4.pdf

approval of that document. Nonetheless, because CANM submitted the OIG report in its public comments, NMED has included it in the Record Proper as supplemented. [**RP 00783-00812**].

Finally, the Appellant discusses a 2006 report prepared by TechLaw, Inc. [**BIC 29-30**]. While NMED disputes some but not all of the findings of the TechLaw report, in any case those findings go towards the remedy selection for the MWL, a decision that has already been upheld by this Court in *Citizen Action v. Sandia Corp.* The disputed findings of the TechLaw report are not relevant to the action purportedly at issue here, NMED's approval of the LTMMP, and the TechLaw report is therefore not part of the Administrative Record in this matter.

IV. Conclusion

For the foregoing reasons, the Court should refuse to review NMED's interpretation of the five-year reporting provision as not properly raised in this purported appeal of the approval of the LTMMP; or in the alternative, uphold NMED's interpretation of that provision, and deny CANM's request for various orders, and for additional administrative proceedings in this matter.

Respectfully submitted,

NEW MEXICO ENVIRONMENT
DEPARTMENT:

Dated: August 4, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August, 2014, a copy of the foregoing New Mexico Environment Department Answer Brief was sent by first class mail, postage prepaid, to the following:

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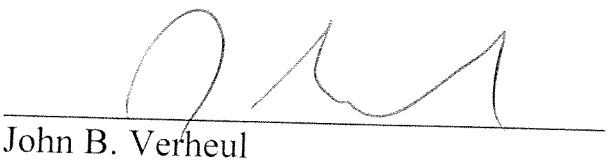

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