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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CITIZEN ACTION NEW MEXICO,

Appellant,

vs.

No. 33,517

NEW MEXICO ENVIRONMENT DEPARTMENT,

Appellee,

and

SANDIA CORPORATION,

Intervenor-Appellee.

COURT OF APPEALS OF NEW MEXICO
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ANSWER BRIEF
OF SANDIA CORPORATION

APPEAL FROM THE NEW MEXICO ENVIRONMENT DEPARTMENT

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Statement of Compliance: I certify in accordance with Rule 12-213 NMRA that this brief is proportionally spaced and that the body of the brief contains 7,908 words. This brief was prepared using Microsoft Word 2010.

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SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE

In 2005, the Secretary of the New Mexico Environment Department ("NMED" or "Department") issued a final order approving a permit modification to the Sandia National Laboratories ("SNL") hazardous waste permit that selected a corrective measure for a waste site at SNL known as the Mixed Waste Landfill ("MWL"). In the permit modification, the Secretary required the permittees, the United States Department of Energy ("DOE") and Sandia Corporation ("Sandia"), to "prepare a report every 5 years, re-evaluating the feasibility of excavation and analyzing the continued effectiveness of the selected remedy." **[RP 1250]**. Neither the final order nor the permit modification specified when the first report was due, and in 2011 the Department interpreted the provision to require submittal of the first report five years after the approval of a long-term monitoring and maintenance plan ("LTMMP") that would allow the effectiveness of the remedy and feasibility of excavation to be evaluated. In this appeal, brought almost three years later, Citizen Action New Mexico ("Citizen Action") challenges the schedule of the first report. The primary issues presented for review are (1) whether Citizen Action's challenge is timely, and (2) whether the Department is entitled to deference on its interpretation of its own final order and permit modification.

II. STATORY AND REGULATORY FRAMEWORK

The federal Resource Conservation and Recovery Act ("RCRA"), as amended by the Hazardous and Solid Waste Amendments ("HSWA"), governs the treatment, storage, and disposal of hazardous waste. *See* 42 U.S.C. §§ 6901–6992. Pursuant to RCRA, the U.S. Environmental Protection Agency ("EPA") authorized New Mexico, as of April 16, 1985, to enforce the New Mexico Hazardous Waste Act ("HWA"), NMSA 1978 §§ 74-4-1 to 74-4-14, and the New Mexico Hazardous Waste Management Regulations ("HWMR"), 20.4.1 NMAC, in lieu of EPA RCRA enforcement. *See* 42 U.S.C. § 6926. The 1985 authorization did not include authorization for HSWA. EPA retained the authority for HSWA until 1996, when it authorized New Mexico to enforce the HWA and HWMR in lieu of HSWA. The HWA and HWMR require corrective action for all releases of hazardous waste or hazardous constituents from solid waste management units ("SWMUs") at a facility, regardless of when the waste was released. NMSA 1978, § 74-4-4.2(B); 20.4.1.500 NMAC (incorporating 40 C.F.R. § 264.101(a)).

III. SUMMARY OF FACTS

A. Site Description

SNL is a federal facility located within the boundaries of Kirtland Air Force Base ("KAFB"), in the City of Albuquerque. SNL is owned by the Department of

Energy ("DOE") and is managed and operated for DOE by Sandia Corporation ("Sandia"). Since 1945, the core mission of SNL has been to provide science and engineering support for the nation's nuclear stockpile. Today, the mission encompasses additional critical aspects of national security, including the non-proliferation of weapons of mass destruction, developing technologies and strategies for responding to emerging threats, and protecting and preventing the disruption of critical infrastructure. As a result of these activities, SNL generates hazardous, radioactive, mixed, and solid wastes. From 1942 to 1988, some of these wastes were released at numerous locations at SNL. These sites have been classified by NMED and EPA as SWMUs or AOCs. The SWMUs and AOCs at SNL include landfills, waste piles, and test areas that pre-date permitting requirements. **[RP 95].**

The MWL, designated as SWMU 76, is a 2.6 acre fenced area located in the north-central section of Tech Area 3 at SNL. The MWL accepted low-level radioactive waste and minor amounts of mixed waste[1] from SNL research facilities and off-site generators from March 1959 until December 1988. **[RP 95-**

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[1] Mixed waste is "waste that contains both hazardous waste and source, special nuclear, or by-product material subject to the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.)." 42 U.S.C. § 6903(41).

96].

B. The 2005 Permit Modification

The regulatory history of the MWL was described in detail in *Citizen Action v. Sandia Corporation*, 2008-NMCA-031,143 N.M. 620, *cert. denied.* 143 N.M. 666 (Feb. 25, 2008). In summary, the Department issued a permit (the "Permit") for storage of hazardous waste at SNL in 1992. EPA subsequently issued Module IV to add HSWA provisions to the Permit in 1993.[2] Module IV of the Permit contains provisions for permit modification and corrective action for releases pursuant to 40 C.F.R. § 264.101. The MWL was designated as a SWMU in Module IV of the Permit. *Citizen Action*, 2008-NMCA-031, ¶¶ 2-6.

Under Module IV and the corrective action rules, 20.4.1.500 NMAC, DOE and Sandia are required to investigate and remediate SWMUs. DOE and Sandia completed the investigation for the MWL in September 1996. Following this process, DOE and Sandia recommended that no further action be taken at the MWL. NMED rejected this recommendation in 1998, and informed DOE and Sandia of its decision to require corrective action for the MWL. *Citizen Action*,

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[2] As discussed above, EPA retained authorization for HSWA until 1996. *See supra* pg. 2.

2008-NMCA-031, ¶ 7. In 2001, NMED directed DOE and Sandia to conduct a Corrective Measures Study ("CMS") in compliance with Sections N, O, P, Q and S of Module IV of the Permit. *Id.*; **[RP 96]**. The purpose of the CMS was to identify, screen, develop, and evaluate potential corrective measures alternatives in order to recommend a final remedy for the MWL. The final CMS Report was submitted on May 21, 2003. *Citizen Action*, 2008-NMCA-031, ¶ 7; **[RP 96]**.

The HWMR allow a facility to request modification of an existing permit. 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42). In accordance with this provision, on January 23, 2004, DOE and Sandia requested a Class 3 modification of the Permit to select a corrective measure or remedy for the MWL. **[RP 96]**. Following a 4-day public hearing, the Secretary of NMED issued a Final Order ("MWL Final Order") in 2005 approving a permit modification and selecting a vegetative soil cover with a bio-intrusion barrier as the final remedy. **[RP 762-66]**.

The MWL Final Order and corresponding permit modification (hereinafter collectively referred to as the "Permit Modification") required DOE and Sandia to submit a Corrective Measures Implementation Plan ("CMI Plan") within 180 days to address the design, construction, operation, maintenance, and performance monitoring for the selected remedy. **[RP 763, 1248]**. The Permit

Modification further required the submission of a Corrective Measures Implementation Report ("CMI Report") after completion of the remedy. **[RP 763, 1249]**. Sandia was instructed to file a proposed LTMMP within 180 days of approval of the CMI Report for consideration by the Department. **[RP 763, 1250]**.

Over DOE and Sandia's objection, Condition 5 of the MWL Final Order ("Condition 5") and Condition 9 of Module IV of the Permit ("Condition 9") required a report every five years on the feasibility of excavation and effectiveness of the remedy ("5-Year Report"). Permit Condition 9 provides as follows:

> The Permittees 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 referenced in Section V.7 above, monitoring reports and any other pertinent data, and anything additional required by the Administrative Authority. In each 5-year report, the Permittees 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. The Permittees shall make the report and supporting information readily available to the public, before it is approved by the Administrative Authority. The Administrative Authority will provide a process whereby members of the public may comment on the report and its conclusions, and will respond to those comments in its final approval of the report.

[RP 1250-51]; *see also* **[RP 766]** (Condition 5 of the MWL Final Order). Nothing in the Permit Modification (neither Condition 5 nor Condition 9, nor any other provision) specifies a date when the first 5-Year Report is due.

Citizen Action appealed the MWL Final Order, but it did not challenge the provision requiring a 5-Year Report, and did not seek a clarification or amendment of the Permit Modification specifying when the first 5-Year Report would be due. *See generally Citizen Action*, 2008-NMCA-031.

C. The CMI Report

The vegetative soil cover with bio-intrusion barrier required by the Permit Modification was installed in 2009. Pursuant to the Permit Modification, in 2010 DOE and Sandia timely submitted the CMI Report detailing the remedy. On October 14, 2011, following an opportunity for public comment, the CMI Report was approved by the Department ("CMI Report Approval"). **[RP 767-68]**. In the CMI Report Approval, the Department specified the date for submittal of the first 5-Year Report: "Upon NMED approval of the LTMMP, the first five-year period for re-evaluating the feasibility of excavation and analyzing the effectiveness of the remedy, required under the Secretary's Final Order of May 26, 2005, will begin." [*Id.*]. Citizen Action submitted pre-approval comments related to the CMI Report

and had the option of appealing the CMI Report Approval. It did not appeal that decision.

D. The LTMMP

The first version of the LTMMP was submitted to the Department on September 25, 2007, but was later withdrawn. **[RP 94]**. Pursuant to the CMI Report Approval, **[RP 767]**, the current LTMMP was re-submitted in March 2012. **[RP 99 - 374]**. "The purpose of the [LTMMP] is to ensure that the MWL, with the ET Cover deployed, remains protective of human health and the environment." **[RP 106]**. To accomplish this, the LTMMP establishes a program for monitoring the following parameters: (1) radon concentrations in the air; (2) tritium, gamma-emitting radionuclides, and metal concentrations in surface soil; (3) soil moisture in the vadose zone; (4) volatile organic compound (VOC) concentrations in the vadose zone soil vapor; (5) VOCs, specific metals, and radionuclide concentrations in groundwater; and (6) gamma-emitting radionuclides in biota. **[RP 104-05]**.

The LTMMP recognizes that the Department had previously determined the schedule for the first 5-Year Report. **[RP 170-71]** (citing the 2011 CMI Report Approval for the proposition that the "[t]he first five-year reevaluation period will begin upon NMED approval of this MWL LTMMP."). Nothing in the LTMMP purports to alter or adjust this schedule. As explained in the LTMMP, DOE and

Sandia will utilize the data obtained from the LTMMP to produce the 5-Year Report, which must include the following elements: (1) a reevaluation of the feasibility of excavation; (2) an analysis of the effectiveness of the cover; (3) an update, if necessary, of the fate and transport model; and (4) a summary of the efforts to monitor contaminants. **[RP 170]**.

IV. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

In September 2012, the Department issued its Notice of Public Comment Period and Public Dialogue Meeting for Sandia National Laboratories Mixed Waste Landfill Long-Term Monitoring and Maintenance Plan. **[RP 93-98]**. Following a public meeting and 150-day public comment period, the Department approved the LTMMP on January 8, 2014 ("LTMMP Approval"). **[RP 1-2]**. The LTMMP Approval does not contain a single reference to the 5-Year Report. **[*Id.*]**. Citizen Action filed its Notice of Appeal on February 3, 2014.

ARGUMENT

I. STANDARD OF REVIEW

This Court may set aside the Department's decision only if it is (1) arbitrary, capricious, or an abuse of discretion; (2) unsupported by substantial evidence; or (3) otherwise not in accordance with law. NMSA 1978, § 74-4-14 (1992).

"A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record," *Citizen Action*, 2008-NMCA-031, ¶ 18 (citations and internal quotation marks omitted), or in other words when consideration of relevant factors is entirely omitted, when the facts found are not rationally connected to the decision made, or when the decision is not the result of a "winnowing and sifting" process. *N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, ¶ 22, 141 N.M. 41; *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n*, 2006-NMCA-115, ¶ 10, 140 N.M. 464.

For questions of fact, the Court looks to the whole record to determine whether substantial evidence supports the agency's decision. *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation. Comm'n*, 2007-NMSC-053, ¶ 24, 142 N.M. 533. Substantial evidence is evidence that a reasonable mind would consider adequate to support the fact-finder's conclusions. *N.M. Mining Ass'n*, 2007-NMCA-010, ¶ 30; *see also N.M. Indus. Energy Consumers*, 2007-NMSC-053, ¶ 24 (stating that the evidence must be sufficient to demonstrate the reasonableness of the decision). This Court views the evidence in the light most favorable to the Department's decision, drawing every inference in support of that decision. *N.M. Indus. Energy Consumers*, 2007-NMSC-053, ¶ 24; *N.M. Mining Ass'n*, 2007-

NMCA-010, ¶ 30. The Court does not reweigh the evidence or substitute its judgment for that of the agency. *Doña Ana Mut. Dom. Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-032, ¶ 11, 140 N.M. 6; *N.M. Mining Ass'n*, 2007-NMCA-010, ¶ 30.

A decision is not in accordance with law when the agency unreasonably or unlawfully misinterprets or misapplies the law. *N.M. Mining Ass'n*, 2007-NMCA-010, ¶ 11. Unless contrary to a statute, the Court generally defers to the Department's interpretation of its own regulations. *In re Application of Rhino Envtl. Servs.*, 2005-NMSC-024, ¶ 13, 138 N.M. 133; *Gila Resources Info. Project v. N.M. Water Control Comm'n*, 2005-NMCA-139, ¶ 16, 139 N.M. 625.

II. CITIZEN ACTION'S CHALLENGE TO THE SCHEDULING OF THE 5-YEAR REPORT IS UNTIMELY

Both the New Mexico Rules of Appellate Procedure and the HWA limit the time for appeal of a permitting decision by requiring that the appeal be filed within 30 days of a final action. Rule 12-601(B) NMRA (notice of appeal of action of an administrative agency must be filed with 30 days of the final order); NMSA 1978, § 74-4-14(A) (requiring appeals of final agency actions to be filed within 30 days of the final action) ("Any person who is or may be affected by any final administrative action of . . . the secretary may appeal to the court of appeals for

further relief within thirty days after action."); *see also Am. Auto Ass'n v. State Corp. Comm'n*, 1985-NMSC-037, 102 N.M. 527, 528 (for "procedural matters such as time limitations for appeals, a rule adopted by the Supreme Court governs over an inconsistent statute"). The 30-day limit for appeal is a mandatory precondition to the exercise of appellate jurisdiction, *State v. Lope*, 2014-NMCA-__, ¶ 8, __ P.3d __ (No. 32,511, July 24, 2014), and an appellant's failure to comply with the 30-day time limit will not be excused except in "the most unusual circumstances beyond the control of the parties." *Santa Fe Pac. Trust, Inc. v. City of Albuquerque*, 2012-NMSC-028, ¶ 23, 285 P.3d 595 (citation and internal quotation marks omitted). The application of this rule in the present case compels denial of the appeal for three related reasons.

First, Citizen Action purports to appeal from the Department's approval of the LTMMP, thus bringing their appeal within the 30-day window for challenges to final Department actions. A review of the Brief in Chief, however, reveals that the specific decision that Citizen Action seeks to have this Court review is not the Department's approval of the LTMMP, but rather the Department's determination that the first 5-Year Report is due within five years of approval of the LTMMP. But the approval of the LTMMP did not implicate the latter determination. Indeed, the written LTMMP Approval contains no reference whatsoever to the 5-Year

Report. **[RP 1-2]**. It is a "common-sense proposition that a party cannot use [an administrative] proceeding to reopen and reargue issues that do not relate to [that proceeding]." *Southwest Research Inst. Ctr. v. State*, 2003-NMCA-012, ¶ 22, 133 N.M. 179.

Second, Citizen Action's challenge to the schedule for the 5-Year Report is untimely because Rule 12-601(B) and Section 74-4-14 required Citizen Action to bring that appeal within 30 days of the Department's final action. As explained above, the 5-Year Report requirement was imposed as Condition No. 5 in the MWL Final Order and Condition No. 9 in the Permit. Citizen Action appealed the Permit Modification, *see generally Citizen Action*, 2008-NMCA-031, and it could have challenged the 5-Year Report provision at that time. It did not.

Similarly, even if Citizen Action considers the 5-Year Report language in the Permit Modification to be ambiguous, the Department made clear in the 2011 CMI Report Approval that the first 5-Year Report was due five years after approval of the LTMMP. **[RP 767-68]**; *see, e.g., Louisiana Environmental Action Network v. EPA*, 172 F.3d 65, 69 (D.C. Cir. 1999) (EPA interpretation of provision qualifies as appealable action). In that decision the Department unambiguously stated that "[u]pon NMED approval of the LTMMP, the first five-year period for re-evaluating the feasibility of excavation and analyzing the effectiveness of the

remedy . . . will begin." **[RP 767]**. The 2011 CMI Report Approval, like the LTMMP approval, was a final appealable action. Citizen Action participated by commenting on the CMI Report after it was submitted by DOE and Sandia, but it did not appeal the CMI Report Approval.

By failing to challenge either the 2005 Permit Modification or the 2011 CMI Report Approval clarifying the schedule for the 5-Year Report, Citizen Action waived its right to challenge the provision. *See Public Interest Research Group of New Jersey, Inc. v. Powell Durrfyn Terminals, Inc.*, 913 F.2d 64, 78 (3d Cir. 1990) ("[b]y failing to challenge a permit in an agency proceeding, [appellant] has lost 'forever the right to do so'" (quoting *Texas Mun. Power Agency v. EPA*, 836 F.2d 1482, 1484-85 (5th Cir. 1988)); *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 905, 909-14 (D.C. Cir. 1985) ("petitioners who delay filing requests for review do so at the risk of finding their claims time-barred"). For example, in *Palumbo v. Waste Technologies Industries*, 989 F.2d 156 (4th Cir. 1993), the appellants sought review of an EPA decision to issue a RCRA permit for a hazardous waste incinerator.[3] The United States Environmental Appeals Board rejected the

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[3]The HWA is patterned after RCRA, and is required to be substantively equivalent to RCRA in order for New Mexico to maintain its authorization to enforce the HWA in lieu of RCRA. Thus, federal case law interpreting RCRA is persuasive

challenge, and appellants failed to appeal the Board's ruling to the appropriate federal circuit court. *Id.* at 158. Thereafter, appellants brought an action in federal court challenging the validity of state and federal hazardous waste permits, and seeking to enjoin the operation of the incinerator. *Id.* The Fourth Circuit Court of Appeals held that the district court lacked subject matter jurisdiction over the collateral challenge to the hazardous waste permits because the appellants failed to appeal the earlier permitting decisions. *Id.* at 160-61 ("Plaintiffs cannot launch a grapeshot collateral attack on the permitting decisions of the EPA"). The same reasoning applies in the present case. Citizen Action chose not to appeal the schedule for the first 5-Year Report to this Court when the Department made that decision; they are now bound by that choice. *See, e.g., Powell*, 913 F.2d at 78

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authority in construing the HWA. *See State ex rel. Sandel v. New Mexico Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 14, 127 N.M. 272 (Court may view as persuasive case law from other jurisdictions interpreting substantially identical statutory language); *State v. Hodnett*, 1968-NMCA-104, ¶ 11, 79 N.M. 761 (where state rule governing motions to vacate sentence was patterned after federal statute, interpretation of federal statute by federal courts was persuasive of meaning of state rule); *State v. Ramirez*, 1967-NMSC-210, ¶ 4, 78 N.M. 418 (indicating that federal case law construing federal statutes upon which New Mexico statutes are patterned is persuasive authority in construing the state statute).

(challenge to Clean Water Act permit time-barred because it was not brought within statutory time for appeal).

Third, Citizen Action's challenge to the schedule for the 5-Year Report is an impermissible collateral attack on the 2005 Permit Modification and the 2011 CMI Report Approval. "A collateral attack is an attempt to avoid, defeat, or evade [a decision], or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking the [decision]." *Lewis v. City of Santa Fe*, 2005-NMCA-032, ¶ 10, 137 N.M. 152 (citation and internal quotation marks omitted). This principle has been applied to preclude untimely challenges to decisions by administrative agencies, *see Shovelin v. Central N.M. Elec. Coop.*, 115 N.M. 293, 298 (1993) (holding administrative decisions may be given preclusive effect), *Vandervossen v. City of Española*, 2001-NMCA-016, ¶ 18, 130 N.M. 287 ("zoning decision may not be challenged by an untimely collateral attack"), and permits, *Chemical Weapons Working Group, Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1492 (10th Cir. 1997) (RCRA "does not allow collateral attacks on [EPA] permit decisions or those of state agencies with federally-delegated authority"); *Greenpeace, Inc. v. Waste Tech. Indus.*, 9 F.3d 1174, 1182 (6th Cir. 1993) (failure to challenge RCRA permit caused plaintiffs to "forfeit[] any opportunity for judicial review of claims that could have been raised by

appealing the RCRA permit amendment"); *Palumbo*, 989 F.2d at 160 (rejecting appeal because a "count-by-count examination of the substance of plaintiffs' complaint confirms that it is at root a collateral attack on the permitting decisions of the federal and Ohio EPAs"). Because Citizen Action failed to timely challenge the actions of the Department, it follows that the schedule for the 5-Year Report is final, and principles of administrative law, res judicata and collateral estoppel render the Department's decision immune from collateral attack.

Citizen Action appears to make three arguments to justify its late appeal of the schedule for the 5-Year Report. As described below, each of these arguments is unpersuasive. First, Citizen Action attempts to frame the CMI Report Approval as an "informal decision-making," suggesting that Citizen Action need not have appealed the decision at that time because it was not a "final administrative action" within the meaning of Section 74-4-14(A). *See* **[BIC 23]**. It is true that "[a]ppellate courts may not review the actions of an administrative agency until those actions are final." *Mills v. New Mexico State Bd. of Psychologist Examiners*, 1997-NMSC-028, ¶ 11, 123 N.M. 421. In determining whether an agency action is final, New Mexico courts consider "whether further fact finding by the [agency] will elicit more evidence illuminating the issues, whether further agency decisions may moot some of the contentions, and whether the parties will suffer imminently

the effects of the final order." *New Mexico Indus. Energy Consumers v. N.M. Pub. Serv. Comm'n*, 1991-NMSC-018, ¶ 24, 111 N.M. 622; *see also Grand Canyon Trust v. Pub. Serv. Co.*, 283 F. Supp. 2d 1249, 1252-53 (D.N.M. 2003) ("The test of finality of an agency action is not whether the action is memorialized in writing, but whether the agency has completed its decisionmaking process, and whether the resulting action has a direct impact on the rights of the parties involved."). "The determination of finality must be based on pragmatic consideration of the matters at issue and analysis of whether the administrative body has in fact finally resolved the issues," and New Mexico courts defer to an agency's determination on whether a particular decision is final. *New Mexico Indus. Energy Consumers*, 1991-NMSC-018, ¶ 24 ("Because of the Commission's great discretion in initially determining the issues before it . . . we believe that, if it reasonably states that it has not finally resolved an issue or will return to it, it should be allowed the opportunity to exercise its discretion.").

Here, the CMI Report Approval demonstrates that NMED completed its decision making process on the schedule for the 5-Year Report in October 2011. The CMI Report Approval was issued following a public process that included the opportunity for notice and comments. It provides:

> The Permitees must submit a [LTMMP] for the Mixed Waste Landfill within 180 days of the date of this letter. Upon NMED approval of the LTMMP, the first five-year period for re-evaluating the feasibility of excavation and analyzing the effectiveness of the remedy, required by the Secretary's Final Order of May 26, 2005, will begin.

[RP 767]. Thus, the plain language of the CMI Report Approval states in no uncertain terms that the Department had determined by 2011 that the five-year re-evaluation period would begin "upon NMED's approval of the LTMMP." Put another way, the Department "had completed its decisionmaking," and the decision had "a direct impact on the rights" and obligations of DOE and Sandia. *Grand Canyon Trust*, 283 F. Supp. 2d at 1252-53.

It is also important that the Department considered its decision on the schedule for the first 5-Year Report to be final as of October 2011. As explained in the LTMMP, "NMED *determined* the first five-year period will begin upon NMED approval of this LTMMP (Kieling October 2011)." **[RP 122, 170-71]** (emphasis added). This past-tense reference to the previous decision reflects the Department's position that it finally resolved this issue in the CMI Report Approval, and the Department is entitled to deference on its interpretation of what constitutes a final action. *New Mexico Indus. Energy Consumers*, 1991-NMSC-018, ¶ 24.

Next, Citizen Action claims, without citation, that it was unaware of the Department's interpretation of the schedule for the 5-Year Report. *See* **[BIC 27-28]**. Since the Department's decision on the schedule was made in the CMI Report Approval, this unsupported claim is inconsistent with the fact that Citizen Action submitted comments on the CMI Report as part of the public process. Further, the CMI Report Approval was posted on the Department's website[4] and placed in Sandia's publicly accessible file. *See* **[RP 768]** (CMI Report Approval cc'd to file SNL 2011 and Reading SNL-10-05 (the public repository for MWL documents)). Thus, the CMI Report Approval has been publicly available since the Department issued it in October 2011 and Citizen Action cannot credibly allege that it was unaware of it until 2014.

Moreover, even if Citizen Action did not receive notice of the CMI Report Approval in 2011, there can be no doubt that Citizen Action was aware of the Department's decision by May 2012 when the Department provided a copy of the CMI Report Approval in response to Citizen Action's Inspection of Public Records

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[4] *See* http://www.nmenv.state.nm.us/HWB/snlperm.html#MWLCMIReport (last visited July 24, 2014).

Act ("IPRA") request.[5] *See* **[BIC 24]**. Citizen Action offers no justification for its failure to appeal the decision setting the 5-Year review schedule at that time. Therefore, regardless of whether Citizen Action received notice of the CMI Report Approval in October 2011 or March 2012, its February 3, 2014 Notice of Appeal is untimely.

For its last argument, Citizen Action implies that it is entitled to appeal the schedule for the first 5-Year Report because the prior decision of the Department is referenced in the 272-page LTMMP. **[RP 170]**. As discussed above, however, the decision on the schedule was not made in connection with the approval of the LTMMP, the LTMMP Approval did not mention the schedule for the 5-Year Report, and the mere reference to a prior decision in a submission by a permittee does not reopen that decision. For example, the implementation of an agency action is not itself a challengeable agency action. *See Montana Wilderness Assoc., Inc. v. U.S. Forest Serv.,* 314 F.3d 1146, 1150 (9th Cir. 2003) (Forest Service's maintenance of trails designated by previously consummated decisionmaking process is not a final reviewable agency action), *vacated on other grounds by* 542

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[5] Although not part of the Record Proper, the IPRA request was attached to Citizen Action's Docketing Statement.

U.S. 917 (2004); *Ecology Center, Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 924-25 (9th Cir. 1999) (holding that monitoring required by forest plan was not final agency action); *Chemical Weapons Working Group,* 111 F.3d at 1494 (implementation of Army decision to destroy chemical weapons by on-site incineration was not itself reviewable agency action); *Shawnee Trail Conservancy v. Nicholas,* 343 F. Supp. 2d 687, 708-09 (S.D. Ill. 2004) (revising mapped boundaries of previously designated natural areas is not final agency action); *Montana Snowmobile Ass'n v. Wildes,* 103 F. Supp. 2d 1239, 1242 (D. Mont. 2000) (letter enforcing previous decision to impose travel restriction is not final agency action).

In sum, if Citizen Action was prepared to demonstrate that it was necessary or prudent to issue the first 5-Year Report within five years of the issuance of the Permit Modification, Rule 12-601(B) and Section 74-4-14 required Citizen Action to bring its appeal directly to this Court within 30 days. Because that was not done, Citizen Action forfeited its opportunity for judicial review of claims that could have been raised by appealing the 2005 Permit Modification or the Department's interpretation of those amendments in 2011. *See, e.g., Greenpeace,* 9 F.3d at 1182 (appellant forfeited right to challenge EPA permitting decisions on

RCRA permit because it did not appeal within statutory window for judicial review). The appeal should be denied.

III. THE DEPARTMENT'S INTERPRETATION OF ITS FINAL ORDER AND PERMIT IS REASONABLE AND ENTITLED TO DEFERENCE

Should the Court decide that the schedule for the 5-Year Report is a proper subject of review in this appeal, the Department's 2011 interpretation of the Permit Modification as setting the start date of the 5-Year review period from the date of approval of the LTMMP should be upheld as reasonable and in accordance with law.

Citizen Action argues that the Permit Modification "unequivocally" requires Sandia to submit the first report evaluating the feasibility of excavation and the continued effectiveness of the remedy five years from the date of the MWL Final Order. **[BIC 26]**. However, while the Permit Modification states that DOE and Sandia shall submit such a report every five years, nothing in either the MWL Final Order or the permit modification that it approves specifies the start date from which the first five year period runs, or when the first 5-Year Report is due. Thus, the 5-Year Report provision is ambiguous and subject to interpretation. *See, e.g., United Nuclear Corp. v. Allstate Ins. Co.*, 2012-NMSC-032, ¶ 10, 285 P.3d 644 (language is ambiguous when "reasonably and fairly susceptible of different

constructions" (citation and internal quotation marks omitted)); *Pub. Serv. Co. of N.M. v. N.M. Public Regulation Comm'n*, 2009 WL 6608297, *4 (N.M. 2009) (applying that rule to an administrative order (citing *Envtl. Control, Inc. v. City of Santa Fe*, 2002-NMCA-003, ¶ 14, 131 N.M. 450)). Indeed, as elaborated below, Citizen Action itself advocates for several different interpretations of the 5-Year Report provision. *Compare* **[BIC 19-20, 26]** (arguing that first 5-Year Report was due in 2010), *with* **[BIC 20]** (arguing that first 5-Year Report is due in 2014), *and* **[BIC 16, 20]** (suggesting that different analysis in 5-Year Report are due at different times). Citizen Action has thereby implicitly recognized that the 5-Year Report provision is reasonably and fairly susceptible of different constructions – that is to say, it is ambiguous.

Courts will generally defer to an agency's reasonable interpretation of its own ambiguous orders. *See In re Application of Rhino Envtl. Servs.*, 2005-NMSC-024, ¶ 13, 138 N.M. 133, 137; *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (an agency's interpretation of its own regulation is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation"). In applying such deference to the Department's construction of its own Permit Modification, the Court should be hesitant to "substitute an alternative reading for the [Department's] unless that alternative reading is compelled by the

[Permit's] plain language or by other indications of [the Department's] intent at the time of the [Permit's] approval." *Gardebring v. Jenkins*, 485 U.S. 415, 429-30 (1988).

In this case, the Department's determination that the first 5-Year Report is due within five years of the Department's approval of the LTMMP is a reasonable interpretation of the Permit Modification, and is supported by the plain language and intent of its provisions. The Permit Modification specifies that the 5-Year Report is to include a review of "the documents referenced in Section V.7 [of the Permit], monitoring reports and any other pertinent data, and anything additional required by [the Department]." **[RP 1250]**; *see also* **[*id.*]** (Section V.7 of the Permit, referencing 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 [Sandia] for the MWL"); **[RP 766]** (MWL Final Order providing that 5-Year Report "shall include a review of the documents, monitoring reports and any other pertinent data, and anything additional required by NMED"). **[RP 1250]**. The Permit Modification further requires that, in each 5-Year Report, DOE and Sandia "shall update the fate and transport model for the site with current data, and re-evaluate any likelihood of contaminants reaching groundwater." **[RP 766, 1250]**.

The above language both explicitly and implicitly ties the information and analysis required in the 5-Year Report to the monitoring data and information generated pursuant to the LTMMP. In fact, the Permit Modification expressly states that one of the documents that must be reviewed in the 5-Year Reports is the LTMMP. **[RP 1250]**. The Permit Modification also requires that the 5-Year Reports be based on "monitoring reports," "other pertinent data," and "anything additional" required by the Department. **[*Id.*]**. The "mechanism for establishing what monitoring data will be the subject of the 5-year review is the approval of the LTMMP." **[RP 9]**; *see also* **[*id.* at 170]**. Without the monitoring data generated pursuant to the LTMMP, it would not be possible for DOE and Sandia to update the fate and transport model or to reevaluate the likelihood of contaminants reaching groundwater, as required by the Permit Modification. **[RP 1167-69]**. Thus, it was logical and reasonable for the Department to interpret the 5-Year Report provision in the Permit Modification such that the first 5-year review period would run from approval of the LTMMP.

Citizen Action's Brief in Chief also appears to suggest an alternative interpretation that would "toll" the running of the first five year period until the remedy – the vegetative cover – was implemented in 2009, thus requiring the first 5-Year Report to be submitted in 2014. **[BIC 20]**. However, requiring the first 5-

Year Report in 2014 would present the same basic problems as requiring it in 2010. There simply is no language in the Permit Modification to support this interpretation. Even if the language did lend itself to this interpretation, since 2011 little new information has been generated upon which to base an evaluation of the effectiveness of the remedy. The limited information that is available, consisting of annual groundwater monitoring data since 2005, one-time active soil-vapor sampling, tritium soil sampling, and air-borne radon testing in 2008, has been reviewed by Department technical staff who determined that conditions at the MWL are stable and no significant impacts to groundwater are likely to occur. Thus, requiring a 5-Year Report in 2014 would be premature given the lack of new data upon which the report must rely, and would not provide any additional protections to human health or the environment. **[RP 1168]**.

Indeed, such new information was the key rationale underlying the hearing officer's recommendation to include the 5-Year Report requirement in the MWL Final Order and, accordingly, in the modification of the Permit. As Citizen Action acknowledged, the 5-Year Reports and associated public comments are intended to "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 [the Department's] attention and addressed." **[BIC 15]**; *see* **[RP 1206]**

(hearing officer's report). The LTMMP is the mechanism by which the new information is generated to guide the evaluations required in the 5-Year Reports. **[RP 1167-68]**. Therefore, the Department's decision to require the first such report five years from approval of the LTMMP is the most logical, common sense interpretation of the Permit Modification.

Citizen Action suggests yet another interpretation, claiming that the evaluation of the feasibility of excavation and the evaluation of the continued effectiveness of the remedy are two separate analyses subject to two separate deadlines. **[BIC 16, 20]**. Citizen Action appears to argue that while the evaluation of the continued effectiveness of the remedy might await the monitoring data generated under the LTMMP, the evaluation of the feasibility of evacuation need not, and should have been subject to an earlier deadline. As explained above, however, the two evaluations are necessarily tied together, both by the plain language of the Permit Modification and by practical constraints. For example, the effectiveness of the remedy bears upon the feasibility of excavation analysis in terms of the risks and benefits of excavation. Evaluation of such risks and benefits necessarily turns upon what the monitoring reveals as far as the effectiveness of the remedy. Monitoring is also necessary to determine whether there is a change in the

hazards the wastes pose over time that might render excavation a safe option. *See* **[RP 1205-06]**.

In sum, the Department's decision to require the first 5-Year Report following installation of the monitoring systems under the LTMMP and collection of data from those systems is the most sensible and well-founded interpretation of the Permit Modification and should be upheld.

IV. THE DEPARTMENT'S APPROVAL OF THE LTMMP WAS NOT A PERMIT MODIFICATION

Citizen Action argues that the Department's approval of the LTMMP changed the terms of the MWL Final Order and corresponding Permit, and thus constituted a permit modification requiring the procedures set forth in 20.1.4.901 NMAC (incorporating 40 C.F.R. § 270.42). **[BIC 13, 21-22, 28]**. As explained below, the LTMMP did not modify the MWL Final Order or the corresponding Permit, and the procedures employed by the Department in approving the LTMMP were therefore appropriate.

A. The Department's Decision on the Schedule for the 5-Year Reports Did Not Modify the Permit

Citizen Action's argument that the Department's determination that the 5-year review period should run from approval of the LTMMP constitutes a

modification of the MWL Final Order and corresponding Permit is premised on the assumption that the Final Order and Permit clearly specify otherwise. However, as explained previously, neither the MWL Final Order nor the corresponding Permit specifies what action triggers the running of the 5-year reporting period, or on what date the first 5-Year Report is due. Thus, the Department's determination that the first 5-year reporting period would run from the approval of the LTMMP did not constitute a modification of the MWL Final Order or the corresponding Permit, but rather an interpretation of an ambiguous term. *See Umano v. W.C. Robinson & Assocs.*, 352 F. Supp. 2d 1259, 1265 (S.D. Fla. 2004) (where written employee benefits plan was ambiguous, employer's "statements resolving the ambiguity [were] considered interpretations, rather than prohibited modifications, of the plan"); *accord Maine v. Garvin*, 1966-NMSC-140, ¶ 13, 76 N.M. 546 (reaffirming parol evidence rule which distinguishes between modifying a written agreement and explaining ambiguity or supplying a missing term in the agreement). An administrative interpretation of an ambiguous term in a permit is, by definition, not a modification of such a term.

B. The LTMMP Provisions Addressing Groundwater Monitoring Did Not Modify the Permit

Citizen Action asserts that the LTMMP "changed the number, location and depth of upgradient and downgradient wells of the groundwater monitoring network," and that these changes constituted a modification of the Permit without the requisite procedures under 40 C.F.R. § 270.42(c). **[BIC at 28-29]**. This assertion cannot be squared, however, with the language of the Permit which does not include specific monitoring requirements such as the number, location, and depth of wells. *See* **[RP 1248-51]**.

Nor does Citizen Action identify any specific provisions in either the LTMMP or the Permit or explain how the LTMMP provisions are inconsistent with the Permit. Citizen Action bears the burden on appeal to establish that the LTMMP modified the Permit such that Class 3 permit modification procedures should have been followed. It has not carried this burden, and neither Sandia nor this Court should be expected to sift through the record to try to discover inconsistencies. The Court should therefore disregard Citizen Action's argument that the LTMMP modified the Permit with respect to the groundwater monitoring

network.[6] *See Muse v. Muse*, 2009-NMCA-003, ¶ 42, 145 N.M. 451 (recognizing that this Court is "not obligated to search the record on a party's behalf to locate support for propositions a party advances or representations of counsel as to what occurred in the proceedings"); *Murken v. Solv–Ex Corp.*, 2005–NMCA–137, ¶ 14, 138 N.M. 653 (Court of Appeals will "decline to review . . . arguments to the extent that [the Court] would have to comb the record to do so").

Citizen Action also makes a series of general assertions regarding problems with the groundwater monitoring network, unsupported by any citation or analysis. **[BIC 28-31]** (stating that the LTMMP changed point of compliance for well locations, monitoring wells were installed without complying with public participation requirements, there are deficiencies in the construction and monitoring of the dirt cover and protection of groundwater, monitoring well network is unreliable and defective). Sandia similarly cannot be expected to comprehend, explain, and respond to these general and unsupported assertions, and the Court should disregard them. In any event, the Department's Response to

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[6] Although approval of the LTMMP does not require a permit modification, Sandia does acknowledge that a Class 3 permit modification relating to the MWL will be necessary in the near future to designate the MWL for corrective action complete ("CAC") status under 20.4.1.500 NMAC (incorporating 40 C.F.R. § 264.101).

Public Comments provides detailed explanations regarding the groundwater monitoring network, and demonstrates that approval of the LTMMP is supported by substantial evidence and is not arbitrary and capricious or otherwise contrary to law. **[RP 3-45]**.[7]

V. CITIZEN ACTION'S ARGUMENT ON THE STATUS OF THE MWL AMOUNTS TO AN IMPERMISSIBLE COLLATERAL ATTACK ON THE PERMIT

Citizen Action argues that the MWL was improperly classified as a SWMU in Module IV of the Permit, and is actually a "regulated unit" under 40 C.F.R. § 264.90(a), requiring a post-closure permit under 20.4.1.500 NMAC (incorporating 40 C.F.R. §§ 264.90 – 264.100). **[BIC 32-33]**. Citizen Action does not explain how the Department's approval of the LTMMP raises the issue of whether the MWL was properly designated as a SWMU, nor can it. The regulatory status of the MWL was determined by EPA in 1993, and the Department's approval of the LTMMP does not present a new opportunity to relitigate this regulatory designation. *See Citizen Action*, 2008-NMCA-031, ¶ 6. Thus, Citizen Action's

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[7] Sandia notes that, although the approval of the LTMMP was not a modification of the Permit, the public was allowed an extensive opportunity for comment prior to such approval, including a public meeting and a 150-day public comment period.

"regulated unit" argument is an impermissible collateral attack on the Permit, and is not appropriately before the Court.

Once the MWL was included in the Permit as a SWMU, the applicable regulatory scheme was set. The proper time to challenge that regulatory scheme was in 1993 when EPA and NMED made the decision. *See* 42 U.S.C. § 6976; *see also* Rule 12-601(B) NMRA; NMSA 1978 § 74-4-14; 20.4.1.901.A(10) NMAC. Citizen Action, like any other interested party, had a statutorily limited time to appeal Module IV. It failed to do so. After the time for appeal had passed, that regulatory decision became final, and Citizen Action, along with the Department and Sandia, were bound by it. Citizen Action did not file a timely appeal to challenge the inclusion of the MWL in Module IV as SWMU 76, and it should not now be allowed to challenge the substance of that decision in this proceeding. *See, e.g., Chemical Weapons Working Group,* 111 F.3d at 1492 (district court properly refused to recognize jurisdiction over plaintiffs' claim, where claim was an impermissible collateral attack on a permitting decision made by an agency; allowing such attack would permit circumvention of statutory limits on judicial review); *Greenpeace,* 9 F.3d 1174 (citizen suit was impermissible collateral attack on EPA permit decision).

VI. THE COURT SHOULD DISREGARD ARGUMENTS PREMISED ON EXTRA-RECORD MATERIALS

The subject of extra-record materials was raised previously in this appeal in a joint motion filed by the Department and Sandia on May 23, 2014, seeking to prevent Citizen Action from relying on such materials in its Brief in Chief. The Court granted the motion, ruling that "the record on appeal is limited to materials that were before the administrative agency at the time that agency made the decision that is now on appeal." June 9, 2014 Order, at 2. The Court instructed that Citizen Action could present argument in its Brief in Chief to expand the record in this matter. *Id.*

After filing its Brief in Chief, Citizen Action filed a Motion to Supplement Incomplete Administrative Record Proper ("Citizen Action Motion to Supplement") on June 24, 2014. In its Motion to Supplement, Citizen Action sought to include in the record the transcript of a public comment session on the LTMMP held by the Bernalillo County Water Protection Advisory Board ("WPAB") on February 6, 2013. On June 27, 2014, the Department also filed a Motion to Supplement the Administrative Record ("NMED Motion to Supplement"), agreeing to include in the Administrative Record the full text of the public comments received regarding the MWL in 2012 and 2013, including the

transcript of the WPAB meeting, as well as the WPAB's February 24, 2014 letter to NMED and NMED's response of April 14, 2014. The Court granted both of these motions in its Orders filed July 16, 2014.

Despite having filed its Motion to Supplement *after* submitting its Brief in Chief, a number of Citizen Action's arguments in the Brief in Chief are premised on documents that it did not address in the Citizen Action Motion to Supplement and did not seek to have included in the record on appeal. *See* **[BIC 29-32]**. These documents are the 2006 Techlaw, Inc. report (the "Techlaw Report"), discussed on pages 29-30 of the Brief in Chief; the April 2010 audit conducted by the EPA Office of Inspector General (the "OIG Audit Report"), discussed on page 31; and the EPA Region 6 2007 Oversight Report (the "2007 Oversight Report"), discussed on pages 31-32 (collectively referred to as the "Extra-Record Documents"). None of the Extra-Record Documents was included in the three motions to supplement. Citizen Action has identified no valid legal basis in its Brief in Chief for inclusion of the Extra-Record Documents in the record. Thus, they are not a part of the record before the Court, as supplemented, and the Court should not consider arguments based upon them.

Even if the Court determines that the Extra-Record Documents are properly considered in this appeal, they are not relevant to, nor do they impact, the

Department's decision to approve the LTMMP. The Department addressed each of these documents in its response to public comments on the LTMMP, explaining why they are not relevant, or how the concerns raised have already been addressed. **[RP 9, 11]** (discussing Techlaw Report); **[RP 8]** (discussing OIG Audit Report); **[RP 35-41]** (discussing 2007 Oversight Report). Substantial evidence in the record supports the Department's approval of the LTMMP, and nothing in the Extra-Record Documents renders that action arbitrary, capricious or otherwise contrary to law.

CONCLUSION

The Court should reject Citizen Action's challenge to the schedule for the first 5-Year Report, and affirm the Department's approval of the LTMMP.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Answer Brief of Sandia Corporation* was served by U.S. mail and by electronic mail on August 4, 2014, on the following:

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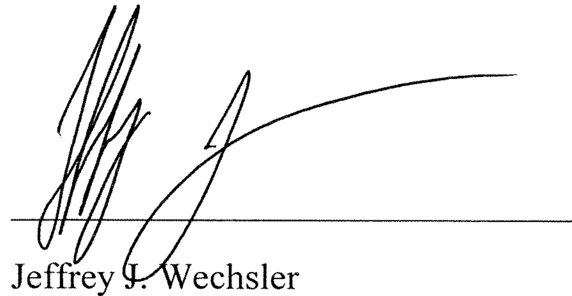

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