IN THE NEW MEXICO COURT OF APPEALS

CITIZEN ACTION NEW MEXICO,

Appellant,

vs. No. 33,517

NEW MEXICO ENVIRONMENT DEPARTMENT,

Appellee,

and

SANDIA CORPORATION,

Intervenor-Appellee.

BRIEF IN CHIEF OF APPELLANT CITIZEN ACTION NEW MEXICO

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Pursuant to Rule 12-214 NMRA, Appellant requests oral argument in this matter because of the procedural and technical complexities of the issues involved in this appeal.

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I. INTRODUCTION

This appeal seeks judicial enforcement of a New Mexico Environment Department ("NMED") Final Order signed by the NMED Secretary on May 26, 2005, (the "Final Order"). The Final Order was intended to insure an appropriate level of oversight and adequate protection of the public health and safety posed by contaminants placed in the Sandia Mixed Waste Landfill (the "MWL"). (Administrative Record, pp. 00762-00766). The NMED administrative decision which led to this appeal occurred on January 8, 2014, when NMED approved the Long-Term Monitoring and Maintenance Plan, March 2012, Sandia National Laboratories ("Sandia"), EPA ID #NM5890110518 HWB-Sandia -12-007 (the "March 2012 LTMMP"). (Administrative Record, pp. 00099- 00374). The March 2012 LTMMP is intended to provide a comprehensive, long-term monitoring program for the MWL.

The administrative decision challenged in this appeal has significant public policy and public health implications. The mission of the NMED Hazardous Waste Bureau is to provide regulatory oversight and technical guidance to New Mexico hazardous waste generators and treatment, storage, and disposal facilities as required by the New Mexico Hazardous Waste Act, Chapter 74, Article 4, NMSA 1978, and regulations promulgated under the Act. http://www.nmenv.state.nm.us/HWB/

A description of the MWL hazardous waste site that is the subject of this appeal may be found on a joint Sandia National Laboratories/

U.S. Department of Energy National Nuclear Security Administration document on the Internet titled "Mixed Waste Landfill (MWL)." http://elm.sandia.gov/docs/fact sheets/MWL FactSheet March2012.pdf

The MWL consists of 2.6 acres of unlined pits and trenches above Albuquerque's aquifer that received radioactive and hazardous chemical waste from 1959 to 1988. (Administrative Record, pp. 00126-00129). The MWL is located 4 miles south of the central Sandia facilities and 5 miles southeast of the Albuquerque International Sunport. It contains solvents and other chemicals mixed haphazardly with radioactive wastes resulting from nuclear weapons activities. The wastes in this toxic dump are in unlined pits and trenches under a compacted dirt cover installed in 2009, and the dump is leaching more than 100 toxic chemicals and radionuclides toward Albuquerque's drinking water aquifers every day. Scientific documentation and evidence presented to NMED by Appellant Citizen Action in the administrative proceeding below, but omitted from the Administrative Record submitted by NMED, demonstrate that the MWL presents a clear and present danger to Albuquerque's public health and safety, and that the waste in this toxic dump should be excavated and disposed of safely. As the wastes continue to seep into the ground, cleanup will become much more expensive and difficult.

A helpful, comprehensive background statement underlying much of the history related to this appeal, and applicable federal and state law cited in this brief is included in a New Mexico Court of

Appeals decision cited and relied upon in this brief. *Citizen Action v. Sandia Corporation*, 143 N.M. 620, 179 P.3d 1228, Certiorari Denied, February 25, 2008. The subtitle of the case caption is *In the Matter of Request for a Class 3 Permit Modification for Corrective Measures for the Mixed Waste Landfill, Sandia National Laboratories, Bernalillo County, New Mexico, EPA ID No. NM5890110518.* The Background section contained in the opinion is repeated below because it provides a concise explanation of the factual history and the legal framework for this appeal:

> Sandia is a federal facility owned by the Department of Energy (DOE). Since 1945, Sandia has conducted research and development of conventional and nuclear weapons, national security measures, and alternative energy sources. As a result of this research and development, Sandia has generated hazardous, radioactive, mixed, and solid wastes. Mixed waste is waste that contains both radioactive and solid waste. Sandia disposed of low-level radiation waste and minor amounts of mixed waste at the MWL from 1959 until 1988.
>
> The regulatory scheme governing mixed waste landfills has developed over a number of years.... The first comprehensive federal law relating to the generation, storage, treatment, and disposal of hazardous waste was passed when Congress enacted the federal Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k (1976, as amended through 2002).... Later, Congress passed the Hazardous and Solid Waste Amendments of 1984 (HSW Amendments), P.L. No. 98-616 (codified as amended at 42 U.S.C. §§ 6901-6981). The HSW Amendments expanded the authority under RCRA to require corrective action as a remedy for certain hazardous waste sites and designated solid waste management units (SWMU). The MWL was designated as an SWMU in 1993....
>
> In 1985, the federal Environment Protection Agency (EPA) authorized the State of New Mexico to administer and enforce a hazardous waste program, pursuant to the New Mexico Hazardous Waste Act, NMSW 1978, §§ 74-4-1 to -14

(1977, as amended through 2007). The HSW Amendments continued to be enforced by the EPA until 1996, when New Mexico obtained authorization for their enforcement. [It is not disputed] that the New Mexico Environment Department (NMED) regulates the MWL under the New Mexico Hazardous Waste Act or that pursuant to RCRA, the EPA authorizes NMED to enforce Sandia's compliance with applicable federal law.

Sandia received a permit from NMED to store hazardous waste in 1992. The MWL was not included in the 1992 permit because the MWL stopped accepting mixed waste for permanent storage toward the end of 1988 and because NMED did not yet have the authority to implement corrective measures at facilities no longer accepting waste.

In 1993, the EPA issued a document titled Module IV. This permit authorized the MWL under federal law and operated together with the 1992 NMED permit as a joint permit. Module IV designates the MWL as an SWMU, subject to corrective measures under HSW Amendments. When NMED took over enforcement of the HSW Amendments in 1996, NMED also took over enforcement of Module IV and oversight of the corrective measures at the MWL.

Sandia conducted internal investigations of the MWL to determine whether remediation was required. As a result of these investigations, Sandia recommended that no further action be taken at the MWL. NMED rejected Sandia's recommendation, and in 1998, NMED notified Sandia that corrective action was required for the MWL. In 2001, NMED compelled Sandia to undertake a corrective measures study (Study), pursuant to Section 74-4-10.1(A). The purpose of the Study was to recommend what corrective action, or remedy, should be implemented at the MWL. The Study examined four alternative remedies: (1) no further action, (2) vegetative soil cover, (3) vegetative soil cover with bio-intrusion barrier, and (4) future excavation. Sandia ultimately recommended a vegetative soil cover to be the most appropriate remedy for the MWL. NMED again disagreed and, instead, elected to implement a vegetative soil cover with a bio-intrusion barrier. In August 2004, NMED proposed its selected remedy in a draft permit. A public evidentiary hearing regarding the draft permit was held in December 2004.

* * * * * * *

> [Following the hearing] The Secretary, with few changes...adopted the remedy proposed in the hearing officer's report; the final order was issued on May 26, 2005 **[the Final Order at issue in this appeal]**. The remedy was an amalgamation of the testimony at the hearing, which combined the previously selected remedy of a vegetative sol cover with a bio-intrusion barrier and the development of a fate and transport model. The Secretary required Sandia to develop systems (1) to trigger future remedial action, (2) to conduct long-term monitoring, and (3) to maximize public comment and access to documents. The order mandates that every five years, Sandia prepare a report to evaluate the feasibility of excavation and the continued effectiveness of the remedy selected....

Paragraph 5 of the Final Order, (hereinafter, "Condition 5"), quoted in part immediately above in the background section in the *Citizen Action v. Sandia Corporation* opinion is quoted in full below.

The January 8, 2014, NMED decision is important for purposes of this appeal because that decision essentially disregarded a critical provision in the Final Order, or Condition 5, which unequivocally required Sandia to perform that which a Hearing Officer's Report noted was essential to insuring the "...feasibility of excavation and [the] continued effectiveness of the selected remedy [the 'vegetative cover with bio-intrusion..,']" and the subject of ongoing reevaluation. The hearing officer's report was adopted in the Final Order,

Condition 5 of the Final Order states:

> 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.

The Final Order notes that it was issued in response to a request by Sandia for a Resource Conservation and Recovery Act ("RCRA"), 42 USC § 6901 et seq., permit modification for Sandia pursuant to the New Mexico Hazardous Waste Act, NMSA 1978, Section 74-4-1 et seq., and the New Mexico Hazardous Waste Management Regulations (20.4.1 NMAC). The proposed modification of the permit incorporated corrective action for the MWL. The RCRA permit modification was approved by the Final Order, subject to a number of changes and conditions, all of which were to be the subject of the Condition 5 review and report to be prepared by Sandia every five years. (Administrative Record, pp. 00762-00766).

As this Court noted in the Order filed in this appeal on June 9, 2014, the Court's review authority is limited to evidentiary material that was submitted to NMED during the administrative decision-making process. A procedural problem in this appeal is presented by what NMED has submitted as the "Administrative Record Proper"[1] which is

[1] The "Administrative Record Proper" is referred to herein as the "Administrative Record."

neither a record proper in the true sense, nor a complete record of the actual administrative decision-making process that led to the action challenged in this appeal. Pages 00004 through 00045 of the Administrative Record contain summaries of selected public comments received by NMED and NMED's response to each. Both summaries were drafted by NMED. The Administrative Record does *not* include most of the relevant comments and documents actually submitted by Appellant and other members of the public during the portion of the administrative decision-making process that is pertinent to this appeal.

One example of the inadequacy of the Administrative Record is a reference to a meeting held by the Albuquerque Bernalillo County Water Utility Authority on February 6, 2013, which is identified in the Administrative Record on page one of the Index. The transcript of the meeting is described in the NMED Response to Public Comments at page 00004, but the actual transcript is not included in the Administrative Record, except for the NMED power point presentation that occurred during the meeting, at pages 00046-00051. The meeting was for the purpose of receiving public comments regarding the MWL. The full transcript of the February 6, 2013, meeting may be found at: http://www.radfreenm.org/images/PDF/MWL/feb 2013 MWL forum transcript.pdf

Appellant is also submitting a copy of the complete transcript of the referenced meeting to the Court.

Additional public comments directly on point in this matter and provided NMED during the period 2012-2013 that are not included in the NMED Administrative Record may be found at the following address:

ftp://ftp.nmenv.state.nm.us/hwbdocs/HWB/snl/Mixed waste land fill/MWL LTMMP/LTMMP comments/

Appellant asks this Court to include the above comments in the Administrative Record.

This Court granted the Appellees' joint motion to exclude certain extra-record materials from the record, presumably assuming that a complete administrative record below exists and would be submitted to the Court. However, if a complete administrative record exists, it is not represented by the NMED submission which omits essential public comments offered by Appellant and others during 2012 and 2013 that are directly relevant to this appeal and which were provided during the administrative decision-making process.

The Court must have materials that reasonably approximate the administrative record below to rule in this matter. Accordingly, Appellant requests that the Court include in its review of the administrative decision-making process the entire administrative record below, including the meeting transcript and numerous public comments identified above, as is contemplated by this Court's Order of June 9, 2014.[2] Certain public comments and other materials that

[2] The Order filed June 9, 2014, states: "Should Appellant's research reveal a valid legal basis for expanding our review in this matter, Appellant may present argument to that effect in the brief in chief." Appellant's position is consistent with the Court's Order: the Court may only consider evidence that was presented

are part of the administrative proceeding in this matter are thus identified and referenced in this brief.

The protracted administrative proceeding below commenced with the NMED issuance on May 26, 2005, of the Final Order. (Administrative Record, pp. 00762-00766). The Final Order granted Sandia's application for a permit modification needed to determine action necessary to insure the appropriate management of the mixed radioactive and hazardous chemical waste that had been placed in the Sandia Mixed Waste Landfill.

The validity of the Final Order is not challenged in this appeal. Appellant in fact seeks judicial enforcement of the Final Order, and this appeal challenges the NMED January 8, 2014, approval of the March 2012 LTMMP (Administrative Record, 00001-00002) which purports to disregard the most significant Condition 5 of the Final Order and its enforcement. The March 2012 LTMMP allows a lengthy delay in the enforcement of Condition 5 of the Final Order which unequivocally requires that "Sandia shall prepare a report every 5 years, re-evaluating the feasibility of excavation and analyzing the continued effectiveness of the selected remedy." (Administrative Record, pp. 00762-00766; Final Order P.5, ¶5). Thus, in approving

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to the administrative agency. This is Appellant's valid legal and logical basis for asking this Court to do exactly as its Order requires. The Court should mandate that NMED provide an accurate and complete administrative record that is germane to the issue on appeal. NMED has not done so. The public comments offered should be before this Court, not the NMED's condensed version of those public comments, together with voluminous internal NMED documents, many of which are not even material to the narrow issue on appeal, which is not the legitimacy of the Final Order of 2005 but rather the process subsequently followed to weaken if not completely eviscerate the Final Order.

the March 2012 LTMMP in January 2014, NMED disregarded Condition 5 of the Final Order, while also excluding effective public participation in the administrative process. Had the mandated five-year review occurred, the feasibility of excavating the toxic wastes from the MWL may have been demonstrated.

II. SUMMARY OF PROCEEDINGS

Following the issuance of the Final Order on May 26, 2005, on September 25, 2007, Sandia prepared a Long-Term Monitoring and Maintenance Plan for the MWL (the "2007 LTMMP") and submitted it to NMED. (Administrative Record, 00456-00761. Sandia withdrew the 2007 LTMMP on December 7, 2011. (Administrative Record, 00375-00377). Sandia subsequently prepared and submitted the March 2002 LTMMP which was approved by NMED in its January 2014 decision.

NMED's approval of the March 2012 LTMMP, by disregarding Condition 5 of the Final Order, violated state law, federal law and regulations directly on point. (The New Mexico Hazardous Waste act, NMSA 1978, Section 74-4-1 et seq. (the "New Mexico Hazardous Waste Act"); the Resource Conservation and Recovery Act ("RCRA"), 42 USC § 6901 et seq.; and 42 CFR 270.42).

During the Albuquerque Bernalillo Water Utility Authority hosted meeting on February 6, 2013, which is identified in the index of the Administrative Record, commenters urged that

> a public hearing should be held to re-evaluate site characterization data and to select a different remedy, the hearing should be held because the groundwater monitoring network in inadequate, that contaminant releases from the

> landfill have caused groundwater contamination, that NMED personnel presented false information concerning the monitoring of ground water at the hearing for remedy selection held in December 2004, and that issues related to the LTMMP require a permit modification of [a] complex nature.

(Administrative Record, p. 00006). NMED's position is that "[a]pproval of the LTMMP does not require a modification of the Permittees' current Hazardous Waste Operating Permit. (Administrative Record, p. 00007). This argument misrepresents the effect of NMED's approval of the March 2012 LTMMP and misstates applicable law.

The Final Order was issued by NMED in response to a Resource Conservation and Recovery Act ("RCRA"), 42 USC § 6901 et seq., permit modification for Sandia pursuant to the New Mexico Hazardous Waste Act. The LTMMP was required by the Final Order for purposes of monitoring and maintaining the MWL. Any modification of the Final Order required that NMED follow the New Mexico Hazardous Waste Act, RCRA and regulatory procedures applicable to permit modification. (40 CFR 270.42). However, in lieu of complying with regulatory procedures, NMED used the March 2012 LTMMP approval process to sidestep Condition 5 of the Final Order. The Final Order contains no provision for its modification using the LTMMP approval process, and the process followed was not in accord with state law, RCRA, or 40 CFR 270.42 which is applicable to such a permit modification.

III. ARGUMENT

The standard of review applicable in this appeal is as is stated

in *New Mexico Department of Workforce Solutions, et al. v. Perez*, 2014-NMCA-035, filed December 12, 2013. As the Court stated in that decision, the Court reviews

> whether the administrative decision-makers acted fraudulently, arbitrarily, or capriciously; whether, based upon a whole-record review, the administrative decisions were supported by substantial evidence; whether the decision-makers abused their discretion by acting outside the scope of authority; and whether the administrative decisions were otherwise not in accordance with law. *San Pedro Neighborhood Association*, 2009-NMCA-045.

Bar Bulletin, May 7, 2014, page 31. This appeal requires only that the Court review and determine whether the administrative decision of January 8, 2014, approving the March 2012 LTMMP, was in accordance with law. The challenged decision disregarded Condition 5 of the Final Order in violation of applicable RCRA administrative procedures adopted by NMED, as well as the clear wording of the Final Order, and it was not in accordance with law. Such a modification of the Final Order excuses Sandia's failure to comply with Condition 5 of the Final Order, both retroactively and prospectively, and accommodates NMED's failure to enforce the Final Order.

The Final Order was adopted as a Class 3 modification of Sandia National Laboratories' ("Sandia") Hazardous Waste Permit Module IV pursuant to the New Mexico Hazardous Waste Act, and the New Mexico Hazardous Waste Management Regulations (20.4.1 NMAC, Revised June 14, 2000) for Sandia's Mixed Waste Landfill (the "MWL" as it has been cited

herein). (Administrative Record, pp. 00762-00766). The cited New Mexico Administrative Code (NMAC) regulations were adopted in compliance with RCRA requirements.

The State of New Mexico received authorization on January 25, 1985, from the U.S. Environmental Protection Agency (the EPA) to implement its hazardous waste management program. A state that receives final authorization from the EPA under RCRA, Section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal Hazardous Waste Program. As the Federal program changes, states must change their programs and ask EPA to authorize the changes. Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k (1976, as amended through 2002).

Changing the terms and conditions of an order that is part of a hazardous waste permit requires a formal process for public notice, an opportunity to comment, and a public meeting or hearing. 40 CFR § 270.41 requires: "If a permit modification is requested by the permittee, the Director shall approve or deny the request according to the procedures of 40 CFR § 270.42." 40 CFR § 270.41. The extension of the compliance deadline for the performance of the Final Order Condition 5 constituted a material and substantial alteration requiring a level 3 permit modification. Permit modifications require that the permittee (Sandia in this instance) submit a written modification request to the Director (here, the Secretary of NMED)

and send a notice of the modification request to all persons on the facility mailing list, publish the notice, and provide a public meeting for the modification request. 40 CFR 270.42. These steps were not taken and the required actions were not performed in this administrative proceeding.

The Final Order requirement for reviews of the MWL "every five years" arose from the 2005 Hearing Officer Report that was adopted and incorporated by the NMED Secretary in the Final Order. The hearing officer's report stated:

> I recommend that the Secretary require Sandia to prepare a report **every 5 years** re-evaluating the feasibility of excavation and analyzing the continued effectiveness of the selected remedy, as suggested by the Albuquerque-Bernalillo County Groundwater Advisory Board. The report should be presented in a public forum, and the public should have an opportunity to evaluate and comment on data presented. The report need not be of the magnitude of a full-scale RFI or CMS; NMED staff should determine what should be included, with input from Sandia and the public. (Emphasis added).

The hearing officer also wrote the following at pages 38-39 in the Report adopted in the Final Order:

> In the process of presiding over this hearing, I was impressed with the level of participation of the public and [Appellant] Citizen Action [New Mexico], with their technical knowledge and understanding, and their detailed study of the history of this landfill. Their presence and participation resulted in a more thorough and comprehensive review of the landfill and proposed permit modification. The public and Citizen Action [New Mexico] demonstrated over and over that

> these issues are of passionate importance to them, and they should be allowed to continue to participate in the process of review as the remedy for the landfill is implemented. It is particularly important for the public to be able to participate in identifying the triggers for future action, and **5-year evaluations of feasibility of excavation and continued effectiveness of the selected remedy.** This will ensure that if the selected remedy is not effective, not properly implemented or maintained, or if new or not-predicted conditions or issues arise, they will be brought to NMED's attention and addressed. (Emphasis supplied).
>
> (http://www.nmenv.state.nm.us/HWB/Sandia/MWL/Final Decision/Hearing Off Rprt Findings Fact Conclusion Law (05-20-2005).pdf, p.37)

(Administrative Record, pp. 00762-00766). The Final Order adopted the hearing officer's report, and the statements of the hearing officer should be given great weight by this Court in deciding NMED's intent in approving the Final Order and Condition 5 thereof.

A May 27, 2005, NMED Press Release entitled *Environment Secretary Ron Curry Approves Remedy for Mixed Waste Landfill at Sandia National Laboratories* stated: "Finally, Sandia must prepare a report every five years that revaluates the feasibility of excavations and analyzes the continued effectiveness of the remedy." However, NMED, while publicly taking credit for and emphasizing the importance of the every five-year reevaluation requirement, has not enforced that very requirement. This public statement of NMED is directly on point here and should be included in the Administrative Record.

The Final Order, by requiring Sandia to "prepare a report every

5 years re-evaluating the feasibility of excavation and analyzing the continued effectiveness of the selected remedy," distinguished between the deadline for the initial five-year report regarding "the feasibility of excavation" and the deadline for "analyzing the continued effectiveness of the selected remedy." These are two distinct activities governed by Condition 5 and the five-year deadline.

Numerous representations were made by the NMED in responses to public comments for various Corrective Measures documents that the MWL would be reviewed for excavation and the effectiveness of the cover every five years. For example:

- "NMED Secretary to reevaluate the performance of the Landfill cover/bio-intrusion barrier and the feasibility of excavation every five years."
  http://www.nmenv.state.nm.us/HWB/Sandia/MWL/Final Decision/Response to Comments (08-02-2005).pdf , Comment A response, p.19, 23 and 41
- "The final order signed by the Secretary requires that the effectiveness of the cover and the feasibility of excavation be reevaluated every five years; the FTM [Fate and Transport Model] is also to be updated."
  (http://www.nmenv.state.nm.us/HWB/Sandia/MWL/Interested Citizen Letter - Response Comments (11-21-2006).pdf , Comment B, p.3-4)

- "The NMED Secretary's Final Order issued on May 26, 2005, requires that Sandia update the Fate and Transport Model every five years."

  http://www.nmenv.state.nm.us/HWB/documents/Index and Response to Comments Sandia MWL SV SAP.pdf , p.6, Response R18.

- "The five-year reviews ordered by the Secretary on May 26, 2005, provide for periodic analysis of the future protectiveness of the cover."

  http://www.nmenv.state.nm.us/HWB/documents/Response to Comments Sandia MWL CMI Report 5-2011-2.pdf Comment 1 Response by NMED.

The above statements of Appellee NMED are property part of the administrative record below; however, they were excluded from the Administrative Record submitted by NMED. Appellant asks this Court to include NMED's public comments in the Administrative Record. They are directly on point in this matter.

Significantly, the decision challenged in this appeal is inconsistent with *Citizen Action v. Sandia Corporation*, quoted above, a ruling of this Court addressing the exact Final Order at issue in this appeal. Condition 5 of the Final Order is a significant provision in the Final Order because it requires periodic evaluation of the remedy utilized to protect against groundwater contamination. In *Citizen Action v. Sandia Corporation*, this Court upheld the Final Order in a case objecting to the MWL dirt cover remedy provision. In

its ruling, the Court emphasized that the Final Order would provide for continued public involvement, stating, at page 24 of the opinion:

> The public has not been shut out of the decision-making; nor have public comments been made legally irrelevant. Instead the Secretary's remedy includes additional provisions "to ensure that the public will remain involved in the future remedy for the MWL."

The Court quoted Condition 5 of the Final Order at issue in this appeal in its decision:

> 5. Sandia shall prepare a report every 5 years, re-evaluating the feasibility of excavation and analyzing the continued effectiveness of the selected remedy.... 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.

In repeating Condition 5 in its decision, the Court suggested its reliance on the five-year reporting requirement as a basis for its decision. By failing to timely order the five-year feasibility reevaluation review, NMED is not only effectively shutting out the public from involvement in the decision making process, it is violating the written word of the Final Order. It is evident that NMED has now disregarded the critically important five-year reporting requirement of Condition 5 of the Final Order.

Appellee Sandia also recognized the five-year reporting requirement of the Final Order in its News Releases (11/02/2009). (p.1):

> The NMED regulates the corrective action of the MWL as well as the implementation of institutional controls and long-term monitoring and maintenance. Sandia and DOE continue to provide quarterly progress reports to the NMED. In addition, the final order requires compilation of a report that re-evaluates the feasibility of excavation and analyzes the continued effectiveness of the selected remedy every five years. Construction of the MWL alternative cover will be documented in the Corrective Measures Implementation Report which will be submitted to the NMED for approval. (Emphasis added).
>
> https://share.Sandia.gov/news/resources/news releases/Sandia-announces-completion-of-mixed-waste-landfill-cover-construction/

This public statement of Appellee Sandia should be a part of the Administrative Record below.

A letter from the Albuquerque Bernalillo County Water Protection Advisory Board (the "WPAB") to the NMED dated February 24, 2014, recites its recommendation from 2001 and 2005 for five-year reviews. The WPAB correctly contended that the clock began ticking on May 26, 2005, for the five year review to be performed and that the review is already years late. The WPAB stated:

> Sandia, DOE/NNSA, and NMED apparently have taken the position that the five-year clock does not start on this re-evaluation and reporting requirement until the LTMMP has been finalized and approved. However, given the remedy stipulated in the Final Order, the potential for groundwater contamination of a serious nature (low probability but high consequence), and the agreed-upon need for continued vigilance, monitoring, modeling, and periodic re-evaluation, a legitimate case can be made that the clock on the five-year reports should have started when the Final Order was issued in 2005,

> which would have required the first five-year report in 2010. In any case, nearly five years have now passed since the cover was installed in 2009. **It is the position of the WPAB that a five-year report, including the supporting data collection, modeling, and analysis, should be produced in 2014.** The WPAB urges the NMED to require the DOE/Sandia to complete this report by the end of this year.

(Bold face type in original).

The above WPAB analysis regarding any tolling of the five-year review is sound. The Final Order did not limit the five-year review to an evaluation of the dirt cover; rather, the five-year review requires that a report be prepared by Sandia every five years "re-evaluating the feasibility of excavation [in addition to]...analyzing the continued effectiveness of the selected remedy." The report was also to update the fate and transport model for the site with current data, and re-evaluate any likelihood of contaminants reaching groundwater. Additionally, the report was required to "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." NMED has not included the quoted WPAB February 24, 2014, letter in the Administrative Record, although it was written directly in response to the decision that this appeal challenges.

NMED relies on Section 1.3 of the March 2012 LTMMP for its authority to disregard Condition 5 of the Final Order. This self-serving rationale simply accommodates NMED's failure to enforce

its own Final Order. 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 were expressly intended to monitor and prevent. The approval also evades the requirement that the public be afforded an opportunity to comment on public health and safety concerns related to an important hazardous waste permit modification.

The hazardous waste permit issued to Sandia requires, as a matter of law, that any modification of the Final Order, and thereby the permit, must first be requested *in writing* by the Permittee (Sandia) from the NMED with appropriate public notification. The applicable procedures of 40 CFR § 270.42 for Class 1-3 permit modifications include the necessity of public notice and opportunity for comment. 40 CFR § 270.41. Sandia did not make a written request for modification of the permit in accordance with the procedures required by 40 CFR § 270.42 and NMAC 20.1.4.901; thus, the public was not informed of Sandia's intent to modify the Final Order, nor was the public informed of NMED's consideration of the requested modification.

Appellant Citizen Action requested a public hearing regarding the requested modification of the permit that would be accomplished by NMED's approval of the March 2012 LTMMP. No public hearing was conducted, however, and the March 2012 LTMMP included a provision in

Section 1.3 (discussed below) extending the Final Order five-year reevaluation report deadline, thereby modifying the Sandia Hazardous Waste Permit as well as the Final Order.

When corrective action is proceeding under a permit, proposals to complete corrective measures should adhere to the procedures applicable to Class 3 permit modifications, which include utilizing the Expanded Public Participation Rule. (60 FR 63417, Dec. 11, 1995). http://www.epa.gov/osw/hazard/tsd/permit/pubpart/chp_3.txt

Class 1-3 modifications of a Final Order for a Hazardous Waste Permit require public notice, and an opportunity for comment. For a general permit modification that changes a schedule of compliance i.e., an extension of a final compliance date, a Class 3 modification is required. 40 CFR § 270.42 Appendix I A.5.b. A Class 3 modification requires notice, opportunity for comment, and a public meeting or public hearing, if requested. 40 CFR § 270.42 (c).

The Final Order contains no language authorizing a delay of the five-year report deadline to a date after NMED approves the March 2012 LTMMP. The Final Order unequivocally states that "Sandia shall prepare a report every 5 years...."

The change of schedule for the compliance date for the feasibility report was discussed in communications exclusively between NMED and Sandia that ignored the requirements of RCRA and Code of Federal Regulations (CFR) permit modification procedures, including those requiring a written permit modification request from

the permittee, public notice, a public meeting, an opportunity for comment, and the honoring of requests for a public hearing. In this instance, the requirements for public participation in the permit modification process were violated by the NMED's denial of a public hearing. This denial was notwithstanding a request made by petitions containing more than 200 signatures received by NMED seeking a public hearing concerning the March 2012 LTMMP.

The challenged action taken by NMED in January 2014 was preceded by informal decision-making that NMED has also failed to identify or include in the NMED Administrative Record. The initial decision to extend the five-year review requirement was made by NMED Hazardous Waste Bureau Chief John Kieling in a letter dated October 14, 2011, addressed to DOE and Sandia and titled "Notice of Approval; Mixed Waste Landfill Corrective Measures Implementation Report, January 2010" (Administrative Record, pp. 00767-00768). Without any notice or opportunity for Citizen Action or the public to comment, the NMED (John Kieling and William Moats) agreed in meetings and e-mails with Sandia, and in "revised" minutes of one such meeting, to modify the Final Order and its conditions to extend the period for the five-year review. The minutes and emails were not posted for public review by NMED or Sandia. However, Citizen Action submitted an Inspection of Public Records Act request (IPRA) to NMED on May 9, 2012, requesting all documents upon which the NMED relied for its interpretation that the five-year review of the MWL was to be performed five years after

the approval of the LTMMP, and obtained the above referenced emails and revised minutes. The above cited emails and minutes are part of the administrative record and decision-making process below and should have been included by NMED in the Administrative Record.

In its May 9, 2012, IPRA request, Appellant Citizen Action also asked NMED to "[p]rovide any letter of approval furnished to Sandia for [its] interpretation [that extends the five-year reevaluation for an additional five years after an LTMMP approval]." The NMED responded on May 24, 2012, as follows: "NMED's interpretation of the provision at issue is included in the October 14, 2011, letter approving the MWL CMI Report, which is enclosed." The referenced letter addressed to DOE and Sandia states:

> The Permittees must submit a Long-Term Monitoring and Maintenance Plan (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 under the Secretary's Final Order of May 26, 2005, will begin. This will allow for monitoring data to be acquired under the LTMMP to be available for the purpose of conducting the evaluation.

The October 14, 2011, NMED letter is significant in several respects. First, the letter had not been seen by anyone other than NMED, DOE, and Sandia representatives prior to the May 24, 2012, IPRA response by NMED. Secondly, the letter is a Notice of Approval of the Mixed Waste Landfill Corrective Measure Implementation Report (the CMI Report). The CMI Report did not include any statement or

implication that Condition 5 of the Final Order was being modified. Finally, neither Appellant Citizen Action nor any other member of the public was aware of any intention on the part of NMED to modify Condition 5 of the Final Order. Thus, NMED effectively denied Appellant Citizen Action and the public any opportunity for participation and commentary regarding the plan to extend the Condition 5 deadline and what was essentially a permit modification process, contrary to RCRA and applicable CFR regulations directly on point. The October 14, 2011, letter discussing the issues involved, the May 9, 2012, IPRA request, and the NMED IPRA response of May 24, 2012, and are all part of the administrative record in this matter and should have been included in the NMED Administrative Record. In fact, of the above three documents discussed immediately above, NMED has included only the October 14, 2011, letter. (Administrative Record, 00767-00768).

Notwithstanding the unequivocal, clear language of Condition 5 of the Final Order, NMED's response to Appellant Citizen Action's IPRA request also made it evident that in February 2011, no consensus on the part of NMED and Sandia existed regarding the deadline for the initial five-year reevaluation report. For example, in the "revised" minutes of the meeting between NMED and Sandia held February 17, 2011,

> NMED stated they believe the first 5-year Re-Evaluation Report is due 5 years after completion of the cover, which would be Sept/Oct 2014, or 5 years after NMED-approval of the cover

(i.e., approval of the CMI Report, still pending).

An email dated March 09, 2011, from William Moats of NMED to Mike Mitchell of Sandia commented:

> One bullet concerns the 5-year report. I just wanted to clarify that I don't have a clear decision from management on when it's due (Sep/Oct 2014 or 5 years after the CMI Report is approved). I changed the summary bullet to reflect the two scenarios we discussed per your comment. We request "formal NMED clarification" in the relatively near future. Perhaps NMED could provide a "final determination" as part of the CMI Report approval process and let DOE/Sandia know in the next 90 days? Your point on the later scenario has merit - the cover construction is not "technically complete" until accepted by NMED. We will keep this issue on the list to "finalize" as we work to resolve the other remaining LTMMP issues (data and trigger level evaluation process, final monitoring and trigger levels, groundwater sampling frequency, etc.).

An email dated March 16, 2011, from Mike Mitchell of Sandia to William Moats and John Kieling of NMED stated:

> Currently the list of issues for further discussion includes the data and trigger level evaluation process, final monitoring /sampling requirements, final trigger levels, and the due date for first 5-Year Re-Evaluation Report.

The above quoted comments demonstrate an official lack of consensus regarding the deadline for the initial five-year report mandated by Condition 5 of the Final Order. None are consistent with the unambiguous wording of Condition 5 which should be understood as it reads: the initial five-year report is due five years from the date of the Final Order.

Section 1.3 of the March 2012 LTMMP inserted the following to delay implementation of Condition 5:

> The 2005 Class 3 Permit Modification also requires DOE/Sandia to prepare a report every five years, reevaluating the feasibility of excavating the MWL contents and analyzing the continued effectiveness of the MWL remedy. NMED determined the first five-year period will begin upon NMED approval of this LTMMP (Kieling October 2011). Additional information regarding the Five-Year Reevaluation reporting requirements is provided in Section 4.8.2.

(Administrative Record, pp. 00122 and 00170-00171).

http://www.nmenv.state.nm.us/HWB/documents/SNL 3-23-2012 MWL LTMM P Final March 2012.pdf

Appellant Citizen Action was unaware of any intent on the part of NMED to modify the five-year report due date until it issued the March, 23, 2012, LTMMP. The issuance of the LTMMP in March 2012 prompted the IPRA request on the part of Citizen Action.

The five-year reevaluation report requirement in the Final Order is also consistent with the requirement of RCRA for land disposal facilities. 40 CFR § 270.50 (d) provides:

> Each permit for a land disposal facility shall be reviewed by the Director five years after the date of permit issuance or reissuance and shall be modified as necessary, as provided in § 270.41.

By delaying the initial five-year review and report deadline to the year 2019, which is the effect of the January 2014 decision, NMED is both violating its own Final Order and denying Appellant Citizen Action and the public from raising substantial and material technical

issues that have arisen during the period since the Final Order was adopted in 2005. Substantial evidence provided during the administrative proceeding below, but excluded by NMED from the Administrative Record, indicates that the selected remedy of the dirt cover is not protective of the groundwater, the groundwater is contaminated and will become increasingly contaminated, the fate and transport model is incorrect and the groundwater monitoring network is defective and inadequate to detect contamination of the groundwater. Further, the groundwater monitoring network was known at all times to the present to be defective to make the remedy decision.

The March 2012 LTMMP changed the number, location and depth of upgradient and downgradient wells of the groundwater monitoring network. These revisions also constituted a modification of the permit. (40 CFR 270.42 Appendix I C.1.a.). The point of compliance was changed for the well locations. The monitoring wells installed for the LTMMP were installed without complying with public participation requirements for review and comment. The order for the installation of new groundwater monitoring wells was a significant alteration of the permit for the MWL and should have been presented to the public as a Level 3 modification. There has been, and continues to be, persistent and significant public concern about the proposed modification to the groundwater monitoring network. Thus, it was especially important that the permit modification for the

groundwater monitoring adhere to the procedures found in § 270.42(c) for Class 3 modifications.

Significantly, a 2006 TechLaw, Inc., report titled *Technical Review of Appendix E, Probabilistic Performance-Assessment Modeling of the Mixed Waste Landfill at Sandia National Laboratories of the* [November 2005] *Mixed Waste Landfill Corrective Measures Implementation Plan* dated January 31, 2006, (the "Techlaw Report"), revealed numerous deficiencies in the construction and monitoring of the dirt cover and the long-term protection of the groundwater. On October 19, 2007, NMED sued Appellant in an unsuccessful effort to withhold the TechLaw Report from Appellant Citizen Action which had requested the report in an IPRA request. Although the Techlaw Report is part of the administrative proceeding below, NMED has not included it in the Administrative Record. Nor did NMED provide this Court with the Techlaw Report in *Citizen Action v. Sandia Corporation,* cited above.

NMED approved installation of the dirt cover without informing Appellant and the public of the concerns stated in the TechLaw Report and without addressing those concerns. The TechLaw Report rejected Sandia's computer modeling for movement of the MWL waste as a "black box" that should not be used. The TechLaw Report also rejected the position of neutron tubes for monitoring for moisture underneath the pits and trenches of the MWL rather than underneath the dirt cover. Further, the TechLaw Report recommended the installation of a

synthetic impermeable membrane below the dirt cover to channel water away from the waste buried in the MWL. That is standard industry practice. Nevertheless, no non-permeable membrane has been installed beneath the dirt cover. The TechLaw Report and even NMED criticized the lack of monitoring for moisture beneath the dirt cover. Water underneath the dirt cover could be entering the MWL and reaching the waste.

The Sandia MWL has never had a reliable network of groundwater monitoring wells. After the first four groundwater monitoring wells were installed at the MWL during 1989-1990 (wells MWL-MW1, -MW2, -MW3 and -BW1), it was discovered that the directional flow of the groundwater was to the southwest rather than to the northwest. The NMED, the EPA, scientists at the Los Alamos National Laboratory, the DOE/Sandia Oversight Bureau, and the DOE Tiger Team documented in reports issued over the years 1991 to 1998 that the groundwater monitoring wells were installed in the wrong locations, had corroded well screens and were contaminated with Bentonite clay that hides evidence of contamination. In 2000, two subsequent monitoring wells (wells MWL-MW5 and -MW6) were installed too deep and distant from the MWL to be of use. The above assertions are reflected in public comments submitted during the administrative proceeding below and should be included in the Administrative Record.

In March 2007, Appellant Citizen Action and Registered Geologist Robert Gilkeson filed a complaint with EPA Region 6 alleging that the

MWL monitoring well network was defective. An April 2010 audit costing $273,000 conducted by the EPA Office of Inspector General (the OIG) found that EPA Region 6 staffers had concerns about the landfill's effect on groundwater and the lack of effective groundwater monitoring at the MWL. (The OIG Audit Report). The Inspector General also found that a 2007 Oversight Report of the EPA staff's MWL concerns was being withheld from the public, thereby limiting public involvement in the corrective measures process. The OIG Audit Report, at Page 3, found:

> Region 6 withheld information from the public regarding the MWL monitoring wells through ... discontinuation of record keeping, misleading communications, and inappropriate classification.

The OIG Audit Report should have been included in the NMED Administrative Record; it was submitted by Appellant during the public comment period.

The EPA Region 6 2007 Oversight Report was orally presented to the NMED by EPA Region 6 to avoid production of documentation that the public could obtain regarding the defective groundwater monitoring network. Region 6 administrators stamped the Oversight Report "Confidential" in a self-serving action to justify withholding it from the public. EPA Region 6 and the OIG thereafter withheld the Oversight Report from Citizen Action and the public, a report that validated Citizen Action's findings and concerns which Region 6 of EPA had found to be valid. The OIG Audit Report and the 2007 Oversight Report are both part of the administrative record below and should

have been included in the Administrative Record.

http://www.epa.gov/oig/reports/2010/20100414-10-P-0100.pdf

The confidential Oversight Report and interviews by OIG staff of the EPA Region 6 staff were recently obtained after a FOIA lawsuit was filed by Appellant Citizen Action. Following is what an EPA Region 6 unidentified staff person told the Inspector General in an October 15, 2008 interview: [Note: "(b)(6)" as used in the document refers to the individual who is being interviewed].

> (b)(6) stated that he did not have any prior connection with the site. In fact he does not report to (b)(6). He also stated that Region 6 had its results preconceived. Region 6 management did not want NMED doing anything wrong. Therefore, management created a structure to ensure the appropriate outcome would result. Furthermore, as the writing and draft comments progressed to a final letter, the team was pushed more and more to agree with NMED's position. He also stated that the teams' initial evaluation would have changed the solution at Sandia MWL [meaning the dirt cover would not have been the "selected remedy".] NMED pushed extremely hard for EPA Region 6 not to even question the past results or the viability of past test results [regarding groundwater monitoring and sampling]. Finally, he stated that [Citizen Action] got shortchanged by Region 6.

The MWL has been (improperly) classified as a Solid Waste Management Unit for closure under Corrective Action; however, there is failure to provide a Post-Closure Plan as required by RCRA and 40 CFR § 264.118. The MWL is a "regulated unit" by definition because it operated to receive hazardous waste after July 26, 1982. (40 CFR § 264.90(a)). 40 CFR § 270.1 (c) requires that owners and operators

of landfills that received waste after July 26, 1982, must have post-closure permits, unless they demonstrate closure by removal or decontamination or obtain an enforceable document in lieu of a post-closure permit. If a post-closure permit is required, the permit must address groundwater monitoring, unsaturated zone monitoring, corrective action and post closure care requirements. No post closure permit has been submitted for the MWL that is leaving wastes in place. This material is part of the administrative decision-making process here and should be a part of the Administrative Record.

IV. CONCLUSION AND RELIEF SOUGHT

The January 2014 administrative decision appealed from required that Sandia submit a written application to NMED seeking modification of the Final Order, and the provision of public notice and an opportunity for a public hearing on the part of NMED prior to its modification of the Final Order Condition 5 and approval of the March 2012 LTMMP. NMED's October 14, 2011, Notice of Approval of the CMI Report did not constitute appropriate notice to the public of the proposed modification of the Final Order Condition 5. The CMI Report did not contain mention of the proposed Final Order modification. NMED also had a duty to give notice and an opportunity for public comment regarding any proposed changes to the groundwater monitoring network prior to approving the LTMMP. The action of NMED, in modifying Final Order Condition 5 by its approval of the March 2012

LTMMP, was arbitrary, capricious, and an abuse of discretion. NMED should be estopped from ignoring or modifying the Final Order Condition 5 after its representations to the public that the five-year review would occur "every 5 years," as is explicitly mandated in the Final Order.

Based on the explicit wording of the Final Order, the initial five-year report was due on May 26, 2010: five years from the date of the Final Order. Nine years have now elapsed since the Final Order was issued, and almost five years have passed since the dirt cover was installed in September 2009. (Administrative Record, p. 00121). Sandia has still not prepared any report reevaluating the feasibility of excavation, and analyzing the effectiveness of the dirt cover, and by its January 8, 2014, approval of the March 2012 LTMMP, NMED has now extended the deadline for the initial five-year report until the year 2019.

Appellant requests that this Court issue an Order declaring that the January 8, 2014, NMED decision approving the March 2012 LTMMP constituted a hazardous waste permit modification as a matter of federal and state law, and declaring the January 8, 2014, NMED decision invalid. Appellant further requests that the Court order that NMED (1) enforce the Final Order and Condition 5 thereof, imposing the five-year review; and (2) stay the effective date of the March 2012 LTMMP until such time as Sandia has complied with the Final Order. Appellant further asks this Court to remand this matter to

NMED for administrative proceedings necessary to insure compliance with the Court's Order in this appeal, and compliance with applicable federal and state law. Appellant further asks this Court to order such further administrative agency action on the part of NMED as the Court deems necessary and proper to insure the provision of adequate opportunity for public comment regarding the matters that are the subject of this appeal, and to insure continued compliance on the part of NMED and Sandia with the Final Order and applicable state and federal laws and regulations.

Respectfully submitted,

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I certify that copies of the foregoing Appellant's Brief in Chief were served by first class mail on the New Mexico Environment Department (Assistant General Counsel William G. Grantham); and on counsel for Sandia National Laboratory (Montgomery & Andrews, P.A., Jeffrey J. Wechsler, Louis W. Rose, and Lara Katz; and Amy J. Blumberg, Sandia National Laboratories, this 17th day of June, 2014.

ROBERT McNEILL