IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE DRAFT HAZARDOUS WASTE FACILITY PERMIT FOR CALCULATING FINAL DISPOSAL VOLUMES, WASTE ISOLATION PILOT PLANT EPA ID NO. NM4890139088

NUCLEAR WASTE PARTNERSHIP, LLC, and UNITED STATES on behalf of UNITED STATES DEPARTMENT OF ENERGY,
Applicants-Appellees,
v.

No. A-1-CA-37894
Environment Department HWB 18-19(P)

CONCERNED CITIZENS FOR NUCLEAR SAFETY, NUCLEAR WATCH NEW MEXICO, and SOUTHWEST RESEARCH AND INFORMATION CENTER,
Protestants-Appellants,
and

STEVE ZAPPE and HAZARDOUS WASTE BUREAU,
Protestants.

BRIEF IN CHIEF ON BEHALF OF SOUTHWEST RESEARCH AND INFORMATION CENTER AND NUCLEAR WATCH NEW MEXICO, Appellants-Intervenors

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TABLE OF CONTENTS

Transcript references are in the form 10/23/18 Tr. 125, ll. 12-16, indicating the transcript date, page, and lines referred to.

Rule 12-318.G compliance: The brief is composed in Times New Roman. The body of the brief comprises 10,981 words.

TABLE OF AUTHORITIES

NEW MEXICO CASES

FEDERAL CASES

OTHER STATE CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

Preliminary statement:

This is an appeal under § 12-601 NMRA and § 74-4-14 NMSA 1978 from the Order (Dec. 21, 2018), of the Secretary of the New Mexico Environment Department ("NMED"), approving a modified Hazardous Waste Act (§ 74-4-1 *et seq.* 1978) ("HWA") Permit for the Waste Isolation Pilot Plant ("WIPP").

WIPP is a federal repository for defense transuranic ("TRU") hazardous and radioactive waste, operated pursuant to Environmental Protection Agency ("EPA") certification under the WIPP Land Withdrawal Act, Pub. L. No. 102-579 (1992) ("LWA"), and a HWA Permit, issued by NMED under the HWA, which applies the Resource Conservation and Recovery Act, 42 U.S.C. § 6921 *et seq.* ("RCRA"), in New Mexico.

The Order was issued in response to a Permit Modification Request ("PMR") by the Permittees[1], which seeks a change to account for the volume of waste emplaced in WIPP, against the 6.2 million ft^3 volume limit in § 7(a)(3) of the LWA and in the HWA Permit—

(a) one way, for NMED to use as it has previously, by summing the volume of the outer containers of waste disposed of at WIPP, and

(b) a second way, for DOE to use pursuant to an unstated method and an unidentified authority to measure its own compliance with the LWA.

[1] The Permittees are DOE and Nuclear Waste Partnership, LLC.

Factual background:

Congress authorized WIPP in Pub. Law No. 96-164, § 213 (1979) ("Authorization Act") "to demonstrate the safe disposal of radioactive waste resulting from the defense activities and programs of the United States. . . ." The law identifies WIPP as a "pilot plant." AR 180121.08, § 213(a). Congress plainly did not designate WIPP as the sole disposal site for defense TRU waste.

The Authorization Act calls for a DOE-State consultation and cooperation ("C&C") agreement:

> (2) The Secretary shall seek to enter into a written agreement with the appropriate officials of the State of New Mexico, as provided by the laws of the State of New Mexico, not later than September 30, 1980, setting forth the procedures under which the consultation and cooperation required by paragraph (1) shall be carried out.

AR 180121.08, § 213(b). The State and DOE made a Stipulated Agreement (AR 180706.02, pp. 9-16 of PDF), and the Governor and DOE Secretary signed a C&C Agreement (AR 180706.02 at 51 of PDF) (July 1, 1981). The Stipulated Agreement states:

> This consultation and cooperation agreement shall be a binding and enforceable agreement between the Department of Energy and the State of New Mexico . . . .

at 3. The Second Modification to the C&C Agreement incorporates the volume limit of 6.2 million ft^3. AR 180706.02, p. 56 of PDF (August 4, 1987).

To open WIPP, Congress passed the LWA in 1992. Repository capacity was a major issue. 10/25/18 Tr. 181, ll. 13-17 (Hancock). Congress imposed a firm volume limit on DOE's Test Phase, the anticipated next step. Capacity limits for the Test Phase (which was not conducted and was deleted in 1996) and for the entire facility were in direct ratio to one another, so that the total capacity is also subject to a hard-and-fast limit. LWA § 6(c)(1)(B) (*as enacted*).

Congress discussed waste capacity in terms of waste containers and their volume. 10/25/18 Tr. 181, ll. 16-21 (Hancock). Thus, Senate Report 102-196 states: "a total of 4,525 55-gallon drums of transuranic waste would be used during the experimental program." SRIC Ex. 8 at 27, AR 180402.34Z. A House bill (HR 2637) (House Armed Services) stated the total volume limit in cubic feet and in drums:

> CAPACITY OF THE WIPP.—The total capacity of the WIPP by volume is 6.2 million cubic feet of transuranic waste. Not more than 850,000 drums (or drum equivalents) of transuranic waste may be emplaced at the WIPP.

SRIC Ex. 9B at 10, AR 180402.34BB, § 9(a)(3). House Report 102-241, Part 1 (House Interior) included total capacity limits of 5.6 million ft^3 of contact-handled ("CH") waste and 95,000 ft^3 of remote-handled ("RH") waste (§ 7(a)) and a Test Phase limit of 4,250 drums. SRIC Ex. 9A at 16, 18, AR 180402.34AA. House Report 102-241, Part 3 (House Energy) included objections to capacity limits "of not more than 5.6 million cubic feet of [CH-TRU] and 95,000 cubic feet of [RH-

TRU] in WIPP" (§ 7(a)) and Test Phase limits of 4,250 barrels or 8,500 barrels of waste. SRIC Ex. 9C at 42, AR 180402.34CC.

LWA § 7(a)(3) states:

> CAPACITY OF WIPP.—The total capacity of WIPP by volume is 6.2 million cubic feet of transuranic waste.

AR 180706.03, § 7(a)(3). The drum count was dropped as unnecessary. (10/25/18 Tr. 232, ll. 13-19) (Hancock). Still, LWA § 6(b)(2) incorporated the Test Phase limitations in EPA's No-Migration Determination, which states limits as a percentage of § 7(a)(3) total capacity and as an equivalent number of waste drums:

> Wastes placed in the repository may not exceed 8,500 drums or 1 percent of the total capacity of the repository, as currently planned.

(55 Fed. Reg. 47700, 47720 (Nov. 14, 1990). Thus, Congress established that waste volume is calculated based on container volumes, and total capacity is 850,000 drums. LWA § 6(c)(1)(B), 55 Fed. Reg. 47700, at III, IV.B.2 (Nov. 14, 1990). Permittees' witness, Mr. Kehrman, testified that the LWA capacity limits were based on the volume of 55-gallon drums (or drum equivalents): 850,000 drums times 7.3 ft^3 (55-gallon drum volume) equals 6,205,000 ft^3. 10/23/18 Tr. 168, ll. 10-20 (Kehrman).

In addition, the LWA repeatedly confirms the State's RCRA authority. LWA §§ 9(a)(1)(C), 14, AR 180706.03.3. It directs that DOE *comply with RCRA, RCRA regulations, and the RCRA permit:* [2]

> SEC. 9. COMPLIANCE WITH ENVIRONMENTAL LAWS AND REGULATIONS.
> (a) In General.—
> (1) Applicability. Beginning on the date of the enactment of this Act, the Secretary [of Energy] shall comply with respect to WIPP, with –
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> * * *
>
> (C) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.);
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> * * *
>
> (H) all regulations promulgated, and all permit requirements, under the laws described in subparagraphs (B) through (G).[3]

LWA § 9(d) confirms the State's authority under RCRA:

> (d) Savings provision.—The authorities provided to the Administrator and to the State pursuant to this section are in addition to the enforcement authorities available to the State pursuant to State law and to the Administrator, the State, and any other person, pursuant to the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) and the Clean Air Act (40 U.S.C. 7401 et seq.).

LWA § 14 states that the LWA *does not modify* the State's or EPA's authority to enforce, nor DOE's obligation to comply with, RCRA[4]:

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[2] The Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.*, includes RCRA, which is 42 U.S.C. § 6921 *et seq.*, Subchapter III.

[3] The LWA also requires DOE certification of RCRA compliance. LWA § 9(a)(2).

[4] The 1996 WIPP Land Withdrawal Amendments Act, Pub. L. No. 104-201, relieves DOE from compliance with the land disposal provisions of

> SEC. 14. SAVINGS PROVISIONS.
>
> (a) CAA and SWDA. No provision of this Act may be construed to supersede or modify the provisions of the Clean Air Act (42 U.S.C. 7401 et seq.) or the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).
>
> (b) EXISTING AUTHORITY OF EPA AND STATE. No provision of this Act may be construed to limit, or in any manner affect, the Administrator's or the State's authority to enforce, or the Secretary's obligation to comply with --
>
> * * *
>
> (2) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), including all terms and conditions of the No-Migration Determination; or
>
> (3) any other applicable clean air or hazardous waste law.

LWA § 21 affirms the C&C Agreement and states that it may only be modified by express language.

Since at least 1980, DOE has consistently measured TRU waste volume by container volume. In the 1980 WIPP Final Environmental Impact Statement ("FEIS"), DOE stated that "The data for TRU waste presently in retrievable storage are the container volume." AR 180121.04 at E-25. So measured, WIPP's design capacity was 6.2 million ft^3. SRIC Ex. 1, AR 180706.03 at 2-17. DOE's 1981 Record of Decision included these capacity figures. AR 180121.02 at 9163, c. 1. DOE's 1990 WIPP Final Supplement Environmental Impact Statement ("SEIS-I") stated that the "design capacity of the WIPP is based upon the total

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RCRA for waste designated for WIPP. These amendments have no effect on the case at hand.

volume of emplaced containers and not their contents." SRIC Ex. 52 at 246[5]. In 1994 DOE published a WIPP Transuranic Waste Baseline Inventory Report, which showed waste volumes in "Final Waste Form," which means the volume of the container. SRIC Ex. 10 at 1-5; 10/23/18 Tr. 175, ll. 8-14 (Kehrman). DOE's 1997 Disposal Phase Supplemental Environmental Impact Statement stated waste volume by the volume of the waste containers. AR 180121.03 at 2-9. DOE emphasized that the volume of waste inside the containers was subject to "considerable uncertainty." Thus, container volume was *the only data available*, and clearly DOE did not assert that the containers were full:

> While the LWA and C&C Agreement include limits on the volume of TRU waste that can be emplaced, there is considerable uncertainty concerning how much of a container's volume is made up of TRU waste and how much is void space. Many of the containers would include a great deal of void space, particularly for RH-TRU waste; the actual volume of waste in a drum or cask, therefore, may be much less than the volume of the drum or cask. For the purposes of analysis in SEIS-II, the volume of the drum or cask is used, as if the drum or cask were full without void space. . .

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[5] The Environmental Evaluation Group commented on the 1989 Draft SEIS that DOE had erroneously calculated WIPP's capacity, by assuming that 55-gallon drums were 80 percent full, and causing WIPP's 6.2 million ft^3 capacity to be contained in "a fictitious number of drums that cannot fit into the WIPP." Instead, the "design capacity of the WIPP is based upon the total volume of emplaced containers and not their contents." *Ibid*. In the final SEIS-I DOE dropped the 80 percent fill ratio, "because the calculations based on this assumption greatly overestimated the volume of waste to be emplaced in the WIPP." SRIC Ex. 53 at B-3. The SEIS-I reiterates that the contact-handled (CH) waste design capacity is 6.2 million ft^3. AR 180914.32C at 3-4. Simply put, no one assumed the containers were full, and a container count was the only data available.

AR 180121.03 at 3-8. See also AR 180121.03 at 2-9, 3-8, A-13, -14.

DOE has consistently reported to Congress and EPA the volume of CH TRU waste emplaced at WIPP, based on container volume. AR 180402.34H to V; SRIC Ex. 55 at 17. DOE's Annual Transuranic Waste Inventory Report shows "final form" volumes and "outer container volume," which is the internal volume of the outer container. AR 180402.34X at 18. *See also* AR 180402.34W at 13.

The LWA requires EPA to certify, by notice-and-comment rulemaking with judicial review, "whether the WIPP facility will comply with the [40 C.F.R. Part 191, subpart b] final disposal regulations." LWA § 8(c)(2), AR 180706.03. The process includes showing compliance with the 6.2 million ft^3 capacity limit. 40 C.F.R. § 194.24(g). DOE submitted waste volume data based on "final form" container volume. SRIC Ex. 14 at 24-97. EPA found WIPP in compliance. SRIC Ex. 14 at 24-98; 63 Fed. Reg. 27354, 27373. Similar data were submitted and accepted in 2006, 2010, and 2017 recertifications. SRIC Exs. 17, 20, 22; 10/23/18 Tr. 192, ll. 16- 195, l. 19 (Kehrman). *See also* 10/24/18 Tr. 150, ll. 7-11(Maestas).

RCRA imposes "cradle to grave," *Chicago v. EDF*, 511 U.S. 328, 331 (1994), regulation of hazardous waste. EPA issued regulations for disposal permits (42 U.S.C. § 6925; 40 C.F.R. Parts 260-272), which include "miscellaneous units," such as WIPP. 40 C.F.R. §§ 264.601-03, Subpart X. They require the permitting authority (here, NMED) to ensure that the unit is "located, designed, constructed,

operated, maintained, and closed in a manner that will ensure protection of human health and the environment." 40 C.F.R. § 264.601. Applicants must state the quantity of waste planned for disposal. 40 C.F.R. § 270.13. DOE's application states WIPP's capacity as 175,600 m^3 (6.2 million ft^3) (AR 180402.48G), *i.e.*, the internal volume of containers. This volume limit was part of the original Permit and remains so. AR 180914.37I, Section 3.3.1. DOE concurs that "the WIPP LWA limit and the HWDU [hazardous waste disposal unit] limit were considered to be the same." AR 180121 at 7.

Under RCRA, NMED must regulate the volume of hazardous waste planned for disposal. EPA Release, 52 Fed. Reg. 46946, 46956 (Dec. 10, 1987). DOE filed a Part B application, describing WIPP's performance. AR 180402.48G, ch. D-9. *See* 10/23/18 Tr. 73, ll. 19 – Tr. 74, l. 18 (Kehrman). On October 27, 1999, after 19 days of hearings, NMED issued the Permit. It imposed capacity limits on each HWDU, based on container volumes, including overpacks. Permit Part III.C.1. The Permit approved use of overpacks. 10/25/18 Tr. 104, ll. 11-24 (Zappe); Tr. 189, ll. 24-25 (Hancock). Waste volume has consistently included the volume of an overpack. Kehrman prefiled testimony at 2; 10/23/18 Tr. 61, ll. 6-23 (Kehrman); 10/24/18 Tr. 117, ll. 1-6 (Maestas). NMED is required to enforce the volume limits. 10/24/18 Tr. 167, ll. 19-25, Tr. 168, ll. 1-13 (Maestas).

The PMR asks NMED to introduce new definitions. AR 180121, PMR at 3. "TRU mixed waste volume" would mean the historically-applied volume of the outer container and would be "reported by the Permittees relative to the maximum capacities in Permit Part 4, Table 4.1.1." *Ibid*. "TRU waste volume of record" is a new concept, defined as the "volume of TRU waste inside a disposal container" and "reported, separately from the Permit, by the DOE pursuant to the WIPP Land Withdrawal Act total capacity limit of 6.2 million ft^3." *id.* at 4. These different definitions would apply to the *same* waste.

Permittees' "Management Policy" states a method of calculating waste volume. TID Response (AR 180706). This is a Draft Policy, however, not final. Although Mr. Maestas of NMED first said that DOE was bound by the Management Policy, he later admitted that it does not constrain how DOE calculates waste volume, nor restrict changes in the policy. 10/24/18 Tr. 103, ll. 11-19, Tr. 104, ll. 6-16, Tr. 127, ll. 16 – 123, l. 2, Tr. 132, ll. 20-25 (Maestas).

The "LWA volume of record" is entirely within DOE's unregulated discretion. Draft Permit §1.5.22. Mr. Kehrman stated that calculation of this volume is an "internal" matter. 10/23/18 Tr. 146 ll. 22-24 (Kehrman). Mr. Maestas agreed that the value is within DOE's discretion. 10/24/18 Tr, 87, ll. 13-19, Tr. 103, ll. 11-19, Tr. 132, ll. 20-25 (Maestas). DOE can change its method of

calculation without notice to or concurrence by NMED. 10/24/18 Tr. 127, ll. 22 – 128, l. 2 (Maestas).

The Hearing Officer's Disqualification:

Matters concerning the Hearing Officer's disqualification have recently come to SRIC's attention: The Hearing Officer, Max Shepherd, acted under a four-year contract with NMED. (Contract #19 667 1210 0001 (submitted herewith)). He is an independent attorney, to whom cases are assigned in NMED's discretion. He accepts referrals, for which he is paid $150.00 per hour, up to $200,000. The Hearing Officer has an incentive to handle each case to NMED's satisfaction, to encourage further referrals. Simply put, he has a financial incentive to sustain NMED's position.

This system denies litigants an impartial tribunal. In *Haas v. County of San Bernardino*, 27 Cal. 4th 1017 (2002), the California Supreme Court held that a hearing officer's retention for a specific case, where additional assignments would be available at the discretion of the county that was a party to the proceedings, violated due process:

> The question presented is whether a temporary administrative hearing officer has a pecuniary interest requiring disqualification when the government unilaterally selects and pays the officer on an ad hoc basis and the officer's income from future adjudicative work depends entirely on the government's goodwill. We conclude the answer is yes.

27 Cal. 4th at 1024. The court explained that

> courts have consistently recognized that a judge has a disqualifying financial interest when plaintiffs and prosecutors are free to choose their judge and the judge's income from judging depends on the number of cases handled. No persuasive reason exists to treat administrative hearing officers differently.

Id. 1024-25. The court cited *Brown v. Vance*, 637 F.2d 272 (5th Cir. 1981); *State ex rel. Shrewsbury v. Poteet*, 157 W. Va. 540, 202 S.E.2d 628, 631-632 (1974); *State ex rel. McLeod v. Crowe*, 272 S.C. 41, 249 S.E.2d 772, 776-777, 778 (1978), and *Doss v. Long*, 629 F. Supp. 127, 129 (M.D. Ga. 1985).

The retention system in *Haas* denied due process as in the "fee-system" cases. 27 Cal. 4th at 1029. The identical defects exist here. The Hearing Officer's intent to obtain future employment is established by his 14-page proposal and the four-year contract. (submitted herewith). He was presiding over a case while seeking employment by a party to that case; thus, he was disqualified. In re *Al-Nashiri*, 921 F.3d 224 (D.C. Cir. 2019). The matter is raised promptly after the facts were disclosed, presenting a constitutional issue in due time. *Aetna Life Ins. Co. v. Lavoie*, 375 U.S. 813, 820 (1986). The Court should vacate the Report and the Secretary's Order.

Decision below:

The Report adopts *verbatim*, or nearly so, all 203 of the proposed findings of fact and the six conclusions of law proposed by NMED.[6]

[6] The sources of the findings of fact and conclusions of law are as follows:

A. THE WASTE ISOLATION PILOT PLANT
Findings 1-13 are HWB Findings 1-13.
B. THE LAND WITHDRAWAL ACT
Findings 14-23 are HWB Findings 14-23.
Findings 24-27 are Permittees' Findings 36, 37-38, 39, and 40
C. RESOURCE CONSERVATION AND RECOVERY ACT
Findings 28-34 are HWB Findings 24-30
D. THE HAZARDOUS WASTE BUREAU
Findings 35-38 are HWB Findings 31-34
E. THE WIPP PERMIT
Findings 39-42 are HWB Findings 35-38
Finding 43 is HWB Finding 39 and Permittees' Finding 24
Finding 44 is HWB Finding 40, with the HO addition of "In practice"
Findings 45-56 are HWB Findings 41-52
F. PERMIT MODIFICATION REQUEST
Findings 57-114 are HWB Findings 53-110
G. THE PROCEDURAL HISTORY OF THE PMR
Findings 115-130 are HWB Findings 111-126
H. THE BUREAU'S RECOMMENDATION AND DRAFT PERMIT
Findings 131-166 are HWB Findings 127-162
I. PUBLIC NOTICE & PUBLIC COMMENTS RECEIVED
Findings 167-177 are HWB Findings 163-173
J. NEGOTIATIONS
Findings 178-183 are HWB Findings 174-179
K PUBLIC HEARING
Findings 184-207 are HWB Findings 180-203
J. ARGUMENT AND EVIDENCE SUBMITTED IN OPPOSITION TO APPROVING THE DRAFT PERMIT.
Finding 208 is partly from HWB Statement about History and Legislative Intent.
Finding 209 is from HWB's HWB Has Authority
Finding 210 is from SRIC Finding 4
Finding 211- "The parties opposing approval of the Draft Permit are obviously confusing engineering design considerations with Congressional intent."
"The mission of WIPP is to isolate and dispose of a defined quantity of TRU waste, i.e., 6.2 million ft3 of DOE's inventory of defense Transuranic ("TRU") waste in a manner that protects public health and the environment. AR 180121 at Page 9." [This statement is in the PMR as relates to 1979 Authorization.]
Finding 212- HO speculation with NO citations to the record.
Finding 213- HO speculation with NO citations to the record.

The Hearing Officer stated that the PMR sought "to differentiate between the way [RCRA] waste volume is calculated versus the way [LWA] TRU waste volume is calculated for [WIPP]." (Report at 1). He stated that the LWA TRU waste volume is "related to" the quantity of waste at generator/storage sites prior to overpacking and is "directly related to" the total capacity limit specified in the WIPP LWA. (FF 114). He stated that DOE will establish and implement a written policy to formalize the tracking and reporting of TRU waste volume of record (FF 112), that DOE has clearly articulated that method that be will [*sic*] utilized to determine the volume of waste in containers emplaced in WIPP (FF 215), and that

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Finding 214- LWA is not ambiguous *Mostly from Permittees argument at 11*.
Finding 215 – "Doe [*sic*] has clearly articulated the method that be will utilized to determine the volume of waste in containers emplaced in WIPP. See Findings of facts paragraphs 87-108 and 141-144 above.
Finding 216 – "However, I find that this "conflict" is one SRIC has created. If the PMR is granted there will simply be two methods of measuring the volume of TRU waste emplaced in WIPP for two different purposes."
Finding 217 – Statute not ambiguous. *Again, mostly from Permittees argument at 11*.
Finding 218- SRIC erroneously argues no reasoned explanation.
Finding 219- RCRA allows PMRs. *Permittees Findings 29 & 30.*
Finding 220- "I also find that the WIPP safety and maintenance issues raised by Mr. Anastas's testimony while obviously of critical importance were not developed fully enough in the hearing to be considered in arriving at the recommended disposition of this case."
Finding 221 – Zappe arguments non-persuasive.
Finding 222 – CCNS not persuasive.

CONCLUSIONS OF LAW
Conclusions 1-6 are HWB Conclusions 1-6
Conclusion 7 is Permittees Conclusion 12

the Permittees had committed to calculate waste volume based on inner containers with a known geometry. (FF 147)

The Hearing Officer stated that the "mission of WIPP is to isolate and dispose of DOE's inventory of defense Transuranic ("TRU") waste." (FF10). He acknowledged that LWA limits WIPP's capacity to 6.2 million ft^3 (FF 15), but stated that the "LWA is silent on the volumetric calculation method for TRU and TRU mixed waste." (FF 20, also FF 209). He stated that, "What is clear is that Congress authorizes and designed WIPP to accommodate 6.2 Million ft^3 of TRU waste." (FF 209). This figure was confirmed in 1987 in the Second Modification to the C&C Agreement. (FF 210).

He stated that parties opposing the PMR had not presented "any direct evidence of Congress's intent" as to the measurements Congress intended when it enacted a limit of 6.2 million ft^3 and that "the record is clear that Congress did not express any intent as to how the volume of waste was to be measured." (FF 208).

He found, however, that "the evidence cited by these [opposing] parties does indeed establish that that the internal dimension of the outer container has been the method historically used to measure the volume of waste emplaced in WIPP." (FF 208). He also found that outer disposal containers equate to 30% more volume based on packaging. (FF 137). He said that the outer containers "do not represent the actual volume of TRU waste emplaced." (FF 138).

The Hearing Officer supported his findings as follows: "The TRU Waste destined for WIPP had to be put in some type of container before it could be transported and stored. In this case *the initial decision was apparently made* that the containers to be used would be 55-gallon drums *that were assumed to be full of waste*." [*emphasis supplied*]. The number of drums and their size are thus only incidental to achieving the Congressional intent of designing a facility within which 6.2 million ft^3 of TRU waste could be stored . . . " (FF 212; see FF 43). No support was cited for the assertion that the capacity limit was based on the assumption that the drums would be full. He also said:

> There is nothing in the record and no reason to assume that if Congress had proceeded on the assumption that each 55-gallon drum of waste would have only been only half full when shipped that Congress would not have authorized the excavated size of WIPP to have been larger than it currently is to accommodate the space necessary to store the 6.2 million ft^3 of TRU waste. Congress's intent was to dispose of a defined volume of TRU waste not to dispose of a fixed number of containers.

(FF 212). He cited nothing to support these statements. He went on:

> It also is not logical to assume that when Congress determined that it would take 850,000 55-gallon drums to hold the 6.2 million ft^3 of TRU waste and when Congress subsequently discovered after 850,000 drums of waste had been emplaced, that for reasons that were not initially anticipated many of those drums were not fully packed and therefore not all of the 6.2 million ft^3 of waste had been disposed of, that Congress would have intended that the number of drums emplaced and not the actual volume of waste disposed of was to be the critical measurement of completing the mission of WIPP. The historical record thus is not a basis upon which the Draft Permit should not be approved. (FF 213).

Again, no support was cited. He said that at the time of the original Permit the Permittees did not account for the significant amount of overpacking that would occur in preparing waste for disposal. (FF 45).

He expressly found that the LWA capacity limit—6.2 million ft^3—is *not ambiguous*. (FF 214). He rejected legislative history showing how Congress intended waste volume to be measured, stating that a court "does not need to consider legislative history when the statutory language is unambiguous." (FF 217). He said that, although one might argue that DOE has no authority to interpret the volume limitation, this is unimportant, since unambiguous statutory language is conclusive. (FF 214).

He said that "DOE has the responsibility to track and report specific waste information controlled by the LWA, including the waste inventory relative to the LWA capacity limit." (FF 27). He cited no support. On the issue of DOE's authority to calculate waste volume, he stated—

> (a) that Congress intended DOE to have the responsibility to define the method used for calculating the LWA capacity limit, citing no support. (FF 132).
>
> (b) that radioactive materials are regulated by DOE in accordance with the Atomic Energy Act ("AEA"). (FF 24).

(c) that DOE has the responsibility and authority to manage radioactive waste under the AEA and the DOE Organization Act, and that NMED does not regulate radioactive waste. (FF 25).

(d) that LWA does not "reassign the responsibility to track the volume of the TRU waste disposed from the DOE to the EPA." (FF 26).

(e) that "DOE has responsibility to track and report specific waste information controlled by the LWA, including the waste inventory relative to the LWA capacity limit," citing no support. (FF 27).

(f) that the DOE authorization basis for disposal of TRU waste at WIPP includes the DOE National Security and Military Applications of Nuclear Energy Authorization Act of 1980, the WIPP LWA, and the Permit. (FF 93).

(g) "Moreover, the Atomic Energy Act (AEA) and the Department of Energy Organization Act (AR180121.01) grant DOE the responsibility and authority to manage certain radioactive materials including radioactive waste, and while neither act specifically grant[] DOE the authority to interpret the volume limitation in LWA", the "Acts would appear to grant DOE authority to make decisions related to carrying out its responsibility of disposing of the defense TRU waste." (FF 214).

(h) that he interprets the Guidance for DOE Order 435.1 to mean that "the total volumetric capacity of a facility is based on the actual waste volume." (FF 146).

The Hearing Officer found that the NMED Hazardous Waste Bureau ("HWB") concurs that "Congress intended DOE to have the responsibility to define the method used for calculating the LWA capacity limit" (FF 132), thus creating "two new distinct volume calculations." (FF 133).

The Hearing Officer found that DOE is required to comply with RCRA at WIPP. (FF 34, 30, 31, 35). He said that the RCRA "Permit is concerned with volume to the extent that the HWDUs have established maximum volume capacities that are necessarily based on the footprint of the HWDU and, therefore, the outermost disposal container." (FF 135).

He concurred that EPA regulations require that in a compliance certification application under 40 C.F.R. Part 191, subpart b, DOE demonstrate that "'the total inventory of waste emplaced in the disposal system complies with the limitations on transuranic waste disposal described in the WIPP LWA.' 40 C.F.R. 194.24(g)." (FF 20).

The Hearing Officer rejected the argument that there would be a conflict between the waste volume calculated by DOE and that calculated by NMED: "If

the PMR is granted there will simply be two methods of measuring the volume of TRU waste emplaced in WIPP for two different purposes." (FF 216).

The Hearing Officer found that, when containers were overpacked because of integrity issues, the outermost container then represents both the RCRA TRU mixed waste and the WIPP LWA TRU waste volume. (FF 141).

As for the fact that waste volume has been calculated based on the outer container for nearly 20 years, and the PMR proposed a change, the Hearing Officer found a reasoned explanation to be the fact that the assumptions underlying the original method of measurement have "with experience" been proved wrong, and the change was necessary "to complete the purpose for which WIPP was authorized by Congress." (FF 218).

Standard of review:

Under § 74-4-14 NMSA 1978 the Court on appeal must vacate the Secretary's decision if it determines that it was

(1) arbitrary, capricious or an abuse of discretion;
(2) not supported by substantial evidence in the record; or
(3) otherwise not in accordance with law[7].

New Mexico courts apply principles of judicial review similar to those applied by federal courts. *Rio Grande Chapter of the Sierra Club v. N.M. Mining*

[7] A permit modification request should be denied if the application (a) is incomplete, (b) fails to comply with applicable requirements, or (c) fails to protect human health or the environment. 40 C.F.R. § 270.42(b)(7).

Commission, 2003-NMSC-005 ¶ 11, 133 N.M. 97, 61 P.3d 806; *Atlixco Coalition v. Maggiore*, 1998-NMCA-134 ¶ 16, 125 N.M. 786, 965 P.2d 370.

The meaning of a statute is an issue of law that is judicially reviewed de novo. *Southwest Research & Information Center v. State*, 2003-NMCA-012 ¶ 24, 133 N.M. 179, 62 P.3d 270. It is arbitrary and capricious for an agency to follow an erroneous interpretation of the applicable law. *Phelps Dodge Tyrone v. N.M. WQCC*, 2006-NMCA-115 ¶ 33, 140 N.M. 464, 143 P.3d 502.

The Secretary must state reasons for his decision. *Citizen Action v. Sandia Corp.*, 2008-NMCA-031 ¶ 19, 143 N.M. 620, 179 P.3d 1228, *cert. denied*, 2008 NM LEXIS 135, 143 N.M. 666, 180 P.3d 673; *Atlixco Coalition* ¶ 15; *Green v. New Mexico Human Services Department*, 1988-NMCA-083 ¶ 13, 107 N.M. 628, 762 P.2d 915.

Agency action must stand or fall on the basis of the agency's reasoning. The reviewing court may not supply a basis for the agency's action that the agency has not given. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Commission*, 2003-NMSC-005 ¶ 11, 133 N.M. 97, 61 P.3d 806; *Atlixco Coalition* ¶ 20.

An administrative agency may not change its position on a regulatory issue without offering a reasoned explanation of the change. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 57 (1983); *Citizens Awareness Network v. U.S. Nuclear Regulatory*

Commission, 59 F.3d 284, 291 (1st Cir. 1995); *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1994-NMCA-139, ¶ 45, 119 N.M 29, 188 P.2d 475.

The Supreme Court has explained the arbitrary and capricious standard:

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc*. v. *United States*, 371 U.S. 156, 168 (1962). In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

State Farm, 463 U.S. at 43.

I. The Secretary's decision is based upon an erroneous legal interpretation:

This case presents a supposed conflict between two federal statutes, the LWA and RCRA. The Report resolves the supposed conflict by (1) surrendering to DOE's demand for unreviewable power to interpret the LWA limit of 6.2 million ft^3 but (2) maintaining NMED's longstanding, and different, interpretation of the *exact same language* in administering the RCRA permit. That action—saying that the same language has two different meanings—is simply sophistry;

Congress cannot have intended two different meanings for the same words; it is clearly error[8].

More basically, a decisionmaker is obligated to avoid finding a statutory conflict, such that one statute must be displaced. Instead, he or she must strive to give effect to both statutes:

> When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "'to give effect to both.'" *Morton v. Mancari,* 417 U. S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "'a clearly expressed congressional intention'" that such a result should follow. *Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer,* 515 U. S. 528, 533, 115 S. Ct. 2322, 132 L. Ed. 2d 462 (1995). The intention must be "'clear and manifest.'" *Morton, supra,* at 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290. And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute. *United States v. Fausto,* 484 U. S. 439, 452, 453, 108 S. Ct. 668, 98 L. Ed. 2d 830 (1988).

Epic Systems Corp. v. Lewis, 138 S.Ct. 1612, 1624 (2018). In *Epic Systems* the Court determined that the National Labor Relations Act "does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand." *Id*. 1624.

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[8] If the Secretary finds that the WIPP capacity limit has a given meaning, that meaning should apply in all contexts: *Brown v. Gardner,* 513 U.S. 115, 118(1994) ("there is a presumption that a given term is used to mean the same thing throughout a statute.").

Here, the Secretary rules that, even though (1) the LWA limit of 6.2 million ft^3 governs DOE's operation of WIPP, (2) that same limit of 6.2 million ft^3 was introduced into the RCRA permit and has been enforced for 19 years, using the volume of outer waste containers, and (3) NMED must continue to enforce that limit based on the volume of outer waste containers—nevertheless, DOE is relieved from that or any other limit upon the volume of waste DOE disposes of at WIPP. Such a decision is self-contradictory and, worse, without support in any statute, abandons the State's authority under RCRA and connives in DOE's violation of the specific limit deliberately imposed by Congress upon the WIPP repository and included in the State's RCRA Permit.

RCRA is a fundamental environmental law. On the other hand, the LWA authorizes no new environmental standards for WIPP, confers no environmental authorities upon DOE, and repeatedly confirms the application of RCRA and the State's authority under RCRA, mandating that DOE must comply with RCRA, which the LWA expressly does not modify or limit. LWA §§ 9, 14. The LWA makes clear that, even if a conflict existed between the LWA and RCRA, RCRA, not the LWA, would prevail.

RCRA requires EPA to issue regulations for hazardous waste permits (42 U.S.C. § 6925), which EPA has done (40 C.F.R. Parts 260-272). These regulations address "miscellaneous units," which include WIPP. 40 C.F.R. §§

264.601-03, Subpart X. The EPA Subpart X regulations have been adopted as HWA regulations. 20 NMAC 4.1.500. Such rules require the permitting authority (here, NMED) to consider the nature and volume of the wastes proposed for disposal and how hazardous wastes might escape, and to issue a permit that protects human health and the environment. 40 CFR § 264.601. NMED must consider:

> The volume and physical and chemical characteristics of the waste in the unit, including its potential for migration through soil, liners, or other containing structures;

Id.

Permittees filed a Part A application, which must include waste volume data:

> (j) A specification of the hazardous wastes listed or designated under 40 CFR part 261 to be treated, stored, or disposed of at the facility, an estimate of the quantity of such wastes to be treated, stored, or disposed annually, and a general description of the processes to be used for such wastes.

40 C.F.R. § 270.13. DOE's application stated the waste capacity of 175,600 m^3 (6.2 million ft^3). AR 180402.48G. It states:

> During the Disposal Phase of the facility, which is expected to last 25 years, the total amount of waste received from off-site generators and any derived waste will be limited to 175,600 m^3 of TRU waste of which up to 7,080 may be remote-handled (RH) TRU mixed waste.

id. at A-25. Further, a permit for a Subpart X facility *must regulate* the volume, concentration and characteristics of hazardous wastes to be disposed of. EPA

Release, 52 Fed. Reg. 46946, 46956 (Dec. 10, 1987). Thus, in RCRA legislation, regulation, and practice, NMED has the authority, and the obligation, to regulate waste quantity. So doing, NMED has specified that WIPP HWDU capacity limits are based on container volumes, including overpacks. Permit Part III.C.1.

It is not correct to suggest, as DOE did, that the purpose of the HWA Permit is simply to ensure that the waste containers fit within the "physical volume of each mined HWDU" or to assure "safe management of the waste and initiation of closure of the HWDUs." AR 180121, PMR at 2. Nor is it correct to state, as the Hearing Officer did, that the RCRA "Permit is concerned with volume to the extent that the HWDUs have established maximum volume capacities that are necessarily based on the footprint of the HWDU and, therefore, the outermost disposal container" (FF 135)—and has no environmental purpose. To the contrary, the HWA permit is designed to ensure that the WIPP facility, present and future, does not adversely affect human health and the environment. 40 C.F.R. § 264.601.

The Hearing Officer, however, decided that NMED's waste volume limits do not apply if DOE disagrees with them. The Report says that there is no interpretation involved in DOE's determination that the LWA limit—6.2 million ft^3—applies to something other than waste container volume, something that the Hearing Officer refers to as "actual waste." (FF 146; see FF 138). Given that

NMED has its own understanding of the 6.2 million ft^3 limit, which is different from DOE's understanding, and that DOE for 19 years adhered to NMED's understanding, but now has changed its understanding, with the result of increasing WIPP's volume by 30% (FF 137), the idea that there is "no interpretation" involved in DOE's way of measuring waste is untenable. The number—6.2 million ft^3—may be a clear target, but there can be several ways to measure proximity to that target, and to say that DOE's adoption, after 19 years, of a different method of measurement does not involve interpretation ignores the reality of DOE's action.

Thus, the Hearing Officer was faced with a conflict of interpretations: DOE insisting on its understanding of 6.2 million ft^3 contained in the LWA, and NMED standing on its reading of 6.2 million ft^3 stated in the RCRA Permit and ultimately derived from the LWA. When confronted with an asserted conflict between two federal statutes, the decisionmaker must accommodate the two statutes, so far as possible, based on a careful interpretation of the scope of each.

NMED's decision here cannot be supported by concepts of implied repeal. "Repeals by implication are not favored." *Morton v. Mancari*, 417 U.S. 535, 549 (1974). Indeed, the LWA expressly saves RCRA from any implied repeal. LWA §§ 9(d), 14. In any case, the Secretary did not say that the LWA repealed RCRA; to the contrary, NMED continues to enforce RCRA.

As for a conflict, the LWA confirms and reconfirms that NMED has regulatory authority over WIPP, including under RCRA, and states unequivocally that DOE's role is not to regulate but to comply with RCRA regulation. The LWA nowhere gives DOE regulatory authority either in general or specifically as to the 6.2 million ft^3 capacity limit. LWA §§ 9(a), 14(a), (b). Since DOE has no regulatory authority, it plainly cannot impose its own interpretation of the waste capacity limit upon operations at WIPP, and there is no conflict with NMED's application of the capacity limit.

An agency's assertion of regulatory authority must be based on clear statutory language: "[A]n administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). Thus: "The Supreme Court has long recognized the principle of deference which requires courts to accord 'considerable weight' to the construction by an executive department of a statute that it administers." *Ohio v. Ruckelshaus*, 776 F.2d 1333, 1339 (6th Cir. 1985). The key phrase is: "a statute that it administers." The statute in question must be "delegated to the[] care" of the agency. *Hydro Resources, Inc. v. U.S. EPA*, 608 F.3d 1131, 1145-46 (10th Cir. 2010). But courts refuse to defer to an agency that has no such delegated authority:

> Courts do not, however, afford the same deference to an agency's interpretation of a statute lying outside the compass of its particular expertise

> and special charge to administer. *See Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9, 117 S. Ct. 1953, 138 L. Ed. 2d 327 (1997) (no deference given to agency interpretation of statute, in part, because the agency was not "charged with administering" it); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649, 110 S. Ct. 1384, 108 L. Ed. 2d 585 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority.").

id. Delegation is not to be found in obscure statutory provisions. *FDA v. Brown & Williamson*, 529 U.S. at 160. The Hearing Officer ignored the watchword that

> Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.'

Epic Systems, 138 S. Ct. at 1626-1627 (2018), *quoting from Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001).

None of the supposed sources of authority cited by the Hearing Officer (pages 17-18, *supra*) gives DOE authority to regulate waste disposal at WIPP. The statutes and orders cited by the Hearing Officer do not refer to WIPP[9] or confer any authority upon DOE to regulate the operation of WIPP. Thus, there is no conflict between LWA and RCRA, because no law authorizes DOE to perform the function that it claims here—that the "LWA requires the volume to be reported relative to the total capacity limit of 6.2 million ft^3 (175,564 m^3) of TRU waste" (AR 180121, PMR at 2)—an imagined DOE function that exists nowhere in any federal law, least of all in the LWA.

[9] An exception is DOE Order 435.1, which expressly *excludes* WIPP from its application.

Moreover, DOE does not disclose its methodology to determine waste volume. For deference, an agency decision must make an explicit "interpretive choice." *United States v. Mead Corp.*, 533 U.S. 218, 226-38 (2001). DOE's public interpretations of the LWA volume limit over decades, which are many, all conflict with the "internal" determinations it now proposes to make. The PMR proposes that DOE simply deliver to NMED a number, without explanation, which NMED will enter in the Permit. Courts must consider "the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position." *Mead Corp*., 533 U.S. at 228. Under DOE's proposal, none of those would be visible. There is nothing to which NMED could defer.

Most basically, NMED cannot pick and choose which statute it shall apply. Courts (and agencies) cannot selectively enforce statutes enacted by Congress:

> These rules exist for good reasons. Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law is into policymakers choosing what the law should be. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.

Epic Systems, 138 S.Ct. at 1624. NMED's job is simply to regulate WIPP waste volume under RCRA.

II. The capacity limit in the LWA is measured by the volume of the waste containers.

Mr. Maestas of NMED testified that he sought the intent of Congress and determined only that § 7(a)(3), viewed by itself, does not *require* measurement based on the outer container volume. Maestas pre-filed testimony at 8; 10/24/18 Tr. 88, ll. 10-16, Tr. 141, ll. 8-25, Tr. 142, ll. 1-9, Tr. 148, ll. 19-21 (Maestas). He therefore reasoned that DOE is free to measure volume by any test it wished. (10/24/18 Tr. 88, ll. 10-16, Tr. 125, ll. 11-14 (Maestas).

The Hearing Officer stated that the LWA is "silent" on the method for calculating the volume of TRU waste. (FF 20, FF 209). He stated that NMED found no evidence that volume is tied to the dimensions of the outer container (FF 134) and concluded that Congress did not express any intent on the matter. (FF 208).

In practically the same breath, the Hearing Officer stated that the volume limit is "not ambiguous" (FF 214), from which he concluded that there is no occasion to consider legislative history. (FF217). He said elsewhere that one might question whether DOE has the authority to interpret § 7(a)(3) (FF 214), but that this does not matter, because the meaning is clear.

The approach of Mr. Maestas and the Hearing Officer is emphatically not the correct way to interpret a statute. They focused exclusively on LWA §

7(a)(3). In so doing, they failed to consider an important aspect of the problem, specifically: the language of the entire statute:

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000). *See also: Robinson v. Shell Oil Co.*, 519 U.S. 337, 345-46 (1997); *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989).

They gave no thought to (a) other LWA provisions, such as the limitations on Test Phase waste volume, (b) the LWA's emphatic confirmation of RCRA coverage, (c) the multiple savings clauses that maintain the State's authority to apply RCRA, or (d) the absence of DOE authority to interpret the waste volume limitation.

Congress's intent in enacting the LWA § 7(a)(3) volume limit is illustrated by two other provisions in the original LWA. There are two limitations on Test Phase waste:

(a) EPA's No-Migration Determination, 55 Fed. Reg. 47700 (Nov. 14, 1990). The No-Migration Determination limited the introduction of waste for the test phase: "Wastes placed in the repository may not exceed 8,500 drums or 1 percent of the total capacity of the

repository, as currently planned." *id*. at 47720**.** This Determination was expressly incorporated into the LWA at § 6(b)(2).

(b) Test Phase limitations contained in the original LWA § 6(c), which limited Test Phase waste to "in no event more than 1/2 of 1 percent of the total capacity of WIPP as described in section 7(a)(3)." AR 180706.03.

When the LWA was passed, the repository capacity was an issue for the future, but Test Phase waste was of urgent interest. In its No-Migration Determination, EPA said that 1% of the total WIPP capacity was equal to 8,500 drums, clearly indicating that capacity measures applied to containers and that total capacity is 850,000 drums. Further, the volume limit was expressly *not* subject to unilateral recalculation by DOE:

> Before DOE could exceed that limit, it would have to repetition EPA, and any EPA approval of an expanded test program would have to undergo public comment.

55 Fed. Reg. 47700, 47707.

In LWA § 6(c)(1) Congress enacted another limitation on Test Phase waste, *viz*: "in no event more than 1/2 of 1 percent of the total capacity of WIPP as described in Section 7(a)(3)." Since the reference in § 6(c)(1) also refers to the "total capacity," the term must be understood in the same sense EPA had used and Congress had incorporated in § 6(b)(2), namely: 850,000 drums.

Congress enacted hard-and-fast limits for Test Phase waste. If Congress had supposedly meant DOE to determine, unsupervised, what constitutes a given volume of waste by "recalculating," such supposed authority would be in utter conflict with the hard-and-fast limits on Test Phase activities. Congress plainly did not allow DOE to thwart its hard-and-fast Test Phase limits; much less did Congress authorize DOE to "recalculate" WIPP's total waste volume, which was in direct ratio with the Test Phase limit.

As the Hearing Officer noted, it is clear that Congress authorized a limit of 6.2 million ft^3 of waste. (FF 209). But he allowed DOE to use any method of calculation it chooses, and NMED must accept DOE's number. There is, as a result, *no limit* at all—contrary to the acknowledged congressional intent.

The Hearing Officer says twice that DOE has committed to the method it will use to calculate the volume of waste emplaced. (FF 149, 215). The statements are incorrect. DOE commits to nothing and may change its method of calculation without asking anyone's permission or submitting to any review. (10/23/18 Tr. 146 ll. 22-24 (Kehrman)).

Section 7(a)(3), seen in the context of the entire LWA, is *not* ambiguous and includes the understanding that waste volume is based upon the volume of containers. It is still appropriate to seek confirmation. Such study under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), "requires

'a searching and careful' inquiry into the facts of each case to determine that the agency has acted within the scope of its statutory authority. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)." *Ohio v. Ruckelshaus*, 776 F.2d 1333, 1339 (6th Cir. 1985). The agency's interpretation is rejected if "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron*, 467 U.S. at 845. Further, "the authoritative source for finding the Legislature's intent lies in the Committee Reports . . . ' *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969)." *Garcia v. United States*, 469 U.S. 70, 76 (1984).

Mr. Kehrman did not consult legislative history. 10/23/18 Tr. 149, ll. 18-21; 166, ll. 4-8 (Kehrman). Mr. Maestas claims that he reviewed the congressional reports but found no help there. 10/24/18 Tr. 102, ll. 16-25, Tr. 141, ll. 8-25; Tr. 148, ll. 6-21, (Maestas). We press the inquiry, even though DOE offers (a) no demonstration of its authority to interpret and regulate waste volume and (b) no interpretation of the LWA volume limit which might be viewed as "permissible."

The reports show that Congress was determined to control the volume of waste brought to WIPP. The House Energy and Commerce Committee observed that DOE's Test Phase plan was a matter of current debate. AR 180402.34CC at 14. Committees intended a firm statutory limit on Test Phase waste. The Senate Energy and Natural Resources Committee proposed "an absolute limitation on

volume of 1 percent of the design capacity of WIPP." AR 180402.34Z. House committees proposed similar firm limits. (See pages 3-4, *supra*). These statements show that that Congress intended its volume limitations to impose a hard-and-fast barrier to any exceedance and understood the volume limitations to refer to waste in containers—*i.e.*, drums.

Regulations issued by a responsible agency also indicate the statutory interpretation. *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019, 1036 (10th Cir. 2003). The outcome of a public rulemaking is especially entitled to deference:

> Underlying this judicial deference to administrative agencies is the notion that the rule-making process bears some resemblance to the legislative process and serves to temper the resultant rules such that they are likely to withstand vigorous scrutiny.

Id. 1036. In *Seneca-Cayuga Tribe*, the results of a public rulemaking were held entitled to "controlling weight." *Id.* 1043.

To obtain EPA's certification, DOE had to show that it would comply with the LWA waste volume limits. 40 C.F.R. § 194.24(g). DOE submitted waste volume data, calculated based upon "final waste form," *i.e.*, using the volume of the outer container. SRIC Ex. 14, CARD No. 24, Waste Characterization, at 24-97. The data were subject to notice and comment rulemaking and judicial review. LWA § 8(c)(2), (3). EPA expressly accepted the "final form" data. SRIC Ex. 14

at 24-98. EPA's determination that waste volume based on final waste form satisfies LWA § 7(a)(3) is entitled to "controlling weight."

Importantly, container-volume data were the *only data available*, thus, the only data to which Congress could refer. Since at least 1980, TRU waste volume has consistently been measured by the volume of the waste container. This principle is embodied in Environmental Impact Statements, RCRA Permits, DOE Inventory Reports and reports to Congress, and EPA Certification decisions. See pages 6-8, *supra*.

The Hearing Officer says Congress in 1992 assumed that the waste containers were *full*. (FF 212). However, the Report speaks uncertainly ("apparently . . . .") and cites nothing in support. The assumption is critical, because he reasons that the fact that WIPP will contain less than 6.2 million ft^3 of "actual waste" (FF 146) somehow justifies the PMR. He plunges further into speculation, stating that Congress would have required a larger repository if it knew that the containers were not full, or if the repository were filled and there were waste left over. (FF 212). These statements, starting with the supposed assumption that the containers were "full" (FF 212), have no connection to the Record or reality. The containers were never full. No one told Congress the containers were full. DOE had no basis to say so and did not say so. The repository has not yet been filled. The 1980 EIS has only container volume data,

and so does the 1990 FEIS. DOE has stated that the containers are *not* full and has consistently offered *only container volume data*. AR 180121.03 at 3-8. See also AR 180121.03 at 2-9, 3-8, A-13, -14. The idea that Congress assumed that the containers were full is a whole-cloth fabrication.

The Hearing Officer states that the "mission of WIPP is to isolate and dispose of DOE's inventory of defense Transuranic ("TRU") waste." (FF10). But WIPP is specifically a "pilot plant," intended to "demonstrate the safe disposal." AR 180121.08, § 213(a). Indeed, Rep. Peter Kostmayer, a co-sponsor of House bill, told the House that WIPP is meant only to accommodate part of DOE's TRU waste inventory: "The facility will take only 20 percent of all the waste that we have." AR 180914.32B at 32552 (c. 2). And, most importantly, Congress included a specific volume limit—6.2 million ft^3. To exceed that limit betrays the intent of Congress.

III. DOE's proposed interpretation would change a longstanding and controlling interpretation without any explanation, contrary to law.

Neither DOE nor NMED has offered a reasoned explanation for changing the interpretation of the LWA limit. An unexplained reversal of a longstanding position deserves no support. *State Farm*, 463 U.S. at 41-42. Thus, an agency "may not, for example, depart from a prior policy sub silentio or simply disregard rules that are still on the books. . . . And of course the agency must show that there

are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The Court offered examples of the need for reasons:

> Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. . . . It would be arbitrary or capricious to ignore such matters.

Id.

The facts have not changed since the 1980's, when DOE relied on container volume. Congress clearly intended to impose a limit on the disposal volume at WIPP when it enacted LWA § 7(a)(3). DOE's new method of measuring disposal volume removes that limit. The new method does not better serve the *congressional* purpose, nor is it even permissible, because it entirely defeats the Congress's purpose in imposing the statutory volume limit.

The State has relied upon the volume limit at WIPP. The State made the C&C Agreement, and its amendments, with DOE, in which the State agreed to accept the construction and operation of WIPP on certain conditions, among which were the stated waste volume limits. Under that C&C agreement, the "prior policy" was to calculate waste volume based on the outer container. That method premised several operative documents, including the C&C Agreement, the Second Modification of 1987, the LWA, and the HWA Permit.

Such agreements had consequences. The duration of WIPP's operation is a function of the disposal volume. The FEIS of 1980 states that "the plant would be

designed for an operating life of about 25 years." AR 180121.04 at 1-5. In 1991, DOE advised Congress of "[t]he total estimated cost over the 25-year operating life." AR 180402.34Z at 18. The House Interior report stated that "[t]he Department of Energy ("DOE") plans to operate the WIPP for 25 years..." AR 180402.AA at 9. The Permit itself states a disposal phase of 25 years. Permit at B-13, G-6.

Based on DOE's representations as to volume limits and duration of disposal, the State and its citizens rightfully expected that waste emplacement would be finished by 2024, when DOE would proceed with closure. The cost and time involved in oversight, regulation and monitoring could start to wind down. More importantly, the risks from WIPP's active operations would end. If waste volume increases, the duration of operations increases accordingly. The "serious reliance interests" tied to the limits on waste volume are manifest.

But DOE offers no "reasoned explanation"; indeed, it cannot, because DOE's new policy rejects DOE's commitments to the State and violates the congressional intent. Mr. Kehrman could only state that DOE sought to break the link between the LWA volume and the Permit volume, because "that connection creates limitations and will not allow WIPP to go beyond—to have a TRU mixed waste volume in excess of 6.2 million." 10/23/18 Tr. 212, ll. 17-21 (Kehrman). Put simply, DOE's explanation is its desire to violate the LWA and the Permit.

Mr. Maestas had no explanation of the purpose of the modification. 10/24/18, Tr. 121, ll 15-25, 122, ll. 1-17 (Maestas). It has been known since 1999 that waste containers might be overpacked, and it has been publicly reported (*See* SRIC Exs. 58, 59, and 60; 10/25/18 Tr. 192, ll. 1-5 (Hancock; Hancock prefiled testimony at 10) that DOE has used disposal space inefficiently, and WIPP may be unable to contain the 6.2 million ft^3 volume. Such circumstances, resulting from DOE's own actions, do not justify violation of the limit Congress enacted, nor the renunciation of DOE's commitment to the people of New Mexico.

IV. The volume of waste at WIPP is limited by the C&C Agreement.

More than a decade before the Permit, the C&C Agreement established capacity limits for WIPP based on container volumes. The Second Modification to the C&C Agreement (July 28, 1987) commits DOE to the waste capacity referred to DOE's 1981 Record of Decision, which came from the 1980 FEIS and is based on container volume. It refers to

> the transuranic waste capacity of the Waste Isolation Pilot Plant, described as 6.2 million cubic feet of transuranic waste in the Waste Isolation Pilot Plant Record of Decision (46 Federal Register 9162, dated January 23, 1981) . . .

AR 180706.02, pp. 56 and 57 of PDF (Second Modification at 4-5). The C&C Agreement is authorized by the WIPP Authorization Act of 1979, Pub. L. No. 96-164, § 213, and is recognized in LWA § 21. The C&C Agreement is "a binding and

enforceable agreement between the Department of Energy and the State of New Mexico." Stipulated Agreement at 3. AR 180706.02, pp. 9-16 and 20 of PDF.

The C&C Agreement is independent of the Permit and outside the Secretary's authority. It cannot be modified by any procedure involving the Permit. DOE has acknowledged that it is bound by the C&C Agreement, *e.g.*, SEIS-II at 1-3 (1997), AR 180121.03. It has offered no reason that it should be released from its commitment. The Hearing Officer made no reference to the C&C Agreement in authorizing DOE and NMED to violate it.

V. NMED refused to consider WIPP's recurring safety problems:

SRIC presented testimony by George Anastas, a professional engineer whose experience as a member of the Environmental Evaluation Group made him specially qualified to address the Permittees' operations at WIPP. Mr. Anastas testified about a series of incidents, unsafe conditions, and negligent actions in WIPP's recent history—events which caused him to challenge Permittees' ability to operate this nuclear waste facility with the necessary attention to safety. The matters that he addressed included:

a. LWA violations, including introduction of high level waste, Anastas prefiled test. 18;

b. Roof falls, Tr. 10/25/18, ll. 1-3; 172 ll. 17-23;

c. Ventilation problems, Tr. 145 l. 14-144 l. 22;

d. Fire safety problems, Tr. 143 l. 14-144 l. 22;

e. Electrical problems, including failure to maintain essential backup electric power, Tr. 142, ll. 2-8;

f. An underground fire in 2014 that affected WIPP employees and revealed safety defects in underground ventilation, Anastas prefiled test. 10-13; and

g. A February 2014 underground explosion in a waste container that released radioactivity to the environment and resulted in a three-year shutdown of waste emplacement. Id. 15-19; Tr. 137 ll. 2-139 l. 25; SRIC Ex. 42-45, 48.

He concluded emphatically that, as an engineer, he would not risk entering the underground facility. (Tr. 174, ll. 21-25).

The Hearing Officer rejected all testimony on safety questions, saying it was not fully "developed." (FF 220). But there is ample evidence of the safety issues that Mr. Anastas raised; as he said, the matters have been analyzed and reported upon in technical detail by DOE, NMED, the Defense Nuclear Facilities Safety Board, and others. Tr. 136, ll. 16 - 149, ll. 21. AR 180914.32 D, F & G.

Under 40 C.F.R. §§ 270.42(c)(6), 264.601, and Part 124, NMED is charged with considering whether the proposed modification is consistent with health and the environment. NMED ignored evidence addressing the safe operation of WIPP,

which was requesting a major expansion. Such refusal to consider plainly pertinent factors constitutes an abuse of discretion and arbitrary and capricious action. *In re Rhino Envtl. Servs.*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939.

Conclusion

Numerous misstatements and errors underlie the Order:

1. The assumption that it is WIPP's purpose to contain the entire DOE TRU waste inventory;
2. The statement that the LWA is silent on the method to calculate waste volume;
3. The assertion that Congress assumed that the waste drums were full;
4. The assertion that DOE is authorized by law to calculate the volume of waste emplaced in WIPP;
5. The misconception that DOE has committed to a method to calculate waste volume;
6. The assumption that the RCRA permit has no environmental purpose;
7. The idea that the same capacity number has two different meanings, and that Congress so intended,
8. The assertion that a number with two meanings is not ambiguous, and
9. The assertion that major safety issues have no relevance to public health and the environment.

To sustain the Order, this Court must accept these misconceptions—all of them. That is impossible, and the Order must be vacated.

Under RCRA, NMED is required to issue, and DOE is required to obtain, an HWA disposal permit. Regulations require NMED to determine the volume of waste to be disposed of, and to make the waste volume a part of the permit. The LWA does not impair the scope of RCRA and the RCRA Permit. No law empowers DOE to override that very Permit with DOE's "internal" calculation of the waste volume. No alternative method for determining the volume of waste emplaced at WIPP is a.uthorized The C&C Agreement is an independent source of DOE's legal obligation to abide by the 6.2 million ft^3 waste volume limit. And safety is relevant and within NMED's responsibilities. The Order must be vacated.

Respectfully submitted,

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June 25, 2020

CERTIFICATE OF SERVICE

The undersigned certifies that on June 25, 2020 he served the foregoing document upon counsel of record pursuant to the Court's electronic service and filing procedures.

/s/ Lindsay A. Lovejoy, Jr.
Lindsay A. Lovejoy, Jr.