IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff, v. NEW MEXICO ENVIRONMENT DEPARTMENT, and JAMES KENNEY, Secretary (in his official capacity), Defendants.	Case No. 2:19-cv-46-KG-SMV

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF UNITED STATES' MOTION FOR SUMMARY JUDGMENT

Dated: June 1, 2021

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GLOSSARY

Area of Concern	AOC
Administrative Procedure Act	APA
New Mexico Environmental Improvement Board	Board
Cannon Air Force Base	Cannon
U.S. Environmental Protection Agency	EPA
New Mexico Hazardous Waste Act	HWA
New Mexico Environment Department	NMED
Perfluorooctanoic Acid	PFOA
Perfluorooctane Sulfonate	PFOS
Resource Conservation and Recovery Act	RCRA
Solid Waste Management Unit	SWMU

INTRODUCTION

On December 19, 2018, the New Mexico Environment Department ("NMED") issued a renewal of Cannon Air Force Base's Corrective Action Permit ("Permit") under the New Mexico Hazardous Waste Act ("HWA"), N.M. Stat. Ann. § 74-4-1 *et seq*. The United States brought suit against NMED challenging the Permit's definition of "hazardous waste" for the purpose of corrective action and the Permit's application of Permit requirements to "contaminants," and alleged that the Permit contains terms that are inconsistent with the scope of "corrective action" as defined by New Mexico law, and that are not supported by the administrative record.

For four independent reasons, the Court should grant the United States' motion for summary judgment on Counts I and II of its Amended Complaint. First, the HWA limits NMED's corrective action authority to only those substances identified as "hazardous waste" under EPA's RCRA regulations. By defining "hazardous waste" for the purpose of corrective action in a manner that exceeds the grant of authority in the HWA, the Permit definitions at issue in this case are unlawful. Second, the administrative record fails to articulate the reasoning for determining that the enumerated categories of substances in the Permit meet the statutory definition of hazardous waste, which was arbitrary and capricious under the circumstances. Third, the Permit unlawfully extends corrective action requirements to releases of "contaminants," which exceeds NMED's authority under the HWA and its implementing regulations. Finally, NMED has not explained why or how the record supports that the disputed Permit terms are necessary to protect human health and the environment pursuant to NMED's omnibus authority.

STATEMENT OF JURISDICTION

The Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1345.

BACKGROUND

I. Statutory and Regulatory Background

A. The Resource Conservation and Recovery Act ("RCRA")

Subtitle C of RCRA, 42 U.S.C. §§ 6921-39g, provides requirements for the cradle to grave management of hazardous waste. The U.S. Environmental Protection Agency ("EPA") administers the RCRA hazardous waste program and issues implementing regulations. *See* 40 C.F.R. § 260.1 *et seq.* However, EPA may authorize a state to administer and enforce a state hazardous waste program that operates in lieu of the federal hazardous waste regulatory program. 42 U.S.C. § 6926(b).

RCRA defines "hazardous waste" broadly as "a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." *Id.* § 6903(5). For purposes of RCRA's Subtitle C regulatory program, Congress directed EPA to "promulgate regulations identifying the characteristics of hazardous waste, and listing particular hazardous wastes . . . , which shall be subject to the provisions of" Subtitle C. *Id.* § 6921(b). EPA gave effect to this requirement by promulgating 40 C.F.R. part 261. A solid waste is a "hazardous waste" under part 261 if it has been specifically listed by EPA (known as a "listed hazardous waste") or if it exhibits the characteristics of ignitability, corrosivity, reactivity, or toxicity (known as a "characteristic hazardous waste"). 40 C.F.R. § 261.3(a)(2); *id.* subpt. C (specifying characteristics), subpt. D (listing specific hazardous wastes).

RCRA contains a limited waiver of the United States' sovereign immunity as to "Federal, State, interstate, and local requirements, both substantive and procedural . . . respecting control and abatement of solid waste or hazardous waste disposal and management." 42 U.S.C. § 6961(a). The United States "shall be subject to, and comply with," those requirements "in the same manner, and to the same extent, as any person is subject to such requirements." *Id.*

B. New Mexico Hazardous Waste Act

New Mexico operates an EPA-authorized state hazardous waste management program under the HWA, N.M. Stat. Ann. §§ 74-4-1 *et seq.*, and implementing regulations, N.M. Admin. Code § 20.4.1. *See* 40 C.F.R. § 272.1601 (authorizing state program). The HWA's statutory definition of "hazardous waste" is materially identical to RCRA's. *See* N.M. Stat. Ann. 74-4-3(K) (defining "hazardous waste" with certain exclusions not relevant here). The HWA directs New Mexico's Environmental Improvement Board ("Board") to promulgate rules establishing standards and permit requirements for hazardous waste management. *Id.* § 74-4-4. It also directs the Board to promulgate rules "for the identification and listing of hazardous wastes" taking into account various factors, but prohibits the Board from identifying or listing "any solid waste or combination of solid wastes as a hazardous waste that has not been listed and designated as a hazardous waste by" EPA. *Id.* § 74-4-4(A)(1).

NMED is tasked with implementing New Mexico's hazardous waste management program under the HWA and the Board's regulations, including administration of the hazardous waste permitting program. *See id.* § 74-4-4.2. That program requires the owner or operator of a hazardous waste treatment, storage, or disposal facility to obtain a permit under the HWA. *See id.* § 74-4-4(A)(6). Hazardous waste permits under the HWA "shall require corrective action for all releases of hazardous waste or constituents from any solid waste management unit" at the permitted facility. *Id.* § 74-4-4.2(B). New Mexico defines "corrective action" as "an action

taken in accordance with rules of the [B]oard to investigate, minimize, eliminate or clean up a release to protect the public health, safety and welfare or the environment." *Id.* § 74-4-3(C).

The "rules of the [B]oard" governing corrective action requirements incorporate EPA's RCRA regulations by reference, with limited exceptions not relevant here. Those regulations require a facility seeking a permit to "institute corrective action as necessary to protect human health and the environment for all releases of hazardous waste or constituents from any solid waste management unit at the facility, regardless of the time at which waste was placed in such unit." 40 C.F.R. § 264.101; N.M. Admin. Code § 20.4.1.500 (incorporating 40 C.F.R. pt. 264 by reference). For purposes of 40 C.F.R. § 264.101, "hazardous waste" is a defined term meaning a listed or characteristic hazardous waste under 40 C.F.R. § 261.3. *See* 40 C.F.R. § 260.10 (defining hazardous waste "[w]hen used in parts 260 through 273" to mean "a hazardous waste as defined in §261.3"); N.M. Admin. Code § 20.4.1.100-200 (incorporating 40 C.F.R. pts. 260 and 261 by reference).

II. Factual and Procedural Background

A. The Cannon Air Force Base Corrective Action Permit

Cannon Air Force Base ("Cannon") is an Air Force installation located on approximately 4,320 acres of land in Curry County, NM. Fact Sheet at 2, AR000136. Before the Permit was issued, Cannon was subject to a corrective action permit issued on October 15, 2003. *Id.* at 6, AR000140.[1]

Cannon applied to renew its corrective action permit in June 2013. *Id.* at 6, AR000140. NMED found the renewal permit application administratively complete in June 2016. *Id.* As a result, NMED issued a draft permit and accompanying fact sheet in October 2017 and initiated a

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[1] The 2003 permit is accessible on NMED's website at https://www.env.nm.gov/wp-content/uploads/sites/12/2019/10/CAFB_Final_Perm_as_modified_2-2006.pdf.

public comment period and the opportunity to request a hearing. *Id.* at 1-8, AR000135-000142. On December 19, 2018, New Mexico issued the final Permit, with an effective date of January 18, 2019. Permit Issuance Memo at 1-2, AR011259-011260. The Permit will be effective for ten years. Fact Sheet at 6-7, AR000140-000141.

The Permit defines "hazardous waste" for the purposes of corrective action as follows:

> *Hazardous Waste*, for the purposes of corrective action for solid waste management units and areas of concern conducted pursuant to 74-4-4.2(B) of the HWA, 40 CFR part 264, subpart F, or 40 CFR 270.32(b)(2), means a hazardous waste as defined in 74-4-3(I) of the HWA.[2] Hazardous waste, for the purposes of corrective action, includes, *without limitation* any hazardous waste as defined in 40 CFR 261.3, any groundwater contaminant listed in the Water Quality Control Commission (WQCC) Regulations in 20.6.2.3103 NMAC, any toxic pollutant listed in 20.6.2.WW NMAC, any contaminant defined in this Permit Section (1.12) or for which the EPA has promulgated a maximum contaminant level (MCL) at 40 CFR parts 141 and 143, perchlorate, methyl tertiary butyl ether, polychlorinated biphenyls (PCBs), dioxins, furans, perfluorinated compounds including perfluorooctane sulfonate and perfluorooctanoic acid, and munitions constituents as defined in 10 U.S.C. 2710(e)(3).

Permit at 16, AR011350 (emphasis added); *see also* Doc. 56 at 24. The Permit also defines "contaminant" as follows:

> *Contaminant* means any hazardous constituent listed in 40 CFR Part 261, appendix VIII and 40 CFR Part 264, appendix IX; any groundwater contaminant listed in the New Mexico WQCC Regulations at 20.6.2.3103 NMAC; any toxic pollutant listed in the New Mexico WQCC Regulations a 20.6.2.7.WW NMAC; methyl tertiary-butyl ether; perchlorate; polychlorinated biphenyls (PCBs); dioxins and furans; perfluorinated compounds including perfluorooctane sulfonate and perfluorooctanoic acid; *and any other substance present in soil, sediment, rock, surface water, groundwater, or air for which the NMED determines that monitoring, other investigation, or a remedy is necessary to carry out the purposes of this Permit.*

Permit at 15, AR011349 (emphasis added); *see also* Doc. 56 at 23.

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[2] The citation appears to be in error. The definition of "hazardous waste" is at Section 74-4-3(K) of the HWA. N.M. Stat. Ann. § 74-4-3(K).

These disputed permit provisions are applied throughout the Permit, most notably in Part 3, which imposes both broad and detailed requirements for corrective action at solid waste management units ("SWMUs") and areas of concern ("AOCs") and beyond the facility boundary and for newly discovered SWMUs or AOCs. Permit at 32-33, 36-37, AR011366-011367, 011370-011371.[3] The corrective action provisions in the Permit also outline detailed requirements for the phased corrective action process, including requirements related to remedial investigation, risk assessment, corrective measures, the use and implementation of interim cleanup measures, selection and implementation of final remedies, and the relevant cleanup levels that are to apply to various environmental media (soil, groundwater, and so forth). *Id.* at 32-82, AR011366-011416.

B. Litigation Background

After New Mexico issued the final Permit, with an effective date of January 18, 2019, the United States timely filed a challenge to the Permit by filing a complaint in this Court.[4] *See* Permit Issuance Memo at 1-2, AR011259-11260; Doc. 1. NMED moved to dismiss the complaint, but that motion was denied. *See* Doc. 26. After NMED filed its corrected administrative record on February 1, 2021, the United States filed an unopposed motion for leave to file an amended complaint on March 18, 2021, which this Court granted the next day. Docs.

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[3] The Permit defines an SWMU as any "discernable unit or area at the Facility at which solid waste has been placed at any time, and from which NMED determines there may be a risk of a release of hazardous waste or constituents, irrespective of whether the unit was intended for the management of solid waste…" Permit at 17, AR011351. The Permit defines an AOC as "any area having a known or suspected release of hazardous waste or hazardous constituents that is not from a solid waste management unit and that NMED has determined may pose a current or potential threat to human health or the environment…" *Id.* at 15, AR011349.

[4] The United States also filed a protective petition for review in state court to ensure compliance with N.M. Stat. Ann. § 74-4-14. *United States v. N.M. Env't Dep't*, No. A-1-CA-37887 (N.M. Ct. App. filed Jan. 17, 2019). The state court petition is stayed pending the outcome of the federal suit.

49, 53, 54. The United States filed the Amended Complaint on April 2, 2021, and NMED filed its answer on the same day. Docs. 56, 57.

STANDARD OF REVIEW

Under the HWA, a permitting decision may be set aside if the action was (1) arbitrary, capricious, or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with the law. N.M. Stat. Ann. § 74-4-14.C. Judicial review of NMED's actions under the HWA is "based on the administrative record and a standard of review similar to that provided in Section 706 of the Administrative Procedure Act" ("APA"). *Citizens for Alternatives to Radioactive Dumping v. CAST Transp., Inc.*, No. CIV-99-32 MCA/ACT, 2004 WL 7338006, at *18 (D.N.M. Sept. 30, 2004), *aff'd sub nom. Citizens for Alternatives to Radioactive Dumping v. U.S. Dep't of Energy*, 485 F.3d 1091 (10th Cir. 2007); *see* 5 U.S.C. § 706(2) (authorizing courts to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "unsupported by substantial evidence").

Summary judgment is appropriate where a party can show that, as to any part of any claim or defense, "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Neither this Court nor the Tenth Circuit has addressed the standard of review for a motion for summary judgment on a claim under the HWA. However, in the analogous context of reviewing federal agency actions under the APA, the Tenth Circuit has held that the standard procedures for adjudicating summary judgment motions do not apply. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994). Under *Olenhouse*, a district court reviewing agency action "acts as an appellate court" and "employs summary judgment to decide, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *N.M. Health Connections v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1138,

1161 (10th Cir. 2019) (internal quotation marks and alteration omitted). This review is limited to the administrative record before the agency at the time the decision was made. *Id.* at 1161-62.

Agency action is arbitrary and capricious if it is "unreasonable or without a rational basis, when viewed in light of the whole record." *Sw. Research & Info. Ctr. v. N.M. Env't Dep't*, 336 P.3d 404, 411 (N.M. Ct. App. 2014) (citing *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 124 P.3d 1164, 1168 (N.M. Ct. App. 2005)); *see also W. Watersheds Project v. Bureau of Land Mgmt.*, 721 F.3d 1264, 1273 (10th Cir. 2013) (stating agency decision is "arbitrary and capricious" under APA where agency, *inter alia*, "failed to base its decision on consideration of the relevant factors" or "made a clear error of judgment"). In performing arbitrary and capricious review, a court may not "rel[y] on the *post hoc* rationalizations of counsel or attempt[] itself to supply a reasoned basis for agency action without regard to the contents of the administrative record." *Olenhouse*, 42 F.3d at 1580.

ARGUMENT

I. The Permit's Definition of "Hazardous Waste" for Purposes of Corrective Action Is Contrary to New Mexico Law and Unsupported by the Administrative Record.

The HWA and its implementing regulations apply corrective action requirements to releases of listed and characteristic hazardous waste as defined at 40 C.F.R. § 261.3. But the Permit's definition of "hazardous waste" for the purposes of corrective action improperly adopts the HWA's broader statutory definition of hazardous waste and proceeds to identify numerous categories of substances that purportedly meet that statutory definition. The Permit's definition of "hazardous waste" and application of that definition in the corrective action requirements are thus "not in accordance with law" because they extend corrective action beyond listed and characteristic hazardous wastes. N.M. Stat. Ann. § 74-4-14(C). Moreover, even if NMED's use of the statutory definition of hazardous waste in the Permit were permissible, NMED failed to

demonstrate in the Permit, fact sheet, or elsewhere in the administrative record that the specific categories of substances it identified actually meet that statutory definition. Thus, the Permit's inclusion of those enumerated categories is by definition arbitrary and capricious.

A. The HWA limits NMED's corrective action authority to only those substances identified as hazardous waste under EPA's regulations.

The Permit defines "hazardous waste" for the purposes of corrective action by reference to the HWA's statutory definition of "hazardous waste" at section 74-4-3(K). Permit at 16, AR011350. The Permit also enumerates several specific substances or categories of substances—*in addition to* "hazardous waste as defined in 40 CFR 261.3"—that NMED believes fall within the Permit's definition. *Id.* And through its incorporation of "contaminants" as defined elsewhere in the Permit, the definition includes a "catch all" provision allowing NMED to reach additional substances at its discretion without regard for the relevant statutory and regulatory constraints. This definition exceeds the scope of NMED's corrective action authority, which the HWA and its implementing regulations limit to listed or characteristic hazardous wastes as defined at 40 C.F.R. § 261.3. Accordingly, the Permit's definition of "hazardous waste" for the purposes of corrective action is unlawful.

The HWA's statutory definition of "hazardous waste" is broad. *See* N.M. Stat. Ann. § 74-4-3(K). But NMED's corrective action authority does not extend to the outer limits of that statutory definition. Instead, the HWA delineates the scope of "corrective action" requirements by reference to the "rules of the [B]oard." *Id.* § 74-4-3(C) (defining "corrective action"). Those "rules of the [B]oard" include provisions establishing corrective action requirements and identifying the hazardous wastes that are subject to those requirements.

Specifically, New Mexico's rules incorporate by reference EPA's regulations outlining corrective action requirements and defining hazardous waste for purposes of corrective action

under those regulations. N.M. Admin. Code § 20.4.1.100, 200, 500 (incorporating 40 C.F.R. pts. 260, 261, and 264, respectively); *see* Fact Sheet at 5, AR000139 (explaining that the Cannon Permit cites federal regulations, not New Mexico regulations, because "only the federal regulations set forth the detailed regulatory requirements; the State regulations incorporate by reference, with certain exceptions, the federal regulations in their entirety."). The regulatory corrective action requirements for releases of hazardous waste or constituents are codified at 40 C.F.R. § 264.101.[5] And for purposes of that provision, "hazardous waste" means "a hazardous waste as defined in [40 C.F.R.] § 261.3," *i.e.,* a listed or characteristic hazardous waste. 40 C.F.R. § 260.10 (defining "hazardous waste" "[w]hen used in parts 260 through 273").

This regulatory definition of "hazardous waste" is decidedly narrower than the HWA's statutory definition used in the Permit. Because NMED's corrective action authority does not extend beyond the "rules of the [B]oard," it does not extend to hazardous wastes that are not listed or characteristic hazardous wastes under 40 C.F.R. § 261.3. The Permit nonetheless defines "hazardous waste" for the purposes of corrective action by reference to the HWA's broader statutory definition. As a result, the Permit purports to apply corrective action requirements to substances that do not fall within the regulatory definition of "hazardous waste," and it therefore exceeds NMED's authority under the HWA.[6]

Moreover, the Permit includes an extensive list of substances purportedly meeting its definition of "hazardous waste" for the purposes of corrective action that expressly expands upon the definition set forth at 40 C.F.R § 261.3 and incorporated by reference into the Board's rules.

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[5] The United States does not challenge the Permit's application of corrective action to hazardous constituents or the Permit's definition of hazardous constituents.

[6] By contrast, for "all other purposes" besides corrective action, the Permit properly defines hazardous waste "as defined in 40 CFR 261.3." Permit at 16, AR011350.

Permit at 16, AR011350. Moreover, even these categories are purportedly listed "without limitation." *Id.* The Permit's inclusion of these substances exceeds NMED's authority under the HWA because it extends corrective action requirements to substances that are not listed or characteristic hazardous wastes. Nowhere in the record did NMED even attempt to demonstrate that any of the enumerated categories of substances are hazardous wastes as defined at 40 C.F.R. § 261.3.[7] Indeed, some demonstrably are not. For example, the Permit lists "perfluorinated compounds including perfluorooctane sulfonate ["PFOS"] and perfluorooctanoic acid ["PFOA"]" among the substances it considers "hazardous waste" for the purposes of corrective action. *Id.* But EPA has not listed any perfluorinated compounds, including PFOS or PFOA, as hazardous wastes under 40 C.F.R. § 261.3. *See* 40 C.F.R. pt. 261 subpt. D (specifying listed hazardous wastes). And NMED has not shown that perfluorinated compounds exhibit any of the characteristics set forth in part 261. *See id.* pt. 261 subpt. C.

Further, the Permit stretches its definition of "hazardous waste" to include "any contaminant defined in this Permit Section (1.12)." Permit at 16, AR011350. In addition to incorporating many of the same substances already enumerated in the Permit's definition of "hazardous waste," the term "contaminant" includes a catch-all provision encompassing "any other substance present in soil, sediment, rock, surface water, groundwater, or air for which the NMED determines that monitoring, other investigation, or a remedy is necessary to carry out the purposes of this Permit." Permit at 15, AR011349. As discussed in Section II below, NMED's corrective action authority under 40 C.F.R. § 264.101 is limited to hazardous wastes and hazardous constituents, and does not cover "contaminants." This catch-all provision is

[7] Still less has NMED shown that whatever additional unidentified substances it may attempt to reach "without limitation" in the future satisfy the regulatory definition. Permit at 16, AR011350.

untethered from both the statutory and regulatory definitions of hazardous waste, allowing NMED to extend corrective action to additional substances at its discretion without regard for 40 C.F.R. § 261.3 or the other "rules of the [B]oard" defining NMED's corrective action authority.

Accordingly, the Permit's definition of "hazardous waste" for the purposes of corrective action is inconsistent with the HWA and its implementing regulations, and the Permit is unlawful.

B. Even if NMED's corrective action authority extended to all statutory hazardous waste, the administrative record does not support the Permit's definition of hazardous waste.

The disputed Permit terms should also be set aside because they are arbitrary, capricious, or an abuse of discretion. N.M. Stat. Ann § 74-4-14(C); *see also Regents of the Univ. of Cal. v. N.M. Water Quality Control Comm'n*, 94 P.3d 788, 795 (N.M. Ct. App. 2004). Even assuming *arguendo* that the "rules of the [B]oard" authorized corrective action for all statutory hazardous wastes, NMED has made no effort to demonstrate that any of the specific categories of substances listed in the Permit's definition of hazardous waste meet the HWA's statutory definition.[8] *See* N.M. Stat. Ann. § 74-4-3(K).

As discussed above, *supra* p. 8, with certain exceptions not relevant here, the HWA defines "hazardous waste" as "any solid waste or combination of solid wastes that because of their quantity, concentration or physical, chemical or infectious characteristics may: (1) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or (2) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise

[8] The Air Force does not argue here that any or all of the enumerated categories of substances could not meet that definition, only that NMED has not shown that they do in the administrative record for this Permit.

managed." *Id.* Nowhere in the Permit or its administrative record, however, did NMED even attempt to demonstrate that the specific substances or categories of substances listed in its definition of "hazardous waste" actually satisfy the HWA's statutory criteria. Permit at 16, AR011350; N.M. Stat. Ann. § 74-4-3(K).

Critically, under New Mexico's permitting process, a draft permit "shall be accompanied by a fact sheet and shall be based on the administrative file" that explains NMED's preliminary permitting decision and sets forth the "principal facts and the significant factual[,] legal, methodological and policy questions considered in preparing the draft permit." N.M. Admin. Code § 20.4.1.901.A(2)/D(1). The fact sheet must also include a "brief summary of the basis for the draft permit conditions including references to applicable statutory and regulatory provisions." N.M. Admin. Code § 20.4.1.901.D(2)(c). In this case, however, the Fact Sheet does not refer to or invoke New Mexico's statutory definition of hazardous waste when describing the requirements contained in the draft Permit. *See generally* Fact Sheet at 1-8, AR000135-000142. Indeed, when describing Part 1 of the Permit, NMED states in the Fact Sheet that the "General Permit Conditions" provide the "*regulatory* authority and basis for the permit including modification and compliance requirements, definitions, and general permit conditions regarding duties and requirements that apply to corrective action at the Facility . . . ." *Id.* at 7, AR000141 (emphasis added).

The Fact Sheet similarly does not explain the principal facts and significant factual, methodological and policy questions considered when NMED decided to include the disputed Permit provisions. *See* N.M. Admin. Code § 20.4.1.901.A(2)/D(1). It includes no background or explanation as to why the Permit requires corrective action as to the additional substances covered by the disputed Permit provisions or why those substances satisfy the statutory

definition of hazardous waste. N.M. Stat. Ann. § 74-4-3(K); *see generally* Fact Sheet at 1-8, AR000135-000142.

NMED has failed to articulate its reasoning for determining that the enumerated categories of substances that it believes meet the HWA's statutory definition of hazardous waste actually meet that definition, or to refer to any evidence in the record that would support such a determination. *See* N.M. Stat. Ann. § 74-4-3(K); Permit at 16, AR011350. Accordingly, NMED's decision to include these categories of substances within the Permit's definition of hazardous wastes for the purposes of corrective action was arbitrary and capricious. N.M. Stat. Ann. § 74-4-14(C).

II. The Permit's Application of Corrective Action Requirements to "Contaminants" Exceeds NMED's Authority under the HWA and Implementing Regulations.

The HWA limits NMED's corrective action authority to releases of hazardous waste and hazardous constituents.[9] But the Permit unlawfully extends corrective action requirements to releases of "contaminants," a defined term in the Permit that does not appear in the HWA, RCRA, or relevant regulations. Indeed, in some places it even applies corrective action to contaminants *in lieu of* hazardous waste or hazardous constituents. This is inconsistent with the HWA and its implementing regulations.

The Permit defines "contaminant" as a term separate and apart from "hazardous waste" and "hazard constituent." Permit at 15, AR011349. As defined, it includes some (but not all) hazardous constituents as defined in the Permit, and some (but not all) of the categories of substances NMED identified in its definition of "hazardous waste" for the purposes of corrective action. *Id.* But it does *not* include "hazardous waste as defined in 40 CFR 261.3." *Compare id.*;

[9] The only possible exception to this rule would be invocation of the omnibus provision, which, as discussed in Section III below, does not support the Permit terms challenged here.

with Permit at 16, AR011350 (defining "hazardous waste" for purposes of corrective action). And it includes a catch-all provision extending the definition to "any other substance present in soil, sediment, rock, surface water, groundwater, or air for which the NMED determines that monitoring, other investigation, or a remedy is necessary to carry out the purposes of this Permit." Permit at 15, AR011349.

Many of the Permit's terms extend corrective action requirements to these "contaminants." For example, the Permit defines "corrective action" as action "necessary to protect human health and the environment for all releases of hazardous waste or hazardous constituents, *or other contaminants defined by the Permit Section (1.12)*, to the environment as required under HWA 74-4-4.2(B) and 40 CFR 264.101." *Id.* (emphasis added). In some of the Permit's key operative provisions, the Permit even applies corrective action requirements to contaminants *instead of* hazardous waste and hazardous constituents. For example, Section 3.10 states that NMED "will require corrective measures at a site if the NMED determines . . . that there has been a release of *contaminants* into the environment at the site and that corrective action is necessary to protect human health and the environment." Permit at 41, AR011375 (emphasis added). Numerous other provisions tie corrective action requirements to the release of contaminants. *See* Permit at 40, AR011374 (requiring Investigation Work Plan to address "pathways of contaminant releases"); Permit at 41, AR011375 (requiring Investigation Report to identify cleanup levels "for each contaminant found during a site investigation"); Permit at 42, AR011376 (requiring Corrective Measures Evaluation Report to evaluate remedy alternatives based on, *inter alia*, whether remedy would "reduce or eliminate . . . further releases of contaminants"); *see also* Permit at 83-110, AR011417-011444 (providing detailed requirements for Investigation Work Plans, Risk Assessment Reports, and Corrective Measures Evaluations).

The Permit's application of corrective action requirements to "contaminants" is unlawful, as nothing in the HWA or its implementing regulations authorizes NMED to extend those requirements to "contaminants." Indeed, the term "contaminant" does not appear in the HWA. Instead, the plain text of that statute provides that hazardous waste permits "shall require corrective action for all releases of *hazardous waste or constituents* from any solid waste management unit at a treatment, storage or disposal facility seeking a permit." N.M. Stat. Ann. § 74-4-4.2(B) (emphasis added). Likewise, the HWA directs the Board to promulgate regulations for "the taking of corrective action for all releases of *hazardous waste or constituents* from" such facilities. *Id.* § 74-4-4(A)(5)(h) (emphasis added).

Further, as discussed in Section I.A above, the HWA defines the scope of its corrective action requirements by reference to the "rules of the [B]oard." *Id.* § 74-4-3(C). Those rules require corrective action "as necessary to protect human health and the environment for all releases of *hazardous waste or constituents* from any solid waste management unit at the facility, regardless of the time at which waste was placed in such unit." 40 C.F.R. § 264.101 (emphasis added); N.M. Admin. Code § 20.4.1.500 (incorporating 40 C.F.R. pt. 264). Nothing in New Mexico's regulations or the federal regulations they incorporate extends corrective action requirements to "contaminants."[10] And as discussed below, nowhere in the administrative record does New Mexico explain its reasons for requiring corrective action as to these additional "contaminants." *See infra* at 21-23.

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[10] Part 261 of EPA's regulations refers to certain specific listed "contaminants" (without defining the term) in order to identify those substances that qualify as characteristic hazardous wastes based on the toxicity characteristic. 40 C.F.R. § 261.24. But that provision does not authorize direct regulation of those contaminants as hazardous waste or hazardous constituents per se. In any event, the "contaminants" listed in that provision of EPA's regulations do not align with the Permit's definition.

Accordingly, the Permit's provisions applying corrective action requirements to contaminants are inconsistent with the HWA and are unlawful.

III. The Challenged Permit Terms Are Not a Valid Exercise of NMED's Omnibus Permitting Authority.

The Permit's general terms passingly allude to NMED's omnibus authority under N.M. Stat. Ann. § 74-4-4.2(C) and 40 C.F.R. § 270.32(b)(2). *See* Permit at 11, AR011345. This provision of the HWA authorizes NMED to issue a hazardous waste permit "subject to any conditions necessary to protect human health and the environment for the facility." N.M. Stat. Ann. § 74-4-4.2(C). New Mexico's regulations likewise provide that permits "shall contain terms and conditions as the [Secretary] determines necessary to protect human health and the environment." 40 C.F.R. § 270.32(b)(2); N.M. Admin. Code § 20.4.1.900 (adopting 40 C.F.R. pt. 270). This authority allows the regulator to impose conditions on a case-by-case basis that are more stringent than those specified by the substantive regulation. 42 U.S.C. § 6925(c)(3); 40 C.F.R. § 270.32(b); *see also In re: Ash Grove Cement Co*., 7 E.A.D. 387, 396 (EAB 1997).

To survive judicial review "an agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 48 (1983); *see id.* at 43 (holding agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made") (internal quotation marks and citation omitted). Accordingly, in order to exercise its omnibus authority, NMED was required to justify its decision in the administrative record. *See* 56 Fed. Reg. 7134, 7147 n.15 (Feb. 21, 1991) (discussing similar federal authority, and stating that "permit writers must justify in the administrative record supporting the permit any decisions based on omnibus authority"); *see also In re Caribe Gen. Elec. Products, Inc.*, 8 E.A.D. 696, 703, 708 (EAB 2000) (requiring fact-specific and site-specific justification for provisions based

on federal omnibus authority). Indeed, EPA's Environmental Appeals Board has held that reliance on RCRA's omnibus authority provision "must be adequately explained and justified."[11] *In re Ash Grove Cement Co.*, 7 E.A.D. 387 (EAB 1997). The omnibus authority "may only be exercised if the record contains a *properly supported finding* that the permit condition is necessary to protect human health or the environment." *In re Chem. Waste Mgmt. of Indiana, Inc.*, 6 E.A.D. 144 (EAB 1995) (emphasis added).

In the instant case, the administrative record is devoid of any finding that the challenged Permit terms are necessary to protect human health and the environment under NMED's omnibus authority. *See* N.M. Admin. Code § 20.4.1.900 (adopting 40 C.F.R. pt. 270); N.M. Stat. Ann. § 74-4-4.2(C). The Fact Sheet that accompanied the Permit purported to identify the statutory and regulatory authority for the proposed permit requirements. Fact Sheet at 1, AR000135. With respect to Permit Part 1, which includes the definitions of "Hazardous Waste" and "Contaminant," NMED stated only that "most [of these conditions] are based upon mandatory permit conditions set forth at 40 CFR Parts 264 and 270." Fact Sheet at 7, AR000141. However, nothing in the Fact Sheet or elsewhere in the administrative record explains why NMED believes that the exercise of omnibus authority to adopt the challenged Permit terms in this case is necessary to protect human health and the environment.

The Permit itself likewise contains only unsubstantiated boilerplate language in the "Authority" section noting that it "contains terms and conditions that the NMED has determined are necessary to protect human health and the environment in accordance with 20.5.1.900 NMAC incorporating 40 Code of Federal Regulations (CFR) 270.32 (b) (2)." Permit at 11,

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[11] The Environmental Appeals Board, by delegation, exercises the EPA Administrator's authority to render final decisions on behalf of EPA in administrative appeals from permit and other administrative decisions under RCRA and its implementing regulations.

AR011345. Despite this statement, nowhere in the administrative record or later in the Permit does NMED articulate why the terms challenged here are necessary in order to protect human health and the environment. NMED's blanket assertions are insufficient to justify the exercise of NMED's omnibus authority, especially given the "fact-specific and site-specific justification" required to support the use of omnibus authority in other administrative proceedings. *In re Caribe Gen. Elec. Products, Inc.*, 8 E.A.D. at 703, 708.

CONCLUSION

For the foregoing reasons, the Court should grant this motion for summary judgment in favor of the United States on Counts I and II of its Amended Complaint.

Respectfully submitted,

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