KAFB 9/ March 25, 1991

ENTERED

IN THE COURT OF APPEALS
FOR THE
STATE OF NEW MEXICO

UNITED STATES OF AMERICA
DEPARTMENT OF THE AIR FORCE
Appellant

v.

No. 12,550

STATE OF NEW MEXICO
HEALTH AND ENVIORNMENT DEPARTMENT,
ENVIORNMENTAL IMPROVEMENT DIVISION
Appellee

# APPELLANT'S REPLY BRIEF TO APPELLEE'S ANSWER BRIEF

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INTRODUCTION

This Reply Brief is filed under the provisions of SCRA 12-213B, 1986 (1990 Repl.) and is timely filed in accordance with SCRA 12-210B(2) 1986 (1990 Repl.). Appellee (The Division) argues in its Answer Brief that Appellant Kirtland Air Force Base's (KAFB) appeal of its RCRA permit is misleading and based on case law that is not on point to the issues raised. As will be demonstrated herein, the Division's reliance on its citations to the record and transcript is misplaced. The Division's assertion that KAFB's arguments are confusing demonstrates a lack of understanding of the legal issues and supports the Appellant's position that the permitting process itself has failed.

Contrary to Appellee's statement on page 2 of the Answer Brief, KAFB has carried its burden as stated in the Brief-in-Chief. The case Appellee cites, Olquin v. Manning, 104 N.M. 791, 792, 727 P.2d 556, 557 (Ct. App. 1986), is distinguishable because it applies to the phrase "See exhibits" mentioned in a brief without corresponding page references, whereas KAFB's Brief-in-Chief cites to pages in the record where appropriate, thus enabling the court to review whether substantial evidence exists. The lack of specific references in the Olquin case did not allow the court to complete its review. Olquin is also distinguishable because it involved a domestic situation on appeal with a record from the District Court. There is no District Court record in the present appeal because the New Mexico statutes do not provide such a mechanism for the appeal of an administrative agency's decision. However, KAFB submits that it is entitled to argue its position by using

facts illustrating the impact of the permit conditions. The Division's interpretation of this case deprives the court of helpful information relevant to the issues on appeal.

The Division cites New Mexico ex rel. Reynolds v. Aamodt, 30 NMSBB 171, 172 (1990) as authority for this court to give great deference to the acts of administrative agencies, when in fact the case merely creates a rebuttable presumption. However, the case also requires the agency to follow the plain English meaning of the wording in its own statutes. Specifically, the court held that the phrase "at any time" in the statute does not allow the agency to establish an arbitrary deadline or in other words, "at any time" means "at any time." This case does not stand for allowing the agency discretion in interpretation. Therefore, the language in NMSA 74-4-4A, 1978 (1990 Repl.) which states "no more stringent than federal regulations" means "no more stringent than federal regulations." The Division should be held to this standard when imposing permit conditions.

Per Appellee's brief, footnote 3 on page 3, New Mexico is an "authorized" state under 40 CFR 271. EPA's delegation of authority is based on the requirement that a state's laws are at least as stringent as federal laws. New Mexico, on its own initiative, went one step further and enacted a statute limiting its authority to requirements no more stringent than federal requirements. The plain meaning required by the above case supports KAFB's arguments concerning the permit conditions.

ARGUMENT

I. THE INCLUSION OF A 90-DAY AUTOMATIC RECLASSIFICATION OF MATERIAL AS WASTE IS NOT IN ACCORDANCE WITH THE LAW, IS ARBITRARY AND CAPRICIOUS AND IS NOT SUPPORTED BY THE EVIDENCE.

The Division's citations (page 7 of the Answer Brief) to KAFB's comments (R 282, 283, 285 and T 39, 40) which purportedly establish KAFB's intent to store hazardous materials in the new storage facility are misplaced. The testimony at T 39, 40 is by Mr Nick Van Kleeck, a Division employee, not a KAFB employee. If the court wishes to hear evidence of his extensive participation in the permitting process, to include week-long on-site visits, KAFB can provide such information. He states:

> "-- we have a provision in the permit which allows them to store hazardous materials as long as they comply with the same operational requirements as if that material were a waste because Kirtland has indicated that as this will be their most state-of-the-art facility that they want to store a percentage of their hazardous materials in the building."

This statement reflects the continued confusion concerning the operations at KAFB. KAFB did not wish to store materials, DRMO expressed this contention. KAFB understands it is ultimately responsible for the permit, however, DRMO submitted this information and KAFB has no line of authority to prevent their comments being submitted directly to the Division. Although both organizations ultimately belong to the Department of Defense, the chain of authority does not overlap. DRMO's comments were submitted to the Division from its headquarters in Battle Creek, MI. R 277. KAFB's comments (R 285) were an attempt to scale down this option given to DRMO which had already been included in the final

draft permit. The request to add "material" to the definitions of Group I and II (R 282, 283) were deemed prudent in an attempt to clarify what was being regulated and based on KAFB's knowledge of DRMO's functions, which the Division still has not grasped as evidenced by its Answer Brief. The Division's own definition of Group I waste is those items turned in in original, unopened containers. (R 1295) Because these items may be recycled, KAFB's comments reflect its belief that Group I items should be treated as "material."

As the generator, KAFB has the responsibility of using the criteria in 40 CFR 261.11 to determine whether constituents they turn in to DRMO are material or waste, contrary to the Division's reading on page 12 of its brief. KAFB does not turn in material to the storage building for storage with hazardous waste, it turns the material in to DRMO for attempted recycling. Although the Division again admits in its Answer Brief (P 7) that it does not regulate material, it proceeds to do so. The statement (P 7) that the permit does not regulate materials outside the storage building is the first time the Division has committed to this interpretation of the permit language, in spite of numerous attempts by KAFB to get clarification on the ambiguous language in permit. In other words, this is the first indication that the Division has inferred potential support for the KAFB position that turning in to DRMO is not the same as turning in to the storage facility; although the language throughout the permit could be interpreted either way. The permit requirements (R 340, 1151, 1433) reference DRMO, which covers more than the storage facility, ie recycling of material outside the building. If

the Division can be held to its own statement of interpretation, this position may resolve this appeal issue. KAFB can then work directly with DRMO to resolve the issue of DRMO storing material in the storage facility before it has been determined that no buyer can be found and it becomes waste. This is a matter to be resolved between government agencies and is beyond the scope of the Division's authority, as they admitted. R 348.

However, KAFB's argument that the 90-day automatic reclassification is arbitrary and capricious is now supported by the Division's own statement in its brief on page 9. The Division admits that the 90-day figure is not based on any facts in the record relating to the economics of recycling, such as quantity, type, or availability of markets, but rather was chosen to match the requirements for generators of hazardous waste in 40 CFR 262.34(a), which is clearly not analogous. The provision at Section 262.34(a) means a generator cannot store waste at an accumulation site longer than 90 days. This provision is designed to deal with material that is already "waste" at this stage and the 90 day limit is to prevent the generation site from becoming a storage facility without a storage permit. By contrast, the storage facility operated by DRMO is not a generator, and is already permitted for storage with a one year limit for storage of hazardous waste before disposal. This federally imposed time limit protects human health and the environment. Under the Division's interpretation of its permit in its Answer Brief, the length of time hazardous constituents may remain in the storage facility is lengthened beyond one year, which is hardly a

reasoned basis for a 90-day automatic reclassification. Specifically, under the permit requirements, hazardous material may sit for three months, then it automatically becomes hazardous waste and may stay for another year, for a total of 15 months, versus the one year limit for waste only. Such an interpretation does not address the concern of the public (R 285) that the Division states as its rationale for this reclassification. A better way to address the public's concern is through the existing mandatory inspections, which will determine if waste is stored beyond the regulatory time limits.

To support their position that 90 days is adequate, the Division cites, on page 10 of its Answer Brief, a routing slip from DRMO to Mr Van Kleeck with some of the DRMS headquarters instructions from 1988 that Mr Van Kleeck requested. R 249. Item VI D (R 251) discusses the accelerated disposal cycle that the Division quotes. A close examination of this DRMO information shows that the Division has misinterpreted it, because it refers to all recycling of hazardous property handled by DRMO in general, and is not limited to what goes in to this one storage facility. Further, these are guidelines only. If the court wishes further information on current recycling policies and the time it takes to find a large quantity buyer for certain items, KAFB will provide it. Beyond this, the information was provided by DRMO directly to the Division, it was not submitted by KAFB. Further, the 120-day cycle of the DRMO guidance is directly contrary to the 90-day reclassification the Division seeks to support and inconsistent with the permit's definition of Group I waste as unused hazardous material at turn-in. R 1295. The

DRMO guidance at R 251 says material that is unused, unopened at turn-in becomes waste at 120 days. Again, this may be interpreted as inside or outside the building (DRMO the facility versus DRMO the organization), and the permit should be clarified accordingly.

On page 11 of Appellee's brief, the Division states that discarded material becomes waste when it enters the permitted buildings. This position is also inconsistent with the 90-day reclassification. If it is waste when it enters the building, then it cannot be material for 90 days before it becomes waste. Although the Division has readily admitted that it cannot regulate material (R 339), it states on page 10 that it has the authority to decide that material has no market and should be disposed of. This statement shows that the Division is taking an inconsistent position on its role regarding material and that its actions are clearly arbitrary and capricious. On page 12 of Appellee's Answer Brief, the Division states that the addition of the 90-day reclassification is neither "untenable" nor "inadvertent," apparently inferring the Division did not have to discuss it with KAFB as stated in Mr Boyd Hamilton's letter. R 320. KAFB submits that the Division had a duty to stand by its employee's statements and could not know what was untenable on facts such as these without consulting KAFB. Although the Division claims it is preventing infinite storage of material inside the buildings, there is no evidence to support its inference that infinite storage of materials has occurred or would occur and, in any event, storage of materials are beyond the scope of its regulatory authority.

The Division shows a further lack of understanding of its own enforcement mechanisms by stating the use of inspections would result in this issue being brought before the court every time an inspector notes lengthy storage of material. Answer Brief, page 13. Inspectors have several levels of administrative mechanisms available for enforcement prior to any judicial review. If DRMO cannot find a user for material, and it must be disposed of as waste, then DRMO (as an organization with many facilities to attempt recycling and not DRMO as synonymous with the hazardous waste storage facility) meets the definition of a generator with control over the waste at or near any point of generation (DRMO is located within the boundaries of KAFB) and can be required to become a satellite accumulation point under 40 CFR 262.34(c)(1). First, the Division uses, inappropriately, the satellite accumulation point 90-day storage requirement for the storage facility, and then they state that the DRMO does not meet the definition of a satellite accumulation point, which is the basis of the 90-day limit. See the Answer Brief, pages 9 and 13.

Again, if the 90-day reclassification applies only to items inside the buildings, then the Division should have no objection to changing the permit language to reflect this as well as eliminating the inconsistencies by using the term "DRMO" when regulation of the hazardous waste storage facilities is what is meant. This eliminates the ambiguity of whether permit conditions apply only to the storage facilities or the entire DRMO organization and all its functions.

II. THE INCLUSION OF ANNUAL WASTE STREAM VERIFICATIONS IN THE PERMIT IS ARBITRARY, CAPRICIOUS AND IS NOT SUPPORTED BY THE EVIDENCE.

The Division cites the permit as not requiring testing of Group I wastes. R 1297. Yet the first paragraph on R 1298 requires certain tests be performed on all wastes, and the heading of the referenced Table C-2 (R 1339) states these tests are for "all" wastes. The paragraph does not reflect that the word "all" refers only to steady-state processes. Again, this is the first time that KAFB has been provided with the Division's interpretation that Group I wastes do not require testing and that annual testing is only for Group II steady-state wastes. Although KAFB applauds this interpretation of the permit, KAFB fears it is not necessarily supported by the language of the permit itself. If the Division interprets the permit provisions this way, they should no longer object to changing the permit language to eliminate the ambiguity. If the court wishes evidence on the number of steady-state processes versus the number of irregular generators (which are the two types of Group II wastes identified in the permit, R 1297, 1298) that exist at KAFB, KAFB will provide that information based on its understanding of those terms.

KAFB rethought the necessity of annual tests that appeared in Revision 4 (Answer Brief, page 14), and at the appropriate time in the permitting process asked the Division to eliminate it. R 342. As stated in the Brief-in-Chief on page 15, KAFB's initial waste stream verification is completed, reviewed for accuracy, and is no longer in its infancy. Mechanisms are in place to insure continuity among personnel and identification of new processes is achieved by annual surveys and

completion of waste profile sheets on each waste stream. To date, no waste has been rejected for disposal due to incorrect information on the profile sheet.

Turnover of personnel is no different at KAFB than at EPA or the Division and it has not been shown by substantial evidence or any facts in the record that turnover of personnel has resulted in harm to the environment. More importantly, there is no evidence that the mix of military and civilian personnel at KAFB suffers any different turnover rate than the regulated community as a whole. Failure to provide any evidentiary basis for discriminating against military permittees is per se arbitrary and capricious.

There are no facts on the record to require annual testing, which does not identify new waste streams, but only verifies what is known of existing waste streams. At the court's discretion, it may wish information from KAFB and US EPA, Region VI, which retains regulatory authority for the other portion of the RCRA Part B permit. In response to KAFB's request for clarification of the requirement for waste stream testing in EPA's portion of the permit, Region VI has stated that if a waste stream analysis has already occurred, annual analysis is not necessary. Only when the process or waste stream content changes is testing required. KAFB's request to the Division to delete annual testing and rely on knowledge of process makes the requirements parallel.

The Answer Brief, page 15, relies on KAFB's submission of a revised list of quantities generated to prove its case. However, revised generation "quantities" does not predict or identify new waste streams or

verify the content of known ones. Reliance on this information does not support the Division's annual testing requirement. Testing based on user knowledge is a less arbitrary and more rational scheme because testing occurs whenever necessary, and many times occurs more often than annually. Based on the Division's current permit requirements, the permittee could merely do annual testing and no more, a provision which hardly serves to protect the environment.

III. BY THE CREATION OF GROUP I AND GROUP II WASTE CATEGORIES, EID HAS EXCEEDED ITS AUTHORITY AND IMPOSED RESTRICTIONS MORE STRINGENT THAN FEDERAL REGULATIONS.

Although the Division contends that it played no part in a group or committee effort throughout the drafting of the permit, it does claim to have written the permit after the final revision. Answer Brief, pages 4 and 16. However, the size and complexity of both the draft and issued permit and the small number of changes from the former to the latter, casts substantial doubt on such a contention.

The definition of Group I wastes as those in their original, unopened, sealed containers (R 1295) (all others being Group II wastes) differs from the listing of Group I wastes in Appendix I (R 1303), because this latter listing includes as Group I, wastes that may result from a process and thus would never have been in original containers. Yet the Division has stated that no testing is required of Group I wastes as long as they are unopened; if they have been opened, then they are Group II wastes. This inconsistency prevents KAFB from knowing what testing is required and indeed which category process wastes fall into, and is based on an arbitrary and capricious rationale.

KAFB did raise a definitional problem in its comments (R 343), and throughout the course of the permit process this definitional problem has been refined. Page 17 of the Answer Brief states that KAFB knew the waste analysis plan would be incorporated directly in the final permit. The complete statement in the letter from Mr Van Kleeck to KAFB is "As you know, the waste analysis plan will be incorporated directly into the permit and therefore must be complete before a draft permit is issued." R 26. He then proceeded to levy additional requirements. He did not say that this was KAFB's last chance for any changes in the plan. That is the purpose of the review and comment period of the draft final permit. KAFB submits that completeness of the plan does not hinge on the artificial definitions of Group I and II wastes when there is no regulatory requirement for such and KAFB's submission does not relieve the Division of its regulatory duty to review and modify the permit to conform to its authority. KAFB cannot by its submission of a draft permit enlarge the authority of the Division beyond the limits imposed by the state legislature.

KAFB did raise the issue of definitional problems in its comments (R 343); and dissatisfaction is all that the case law cited by the Division requires. Answer Brief, pages 17, 18. By not following through with Mr Hamilton's promises (R 320), the Division chose to eliminate any opportunity the Division had to apply its own expertise or to hear KAFB's concerns. Because the regulations do not provide for the classification of Group I and II wastes, (Answer Brief, page 18), the Division must show a reasoned basis supported by substantial evidence to make it a permit

requirement. The fact that the final language first appeared in draft permits does not meet this test. There is no extra benefit or protection to human health and the environment by this classification and therefore, the Division has exceeded its authority.

The Division's reliance on State v. Hoxsie, 101 N.M. 7, 9, 677 P.2d 620, 622 (1984) (Answer Brief, page 19) to support its contention that this issue was not properly raised in the docketing statement is misplaced first because it is a criminal appeal and the instant appeal is not. Secondly, the issue of who determines at turn-in whether the item is waste or material is part of the Group I and II definitional problems and shows additional errors created by inartful adoption of this requirement. It is an additional part of the permit encompassed by the Group I and II problems as well as the 90-day reclassification problems. KAFB believes the court has the discretion to consider any matter affected by the issues in the docketing statement and that this issue, in its entirety, is properly before the court.

IV. THE REQUIREMENT TO CONDUCT SPECIFIC TESTS EXCEEDS AND IS MORE STRINGENT THAN FEDERAL REGULATIONS.

The Division quotes the permit provisions to ostensibly show that KAFB is mistaken about all tests being required for each waste stream. Answer Brief, page 19. Once again, this is the first time KAFB has been provided with the interpretation that the permit does not require all tests be run on all wastes. However, the plain words of the text (R 1297-98) say "Table C-2 lists the tests and rationale for these tests." The title of Table C-2 (R 1339) is "Analytical Parameters for all Group

II Wastes". (emphasis added). The next sentence in the text (R 1298) states "Generations that do not have a profile sheet on file are tested when they occur using the appropriate tests listed in Table C-2". The next four sentences state specific tests required for all wastes, with no mention of "appropriate" or that these apply only to those wastes without a profile sheet. Inconsistency is the result and KAFB's interpretation to date is that all the tests must be run. A further inconsistency exists with the Division's statement on page 20 of the Answer Brief that this permit provision does not apply to Group I or to Group II wastes that have a profile sheet. A profile sheet may be filled out based on user knowledge alone, with no testing. The Division's statement, also on page 20, that if a profile sheet exists for each waste, the testing is not required, cannot be reconciled with the four sentences referenced above and Table C-2 which state all tests in those sentences and in the Table are required for all wastes.

The example cited by KAFB of useless and costly tests required for a sealed battery is further enhanced by the Division's statement on page 20 of the Answer Brief that testing would not apply to a sealed battery. This is the first time the Division has clarified tests necessary on a sealed battery. KAFB's statement of the impact of costly, unnecessary testing is legitimate in support of the elimination of wasteful testing requirements that serve no purpose. The Division has the burden of proving by the record that the imposition of such wasteful requirements is not arbitrary or capricious. The absence of such evidence from the record undermines the Division's position, not that of KAFB. The

Division apparently seeks to shift the burden to KAFB. Therefore, Poorbaugh v. Mullen, 99 N.M. 11, 653 P.2d 511 (Ct. App, 1982) is not controlling.

The same four sentences and Table C-2 referenced in the above paragraph led KAFB to believe all tests would be required even for a waste stream such as a sealed battery. However, the Division's statement that no tests are needed unless there is no profile sheet (Answer Brief, page 20) only raises a further need for clarification. Because a profile sheet may be based on user knowledge and because user knowledge for a sealed battery could come from either the package label or the Material Safety Data Sheet, the Division needs to clarify whether either of these two sources of knowledge is sufficient. If the Division instead expects KAFB to open the battery and conduct analytical tests on the contents to complete the Profile sheet, KAFB would contend that such a requirement is arbitrary and capricious. KAFB submits that for its approximately forty waste streams, the above inconsistencies may be eliminated by creation of two lists, one for which all tests must be done and one for which specific tests appropriate to the waste stream must be run. In the alternative, changing all of the "all" statements to "appropriate tests" also solves the issue.

If New Mexico does not have authority from EPA to regulate the TCLP test (Answer Brief, page 20, footnote 8), then it has the duty to keep current and get authority. The TCLP test was adopted by EPA as the preferred method because it covers 28 constituents, including those covered by the EP Toxicity test, whereas the EP Toxicity test covers only

8 heavy metals. The permit does allow for a TCLP if required. R 1296. However, two pages later (R 1298) it states the EP Toxicity test will be run on all wastes. Thus, both tests must be run in some cases, which is costly and duplicates results, and frustrates the EPA's intent that the TCLP substitute for the EP Toxicity test. There is no provision to substitute the TCLP for the EP Toxicity test when a single test will provide the same information. The broader testing capability of the TCLP serves to better protect the environment.

If what the Division is saying on pages 20 and 21 of its Answer Brief is that Table C-2 only states parameters, from which KAFB may determine which tests are appropriate, and all the tests are not required, then the Division should not object to altering the permit language to so state, as KAFB has requested.

V. THE USE OF THE WORDS "PERMITEE", "OWNER" AND "OPERATOR" ARE USED INTERCHANGEABLY AND INCONSISTENTLY, MAKING IT UNCLEAR AS TO WHICH REQUIREMENTS ARE APPLICABLE TO WHOM.

The entire record pertaining to this permit, which includes not only the record proper and the hearing transcript but also the numerous pleadings, motions, and briefs, more than demonstrates the problems stemming from the ambiguous and inconsistent words and phrases. The Division demonstrates its own difficulty in comprehending the problem it has created by the simplistic statement in the Answer Brief, page 22, that "As the owner of the facility, KAFB is ultimately responsible." That is precisely the reason that KAFB has raised the issue. Because KAFB is ultimately held accountable, the terms of the permit must be clear as to what is required, the scope of the requirements, and the

specific organizations affected so that KAFB will know what is necessary to comply with the permit. Many terms in the permit can be interpreted either very broadly, i.e., "permittee" can mean the whole base, or very narrowly, i.e., the storage facilities. KAFB has no way to interpret the scope of the requirements. This is not a unilateral problem; the Division has amply demonstrated its own difficulty in interpreting the breadth and application of its own permit conditions.

These types of problems should have surfaced during the Division's preparation of the permit and would have been readily apparent during an in depth review. It appears the Division is attempting to evade its responsibility to eliminate problems that will otherwise last the life of the 10 year permit and will create an administrative morass, inspection difficulties, and compliance problems. In failing to correct the deficiencies of the permit, the Division will thereby also fail to meet its statutory obligation to protect human health and the environment.

KAFB contends that the court has the discretion to consider any matters relevant to resolve not only the issues on appeal in this case but also to insure that compliance with the spirit of the law is achieved. For both sides of this appeal, the ultimate goal should be to protect the environment. The entire permit as it stands does not serve this purpose and if allowed to stand as is, will set an inappropriate standard for future permits throughout the state.

CONCLUSION

For all the foregoing reasons, the Hazardous Waste Operating Permit should be modified accordingly.

Respectfully submitted,

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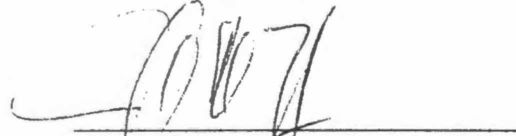

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CERTIFICATE OF SERVICE

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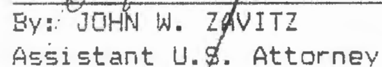

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