IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Southwest Research and Information Center,
Petitioner,

-against- **No. S-1-SC-38373**

New Mexico Environment Department,
Respondent.

NEW MEXICO ENVIRONMENT DEPARTMENT)
HAZARDOUS WASTE BUREAU)
CLASS 3 PERMIT MODIFICATION REQUEST:)
EXCAVATION OF A NEW SHAFT AND ASSOCIATED)
CONNECTING DRIFTS, WASTE ISOLATION PILOT)
PLANT, NO. NM4890139088-TSDF)

PETTIONER'S REPLY MEMORANDUM ON PETITION FOR CERTIORARI

This proceeding poses the question whether the hazardous waste laws shall be applied for the benefit of the public: There is a statutory requirement that any major modification of a Hazardous Waste Act, § 74-4-1 et seq. NMSA 1978 ("HWA"), permit be adopted after an opportunity for a public hearing. The Legislature called for regulations,

> establishing procedures for the issuance, suspension, revocation and modification of permits issued under Paragraph (6) of this subsection, which rules shall provide for public notice, public comment and an opportunity for a hearing prior to the issuance, suspension, revocation or major modification

> of any permit unless otherwise provided in the Hazardous Waste Act [74-4-1 NMSA 1978] . . . .

§ 74-4-4 NMSA 1978. Regulations so require. 20.4.1.900 NMAC. Construction of a shaft and drifts is, by any standard, a major modification; the Permittees have so labeled it, and the Environment Department ("NMED") accepted that term. But the Permittees ("DOE" and "NWP") and NMED, acting in concert, seek to defeat the Legislature's requirement by adopting a Temporary Authorization that allows a year's construction of the shaft and drifts and thereby forces the adoption of the modification. Such action is not authorized by any statute or regulation. Moreover, the Temporary Authorization constitutes a final order, ripe for appellate review:

a. Finality of the April 24, 2020 Order:

Neither NMED nor NWP disputes the statements in Mr. Zappe's affidavit that, once the Temporary Authorization is granted and construction proceeds, it will be impossible for NMED to deny the permit modification request ("PMR"):

> In granting the TA on April 24, 2020, NMED has in essence foreordained the outcome of the PMR without the benefit of public comment and hearing. After the Permittees spend millions of dollars *beginning* the excavation of a new shaft under the TA granted by NMED, it is unimaginable that NMED would be able to deny the PMR. Likewise, telling the Permittees that they would need to "reverse all construction activities associated with this Request" if the PMR were ultimately denied is technically infeasible.

Zappe Affidavit, sworn to April 26, 2020, ¶15.E, at 8. Given that basic fact, the Court should issue the writ of certiorari; the Temporary Authorization should be vacated on review, and the Court should remand to NMED.

Steven Zappe's testimony stands uncontradicted. Nor is it denied that DOE plans to use the shaft and drifts to construct new disposal panels and rooms to accommodate additional radioactive and hazardous waste—more waste than the RCRA permit or the Land Withdrawal Act allows. DOE is publicly committed to extend WIPP's period of operation from its current termination date of 2024 to 2080 and beyond, throwing the risks and costs of a nuclear waste repository onto the State and the people of New Mexico for an additional 50 years past its lawful end date. Exhibits M, N, O, P.

NMED has committed to support DOE's plan. Left out of DOE's and NMED's calculus is the public. Under the law and the regulations, construction of the shaft and drifts cannot take place without public comment on the proposal and an opportunity to request a public hearing, where the magnitude and illegality of the proposal could be exposed. But NMED has granted DOE's request to go forward with a year's construction *without* any public hearing. It is not for lack of

public concern. Of the 295 public comments submitted about the proposal, 97% are opposed. [AR 191019][1].

There is no schedule for the public proceeding to consider the PMR, so that with the Temporary Authorization DOE and NMED stand poised to force their illegal plan on the State and prevent any effective public process or judicial review. By the time the public can make its voice heard or this Court can judge the legality of the project, the construction will be so far along that no court or agency can reverse it.

NMED insists that the *language alone* of the order establishes that the Temporary Authorization is nonfinal and nonreviewable. (NMED Br. 13). But, to the contrary, under decisions of this Court and the Court of Appeals, the question of finality is determined from a pragmatic analysis of the *facts of the case*. *Public Service Co. v. N.M. Public Service Commission*, 1991-NMSC-018, ¶ 24, 111 N.M. 622, 808 P.2d 592; *Citizen Action v. N.M. Env't Dep't*, 2015-NMCA-058, ¶ 17, 350 P.3d 1178, 2015 N.M. App. LEXIS 25, at *12-13 (Ct. App. Feb. 18, 2015). The facts here are that DOE has been authorized to put in 360 days of effort and expenditure on a $197,000,000 project. The contention that neither NMED nor DOE is committed to completion of that project can only be deemed willfully

[1] https://hwbdocuments.env.nm.gov/Waste%20Isolation%20Pilot%20Plant/200613/191019.pdf

blind. It does no good to insist that there is an ongoing PMR process in which the public may participate. (NMED Br. 2-8, 13; NWP Br. 3, 8). Neither may this Court imagine that it could order DOE to eradicate its $197,000,000 shaft and drifts project upon ultimate determination of its unlawful nature. The decision has been made; only the naïve could say otherwise, and this Court is not enjoined to naivete.

NMED states that it specifically imposed the condition that, if the Permit Modification Request is denied, "the Permittees must reverse all construction activities associated with the Temporary Authorization" (NMED Br. 10), but there is no suggestion that NMED asked how that might be done or whether it is even possible. NWP repeatedly refers to the authorized activities as "temporary construction." (NWP Br. 3, 7, 13). The excavation of a 2,275-foot shaft and 1200 feet of drifts is not temporary in any sense, and there is no suggestion of how it might conceivably be reversed and undone.

NWP asserts that the Temporary Authorization is "by definition tentative and interlocutory in nature" (NWP Br.7), but the finality of an order under § 74-4-10 NMSA 1978 is determined not by counsel's "definition," but by the facts, which here establish that construction of the shaft and drifts cannot be reversed. (Zappe Affidavit ¶ 15.E). The Court of Appeals erred when it relied upon the

recital in the Temporary Authorization (Order at ¶ 5, June 11, 2020) and dismissed the case without allowing SRIC to reply and address the facts.

The further contention that the dispute here is not "ripe" (NMED Br. 5-8; NWP Br. 8-11) wholly disregards the fact that SRIC and the rest of the public are imminently threatened with the loss of any right to contest at a hearing or to appeal the grant of the PMR and the consequent enlargement of WIPP beyond lawful limits. Ripeness exists where a "decision has been formalized and its effects felt in a concrete way by the challenging parties." That is exactly the effect of the unlawful Temporary Authorization, which should not escape judicial review. *Public Service Co. v. N.M. Pub. Serv. Comm'n*, 1991-NMSC-018, ¶ 25, 111 N.M. 622, 630, 808 P.2d 592, 600.

b. The unlawful Temporary Authorization:

NMED says that the Temporary Authorization conforms to the terms of 40 C.F.R. § 270.42(e). (NMED Br. 8-11). NMED asserts that "[a]fter thoroughly evaluating the TA request, the Department determined that the Permittees' request met all the elements required under 40 C.F.R. § 270.42(e)" (NMED Br. 10), but no documentation of the supposed analysis is provided, and neither NMED nor NWP explains the regulatory basis for the Temporary Authorization, which is only allowed under very specific circumstances. 40 C.F.R. § 270.42(e). NMED states that it specifically imposed the condition that, if the Permit Modification Request is

denied, "any work done by Permittees under the TA would have to be undone at Permittees' expense" (NMED Br. 4), but there is no indication that NMED asked how that might be done or whether it is even possible.

Section 270.42(e) allows a temporary authorization here only if the order "meets the criteria in paragraphs (3)(ii)(C) through (E) of this section *and* provides improved management or treatment of a hazardous waste already listed in the facility permit." (*emphasis supplied*.) (Paragraphs (C) and (E) state permissible "objectives" of Temporary Authorizations.[2]) "Improved management or treatment of a hazardous waste" is explicit limiting language. NMED argues that heavy construction to sink a 2,275-foot shaft and 1200 feet of drifts constitutes "improved management or treatment of a hazardous waste." (NMED Br. 10). But heavy construction is simply not waste "management or treatment." Such unbounded reading of specifically limiting language violates standards of regulatory interpretation: "Unless a word or phrase is defined in the statute or rule being construed, its meaning is determined by its context, the rules of grammar and common usage." § 12-2A-2 NMSA 1978. If a definition be sought, a "hazardous waste management facility" is a facility used for "treating, storing, or disposing of

[2] (C) To prevent disruption of ongoing waste management activities;
; or (E) To facilitate other changes to protect human health and the environment.

hazardous waste," 40 C.F.R. § 270.2. These activities clearly do not include heavy construction; especially so where the same rule bars "preconstruction."

But, without disputing that 40 C.F.R. § 270.42(e) was designed to *prevent* a fait accompli caused by preconstruction, Respondents argue that the same rule *allows* pre-construction of the shaft and drifts under a Temporary Authorization. Such a reading ignores the regulatory language and renders the rule absurd and self-defeating, contrary to common sense and the express direction of § 12-2A-18 NMSA 1978, to "avoid an unconstitutional, absurd, or unachievable result."

If the major modification here were deemed permissible under a Temporary Authorization, the regulation would conflict with the statutory requirement of an opportunity for a public hearing. § 74-4-4 NMSA 1978. In any event, courts are admonished to construe statutes and rules to avoid conflicts (§ 12-2A-10 NMSA 1978), action which here requires that the statutory requirement of a public hearing be honored.

Most importantly, a court may sustain agency action only on the grounds stated by the agency in taking action; rationales devised by counsel after the fact cannot sustain agency action. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Commission,* 2003-NMSC-005 ¶ 11, 133 N.M. 97, 61 P.3d 806 (courts are not free to accept post hoc rationalizations of counsel in support of agency decisions, because a reviewing court must judge propriety of agency action solely

on grounds invoked by agency); *Atlixco Coalition v. Maggiore*, 1998-NMCA-134 ¶ 20, 125 N.M. 786, 965 P.2d 370.

SRIC explained in its Petition that the reasoning offered in the Temporary Authorization itself (*i.e.*, no reasoning) and in Mr. Maestas's memorandum, dated April 24, 2020 (attached to Certiorari Petition), which states that a Temporary Authorization may be used for permanent construction, is plainly erroneous and does not support NMED's action. (Certiorari Petition at 12-13). EPA, in issuing the rule, expressly stated that preconstruction would not be allowed under a Class 3 modification, because of the concern that it would be used to create a fait accompli, compelling the regulator to grant the underlying PMR. 53 Fed. Reg. 37912, 37918. Mr. Maestas's other interpretation—that EPA intended the Temporary Authorization procedure to enable "permanent activities"—is expressly rejected by EPA's preamble explanation. *Id*. and see Certiorari Petition at 12-14; see also Zappe affidavit ¶¶ 7-10. And the idea that a subsequent public process may retroactively sustain a Temporary Authorization misses the whole point: that completion of construction creates a fait accompli, contrary to EPA's intent. Neither NMED nor NWP have responded to this fundamental failure of NMED's analysis.

NWP claims that the construction is needed for the health and safety of the WIPP staff. (NWP Br. 4-5). But the Permittees recently obtained another PMR

(the "New Filter Building"), issued on March 23, 2018, which NMED approved because "The Underground Ventilation Filtration System (UVFS) fans which are part of the New Filter Building (NFB) (Building 416) provide enhanced ventilation in the underground, sufficient to allow concurrent mining and waste emplacement while in filtration mode." Permit A2-9.[4].

If there is truly a rush to construct the new shaft and drifts as additional safety measures after WIPP's February 2014 fire and radiation incidents, one must ask why the Permittees first presented this modification to NMED on December 22, 2017 with a request for class determination, which Permittees and NMED let languish until August of 2019, when it was finally withdrawn and the present Class 3 PMR[5] substituted, which sat idle with NMED until January 2020, when the Permittees finally requested a Temporary Authorization, which, three months later, on April 24, 2020, NMED granted. The claims of urgency and concern for personnel safety ring hollow in light of the Permittees' and NMED's actions.

Finally, it is urged that the Temporary Authorization does not, in so many words, enlarge the disposal capacity of WIPP. (NWP Br. 11). But WIPP's present configuration was designed to accommodate the full lawful capacity. The DOE

[4] https://www.env.nm.gov/wp-content/uploads/sites/12/2018/03/Attachment-A2-03-2018-Redline.pdf

[5] NWP claims that NMED classified the PMR as Class 3. NWP Br. at 9. It was DOE and NWP.

reports (Ex. M, N, O, P) all state that the function of the new shaft and drifts is to enable the excavation of new disposal panels, the purpose of which is to enlarge the capacity of WIPP and extend its operations beyond legal limits.

Conclusion

The Court is told that this case presents no issues of importance. NMED Br. 2; NWP Br. 12. To the contrary, this case concerns the Nation's first nuclear waste repository, a facility that the State of New Mexico accepted on its soil only under an agreement with the Department of Energy on specific conditions defining its role, dimensions, and duration. The federal government is now pursuing a different agenda for the expansion of the facility and its diversion to new purposes outside the scope of its legal mission and the State's agreement. DOE is seeking to enroll the agencies and courts of New Mexico in support of its unlawful missions. The courts of this State are sworn to follow and enforce the law. The law here requires the vacatur of the unlawful Temporary Authorization and denial of the unlawful Permit Modification Request. This is a case of supreme public importance.

Respectfully submitted,

/s/_____
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CERTIFICATE

The undersigned certifies that the foregoing Reply Memorandum was served on July 22, 2020 upon counsel for all parties pursuant to the Court's electronic service and filing procedures.

/s/Lindsay A. Lovejoy, Jr.