

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

**IN THE MATTER OF:
HEARING DETERMINATION REQUEST
CLASS 3 “EXCAVATION OF A NEW SHAFT
AND ASSOCIATED CONNECTING DRIFTS” Docket No. HWB 21-02
PERMIT MODIFICATION TO THE WIPP
HAZARDOUS WASTE FACILITY PERMIT**

**MOTION FOR A STAY PENDING APPEAL
ON BEHALF OF
SOUTHWEST RESEARCH AND INFORMATION CENTER**

Introduction

Southwest Research and Information Center (“SRIC”), a party herein, moves the Environment Department (“NMED”) to stay the Secretary’s Final Decision, Oct. 27, 2021, to modify the Hazardous Waste Act, 74-4-1 *et seq.* NMSA 1978 (“HWA”), permit for the Waste Isolation Pilot Plant (“WIPP”) upon application by the Permittees U.S. Department of Energy (“DOE”) and Nuclear Waste Partnership (“NWP”) (collectively, “Permittees”) to authorize the construction of a fifth shaft and associated drifts pursuant to the Permit Modification Request (“PMR”) dated August 15, 2019 (AR 190815).

Pursuant to 74-4-14.A. NMSA 1978, SRIC has filed an appeal of the Secretary’s Final Decision. A-1-CA-40030. Pursuant to 74-4-14.D(1) NMSA 1978, SRIC files this Motion for a Stay Pending Appeal.

A stay in a civil case pending appeal raises factual issues concerning (1) the likelihood that applicant will prevail on the merits of the appeal; (2) a showing of irreparable harm to applicant unless the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest. *Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, 1986-NMCA-033, ¶ 10, 105 N.M. 708, 710, 736 P.2d 986, 988. SRIC addresses these issues herein.

Likelihood of success on appeal

1. The PMR is a Class 3 major modification under 40 C.F.R. § 270.42, whose process includes the opportunity for a public hearing on the issues raised by the PMR. The hearing held in this case fails to meet the legal requirements. Numerous issues have been raised for decision but are not addressed in the Hearing Officer's Report, nor in the Secretary's Final Decision, thus denying the parties the right to a hearing.
2. Congress authorized the construction of WIPP in Pub. L. No. 96-164, § 213 (1979) (the "Authorization Act"), which defines WIPP's purpose as a research and development facility to demonstrate the safe disposal of defense transuranic waste. The statute directs DOE to consult and cooperate with the State of New Mexico with respect to health and safety concerns and to cooperate in resolving such concerns, specifically, by

entering into a written agreement setting forth the procedures for consultation and cooperation. Congress directed that the agreement authorize the State to comment and make recommendations to DOE on health and safety issues “before the occurrence of certain key events identified in the agreement.” (§2(A))

3. Pursuant to the Authorization Act, DOE and the State of New Mexico in 1981 entered into the Consultation and Cooperation (“C&C”) Agreement (AR 200503), which has subsequently been modified and remains in force. The C&C Agreement was entered into as a consent decree in settlement of litigation with the State, and DOE agreed therein that the C&C Agreement is a “binding and enforceable” agreement. Pursuant to the C&C Agreement, DOE committed to the original design of WIPP, with four shafts and eight underground panels, as the “full WIPP.” Tr. Feb. 22, 1999 at 81, SRIC Ex. 11.
4. The 1992 WIPP Land Withdrawal Act, Pub. L. No. 102-579, § 21 (1992), recognizes the effectiveness of the C&C Agreement and directs that it may only be amended by specific legislative language.
5. Under the binding and enforceable C&C Agreement, DOE is prohibited to add a fifth shaft or additional disposal panels to the repository.

NMED's action in approving the PMR clearly violates the C&C Agreement.

6. The Hearing Officer's Report, which the Secretary has adopted in the Final Order, gives no consideration to the terms of the binding and enforceable C&C Agreement and refuses, without any explanation, to enforce the limits on WIPP's design and dimensions that DOE has agreed to. There is no discussion of the evidence that DOE has broken its commitments to the State and its people to limit the WIPP project to the purposes allowed by the Authorization Act and the C&C Agreement.
7. To ignore the C&C Agreement, saying obscurely that NMED is "not the appropriate forum" (CL 52), is no explanation at all and denies any hearing and decision to the parties who are entitled to rely upon the C&C Agreement and offers no reasoning to a reviewing court.
8. Further, in the Report there is no discussion of the evidence of DOE's plans to expand the WIPP disposal facility, which are the plain purpose of the PMR. *See*: DOE Carlsbad Field Office Draft 2019-2024 Strategic Plan (WIPP to operate through 2050, receive entire "existing defense [transuranic] waste inventory."); Memorandum, R. Kehrman (Dec. 16, 2019) (WIPP to receive shipments through 2052); Final Supplement Analysis of the Complex Transformation Supplemental Programmatic

EIS, DOE/EIS-0236-S4-SA-02 (Dec. 2019) (TRU waste from plutonium pit production in 2030-2080 will go to WIPP, at 65); Environmental Management Strategic Vision 2020-2030 (Utility Shaft will facilitate mining additional panels.); HWA Permit Renewal Application (March 31, 2020) (“a final waste emplacement date is unknown at this time.”) (FR 200318 at 59-60); EIS for Plutonium Pit Production at the Savannah River Site, DOE/EIS-0541 (Sept. 2020) (TRU waste from pit production in 2030-2080 would go to WIPP) (at S-31)); Supplement Analysis for WIPP Site-Wide Operations, DOE/EIS-0026-SA-12 (April 8, 2021) (“DOE needs to excavate two replacement panels . . .”, new shaft and drifts give access to “replacement” panels.); EM Strategic Vision 2021-2031 (April 13, 2021) (“WIPP is currently anticipated to operate beyond 2050,” at 50). See AR 400422; SRIC Ex. 14 at 5-8.

9. In fact, the Hearing Officer erroneously excluded all evidence of plans to expand WIPP. See, e.g., May 19, 2021 Tr. 177 l. 19 – 178 l. 13. The Hearing Officer excluded all evidence of future expansion on the erroneous theory that only those permit terms that are subject to modification may be discussed in a PMR hearing. Report at 5-6. This is a basic error, since relevance is not restricted to the terms subject to modification. In a PMR proceeding, the draft permit is required to

contain all permit terms and conditions, any and all of which clearly may be considered in ruling on a PMR. 20.4.1.901.A(1)(a) NMAC.

10. There is no discussion in the Hearing Officer's Report of testimony and comments about the effects of the planned WIPP expansion, and the consequent extension of its operating life into the 2080's, upon communities where waste is generated, those along the transport routes to WIPP, and those near the disposal facility. To make no findings about such impacts, when numerous witnesses had voiced their concerns about the magnitude of future expansion and the integrity of DOE's commitments (FF 119), denies the hearing that the Supreme Court has demanded: "It appears that the Secretary ignored an entire line of evidence in reaching his decision on the final order." In re *Rhino Environmental Services*, 205-NMSC-024, ¶ 41, 138 N.M. 133, 143, 117 P.3d 939, 949.

11. The Secretary is required by 20.1.4.500(D)(2) NMAC to "set forth in the final order the reasons for the action taken." The Secretary may not disregard difficult facts or challenging legal issues. Such action, as the Hearing Officer has done, and as the Secretary has confirmed, denies parties the hearing promised by 40 C.F.R. § 270.42(c). *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 24, 125 N.M. 786, 793-94, 965 P.2d

370, 377-78. *See also Gila Resources Information Project v. N.M.*

WQCC, 2005-NMCA-139, ¶¶ 33-38, 138 N.M. 625, 124 P.3d 1164.

12. Regulations require that the applicant for a permit modification set forth why the modification is “needed.” 40 C.F.R. § 270.42(c)(1)(iii). The PMR seeks authority to construct an additional shaft, whose plain purpose is to enable the construction and operation of additional disposal units in the underground. The new shaft would not be available for use until 2025. SRIC Ex. 13; May 19, 2021 Tr. 92 ll. 10-14 (Maestas); 162 ll. 12-17 (Hancock). Currently, WIPP is scheduled to be fully excavated in accordance with its original design by early 2022 (May 17, 2021 Tr. 89 ll.14-16 (Kehrman); SRIC Ex. 12) and filled within a few years after that. The permit states that the disposal phase is expected to end in 2024. (Permit at G-6). The only purpose that the new shaft could serve is the underground expansion of the repository by the addition of new disposal units. This purpose is not disclosed in the PMR, contrary to the regulation requiring such disclosure. 40 C.F.R. § 270.42(c)(1)(iii).

13. The Hearing Officer’s Report erroneously determines that 40 C.F.R. § 270.42(c)(1)(iii), which requires DOE to state why the modification is “needed,” calls only for an explanation of changes in the language of the *permit* to reflect changes in the facility, and does not require DOE to

explain why the major changes in the *facility* are “needed.” (FF 48, 56; CL 33, 47). This interpretation, which denies that DOE has any obligation to justify the changes to be made in the facility, rejects the plain meaning of the regulatory language, disregards EPA’s explanation of the rule at the time of its issuance (53 Fed. Reg. 37912, at IV.B.5 (Sept. 28, 1988)), and ignores the stated position of the Hazardous Waste Bureau, which holds that DOE must “show that the modification is needed by the facility.” May 19, 2021 Tr. 85 ll. 16-19 (Maestas). No explanation is offered for the rejection of EPA’s and the Bureau’s interpretation. Their interpretation is the correct one, and under that standard DOE has not shown why the modification is needed and has not met its burden of proof.

14. The Court of Appeals has determined the sufficiency of a showing that a permit modification is “needed” based on the utility of the proposed modification to the *facility* in its *future operations*. *Southwest Research & Information Center v. Environment Department*, 2014-NMCA-098, ¶¶ 24-26, 336 P.3d 404. Here, the Hearing Officer made no such finding. To the contrary, he stated that “future uses outside of ventilation are not part of this PMR” (FF 40), disregarding the applicable law.

15. The observation that the new shaft and drifts will “ventilate” WIPP does not establish a need of any kind. (FF 14). There is only a need for ventilation of mining operations if mining is going on. Yet the Hearing Officer refused to take evidence of WIPP’s future expansion, which is carried out by mining. This refusal to confront the facts apparently arises from a refusal to face up to the fact that DOE is breaking the commitments it made to the State and its people in obtaining their consent to the original WIPP design.
16. There is no testimony that the new shaft and drifts are “needed” for WIPP as originally designed. 40 C.F.R. § 270.42(c). DOE’s witness, Mr. Kehrman, would only state that the new shaft and drifts are “needed” on the assumption that the disposal phase continues until DOE has no more waste to dispose of, or NMED stops authorizing new disposal units. May 17, 2021 Tr. 90 l. 19-97 l. 9 (Kehrman). He *would not say* that they are “needed” for the original WIPP design, which would cease disposal operations in 2024. *Id.* Tr. 103 ll. 9-10 (Kehrman). But the Hearing Officer barred evidence of future expansion as irrelevant and inadmissible—leaving Mr. Kehrman’s expert opinion bereft of factual support for its key assumption. DOE has failed, again, to meet its burden of proof.

17. The Hearing Officer's Report contains factual errors on material points.

The Hearing Officer found that the existing ventilation system limits air flow to a small percentage of the flow before the 2014 radioactivity release (FF 42), but the new shaft will increase air flow to previous levels. (FF 49, 62). He found that the new shaft would "provide[] significantly increased ventilation flow." (FF 76, 87). But the evidence clearly indicated that the construction of the New Filter Building, already authorized by a March 2018 permit modification, will bring the flow volume back to pre-2014 levels, and the present PMR would not increase it further. May 17, 2021 Tr. 84 ll. 19-21, 86 ll. 2-12 (Kehrman).

18. The errors enumerated above must be regarded as material and important to the result reached by NMED. The likelihood of SRIC's success on appeal is high.

Irreparable injury without a stay

19. Without a stay, it is likely that there can be no judicial review. If NMED proceeds to issue the modified permit, immediately authorizing construction of the shaft and drifts, and there is no stay, the injury to the opposing parties will be irreparable.

20. Denial of a stay would make it nearly impossible for the Court of Appeals or the Supreme Court to review NMED's approval of the PMR.

DOE expects to complete the shaft and drifts project within 30 months of permission to commence construction. May 18, 2021 Tr. 30 l. 21 – 31 l. 4 (Farnsworth). Upon completion of construction the case would become effectively moot. Yet a NMED proceeding similar to this one, involving the “volume of record” PMR, resulted in a final order dated December 21, 2018, which order is still pending on appeal in the Court of Appeals, with no date for argument, more than 34 months after the final order. (No. A-1-CA-37894). If NMED does not stay the effectiveness of the permit modification, its order is likely to become effectively moot before the case can be heard at the first appellate level. That would clearly be an unjust result. NMED should not wield the power to render its own decisions immune from judicial review.

21. DOE has already excavated the new shaft to a depth of 116 feet, under a temporary authorization (“TA”) that NMED granted over SRIC’s objections and in violation of the terms of 40 C.F.R. § 270.42(e). NMED on November 18, 2020 refused to renew the TA, citing its concerns over DOE’s compliance with the language of the PMR and the TA, which require DOE to stand ready to reverse the construction and restore the site if the PMR is denied. (AR 201108 at 2). NMED thus stopped the construction.

22. NMED's concerns still apply here. New Mexico remains under a Public Health Order associated with the COVID-19 pandemic. DOE clearly plans to excavate the shaft and the associated drifts as rapidly as possible once it is freed to do so, to secure its foot in the door and prevent any court from reversing the permit modification. The attached affidavit of Steven Zappe, former leader of the NMED WIPP project, attests that continued construction will render the shaft increasingly impossible to reverse.

23. The Hearing Officer refused to accept the idea that ongoing construction would affect the decision on the PMR. He demanded evidence of the fact. (CL 51). Obviously, it is not possible to ask a decisionmaker to testify to unstated factors affecting his decision. At the same time, EPA has recognized the realistic fact that on-the-ground construction deters an agency from denying a PMR. (53 Fed. Reg. 37912, at IV.B(2)(ii) (Sept. 28, 1988)).

24. In addition, the affidavits of Cynthia Weehler and Kathleen Sanchez attest that, if the construction of the new shaft is allowed to go forward, DOE's \$197,000,000 investment, and its failure to develop alternative disposal sites will impel it to carry out underground expansion of WIPP, adding disposal panels and extending the disposal phase for decades. If

WIPP continues to dispose of waste into the 2080's, as DOE's plans indicate (Final Supplement Analysis of the Complex Transformation Supplemental Programmatic EIS, DOE/EIS-0236-S4-SA-02 (Dec. 2019), AR 200422 at 65; Final EIS for Plutonium Pit Production at the Savannah River Site in South Carolina, DOE/EIS-0541; SRIC Ex. 14 at 7-8), waste-bearing trucks will throng New Mexico's highways, and disposal operations will continue for more than 50 years past the original end date of the disposal phase, straining the aging disposal system and prolonging the risks of waste transportation and emplacement far in excess of the plan that New Mexico agreed to in 1981.

Absence of prejudice to the Permittees

25. At the same time, the site is now safeguarded against deterioration and can be preserved for whatever interval is required to complete appellate review. There is no urgency to construct. The waste that DOE would inter in the planned additional disposal panels is not yet ready for disposal; no final plan exists to dispose of surplus weapons-grade plutonium or the waste from pit production, and a delay pending judicial review would not compromise DOE's plans. See NAS Report at Figure 3-1 (Surplus Plutonium Repository shipments scheduled to begin in mid-2024); Final EIS for Plutonium Pit Production at Savannah River Site,

DOE/EIS-0541(September 2020) at S-31 (Pit production commencing in 2030).

The public interest requires a stay

26. The public interest favors maintaining the status quo to allow appellate review. New Mexico has made the C&C Agreement with DOE in the 1980's, specifying the scope and duration of WIPP's operation. DOE at that time was willing to abide by the limits in the C&C Agreement and the later Land Withdrawal Act. It is not for NMED to upset those agreements by pushing forward with legally unsupportable modifications, breaking through the agreed limits by main force and preventing judicial review.

Argument

27. It is the responsibility of NMED, or a court, in ruling on a motion for relief pending appeal, to preserve the status quo insofar as possible without injury to the rights of any of the contesting parties.

28. The New Mexico Supreme Court recently discussed preliminary relief in *Grisham v. Romero*, 2021-NMSC-009, 483 P.3d 545. It enumerated, first, the four factors governing issuance of a preliminary injunction or a temporary restraining order:

To obtain a TRO, a movant must therefore show that "(1) the [movant] will suffer irreparable injury unless the injunction is

granted; (2) the threatened injury outweighs any damage the injunction might cause the [adversary]; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood [movant] will prevail on the merits." See *LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314, 850 P.2d 1017 (applying the four factors to review the grant of a preliminary injunction); see, e.g. *Romer v. Green Point Sav. Bank*, 27 F.3d 12, 16 (2d Cir. 1994).

Grisham ¶ 20.

29. In identifying the status quo, the Supreme Court in *Grisham* relied upon

11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948, *Grounds for Granting or Denying a Preliminary Injunction* (3d ed. 2013) (observing that some courts "have awarded preliminary injunctions when it is necessary to compel defendant to correct injury already inflicted by defining the status quo as 'the last peaceable uncontested status' existing between the parties before the dispute developed").

Grisham ¶ 21.

30. Here, the "last peaceable uncontested status" is the condition of the WIPP facility before the PMR was filed. NMED itself has recognized that such condition should be preserved, as far as possible, by its denial of the TA extension in November 2020.

31. On this motion to determine the conditions under which judicial review may proceed, the burden of proof is on DOE, because DOE is the Applicant for the PMR and the party seeking to alter the status quo and proceed to construction despite the pending appeal, which construction, if completed, would effectively moot the case. The Supreme Court in

Grisham emphasized that the party seeking to alter the status quo, pending litigation, has the burden to justify such an order. Indeed, the Supreme Court ruled that such party *must satisfy a heightened burden* in seeking permission to upset the status quo:

Moreover, where injunctive relief is the ultimate relief sought, or where such relief is affirmative—not merely a maintenance of the status quo—the plaintiff "must satisfy a heightened burden" of proof. *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004) (characterizing such injunctions as "historically disfavored" and holding that the movant must show "that the four . . . factors . . . weigh heavily and compellingly in movant's favor before such an injunction may be issued" . . . , *aff'd*, 546 U.S. 418, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006)).

32. The Supreme Court in *Grisham* cites repeatedly from *O Centro Espirita Beneficente*, and the following passage from that case is pertinent:

In *SCFC ILC, Inc. v. Visa USA, Inc.*, this court identified the following three types of specifically disfavored preliminary injunctions and concluded that a movant must "satisfy an even heavier burden of showing that the four [preliminary injunction] factors . . . weigh heavily and compellingly in movant's favor before such an injunction may be issued": (1) preliminary injunctions that alter the status quo; (2) mandatory preliminary injunctions; and (3) preliminary injunctions that afford the movant all the relief that it could recover at the conclusion of a full trial on the merits. 936 F.2d 1096, 1098-99 (10th Cir. 1991).

33. The Supreme Court observed that the preliminary injunction in *Grisham*

‘would supply [the movants] with all the relief [they] could hope to win from a full trial.’ *Legacy Church, Inc.*, 472 F. Supp.3d at 1023 (internal quotation marks and citation omitted). Thus, the district court here was bound to "closely scrutinize" the application "to

assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course." *Id.* (internal quotation marks omitted) (quoting *O Centro Espirita Beneficente Uniao do Vegetal*, 389 F.3d at 975).

Grisham ¶ 21.

34. Here, likewise, to allow DOE to construct the shaft and drifts pending appeal “‘would supply [them] with all the relief [they] could hope to win from a full trial,’ *Legacy Church, Inc.*, 472 F. Supp.3d at 1023 [D.N.M. 2020]. Thus, on this motion the burden is on DOE, and NMED must “‘closely scrutinize” DOE’s showing to “‘assure that the exigencies of the case support the granting of a remedy that is extraordinary even in the normal course.” *Grisham* ¶ 21.

35. No exigencies support an extraordinary order allowing construction to proceed pursuant to the PMR pending review of the lawfulness of that PMR. Only a stay of construction will allow the permit modification to be reviewed for legal compliance. If there is no stay, NMED’s erroneous ruling is likely to lapse, effectively, into mootness before the courts can correct it. NMED should stay the effectiveness of its order to allow the courts to review its legality.

Conclusion

NMED has no lawful authority to insulate its own orders from judicial review. In light of the continuing Public Health Order related to the Covid-19

pandemic, the schedule that DOE plans for construction, and the time required for judicial review, a failure to stay the effectiveness of the Final Order pending appeal will, most likely, prevent a ruling on appeal before the case becomes effectively moot. That result would deny the parties' right to judicial review. NMED should maintain the status quo by staying the effectiveness of the Secretary's Final Order pending judicial review.

Respectfully submitted,

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Dated: November 9, 2021

Certificate of Service

I hereby certify that a copy of this Motion was served on the following via electronic transmission on November 9, 2021:

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3. I am providing this affidavit in support of a motion for a stay of the Final Order of the Secretary of NMED in this matter (October 27, 2021).

NMED's Approval of the Permittees' TA Request

4. On January 16, 2020, the Permittees submitted a Request for Temporary Authorization (TA) which sought to "*Excavate a new shaft, Shaft #5 (S#S), approximately 1,200 feet to the west of the existing Air Intake Shaft.*" [AR 200112]

5. On April 24, 2020, NMED issued a letter of approval of the Permittees' TA Request [AR 200415]. The approval letter granted the Permittees a 180-day temporary authorization, effective April 27, 2020 and expiring on October 24, 2020, to undertake only those activities specified in the TA Request. The letter allowed that, if the Permittees were not able to complete the activities associated in the Request within this timeframe, they may request the re-issuance of the temporary authorization for one additional term of 180 days, subject to re-evaluation by NMED.

6. The approval letter further stated that the authorization was temporary and did not constitute a final agency action, and that if "*NMED ultimately denies the PMR, the Permittees must reverse all construction activities associated with this Request at their expense and within the timeframes specified by the Department.*" [AR 200415, p. 2]

7. During the term of the TA, Shaft #5 was excavated to 116 feet below ground surface. [Applicants' Exhibit 2, p. 20]

8. On September 9, 2020, the Permittees submitted a Request for a Reissuance of the TA stating, "*The reissuance of the TA is needed because the activities authorized in the referenced TA request (Reference 2) will not be completed within the term of the approved TA.*" [AR 200907]

9. The Permittees ceased excavation on the shaft after the TA expired on October 24, 2020. [Applicants' Exhibit 1, p. 37; AR 201012, 201103]

NMED's Denial of the Permittees' TA Reissuance Request

10. NMED issued a Denial of Temporary Authorization Reissuance on November 18, 2020 [AR 201108], citing numerous reasons for the denial, including NMED's concern that the Permittees were not appropriately planning the execution of shaft construction according to the timeframe of the TA term and the inability to evaluate whether the Facility's COVID-safe practices were sufficient. [NMED Exhibit 3, pp. 11-12]

11. The denial letter required the Permittees to adhere to its "Contingency Plan Scenario 1: No Reissuance of Temporary Authorization" until the Class 3 PMR process had concluded. The letter repeated the condition first stated in the TA approval letter that if "*NMED ultimately denies the PMR, the Permittees must reverse all construction activities conducted under the original Temporary Authorization at their expense and within timeframes specified by the Department.*" [AR 201108, p. 3]

NMED's Approval of the Shaft #5 PMR and Draft Permit

12. On October 27, 2021, NMED Secretary James Kenney issued a Final Order in the matter, granting the PMR for the excavation and operation of Shaft #5 and associated connecting drifts, and directing HWB to issue a permit consistent with the draft permit that was subject to the public hearing.

13. On November 4, 2021, the Carlsbad Current-Argus reported, "*Donavan Mager, spokesman for Nuclear Waste Partnership – the primary operations contractor at*

WIPP – said it was unclear yet when construction would resume and be completed as planning was to resume with subcontractor Harrison Western-Shaft Sinkers. ”

Argument in Support of NMED Granting a Stay

14. With the Secretary’s order granting the Class 3 PMR on October 27, parties to this proceeding are entitled to judicial review (74-4-14 NMSA) However, *“The filing of an appeal does not act as a stay of any action required by the secretary's decision.”* (20.4.1.901.H(1) NMAC; see also 2.1.4.500.E NMAC). Moreover, any future construction is not subject to the express condition that NMED imposed during its administrative review, namely, that if the permit modification is reversed, the construction must be reversed and undone.

15. It is appropriate to file a motion to stay with the Secretary in support of an appeal of this matter (74-4-14.D(1) NMSA 1978).

16. To date, NMED has clearly stated in two separate determination letters that *“all construction activities conducted under the original Temporary Authorization”* must be reversible in the event *“NMED ultimately denies the PMR.”*

17. NMED took this position recognizing that construction of Shaft #5 could be effectively irreversible and prejudice the final decision on the Class 3 PMR.

18. NMED should be equally considerate towards the judicial review process as it was in the administrative permit modification process, to ensure the courts have sufficient time to review objectively the facts and arguments associated with the appeal.

19. NMED owes it to the court of appeals to relieve the pressure of ongoing construction which, if it resumes, will tip the scales of judicial review in favor of

I support the SRIC Appeal of the Secretary's Final Order of October 27, 2021. I support the SRIC Motion for Stay because, if the new shaft construction and WIPP expansion are allowed to proceed, they will negatively affect my health, well-being, and the value of my property.

6. I also support the SRIC Motion for Stay, because it is necessary to stay the Environment Department's order to enable the courts to rule on its legality; otherwise, DOE may be able to get the new shaft and drifts built before the Court of Appeals can hear the case, and the appeal will become moot, in effect, which I would consider very unfortunate.

7. If the construction of the new shaft is allowed to go forward, DOE's \$197,000,000 investment, and its failure to develop alternative disposal sites will impel it to carry out underground expansion of WIPP, adding disposal panels and extending the disposal phase for decades.

8. As reflected in my written and oral comments in this proceeding, I am strongly opposed to the new shaft and WIPP expansion. The new shaft is not needed for current ventilation of the underground, as such ventilation will be provided by the New Filter Building. Further, as evidenced by the testimony in the Public Hearing, the new shaft will not provide any ventilation until at least 2025.

9. I purchased my house, which is 1¼ miles from the designated WIPP Route US 285, in 2017, knowing that it was on the WIPP Route. But I also

understood that the WIPP Permit stated that the anticipated last date for waste shipments to WIPP for disposal was 2024. I relied on that date in the Permit to ensure that waste shipments for WIPP would not be coming by my house after 2024.

10. I travel on US 285 many times each week, as it is the principal artery in and out of my neighborhood in Eldorado. Thus, increased transportation related to WIPP expansion endangers me in my travels.

11. DOE's expansion plans, which require the new shaft, are intended to keep WIPP open for decades longer than 2024, until at least 2080, and would result in thousands of additional shipments coming near my house for many decades. I am very concerned of the health impacts of any accident near my house. I further believe that such shipments will reduce my property values.

12. Prior to my oral comments at the WIPP hearing on May 17, 2021, the Hearing Officer stated that WIPP expansion was a forbidden subject matter for testimony. I felt that my comments would be disregarded by the Hearing Officer, which appears to be the case from his Hearing Officer Report and the Secretary's Final Order. My written comments on May 18, 2021 reflected my objections to the facts about WIPP expansion not being heard and addressed in this new shaft permit process.

13. Over the past several months, I have spent hundreds of hours

understanding WIPP expansion, including reading many documents. I have talked about WIPP expansion to my neighbors and people in the Santa Fe area and have discovered that most people are unaware of the expansion plans. I serve as co-chair of 285ALL, a community organization, which has held public meetings regarding WIPP expansion. I am also a member of the STOP Forever WIPP Coalition, of which SRIC also is a member. I have assisted in two Town Hall meetings, held by Santa Fe County Commissioners. The first was called by Commissioners Hank Hughes and Anna Hamilton on August 4, 2021 and included presentations by Santa Fe County Emergency Manager, Chief Martin Vigil, and by me. Exhibit 1. The second was called by Commissioner Anna Hansen and State Representative Tara Lujan on October 19, 2021 and included presentations by Santa Fe County Fire Chief Jackie L. Lindsey and me. Exhibit 2. Both of those meetings discussed WIPP expansion, including the new WIPP mission to dispose of weapons-grade plutonium, which involves transporting plutonium from the Pantex Plant near Amarillo, Texas, to Los Alamos National Laboratory ("LANL"), and from LANL to the Savannah River Site (SRS), followed by shipments from SRS to WIPP. All of the shipments from Pantex and from LANL would use US Highway 285, going past my house and neighborhood. Those meetings showed that many of my concerns about the impacts of WIPP expansion and the additional transportation that would result are shared by elected officials and members of the public.

The above matters are stated under penalty of perjury under the laws of the State of New Mexico.

Cynthia Weehler
Cynthia Weehler

State of New Mexico)
)
County of Santa Fe)

Signed and sworn to before me on the 5 day of November, 2021

Julia Trejo
Notary Public

My commission expires: July 30, 2022



OFFICIAL SEAL
JULIA TREJO
NOTARY PUBLIC - State of New Mexico
My commission Expires 07/30/2022

Santa Fe County Nuclear Waste Emergency Response Town Hall



**Wednesday, August 4, 2021
6:00 p.m. to 7:15 p.m.
Hondo 2 Fire Station
645 Old Las Vegas Hwy
Santa Fe, NM 87508**

Many New Mexicans know that radioactive waste has been regularly transported between Los Alamos National Labs (LANL) and the Waste Isolation Pilot Plant (WIPP). The WIPP facility has been storing nuclear weapons waste from sites across the country for over 20 years. Recent plans to expand the WIPP repository have raised concerns among those who live along the US 285 corridor.

Please join Santa Fe County Commissioners Hank Hughes and Anna Hamilton for a town-hall regarding the County's emergency preparedness and response in the unlikely event of a toxic waste incident. Special presentation by Santa Fe County Emergency Management Team and opportunity to express questions and concerns.

For further questions or inquiries regarding the meeting please contact District 5 Liaison Olivia Romo at 505-986-6202 or orromo@santafecountynm.gov or District 4 Liaison Tina Salazar at 505-986-6319 or tsalazar@santafecountynm.gov

Santa Fe County Nuclear Waste Emergency Response Town Hall



Tuesday, October 19, 2021 6:00 p.m. to 7:30 p.m. Nancy Rodriguez Community Center 1 Prairie Dog Loop Santa Fe, NM 87507

Many New Mexicans know that radioactive waste has been regularly transported between Los Alamos National Labs (LANL) and the Waste Isolation Pilot Plant (WIPP). The WIPP facility has been disposing of nuclear weapons waste from sites across the country for over 20 years. Recent plans to expand the WIPP repository have raised concerns among those who live along the NM 599 and US 285 corridors.

Please join Santa Fe County Commissioner Anna Hansen (D-2), Santa Fe County Fire Chief Jackie L. Lindsey, NM State Representative Tara Lujan (D-48), and Cynthia Weehler at this town hall and hear about the Department of Energy's proposal to transport plutonium along NM 599 and the County's emergency preparedness and response in the unlikely event of a toxic and radioactive waste incident.

Attendees will have an opportunity to express concerns and ask questions.

Please arrive at least 15 minutes early to complete a COVID-screening. Masks will be required. [RSVP here.](#)

For more information, please email Commissioner Anna Hansen at ahansen@santafecountynm.gov or 505-986-6329.



6. My greatest fear is with an increase in the underground disposal area, the transportation route usage would drastically increase the risk of enroute transportation accidents and 2 schools are located on NM 502 where most of our Pueblo children are in attendance. This might mean total genocide of our future lives in case of a fatal accident.

7. I also support the SRIC Motion for Stay, because it is necessary to stay the Environment Department's order to enable the courts to rule on its legality; otherwise, the Department of Energy ("DOE") may be able to get the new shaft and drifts built before the Court of Appeals can hear the case, and the appeal will become moot, in effect, which I would consider very unfortunate.

8. If the construction of the new shaft is allowed to go forward, DOE's \$197,000,000 investment, and its failure to develop alternative disposal sites will impel it to carry out underground expansion of WIPP, adding disposal panels and extending the disposal phase for decades. There is no pre, prior informed consent for this action.

9. As reflected in my written and oral comments in this proceeding, I am strongly opposed to the new shaft and WIPP expansion. The new shaft is part of the DOE plan to expand WIPP and continue nuclear weapons production. Having a nuclear winter is avoidable. Having an increase WIPP capacity would increase to likelihood of disaster with extreme climate change happenings. Reality is visible in the death of our water sources.

10. My Tewa Pueblo is on the designated WIPP Route NM Highway 502, where shipments from Los Alamos National Laboratory ("LANL") travel to WIPP. The WIPP expansion plan would result in thousands of new shipments using NM Highway 502 for decades transporting plutonium from the Pantex Plant near Amarillo, Texas, to LANL, and from LANL to the Savannah River Site (SRS), followed by shipments from SRS to WIPP. All of the

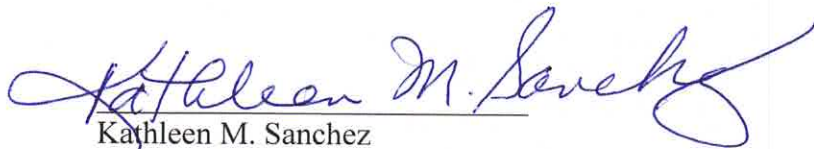
shipments from Pantex and from LANL would use NM Highway 502, going pass sovereign nation lands.

11. I travel on NM Highway 502 many times each week, as it is the principal artery through my tribal land. Thus, increased transportation related to WIPP expansion endangers me as I stay home and increase greater risk in my travels.

12. I am very concerned of the health impacts of any accident near my relatives' homes on our sovereign nation lands. I further believe that such shipments will cause inner spirit rooted exponential damage to me, my children, grandchildren, and Mother Earth.

13. At the WIPP hearing on May 17, 2021, there was no Tewa translation available, and I am a fluent Tewa language speaker. The Court Reporter could not correctly understand and transcribe my name, as the transcript states: "My name is Kathy Wimboni [phonetic] Sanchez". *Id.* Tr. 159 l. 12. The Hearing Officer and Hearing process demonstrated a disregard for me and my people and our language, as well as a disregard for our comments and beliefs about the new shaft and WIPP expansion. I understand the implications of multiplicity of entry ways that toxic industries assault women, girls' bodies and that of our Earth Mother.

The above matters are stated under penalty of perjury under the laws of the State of New Mexico.


Kathleen M. Sanchez

State of New Mexico)

County of Santa Fe) Rio Arriba

Signed and sworn to before me on the 4th day of November, 2021 Notary Public

My commission expires: 7/1/2023

