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

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

Introduction

Southwest Research and Information Center ("SRIC"), a party herein, submits this Memorandum in reply to the Responses filed by the Hazardous Waste Bureau (HWB Br.) and the Permittees (P. Br.) on November 22, 2021 on SRIC's Motion, November 9, 2021, 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").

Argument

a. The equities require a stay to preserve the parties' relative positions.

1. In seeking a stay, SRIC is asking the Secretary to preserve the existing status quo to allow the Court of Appeals to review the Secretary's decision dated

October 27, 2021, authorizing the construction at WIPP of a fifth shaft and associated drifts. Without a stay, it is likely that the Permittees will proceed with construction to the point that the appeal becomes effectively moot. (Motion at ¶ 20).

2. Preliminary relief, of which a stay is one example, has the purpose to "preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). *See also O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 999 (10th Cir. 2004) (concurring opinion); 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2947 at 123 (2d ed. 1995) (purpose of preliminary injunction is to prevent non-movant from taking unilateral action which would prevent court from providing relief to the movant on the merits).

3. SRIC's Motion (Nov. 9, 2021) seeks to prevent the Permittees from taking unilateral action which would prevent the Court of Appeals from providing relief on the merits. The Motion is accompanied by affidavits of individual supporters of SRIC, averring that the new shaft and drifts are part of the Department of Energy's ("DOE") plan to enlarge the underground disposal space at WIPP, with the result that operations at WIPP would continue longer than the expected end date of 2024 and up to the year 2080, creating

risks of dangerous incidents near their residences for far longer than previously expected and damaging property values. (Weehler Aff. ¶¶ 5-11; Sanchez Aff. ¶¶ 5-12).

4. Permittees' opposing brief asserts that, if they cannot proceed with construction under the permit modification, they cannot build the new shaft and drifts, whose purpose is "to provide a new intake and exhaust system to improve the underground ventilation system and return it to pre-2014 conditions." (P. Br. 9).

5. However, it was established during the hearing that the construction of the New Filter Building ("NFB"), which is already authorized under an earlier PMR and is ongoing, would create air flow of 540,000 cubic feet per minute—equal to pre-2014 conditions—and the new shaft and drifts would not increase the air flow at all.

6. The Permanent Ventilation System ("PVS") (now called the SSCVS), which includes the Salt Reduction Building and New Filter Building ("NFB"), was incorporated into the WIPP Permit by NMED's approval of a Class 2 PMR on March 23, 2018. FR 80310; SRIC Ex. 14 at 4. As the Permittees requested in that earlier PMR (AR 171112 at A-3, B8), the Permit in effect before the Secretary's Final Decision states:

> 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 at A2-9. The present PMR seeks no change in that provision. SRIC Ex. 14 at 5.

7. The present PMR details the asserted advantages of the new shaft and drifts, comparing them to the "current" ventilation system. AR 190815 at 2, 3. The PMR contains similar language to that in Permittees' brief concerning "why the modification is needed":

> The addition of shaft #5 and associated connecting drifts represents an upgrade to the UVS, and will provide a new intake and exhaust system capable of restoring full-scale, concurrent, mining, maintenance, and waste emplacement operations.

AR 190815 at 9.

8. Permittees' statements misstate the function of and the need for the proposed modification. Both the PMR and Permittees' brief (P. Br. 9) misleadingly fail to state that the "current" ventilation system referred to is the original system from 1999-2014, which is already due to be replaced by the SSCVS, which enhances ventilation considerably. May 17, 2021 Tr. 72 l. 12 – 73 l. 25; *Id*. 81 l. 4-82 l. 14 (Kehrman).

9. Permittees have made clear that the already-permitted SSCVS and the existing four shafts "will supply additional air to the underground in order to achieve up to 540,000 actual cubic feet per minute (acfm) in filtration

mode." SRIC Ex. 5. Ms. Farnsworth, Permittees' witness, confirmed that the PVS (or SSCVS) can exhaust 540,000 cubic feet per minute, ventilating the entire underground with filtration. May 17, 2021 Tr. 215 ll. 9-17; *id.* Tr. 218 ll. 7-21 (Farnsworth). The SSCVS can provide the increased ventilation without the new shaft. *Id*. Tr. 216 ll. 4-5 (Farnsworth). Thus, the need claimed in the present PMR, and the purpose asserted in Permittees' brief (at 9) is already met by the SSCVS. May 19, 2021 Tr. 144 ll. 17-18 (Hancock).

10. The PMR also states that the new shaft and drifts would "aid in increasing the air intake volume." *Id*. Tr. 84 ll. 14-18 (Kehrman). However, the PMR does not quantify any volume increase. *Id*. ll. 19-21 (Kehrman). Permittees' Response to NMED's Technical Insufficiency Determination states specifically that "the ventilation capacity for the underground repository is not increasing over the previous airflow design." *Id*. 86 ll. 2-12 (Kehrman); AR 200114 at 8.

11. Mr. Kehrman stated that, if asked whether he was present "to testify whether or not the facility needs additional ventilation, the answer is, no, I'm not here to testify to that." *Id*. Tr. 52 ll. 8-10 (Kehrman).

12. Ms. Farnsworth confirmed that the NFB can operate without the proposed new shaft (May 17, 2021 Tr. 215 l. 23-216 l.5), as did Mr. Maestas of NMED (May 19, 2021 Tr. 86 ll. 2-22). Mr. Maestas testified that, with the

construction of the NFB, the new shaft was not necessary for acceptable air quality. *Id*. Tr. 99 ll. 4-15. Indeed, the Class 2 PMR for the SSCVS would not be truthful if the SSCVS requires the addition of the new shaft to be effective. May 19, 2021, Tr. 149 l. 13-150 l.3 (Hancock).

13. Permittees and the Hazardous Waste Bureau ("HWB") argue that SRIC is seeking an injunction here. (P. Br. 1-3; HWB Br. 3). This is incorrect. SRIC is seeking a stay, as expressly authorized in 74-4-14.D NMSA 1978:

> A stay of enforcement of the action being appealed may be granted after hearing and upon good cause shown:

SRIC is seeking only a stay of the order granting a permit modification. SRIC is not seeking, on this motion, the dismantlement of any of the construction done under a temporary authorization. SRIC seeks only a stay of active construction so that the Court of Appeals may hear the pending appeal without the time pressure created by ongoing construction. The statute expressly authorizes issuance of a stay by the Secretary. *Id*. The HWB ignores the statute in claiming that this motion should be addressed to the Court of Appeals. (HWB Br. 1).

14. Permittees assert that SRIC has the special burden imposed upon a party that seeks a change in the status quo pending appeal. (P. Br. 3-4). But it is DOE that seeks to change the status quo by proceeding with construction. At present, based upon NMED's denial of an extension of the temporary

authorization on November 18, 2020, construction has been halted. AR 201108. No construction is occurring on the shaft and drifts pursuant to NMED's order to suspend construction and place the project on hold. NMED's order has created the existing status quo.

15. Although SRIC might contend that the site conditions prevailing before the PMR was filed, being the "last peaceable uncontested status," *Grisham v. Romero*, 2021-NMSC-009, ¶ 21, 483 P.3d 545, constitute the status quo to be preserved pending appeal, SRIC is not asserting that Permittees "correct injury already inflicted" (P. Br. 3) by reversing construction done during the temporary authorization; SRIC requests only that NMED maintain the existing status quo while the lawfulness of the permit modification is examined.

16. DOE's claim that the status quo to be preserved is one of ongoing construction ignores reality. (P.Br. 2). Construction of a $197,000,000 project obviously *changes* the status quo and places pressure on the courts to rush their decision or, ultimately, to accept that an appeal has become effectively moot. Neither circumstance serves justice. Cases relied on by Permittees (P. Br. 3), where the issuance of a regulation was deemed to establish the status quo, do not apply here, because a regulation may be

withdrawn or modified without the consequences involved in undoing a $197,000,000 construction project.

17. Thus, Permittees' claim that they would be prejudiced by a stay has no basis in fact. Only the supporters of SRIC who made affidavits on this motion, and others similarly situated, would be prejudiced by the denial of a stay. The stay should be granted.

b. Likelihood of success on the merits:

18. It is uncontested that DOE has plans to use the shaft and drifts to expand the underground disposal areas of the WIPP facility so that it will operate into the 2080's and beyond. DOE so states in several publications. (Motion at ¶ 8). The prospect of WIPP's expansion is not "speculative" at all. (P. Br. 4, 6, 7, 9).

19. It is uncontested that DOE has no other disposal site for transuranic waste, and, since it has ongoing transuranic waste disposal needs, it must expand the disposal capacity at WIPP. (Weehler Aff. ¶ 7; Sanchez Aff. ¶ 8; SRIC Ex. 14 at 9, 16).

20. It is therefore predictable that, if the shaft and drifts are built, DOE will construct additional disposal panels in the underground. DOE will predictably state that it has already built the fifth shaft and access drifts that

will serve the expansion and that the $197,000,000 invested in the shaft and drifts would be wasted if expansion is not allowed.

21. Further, it cannot be denied that DOE has historically built facilities before regulatory approval, then presented its regulators with a status quo that an agency would find it difficult to disapprove. WIPP itself was constructed by DOE in the 1980's and 1990's and only determined by EPA to meet the applicable disposal regulations, 40 C.F.R. Part 191, subpart b, in 1998. 63 Fed. Reg. 27354 (May 18, 1998). EPA was clearly under pressure to authorize use of the already-built billion-dollar facility. DOE began waste shipments in March 1999, before the HWA Permit was issued, thus requiring NMED to include additional provisions in the Permit. *See Southwest Research & Information Center v. State,* 133 N.M. 179, 62 P.3d 270, 2003-NMCA-012. After the February 2014 radiation incident, DOE easily got leave to reopen WIPP from NMED and from EPA for the already-existing facility. In this very case DOE secured a temporary authorization to start the additional shaft and connecting drifts, enabling DOE to create another fait accompli. In sum, it has been DOE's strategy to engineer the status quo to suit its plans and, only thereafter, to seek regulatory approval.

22. Permittees argue that, in issuing 40 C.F.R. § 270.42, EPA did not express concern about the creation of a fait accompli through the temporary

authorization process. (P. Br. 8). EPA pointedly *did* express such concern, seeking to prevent a situation where an agency is reluctant to deny a permit modification where construction has already begun. The passage where EPA says that such concerns do not apply involves "preconstruction" under a Class 2 PMR, which EPA allowed "[b]ecause of the limited nature of Class 2 modifications" (53 Fed. Reg. 37912 at IV.B.2(iii)) (Sept. 28, 1988), which are restricted to minor changes that might easily be undone. But EPA stated: "[T]here is no preconstruction allowed with a Class 3 modification" (*id.*)—*i.e.*, this one—expressly to prevent creation of a fait accompli with a major construction project, an error that should not be committed here by denying a stay.

23. There are other matters that are undisputed. The Court of Appeals would be bound to find a violation of In re *Rhino Environmental Services,* 2005-NMSC-024, 133 N.M. 138, 117 P.3d 939, since the Hearing Officer blatantly refused to hear evidence of the impacts upon New Mexico communities either near WIPP or along transport routes of the expansion of WIPP and the prolongation of WIPP's operating period from the expected end in 2024 until 2080 and beyond. The Hearing Officer made no findings of fact or legal conclusions about the planned expansion and extended operation of the disposal site. Such matters are clearly contested and

relevant, and the Hearing Officer is bound to make findings and conclusions on them. "Allowing the Secretary to ignore material issues raised by the parties in this manner would render their right to be heard illusory." *Rhino* ¶ 41.

24. Indeed, after NMED issued several public notices inviting citizens to attend hearings, comment on the PMR, and participate as parties, the Hearing Officer shut down the evidence on the most important issue—expansion of the WIPP disposal site and extension of its operation—providing the parties and the public no hearing on their concerns and making no findings on such matters. *See Freed v. City of Albuquerque,* 2017-NMCA-011, 388 P.3d 287 (Agency ruling vacated where public notice of hearing was given, but agency resolved matter before hearing and cancelled the hearing, preventing public comment.).

25. Permittees seek to justify the Hearing Officer's refusal to consider future expansion, by stating that the rules do not require a draft permit to contain all the terms of the permit, as proposed to be modified, such as the language stating that disposal operations are expected to end in 2024. (P. Br. 4-5). Permittees cannot deny that a draft permit "means a document prepared by the Division indicating the Division's proposed decision to issue, deny, or modify a permit" (20.1.4.7.A(9) NMAC) and "[a] draft permit shall contain

all conditions, compliance schedules, monitoring requirements, and technical standards for treatment, storage and disposal provided for in 40 CFR Part 270" (20.4.1.901.A(1)(a) NMAC). And, in any case, none of the provisions concerning a draft permit authorizes the Hearing Officer to limit the evidence at a hearing to the specific terms proposed to be modified, when other permit language bears on the validity of the modification.

26. It is uncontradicted that construction of the shaft and drifts will commit DOE to the expansion of WIPP. It is established law that the expansion of a disposal facility calls for a public process and regulatory approval before it may proceed. The Court of Appeals for the Fourth Circuit explained as follows:

> As discussed above, South Carolina has a carefully crafted process for granting a waste disposal operator additional space. That process includes the opportunity for public notice and comment. Safety-Kleen seeks to bypass this procedure by demanding immediate additional capacity. The public has a strong interest in the opportunity for notice and comment. First, the notice and comment procedure allows individual citizens and groups that are affected by an expansion in waste operations to participate in the permitting process. If history is any guide, a number of citizens and interest groups will participate in any process for public notice and comment on whether Pinewood's capacity should be increased. Second, the notice and comment procedure allows for careful and deliberate consideration of whether it is environmentally safe to allow Safety-Kleen to store additional waste. The Pinewood facility is located in an environmentally sensitive area. The facility is a mere 1200 feet from Lake Marion, a popular recreational spot and a source of drinking water for several thousand people. The facility is adjacent to over 8500 acres of forest and wetlands. The public has a strong interest in ensuring that DHEC

> carefully considers whether additional capacity is warranted. See *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1307, 47 L. Ed. 2d 67, 96 S. Ct. 845 (1976) (vacating stay of enforcement of federal motor vehicle safety standard in part because of public's strong interest in safety); see also *Ark. Peace Ctr. v. Ark. Dep't of Pollution Control,* 992 F.2d 145, 147 (8th Cir. 1993) (staying preliminary injunction in part because of potential environmental harm if an injunction was in force). We agree with the district court that the public interest weighs in favor of denying an injunction against DHEC.

Safety-Kleen, Inc. v. Wyche, 274 F.3d 846, 863-64 (4th Cir. 2001). That process has been denied here in a case of significant public concern.

27. Moreover, NMED's decision here is based upon erroneous premises. The fundamental error is the idea that NMED can fairly assess the supposed benefits conferred by the planned shaft and drifts without considering the nature of the repository that would be served by them. WIPP, in its original design, is nearly finished. Panel 8 will be done in early 2022, and then it will only take a few years to fill it. At that point, it is no use discussing how a fifth shaft will supposedly allow simultaneous mining, maintenance, and waste emplacement, while blinding one's self to expansion of WIPP, because there will be no repository to mine, maintain, or emplace waste—unless WIPP expands. Similarly, it is no use discussing improved ventilation for WIPP's underground workers, because there will be no place for underground workers to work—unless WIPP expands. The Court of Appeals has held that the "need" for a permit modification is judged based

upon how the repository will function in the future with the proposed changes. *Southwest Research and Information Center v. Environment Department*, 2014-NMCA-098, ¶¶ 24-26, 336 P.3d 404. The Hearing Officer ignored this ruling.

28. Further, the Hearing Officer determined that NMED need only decide whether the Permittees need to modify the permit, not the facility, which ignores the clear purpose of 40 C.F.R. § 270.42(c)(1)(iii) and erroneously reduces the regulator to the role of revising editor. (Findings 48, 56, Conclusion 47).

29. The Hearing Officer entirely ignored the application of the Consultation and Cooperation ("C&C") Agreement, stating only that it should be litigated in another forum—which is no explanation at all. (Conclusion 52). Such unexplained rulings ignore the proper role of NMED, which must explain its decision. *Atlixco Coal v. Maggiore*, 1998-NMCA-134, ¶ 24, 125 N.M. 786, 793-94, 965 P. 2d 370, 377-78.

30. Permittees do not deny that their actions to expand WIPP are subject to the terms of the C&C Agreement (See P. Br. 6-7), nor do they dispute that SRIC, as a citizen group that has long participated in the established review and comment process under the C&C Agreement, has standing to call for enforcement of that Agreement. The statement that SRIC is not a "party" (P.

Br. 6) to the C&C Agreement does not contest SRIC's third party beneficiary status, which has been explained at length in SRIC's Proposed Findings of Fact and Conclusions of Law, at ¶¶ 91-95 (Aug. 16, 2021). Nor may the C&C Agreement be ignored as "independent" of the Permit (P. Br. 7), since environmental requirements must often be interpreted in conjunction with independent sources of law. *See* SRIC Comments on Hearing Officer's Report ¶¶ 24-25 (Sept. 29, 2021).

31. Permittees point out one term of the C&C Agreement that they claim is met (P. Br. 6-7), but they omit to explain how DOE can possibly be in compliance with the Agreement terms which require DOE to adhere to the original WIPP design of four shafts and eight panels, which DOE publicly committed to as the "full WIPP." (AR200503, Working Agreement at IV.F.6(e)(2), III.A, SRIC Ex. 4). As Dr. Channell testified, "a permit from the Environment Department does not qualify as a modification of the C&C Agreement." May 20, 2021 Tr. 82 ll. 1-2 (Channell).

32. The Hearing Officer barred evidence of expansion of WIPP, but Permittees' chief witness, Robert Kehrman, refused to say that the proposed shaft and drifts are needed without assuming that WIPP continued to expand. May 17, 2021 Tr. 90 l. 19—97 l. 9 (Kehrman). Thus Mr. Kehrman's expert opinion is unsupported. *Id.* 103 ll. 9-10 (Kehrman).

Conclusion

There is no showing that Permittees would be irreparably injured by a stay of the effectiveness of the permit modification approved in the Secretary's order dated October 27, 2021. At the same time, if a stay is denied, Permittees would be free to upset the status quo by constructing a shaft and drifts that would unavoidably lead to the expansion of the underground disposal areas, without the legally necessary public processes and in violation of the C&C Agreement. SRIC has shown a likelihood that it will prevail on appeal. A stay should be granted so that the Court of Appeals may examine the lawfulness of the permit modification without the pressures of ongoing construction.

Respectfully submitted,

/s/ *Lindsay A. Lovejoy, Jr.*
Lindsay A. Lovejoy, Jr.
Attorney for Southwest Research and
Information Center
3600 Cerrillos Road, #1001A
Santa Fe, NM 87507
(505) 983-1800

Dated: November 29, 2021

Certificate of Service

I hereby certify that a copy of this Reply was served on the following via electronic transmission on November 29, 2021:

James Angel
James.Angel@emcbc.doe.gov
Myles Hall
Myles.Hall@cbfo.doe.gov

Michael L. Woodward
mwoodward@hslawmail.com
J.D. Head
jhead@fbhg.law
Robert A. Stranahan, IV
Rstranahan1@me.com
Dennis N. Cook
dennis.cook@wipp.ws
Leslie Brett Babb
Brett.Babb@wipp.ws

Chris Vigil
christopherj.vigil@state.nm.us
Christal Weatherly
Christal.Weatherly@state.nm.us
Ricardo Maestas
Ricardo.Maestas@state.nm.us
Megan McLean
Megan.McLean@state.nm.us

Steve Zappe
steve_zappe@mac.com

Scott Kovac
scott@nukewatch.org

Joni Arends
jarends@nuclearactive.org

Deborah Reade
reade@nets.com

George Anastas
GAnastas5@Comcast.Net

Dave McCoy
dave@radfreenm.org

Lindsay Lovejoy
lindsay@lindsaylovejoy.com

/s/Don Hancock________
Don Hancock