IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

SOUTHWEST RESEARCH AND INFORMATION CENTER and CYNTHIA WEEHLER,
Appellants,

-against- **No. A-1-CA-40030**

SECRETARY OF NEW MEXICO ENVIRONMENT DEPARTMENT,
Appellee,

-and-

UNITED STATES o/b/o UNITED STATES DEPARTMENT OF ENERGY,
Intervenor.

In re NEW MEXICO ENVIRONMENT DEPARTMENT HEARING DETERMINATION REQUEST CLASS 3 "EXCAVATION OF A NEW SHAFT AND ASSOCIATED CONNECTING DRIFTS" PERMIT MODIFICATION TO THE WIPP HAZARDOUS WASTE FACILITY PERMIT

MOTION FOR A STAY PENDING APPEAL ON BEHALF OF SOUTHWEST RESEARCH AND INFORMATION CENTER and CYNTHIA WEEHLER

Introduction

Southwest Research and Information Center ("SRIC") and Cynthia Weehler, Appellants herein, move the Court to stay active construction of the new shaft and associated drifts, as is allowed by the Secretary's Final Decision, Oct. 27, 2021

[246 RP 00589-93], here in issue, which modifies the Hazardous Waste Act, 74-4-1 *et seq*. NMSA 1978 ("HWA"), permit for the Waste Isolation Pilot Plant ("WIPP"). The permit modification request ("PMR"), dated August 15, 2019 **[AR 190815]**,[1] was submitted by the Permittees U.S. Department of Energy ("DOE") and Nuclear Waste Partnership ("NWP") (collectively, "Permittees") and would authorize the construction of a fifth vertical shaft and associated horizontal drifts in the underground waste repository.

Counsel for Appellants has consulted with counsel for other parties and can state that DOE, NWP, and NMED oppose this motion, and Concerned Citizens for Nuclear Safety, Citizen Action New Mexico, George Anastas, Deborah Reade, and Steven Zappe concur in this motion.

Pursuant to 74-4-14.D(2) NMSA 1978, SRIC and Weehler file this Motion for a Stay Pending Appeal.[2] A stay in a civil case pending appeal raises issues concerning (A) the likelihood that applicant will prevail on the merits of the appeal; (B) a showing of irreparable harm to applicant unless the stay is granted; (C) evidence that no substantial harm will result to other interested persons; and

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[1] The Record Proper, filed on December 23, 2021, did not include many Administrative Record documents. Parties are working to include such AR in the Record Proper as soon as possible.

[2] On November 9, 2021, SRIC and Weehler filed a Motion for Stay with the NMED Secretary, pursuant to 74-4-14.D(1) NMSA 1978. The Secretary has taken no action on the Motion and sixty days having elapsed, this Motion for Stay is proper.

(D) 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. Appellants SRIC and Weehler address these issues herein.

A. Likelihood of that Appellants will succeed on appeal:

Appellants show herein that they are likely to succeed on appeal on the grounds of—

1. Denial of a public hearing, as required by 74-4-4.A(7) NMSA 1978, 20.4.1.901.A(5) NMAC, and *Rhino Environmental Services*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939. The PMR requests 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. Numerous issues have been raised for decision and are relevant but are not addressed in the Hearing Officer's Report **[239 RP 004969—005026]**, nor in the Secretary's Final Decision **[246 RP 005089-005093]**, thus denying the parties and the public the right to a hearing.

2. Failure to disclose the need for the proposed modification, as required by 40 C.F.R. §270.42(c)(1)(iii). DOE has formed plans to enlarge the WIPP nuclear and hazardous waste repository beyond the limits of its size and period of operation that DOE stated when WIPP was built. DOE intends to pursue such expansion plans without disclosing in the PMR process to NMED or the public

the extent of its plans to expand WIPP, contrary to the requirements of 40 C.F.R. § 270.42(c)(1)(iii). The Hearing Officer has cooperated in DOE's concealment by excluding any evidence of DOE's expansion plans from the permit modification process and, specifically, holding a public hearing at which the Hearing Officer prevented the parties and the public from addressing the subject of expansion. The NMED Secretary has approved such result. Such actions by DOE, the Hearing Officer, and the NMED Secretary violate the statute and the rules governing permit modification and invalidate the result of that process.

3. Violation of the Consultation and Cooperation ("C&C") Agreement. In 1981, at the direction of Congress in the WIPP Authorization Act, Pub. L. No. 96-164, §213, DOE signed an agreement with the State of New Mexico to develop the WIPP project by a process of consultation and cooperation, which included the opportunity for members of the public to comment and receive responses to comments before "key events." The C&C Agreement incorporates a staged process, which included the parties' agreement upon the scope and dimensions of the "full WIPP." DOE by the present permit modification request seeks to expand WIPP beyond the agreed scope and dimensions, violating the rights of members of the public, who are beneficiaries of the C&C Agreement.

4. Violation of Appropriation Clause. The WIPP Authorization Act, Pub. L. No. 96-164, §213 (Dec. 29, 1979), establishes the limits of DOE's authority to apply funds of the United States to the WIPP project, which limits include the determination of the scope and dimensions of WIPP through consultation and cooperation with the State. Expenditure of funds for expansion beyond the scope and dimensions of the agreed-upon WIPP project violates the Appropriation Clause of the United States Constitution:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law;

U.S. Const., Art. I, § 9, Cl. 7. Such expenditures injure SRIC and its supporters.

Factual background

1. Planning for WIPP began in the 1970's. After public debate, Congress enacted the WIPP Authorization Act, Pub. L. No. 96-164. § 213 (1979) ("Authorization Act"). The Authorization Act directs that the WIPP project may proceed—

> for the express purpose of providing a research and development facility to demonstrate the safe disposal of radioactive wastes exempted from regulation by the Nuclear Regulatory Commission.

§ 213(a).

2. The Authorization Act sets forth conditions under which the WIPP project may go forward. It directs that the specifics of the WIPP project be worked out in consultation with the State:

> (b)(1) In carrying out such project, the Secretary [of Energy] shall consult and cooperate with the appropriate officials of the State of New Mexico, with respect to the public health and safety concerns of such State in regard to such project and shall, consistent with the purposes of subsection (a), give consideration to such concerns and cooperate with such officials in resolving such concerns. The consultation and cooperation required by this paragraph shall be carried out as provided in paragraph (2).

3. The Authorization Act sets down the specific terms for consultation and cooperation, which are, again, conditions upon the authorization of the WIPP project:

> (2) The Secretary [of Energy] shall seek to enter into a written agreement with the appropriate officials of the State of New Mexico, as provided by the laws of the State of New Mexico, not later than September 30, 1980, setting forth the procedures under which the consultation and cooperation required by paragraph (1) shall be carried out. Such procedures shall include as a minimum—
>
> (A) The right of the State of New Mexico to comment on, and make recommendations with regard to, the public health and safety aspects of such project before the occurrence of certain key events identified in the agreement;
>
> (B) Procedures, including specific time frames, for the Secretary to receive, consider, resolve, and act upon comments and recommendations made by the State of New Mexico; and
>
> (C) Procedures for the Secretary and the appropriate officials of the State of New Mexico to periodically review, amend, or modify the agreement.

4. Thus, Congress authorized a single specific project and imposed limits upon it. The Authorization Act authorizes DOE to construct a "demonstration" facility to dispose of defense transuranic waste by underground burial. This was not a carte blanche to expand the waste repository beyond a "research and development" project or to receive unrestricted types of waste (*e.g.*, high level waste, spent nuclear fuel).

5. Congress further limited that authorization by requiring that DOE shall consult and cooperate with officials of the State "with regard to <u>such project</u>." Such direction clearly meant that the specific design of the authorized project would be completed in consultation between DOE and the State.

6. The Authorization Act also directed DOE to enter into a consultation and cooperation agreement with the State concerning the project, which would list key events and call for review and comment on DOE's specific plans <u>before such key events</u>.

7. DOE's construction plans and the State's concern to follow the process of consultation and cooperation under the Authorization Act put them in conflict. The State filed a lawsuit that prominently relied upon the Authorization Act, asserting that DOE had failed to reach agreement as

required by Pub. L. No. 96-164, §213 (Complaint, Civil Action No. 81-0363 JB, at ¶¶ 28-30, 49-56) (May 14, 1981) **[232 RP 004585- 004627]**.

8. Settlement talks followed, and DOE and the State reached a Consultation and Cooperation ("C&C") Agreement, which was filed as a consent decree in United States District Court on July 1, 1981 and is still in effect. [**32 RP 000908-001120].** In the accompanying Stipulated Agreement DOE agreed that the C&C Agreement is "binding and enforceable":

> This consultation and cooperation agreement shall be a binding and enforceable agreement between the Department of Energy and the State of New Mexico . . . .

[32 RP 000918].

9. The Stipulated Agreement [**32 RP 000918-00919]** that DOE and the State signed and accompanies the C&C Agreement extended the right to review and comment on the project to the State and its citizens and established a process for submission of data by DOE, review by the State and citizens, comment by the State and citizens, consideration of comments and response by DOE, and resolution of their comments *in advance* of key events.

10. The Stipulated Agreement describes in ¶ 2 the process leading up to the decision to construct the "full WIPP:"

> The United States Department of Energy shall prepare and provide to the State of New Mexico and the public a formal, public document containing a summation of the results of all experiments and studies conducted during the SPDV phase and site validation phase of the WIPP project at least sixty (60) days prior to any decision as to whether the information obtained from the SPDV program and site and design validation tests warrants the commencement of construction of the permanent facility for the **full WIPP** repository which decision is now estimated to be no earlier than September of 1983. Within such period the State of New Mexico and interested members of the public shall have an opportunity to comment on that document as it relates to the decision to commence construction of the permanent facility for the **full WIPP** project. After receiving, reviewing, considering and responding to any comments made by the State and interested members of the public, the Department of Energy shall enter a final decision on whether the information obtained from the SPDV program and site and design validation tests warrants the commencement of permanent facility construction for the WIPP project.

(*emphasis supplied*). Subsequent paragraphs call for interim and final reports to be provided to the public and a similar comment and response process. [**32 RP 000919-00920, ¶¶** 3, 4, 5]. Under the C&C Agreement, the State may disseminate data furnished by DOE and "may elicit comments and concerns from the public thereon for communication to the DOE." **[32 RP 00947, ¶** 3].

11. The Working Agreement is part of the C&C Agreement. In that agreement (Rev. 1) (April 8, 1983), DOE agreed to issue the Site Validation Summary Report at least 60 days before a decision to construct "the **full WIPP** repository," and to "review, consider and respond to any State or

public comments before entering a final decision to construct the WIPP repository." **[32 RP 00988, IV.F.6(e)(2))** (*emphasis supplied)***]**.

12. The Working Agreement details the information to be published, and therefore subject to comment and response, before a "decision to construct the **full WIPP** Repository":

> Site Validation Summary Report containing a summation of the results of all experiments and studies conducted during the SPDV phase and site validation phase at least sixty (60) days prior to the issuance of the Final Validation Declaration, i.e., the "Decision to Construct the **full WIPP** Repository."
>
> (1) State and public shall have sixty (60) days in which to comment on the document.
> (2) DOE shall review, consider and respond to any State or public comments before entering a final decision to construct the WIPP repository.

[32 RP 00988 (*emphasis supplied)***]**.

13. The Working Agreement requires DOE to publish the WIPP Safety Analysis Report ("SAR"). The SAR "constitutes the most comprehensive document concerning WIPP both in general and specifically as related to public health and safety as well as other matters." **[32 RP 00967]**. The SAR repeatedly describes and depicts the design of the WIPP repository comprising four shafts and eight underground panels. SRIC Ex. 4, which is part of the SAR, is a plan showing the original design of WIPP, as presented by DOE, incorporating four shafts and eight panels, plus possible

Panels 9 and 10 formed from access drifts within the footprint. **[142 RP 002485].**

14. Dr. James Channell was a member of the Environmental Evaluation Group, a State scientific group chartered to give an independent assessment of WIPP, starting in 1979. **[3 May 20, 2021 Tr. 79 ll. 12-18]**. Dr. Channell testified that "a limited scope for the WIPP project was a primary concern by New Mexico in order to prevent WIPP becoming the dumping ground for high-level waste and commercial spent fuel." **[3 May 20, 2021 . Tr. 80 ll. 4-7]**. Further, "The State of New Mexico engaged in a good faith effort with DOE to allow the original WIPP project to proceed. If they had not, it would never have proceeded." **[3 May 20, 2021 Tr. 81 ll. 19-21]**.

15. Dr. Channell made clear that the C&C Agreement limited the permissible scope of the WIPP project:

> And there was a concern about limiting the project and including the underground footprint. This fifth shaft increases the underground footprint of WIPP. Regardless of what comes after that, it increases the original footprint of WIPP. And a permit from the Environment Department does not qualify as a modification of the C&C agreement.

[3 May 20, 2021 Tr. 81 l. 22—82 l. 2].

16. The original agreed-upon design, with four shafts and eight disposal panels, was the basis for the Environmental Protection Agency's ("EPA") review of DOE's application for certification under the 1992 WIPP Land

Withdrawal Act, Pub. L. No. 102-579 (1992) ("LWA"). It was also the basis for NMED's issuance of a permit under the HWA. WIPP has been built and operated since 1999 in accordance with the original design.

17. Now, in 2022, the eight panels will soon be filled. The Permittees' testimony stated that Panel 8 is estimated to be filled by August 2025. **[4 5/20/2021 Tr. 171 ll. 13-14]**.

18. DOE, in private, has developed expansion plans to enlarge WIPP beyond the limits of the original agreed-upon design. The existence of DOE's expansion plans is disclosed in publications issued the National Academy of Sciences ("NAS") [**29 RP 000619- 000843]** and the Government Accountability Office ("GAO") **[30 RP 000844-000907]**, which are public documents and are in the record of this case, and DOE documents.[3]

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[3] 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) **[28 RP 000576-000618, (at 000606 (S-31))]**; Supplement Analysis for WIPP Site-Wide Operations, DOE/EIS-0026-SA-12 (April 8, 2021) ("DOE needs

19. The full extent of the planned expansion is not disclosed in these documents. DOE does not wish to disclose its expansion plans, possibly because the expansion conflicts with DOE's written agreement to the original design, with four shafts and eight panels, as the "full WIPP."

20. WIPP operates by mining underground disposal space, filling it with waste, and then closing the space that has been filled. DOE's main expert witness, Bob Kehrman, stated that the permit modification request here assumes continued operation of the facility:

> Like I said, we prepared this permit modification to describe the ventilation system for the underground. Inherent in that is the assumption that operations will continue.

[1 May 17, 2021 Tr. 99 l. 12-16]. And continued operation means that the facility *must expand*:

> Q. Yeah. Now, WIPP as a facility operates by mining disposal space and putting waste into it, true?
> A. Yes, sir.
> Q. And if WIPP is to continue operating, it must continue mining disposal space, true?
> A. Yes. Yes, sir.

[1May 17, 2021 Tr. 89 ll. 17-22].

21. Waste disposal operations in the existing repository are expected to end in 2024. (Permit at G-6). When the eight disposal panels are filled or

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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). **[142 RP 002460-2463]**.

closed, WIPP, as originally designed, can receive no more waste[4]. At that point, to continue waste disposal, WIPP must expand, *i.e.*, excavate more disposal panels.

22. The permit modification request in issue here proposes to construct a fifth shaft, which would not be operational until 2025 at the earliest. **[159 RP 002891; 3 May 19, 2021 Tr. 162 ll. 12-17].** Such a shaft would have no role in waste disposal pursuant to the original repository design, which is expected to be filled by 2024.

23. The new shaft and associated drifts would cost $197,000,000. **[1 May 17, 2021 Tr. 86 ll. 23-25)].** Consistently with such a significant expenditure, DOE plans to expand the underground repository. DOE's publications disclose that DOE plans to dispose of waste at WIPP for decades beyond 2024. Some documents refer to disposal operations extending to the 2050's. Some refer to plans to dispose of waste into the 2080's. (See note 3, *supra*) Such plans necessarily include thousands of shipments of radioactive waste across New Mexico highways and use of WIPP's mining, maintenance and disposal infrastructure for many decades beyond 2024.

[4] Additional waste might be emplaced in the access drifts, but such is not now planned or authorized since it would block those drifts.

24. In this proceeding, the NMED Hazardous Waste Bureau ("HWB"), siding with DOE, moved before the hearing to exclude any evidence of expansion of WIPP from the public process. The Hearing Officer ruled *in limine* on April 26, 2021, 21 days before the hearing, that such evidence would be excluded.[5] **[RP 59 001444-49]**. Counsel for the other parties, such as SRIC, were directed not to ask questions about WIPP's future expansion. Citizen witnesses were directed not to testify or ask questions about WIPP's future expansion.

25. The Hearing Officer elaborated at the hearing:

> I don't know if you know the subject matter of tonight's hearing, but this is regarding a permanent [*sic*; permit?] modification request made by the Department of Energy and the WIPP operator to add a fifth ventilation shaft and associated drifts. We're not here to talk about any future expansion of the WIPP facility. When you make a public comment, please make sure that it's relevant to that issue. **[1 May 17, 2021 Tr. 132 ll. 18-24]**.
>
> Ms. Weehler, before you begin, I hope that you heard what I said before about relevancy. **[1 May 17, 2021 Tr. 134 ll. 12-13].**

26. The Hearing Officer professed that he had excluded evidence about the expansion of WIPP because the Permittees and the HWB *stated* that the purpose of the new shaft and drifts was only ventilation:

[5] The order says that evidence about the "need" for the PMR may be admitted, but at the hearing the Hearing Officer made clear that no evidence about future expansion would be admitted for any purpose. **[1 May 17, 2021 Tr. 132 ll. 18-24]**.

> HEARING OFFICER: But Mr. Lovejoy, the reason that I put future expansion out of bounds for this hearing was because the DOE, the WIPP operators and the New Mexico Environment Department have all—have all presented evidence that Shaft No. 5 and the associated drifts are needed to restore the air circulation that they had before the 2014 incident. Now, I'm not saying, sir, that it is not possible that the Shaft no. 5 could someday also facilitate future expansion. I'm not saying that at all. I don't know that. But it is not on the table because they have not come to the New Mexico Environment Department and said we have—we want a draft permit change, a modification for this expansion of the panels or whatever it is that they would say. And that's why that's not on the table for tonight's hearing.

[3 May 19, 2021 Tr. 177 l. 19 – 178 l. 8]. Thus, based on Permittees' unilateral assertion, the Hearing Officer ruled that the purpose of the shaft and drifts was only ventilation. But WIPP does not exist solely to ventilate itself. Without physical expansion of disposal space, there is nothing to ventilate. And if ventilation capacity is added, at a cost of hundreds of millions, it clearly is meant to be used to ventilate new disposal space.

27. The Hearing Officer also explained his exclusion of evidence of expansion by the fact that only certain permit language was proposed to be modified, reasoning that only such language may be discussed in the hearing. **[239 RP 004973, 005003 (FF 119), 005010 (FF 147), 005017 (CL 33)]**. But in a PMR proceeding, the remaining provisions of the Permit remain in effect and clearly may be considered in connection with a proposed modification. 20.4.1.901.B(7) NMAC.

28. However, the Hearing Officer was emphatic: "My order precludes discussion of future expansion." **[4 May 20, 2021 Tr. 122 ll. 5-6]**. He cautioned counsel:

> HEARING OFFICER: Mr. Lovejoy, there's been an objection based on asked and answered, and I'm going to sustain the objection, and I'm also going to caution you that you have been skirting very close, very close to the line that I established in my order in limine that said future expansion is not on the table for discussion during this hearing, that we're here for the Permit Modification Request.

[3 May 19, 2021 Tr. 95 ll. 11-19]. When Mr. Hancock of SRIC testified that the actual "need" for the proposed shaft and drifts was to expand the disposal facility, the Hearing Officer cut him off:

> HEARING OFFICER: Mr. Hancock and Mr. Lovejoy, I know you understand my order in response to the motion in limine, so I'm asking you not to go into this subject. If you do, we'll have to strike it from the record. And we'll have to end your case-in-chief prematurely. So please, avoid this subject. Thank you.

[3 May 19, 2021 Tr. 151 ll. 7-12]. He continued:

> However, if you're talking about future expansion, you are in violation of that order because what I said was future expansion is future expansion and when and if that comes in a draft permit, then we will go through the same process like we are tonight about that future expansion.

[3 May 19, 2021 Tr. 152, ll. 18-22].

29. The Hearing Officer refused to admit recent documents published by DOE and referring to the addition of disposal panels. **[3 May 19, 2021 Tr. 167 ll. 9-22; 142 RP 002487]**. A document issued by GAO showing

planned WIPP expansion, based upon DOE information, was also refused. **[3 May 19, 2021 Tr. 167 l. 24 – 168 l. 16; 142 RP 002488]**. The Hearing Officer dismissed these and other documents from several federal agencies, without explanation. **[239 RP 004984 (FF 48)].**

30. Several non-technical witnesses objected to the physical expansion of WIPP, the new and more dangerous waste forms to be disposed of in WIPP's expansion, the extended operating period, and the decades-longer risk to their communities. **[1 May 17, 2021 Tr. 135 ll. 18-19; *Id.* 138 ll. 20-25; 139 ll. 17-24, 140, ll. 4-11; 2 May 18, 2021 Tr. 7 l. 20-8 l. 7; *Id.* 10 l. 1- 11 l. 15; 3 May 19, 2021 Tr. 132 ll. 4-10, 133, ll. 8-13; *Id.* 136, l. 19-137 l. 18]**. Other witnesses expressed consternation that DOE, having committed to a repository with eight panels and operations ending in 2024, reneged on its commitments, and they questioned whether DOE would fulfill its current-day promises about the management of hazardous and radioactive waste at WIPP. **[3 May 19, 2021 Tr. 134 ll. 12-23, 135 ll. 7-18]**. The Hearing Officer made no findings concerning community impacts or the credibility of DOE's promises and flatly ruled this testimony out of order. **[239 RP 005003 (FF 119); 005007 (FF 147); 005017 (CL 33); 005020 (CL 48)]**.

31. SRIC offered evidence of the Permittees' plans to expand the repository **[142 RP 002459-002462]** and stated what is obvious: that the construction of a $197,000,000 shaft and drifts project would commit the Permittees to continue with physical expansion of disposal capacity. **[142 RP 002462]**:

> To propose a $197,000,000 improvement, to be followed immediately by the shutdown of the facility, clearly makes no sense and fails to disclose the true purpose. The forthcoming expansion requires operations for decades beyond what has been agreed to in the social contract and stated in the WIPP Permit. The reason for the expansion and much longer lifetime is clearly to dispose of much waste that was never part of the WIPP mission and is a much greater volume than allowed by the legal and permitted limits, as the 2020 National Academy of Sciences (NAS) Report found. Exhibit B, Motion to Dismiss, Mar. 10, 2021. None of this essential information is disclosed in the PMR or draft permit.

32. Nevertheless, the Hearing Officer refused to admit evidence about the planned expansion. There is no discussion in the Hearing Officer's Report of testimony about the planned WIPP expansion, and the consequent effects of 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.

a. Denial of a public hearing.

33. To make no findings about such impacts, when numerous witnesses had voiced their concerns about future expansion and the integrity of

DOE's commitments **[239 RP 005003 (FF 119)]**, denies the hearing that the New Mexico Supreme Court has required: "It appears that the Secretary ignored an entire line of evidence in reaching his decision on the final order." In re *Rhino Environmental Services*, 2005-NMSC-024, ¶ 41, 138 N.M. 133, 143, 117 P.3d 939, 949.

34. The New Mexico Supreme Court has held that public hearings on environmental permitting should address the applicant's entire plan and its impacts upon affected communities and that NMED must consider the testimony and report upon the impacts of the project. In *Rhino*, the Supreme Court ruled that evidence of the cumulative impact in the future of a proposed waste disposal facility, along with other facilities, upon a community must be admitted and considered. (¶ 24). The Supreme Court held that the NMED Secretary abused his discretion by refusing to hear testimony about the cumulative impact of the proposed disposal facility:

> As a result, we hold that the Secretary abused his discretion by limiting the scope of testimony during the public hearing and interpreting the Department's role as confined to technical oversight.

Rhino ¶ 27. *Rhino* specifically holds that evidence about the future impacts of a proposed project must be admitted and given consideration:

> Contrary to the Department's position, the impact on the community from a specific environmental act, the proliferation of landfills, appears highly relevant to the permit process.

Rhino ¶ 30. The Court emphasized that such testimony falls well within the scope of environmental concerns:

> The adverse impact of the proliferation of landfills on a community's quality of life is well within the boundaries of environmental protection.

Rhino ¶ 31. Similarly, the permitting process for WIPP is mandated by regulation to incorporate human health and environmental concerns:

> A miscellaneous unit must be located, designed, constructed, operated, maintained, and closed in a manner that will ensure protection of human health and the environment.

40 C.F.R. § 264.601.

35. The testimony, both technical and lay, about the impacts of construction of the shaft and drifts and the projected future expansion, should have been not only admitted but also reported by the Hearing Officer and acted upon by NMED. *See Southwest Org. Project v. Albuquerque-Bernalillo County Air Quality Control Board,* 2021-NMAC-005, ¶ 23, 482 P.3d 1273, 2020 N.M. App. LEXIS 44 (explaining that in *Rhino* NMED was required to consider "evidence and testimony impacting quality of life," citing regulations requiring a permit to protect public health, welfare, and the environment).

36. Moreover, the hearing rules call for liberal admission of evidence:

> A. The New Mexico Rules of Civil Procedure, SCRA 1986, 1-001 to 1-102 and the New Mexico Rules of Evidence, SCRA 1986, 11-101 to

> 11-1102 shall not apply to proceedings under this Part. At the discretion of the Hearing Officer, the rules may be used for guidance and shall not be construed to limit, extend, or otherwise modify the authority and jurisdiction of the Secretary under any Act.
>
> B. Liberal Construction: This Part shall be liberally construed to carry out its purpose and the purposes of the statute or statutes and regulations pursuant to which the proceeding at issue is conducted. This part shall also be liberally construed to facilitate participation by members of the public, including those who are not represented by counsel.

N.M. Code R. § 20.1.4.100. Further:

> (1) General: Except as otherwise provided in this subsection, the Hearing Officer shall admit all relevant evidence that is not unduly prejudicial or repetitious, or otherwise unreliable or of little probative value.

N.M. Code R. § 20.1.4.400. And again:

> 5) No ruling shall be made on permit issuance or denial without an opportunity for a public hearing, at which all interested persons shall be given a reasonable chance to submit significant data, views or arguments orally or in writing and to examine witnesses testifying at the public hearing.

N.M. Code R. § 20.4.1.901.

37. The Updated Fact Sheet, dated March 18, 2021, about the hearing stated that it was "to improve the public's understanding and participation in this Permit action." **[AR 210316 at 1]**[6]. There was no suggestion that comments and testimony about the expansion of WIPP were prohibited. On the contrary, the document stated: "A primary concern raised by

[6] See note 1, *supra*.

commenters was the proposed new shaft's relation to expansion of the Facility footprint." at 4. It also stated:

> Further, the public hearing will provide interested persons a reasonable opportunity to present data, views, and arguments, as well as to examine witnesses. The hearing will also afford an opportunity for all persons to present comments.

at 5.

38. The Public Hearing Notice (March 18, 2021) also contained no suggestion that comments and testimony about the expansion of WIPP were prohibited:

> Through this Hearing Public Notice, NMED announces a public hearing to accept additional public comment on the draft Permit and provide persons a reasonable opportunity to present testimony, as well as to examine witnesses on the draft Permit prior to issuance of a final decision. at 2.
>
> The public hearing will provide interested persons a reasonable opportunity to present data, views, and arguments, as well as to examine witnesses. The hearing will also afford an opportunity for all persons to present comments. at 3.
>
> At the public hearing, the Department will accept technical testimony and non-technical oral comments. The Hearing Officer may set reasonable limits on the time allowed for technical testimony and oral comments. Technical testimony and oral comments on the draft Permit shall be accepted at the public hearing, in accordance with the Department regulations as set forth below. at 4.
>
> Pursuant to the February 12, 2021 Scheduling Order, the Hearing Officer will accept non-technical public comment at various and convenient times throughout the hearing. at 5.

39. This Court has vacated agency rulings where the notice of a hearing invited public comment, but no such hearing was held. The Court held that "In our view, this notice plainly fails to inform the public that the Board might well resolve the appeal by use of summary procedures prior to the November 5, 2014 public hearing." *Freed v. City of Albuquerque*, 2017-NMCA-011, ¶ 15, 388 P.3d 287, 2016 N.M. App. LEXIS 84. The Court held that the published notice—

> affirmatively misleads the reader by suggesting that the public would be given an opportunity to comment on the petition at the November 5, 2014 hearing, when in fact the hearing was never held. To say the least, misinformation does not comport with the publicly inclusive spirit of the applicable statutory framework.

Freed, ¶ 17, 388 P.3d 287, 292-93. Here, the public was told that a hearing would be held starting May 17, 2021, but when the hearing took place, the key issue of expansion had been excluded from consideration in an agreement between NMED, the Permittees, and the Hearing Officer: There would be no discussion of expanding the facility, even though that is plainly the purpose of the permit modification. The public and the parties were denied a hearing. The Final Order should be vacated.

b. Failure to disclose the need for the proposed modification.

40. In addition, Permittees' PMR is deficient under the regulation that requires the PMR to "Explain[] why the modification is needed." 40 C.F.R.

§ 270.42©(1)(iii). The new shaft would not be available for use until 2025. **[159 RP 002891; 3 May 19, 2021 Tr. 92 ll. 10-14; Tr. 162 ll. 12-17]**. Currently, WIPP is scheduled to be fully excavated in accordance with its original design by early 2022 **[1 May 17, 2021 Tr. 89 ll.14-16; 157 RP 002888- 002889]** and filled by August 2025. **[4 May 20, 2021 Tr. 171 ll. 13-14]**. The permit states that the disposal phase is expected to end in 2024. (Permit at G-6). A shaft and drifts that will not be completed before 2025 will serve no "need" if the repository ceases operation in 2024 or if Panel 8 is filled by August 2025.

41. Previously, in applying the regulatory language—"Explain[] why the modification is needed"—this Court has relied upon a showing of how the proposed changes will function in *future* operations at WIPP. *Southwest Research & Information Center v. Environment Department*, 2014-NMCA-098, ¶¶ 24-26, 336 P.3d 404.

42. Permittees have declined to disclose how the new shaft and drifts would be needed for WIPP's future operations. And the Hearing Officer made no findings of such facts. To the contrary, he stated that "future uses outside of ventilation are not part of this PMR" **[239 RP 004982 (FF 40)]**, disregarding 40 C.F.R. §270.42(c)(1)(iii) and the applicable precedent.

43. The proposed $197,000,000 shaft and drifts are clearly not "needed" to ventilate WIPP or dispose of waste in WIPP, as built following the original design, because that facility will conclude disposal operations before the new shaft and drifts are completed. The only purpose that the new shaft could serve is expansion by the addition of new disposal units. This purpose is not disclosed in the PMR, contrary to 40 C.F.R. § 270.42(c)(1)(iii).

44. The Hearing Officer stated that the PMR is "needed" for ventilation, stating that "it is needed to upgrade the ventilation shaft because of the 2014 event, bringing the system back to full scale operations." **[2 May 18, 2021 Tr. 25 ll. 22-24]**. Factually, this is incorrect. (See note 8, *infra*). Moreover, he required the parties to address the "need" for ventilation without speaking about what facility would need to be ventilated—which is impossible.

45. On the issue of "need," Permittees' expert, Mr. Kehrman, was not willing to state that the new shaft and drifts are necessary to WIPP, if the disposal phase ends in 2024. **[1 May 17, 2021 Tr. 103 ll. 6-10)]**. He would only say that the new shaft and drifts would be necessary if disposal operations continue past 2024—*i.e.*, assuming WIPP expanded. **[1 May 17, 2021 Tr. 96 l. 19—97 l. 3]**.

46. But the Hearing Officer ruled that discussion (including opposition testimony and cross-examination) of future expansion is "out of bounds." Under that limitation, Mr. Kehrman's expert testimony was "predicated on factual assumptions unsupported by the record" and cannot be considered. *State v. Downey*, 2008-NMSC-061, ¶ 1, 145 N.M. 232, 195 P.3d 1244. Since Mr. Kehrman's testimony was offered to show that the PMR was "needed," 40 C.F.R. § 270.42(c)(1)(iii), the Permittees have failed to satisfy their burden of proof.

47. However, the Hearing Officer found that DOE is in compliance with 40 C.F.R. § 270.42(c)(1)(iii) if DOE merely discloses how the *permit* needs to be changed to describe the new shaft and drifts—not why the *facility* needs to be modified by constructing the shaft and drifts. **[239 RP 004984 (FF 48), 005986 (FF 56)]**. Such ruling relieves DOE of any duty to explain the costly and extensive changes to the facility and reduces the permit modification process to an exercise in expository description. Such cannot be, and is not, the purpose of this proceeding.

48. The Hearing Officer's interpretation 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 HWB, which holds that DOE must "show that the

modification is needed by the facility." **[3 May 19, 2021 Tr. 85 ll. 16-19)].** No explanation is offered for the rejection of EPA's and HWB's interpretation. Their interpretation is the correct one, and under that standard DOE has not shown why the modification is needed and, again, has not met its burden of proof.

c. Violations of the C&C Agreement.

49. Further, SRIC and Weehler have been prevented from invoking the limitations on the WIPP facility that are stated in the C&C Agreement. The C&C Agreement is enforceable by SRIC, which has participated in the WIPP authorization process, including submitting comments on DOE's plans, since the process began more than 40 years ago **[42 RP 002454]**, for violation of DOE's commitment that the "full WIPP" project comprises the original design of four shafts and eight panels and that the public would have an opportunity to comment and receive responses in advance of "key events" in the process of constructing the WIPP project.

50. A contract with a federal agency supports a third-party beneficiary claim in accordance with the federal common law that governs contracts with the United States. The essential element is the intent to benefit the third party. *Roedler v. DOE*, 255 F.3d 1347, 1351-52 (Fed. Cir. 2001). Here, the parties to the C&C Agreement intended to give citizens the right to submit

comments on key events in the WIPP project leading up to the "full WIPP" and to entitle commenters to consideration of and responses to their comments *before* DOE carries out each key event in that process. Moreover, the beneficiaries are entitled to rely on DOE's agreement that the processes of review and consultation culminated in the decision to construct the original design, which constitutes the "full WIPP."

51. An intended third-party beneficiary will be found when it is appropriate to recognize a right to performance in the third party and the circumstances indicate that the promisee intends to give the third party the benefit of the promised performance. *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566, 573 (2d Cir. 1991). *See also: J.G.B. Enters. v. United States*, 497 F.3d 1259, 1260 (Fed. Cir. 2007); *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1259-60 (Fed. Cir. 2005); *Chevron U.S.A., Inc. v. United States*, 110 Fed. Cl. 747, 782-83 (Ct. Fed. Cl. 2013).

52. A third-party beneficiary is one who reasonably relied upon a promise to benefit him in the contract in issue. See Restatement (Second) of Contracts § 302(1)(b) cmt. D; *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997). Thus, for example, a labor union may make an agreement with an employer concerning worker benefits; all union members employed then or later are third-party beneficiaries. Restatement (Second)

of Contracts § 302, illustration 14. The agreement need not identify each beneficiary by name; it is enough that the class or category of persons intended to benefit from the contract be indicated. *Tradesmen Int'l v. U.S. Postal Service*, 234 F.Supp.2d 1191, 1202 (D. Kan. 2002). *See also: Owens v. Haas*, 601 F.2d 1242, 1250 (2d Cir. 1979); *U.S. v. Spencer*, 2011 U.S. Dist. LEXIS 16172 at *14-15 (D. Okla. 2011); *United States v. El-Sadig*, 133 F. Supp. 2d 600, 608-09 (N.D. Ohio 2001).

53. At another DOE site in Hanford, Washington, the Department of Justice ruled that a cleanup agreement among DOE, EPA, and the Washington State Department of Ecology is "binding and enforceable . . . by the State of Washington and any affected citizens." Letter, D.A. Carr to C. Gregoire, Feb. 26, 1989, *quoted in United States v. Manning*, 434 F.Supp.2d 988, 1020-21 (E.D. Wash. 2006).

54. Third-party beneficiary status is appropriate where, if not deemed a third-party beneficiary, a person who is meant to benefit from a contract would have no remedy: "The court will not lightly presume that the parties intended, with one hand, to create" a right to consultation and cooperation about the WIPP project and, "with the other hand, take away any remedy" and thus "make a mockery of the whole program." *Ungott v. Watt*, N82-

004 Civ., slip op.at 7 n.3 (D. Alaska 1984), *cited in Dewakuku v. Cuomo*, 107 F.Supp.2d 1117, 1134 (D. Ariz. 2000).

55. SRIC and Weehler are entitled to an order directing that, since the C&C Agreement and the Working Agreement and consultation processes under them have concluded that the original design constitutes the "full WIPP," the PMR that seeks permission to expand WIPP beyond that design shall be denied.

d. Violation of Appropriations Clause.

56. The Constitution prohibits federal appropriations from being applied for purposes outside the limits of the Authorization Act, Pub. L. No. 96-164, § 213:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law

U.S. Const. Art. I, § 9, Cl. 7.

57. SRIC, on behalf of its individual supporters, and Weehler are clearly adversely affected by the expansion of WIPP. The impacts are direct; they are caused by the expansion being pursued by DOE, and relief from the expansion is available in this Court. (See Exhibit 1 - Weehler Affidavit and Exhibit 2 - Sanchez Affidavit). Thus, SRIC and Weehler have standing.

58. The Appropriations Clause, U.S. Const. Art. 1, § 9, cl. 7, "'constitutes a separation-of-powers limitation that [litigants] can invoke to challenge'

actions that cause justiciable injuries." *Sierra Club v. Trump*, 977 F.3d 853, 878 (9th Cir. 2020). SRIC and Weehler are "protected by the operations of separation of powers and checks and balances; and . . . not disabled from relying on those principles in otherwise justiciable cases and controversies." *Bond v. United States*, 564 U.S. 211, 223 (2011).

59. The recent litigation about the proposed wall at the border with Mexico sustains the private right to enforce the limits upon use of funds for the WIPP project. In *California v. Trump,* 963 F.3d 926 (9th Cir. 2020), private plaintiffs contended that they were injured by the application of federal funds pursuant to the Defense Appropriations Act, Pub. L. No. 115-245 (2018), which requires that funds be applied to meet "unforeseen military requirements." (*Id*. § 8005). The Ninth Circuit Court of Appeals determined that, in previous uses of the statutory authority, the Defense Department had required that funds be used for *unexpected* emergencies. The court relied upon the department's previous practice in enforcing the statutory limitation. Succinctly put:

> Prior use of this authority confirms this meaning.

California v. Trump, 963 F.3d at 944.

60. The same principle applies here. In the Authorization Act, Congress authorized construction of a limited facility, the specific plans for which

would be completed in consultation between DOE and the State. To support the consultation, Congress directed DOE to make the C&C Agreement. In the mandated consultations with the State and citizens pursuant to the C&C Agreement, DOE committed to the original design as the "full WIPP," which design is shown in the SAR **[142 RP 002485]** as comprising eight panels and four shafts. "Prior use of this authority confirms this meaning." *California v. Trump,* 963 F.3d at 944. That is the limit of the authorization, and DOE may not exceed it.

61. Further, in *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. June 26, 2020), the Ninth Circuit upheld the right of affected individuals (such as SRICs supporters and Weehler) to relief from a violation of the Appropriations Clause, the constitutional prohibition of funding of unauthorized projects. First, following *Bond v. United States*, 564 U.S. 211 (2011), the court held that the Appropriations Clause gives rise to a cause of action in an individual, who "may challenge government action that violates structural constitutional provisions intended to protect individual liberties." *Sierra Club*, 963 F.3d at 888, relying on *McIntosh v. United States*, 833 F.3d 1163, 1173-74 (9th Cir. 2016). The court stated (963 F.3d at 889) that *McIntosh* relies upon *Bond*, which ruled that "both federalism and separation-of-powers constraints in the Constitution serve to protect

individual liberty, and a litigant in a proper case can invoke such constraints '[w]hen government acts in excess of its lawful powers,'" *id*. 1174, quoting *Bond*, 564 U.S. at 222. Thus, "it is for the courts to enforce Congress's priorities, and we do so here." 963 F.3d at 889.

62. The State of New Mexico agrees that there is a cause of action to restrain a federal agency that exceeds the scope of an authorization act. The State told the Ninth Circuit that its constitutional claims concern express constitutional restrictions on the executive branch's power:

> One of those claims is based on the Appropriations Clause, which directs that "[n]o money shall be drawn from the Treasury, but in consequence of appropriations made by law." U.S. Const. art. 1, §9. Cl. 7. This explicit prohibition "acts as a separate limit on the President's power," and therefore, provides a distinct cause of action. *In re Aiken Cty.*, 725 F.3d 255, 262 n. 3 (D.C. in ¶ 22013) (Kavanaugh, J. alternative holding).

Principal and Response Brief of the States of California and New Mexico in No. 19-16299 (9th Cir.), at 39 (Aug. 15, 2019) ("Brief of Calif. and N.M").

63. *Sierra Club* also upheld a private equitable *ultra vires* cause of action to challenge the federal agency's use of funds in violation of the applicable authorization act. 963 F.3d at 890-93. This is a "judge-made remedy for injuries stemming from unauthorized government conduct, [resting] on the historic availability of equitable review," *id*. 891, *citing Armstrong v.*

Exceptional Child Ctr., Inc., 575 U.S. 320 (2015), and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

64. The State of New Mexico agrees:

> This Court has recognized an equitable ultra vires cause of action, challenging executive acts in excess of statutory authority, including in the context of the Appropriations Clause. Stay Op. 45-49 (citing, inter alia, *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S.Ct. 1378, 1384 (2015); *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016)).

Brief of Calif. and N.M. at 26.

65. The Ninth Circuit so ruled in *Sierra Club v. Trump*, 977 F.3d 853 (9th Cir. Oct. 9, 2020), which adjudicated challenges to use of federal funds in violation of the National Emergencies Act, 50 U.S.C. §1601 *et seq.* The court held that private parties may challenge agency action taken in violation of an authorization act. 977 F.3d at 878-79.

66. The Supreme Court granted certiorari in both Ninth Circuit cases. (141 S.Ct. 618 (Oct. 19, 2020); 142 S.Ct. 56 (Oct. 4, 2021). After the change in federal administration, the federal government moved to vacate the judgment, and the Court did so in light of "changed circumstances." 142 S.Ct. 46 (July 2, 2021); 142 S.Ct. 56 (Oct. 4, 2021).[7]

[7] After the district court entered a permanent injunction and certified the issue for appeal to the Ninth Circuit, the federal government sought a stay from the Ninth Circuit, which was denied. *Sierra Club v. Trump*, 929 F.3d 670 (9th Cir. 2019). The federal government then applied to the Supreme Court, which

67. There can be no claim that the limitations in the Authorization Act, made more specific by the C&C Agreement, fail to limit DOE's power to build and enlarge the WIPP project:

> Simply put, '[w]here Congress has addressed the subject as it has here, and authorized expenditures where a condition is met, the clear implication is that, where the condition is not met, the expenditure is not authorized.' *United States v. MacCollom*, 426 U.S. 317, 321 (1976).

Brief of Calif. and N.M. at 23.

68. The Ninth Circuit rejected arguments to limit judicial review of spending in violation of an authorization statute:

> Therefore, the President's emergency authority is conferred only by statute. Were we to conclude that judicial review of such a statute was precluded, the President's emergency authority would be

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granted a stay by memorandum order, supported by five justices with four dissenting. The order, *Trump v. Sierra Club*, 140 S.Ct. 1 (July 26, 2019), stated that the Government had shown that the plaintiffs had no cause of action to seek review of the action by the Acting Secretary of Defense. The State of New Mexico has asserted that the language of the stay "was made at a preliminary stage in the context of a stay application, and thus is not binding on this Court. Brief of Calif. and N.M. at 26. The Ninth Circuit, in *Trump v. Sierra Club*, 963 F.3d 874 (9th Cir. June 26, 2020), responded in detail to the assertion of failure to state a claim:

> The Supreme Court stay order suggests that Sierra Club may not be a proper challenger here. *See Sierra Club*, 140 S. Ct. at 1. We heed the words of the Court, and carefully analyze Sierra Club's arguments. Having done so, we conclude that Sierra Club has both a constitutional and an *ultra vires* cause of action.

Sierra Club v. Trump, 963 F.3d 874, 887 (9th Cir. 2020). The court of appeals proceeded to explain in detail the bases for the private cause of action. See ¶¶ V. A and B.

> effectively unbounded, contravening the purpose of the [authorization statute].

Sierra Club v. Trump, 977 F.3d at 882. That court rejected the federal defendants' construction, under which the limits would have no force:

> This means that, if we were to adopt their interpretation of "other activity," and, as the district court explained, "provided [they] complete the right paperwork," the Federal Defendants would be free to divert billions of dollars from projects funded by congressional appropriations to projects of their own choosing. As demonstrated by this case, this would allow the Federal Defendants to redirect funds at will without regard for the normal appropriations process. Ordinarily, we reject interpretations with "unnecessarily expansive result[s], absent more explicit guidance or indication from Congress," and instead, adopt more "rational" or "natural" readings. Ariz. State Bd. for Charter Sch. v. U.S. Dep't of Educ., 464 F.3d 1003, 1008-09 (9th Cir. 2006). For this reason, where there is no guidance or indication from Congress that such an expansive interpretation is favored, and particularly where doing so would produce a result contrary to the express will of Congress, it is untenable for us to adopt such an interpretation.

Id. 887.

69. Here, the Hearing Officer ignored the "binding and enforceable" C&C Agreement **[32 RP 000918],** saying opaquely that NMED is "not the appropriate forum" **[239 RP 004969—005021-22 (CL 52)]**, and refusing to enforce the limits on WIPP's design and construction. Contrary to the Hearing Officer's statement, the Supreme Court has clearly held that "[t]he individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines." *Bond v. United*

States, 564 U.S. 211, 220 (2011). Such limitations may be asserted in any tribunal of jurisdiction. *Bond*, 564 U.S. at 223.

70. The State of New Mexico has urged this point:

> *McIntosh* followed the Supreme Court's decision in *Bond v. United States*, 564 U.S. 211 (2011) where the Court said that 'if the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object. *McIntosh*, 833 F.3d at 1174 (quoting *Bond*, 564 U.S. at 223).

Brief of Calif. and N.M. at 48.

71. SRIC and Weehler here assert injury from the violation of the limits contained in the federal government's spending authorization. This Court may not ignore the use of federal funds in excess of the limits under the Authorization Act and in violation of DOE's commitment that the original design of this limited-purpose facility constitutes the "full WIPP."

e. Refusal to address issues raised in the PMR process.

72. 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):

> Finally, we interpret the standard of review under Section 74-9-30 as embodying the principle of federal administrative law that an agency's action is arbitrary and capricious if it provides no rational

> connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand. *Motor Vehicle Mfrs. 'Ass'n.*, 463 U.S. at 43. To meet this standard, the Secretary may not disregard those facts or issues that prove difficult or inconvenient or refuse to come to grips with the result to which those facts or issues lead, *see Sea Robin Pipeline Co. v. F.E.R.C.*, 127 F.3d 365, 370 (5th Cir. 1997), nor may the Secretary select and discuss only that evidence which favors his ultimate conclusion or fail to consider an entire line of evidence to the contrary, *see Herron v. Shalala*, 19 F.3d 329, 333 (7th Cir. 1994). Allowing the Secretary to ignore material issues raised by the parties in this manner would render their right to be heard illusory. *See Tenneco Gas v. F.E.R.C.*, 297 U.S. App. D.C. 187, 969 F.2d 1187, 1214 (D.C. Cir. 1992).

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.

73. There are other errors; for example, the Hearing Officer misstated the benefits available using the new shaft, which are already provided by the New Filter Building, which has been included in the Permit since 2018. **[142 RP 002459-60; Permit A2-9].** But such calculations, erroneous or not, all *assume* that the new shaft has any operational function at all, which it will *only* have if WIPP expands its disposal areas.[8] They can only be

[8] The Hearing Officer found that the existing ventilation system limits air flow to a small percentage of the flow before the 2014 radioactivity release **[239 RP 004983 (FF 42)]**, and he stated that the new shaft will increase air flow to pre-2014 levels. **[239 RP 004984 (FF 49), 004989 (FF 62]**. He found that the new shaft would "provide[] significantly increased ventilation flow." **[239 RP 004993 (FF 76), 004996 (FF 87]**. But the clear evidence showed that the construction of

evaluated in a proceeding where expansion may be fully considered, which was not allowed in this case.

74. The errors enumerated above must be regarded as material and important to the result reached by NMED.[9] The likelihood of Appellants' success on appeal is high.

B. Irreparable injury without a stay

75. Without a stay of active construction, it is likely that there can be no judicial review. If DOE proceeds with active construction, the injury to SRIC and Weehler will be irreparable. Zappe Affidavit ¶¶ 14-17, 21 (Exhibit 3to Motion).

76. Denial of a stay of active construction would make it nearly impossible for this Court or another 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. **[2 May 18, 2021 2 Tr. 30 l. 21 – 31 l. 4]**. Upon completion of construction the case would become effectively moot. Yet a NMED proceeding similar to this one, involving

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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. **[1 May 17, 2021 Tr. 84 ll. 19-21, 86 ll. 2-12]**.

[9] Appellants attach as Exhibit 4 their comments on Factfindings and Conclusions contained in the Hearing Officer's Report, showing additional errors underlying that Report **[239 RP 004969-005026].**

the "volume of record" PMR, resulted in a final agency order dated December 21, 2018 (No. A-1-CA-37894), and this Court ruled on November 9, 2021—nearly three years after the order appealed. *Nuclear Waste Partnership v. Nuclear Watch New Mexico,* No. A-1-CA-37894 (Nov. 9, 2021). Without a stay of active construction, this appeal is likely to become effectively moot before the case can be decided at the first appellate level. That would clearly be an unjust result.

77. 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 40 C.F.R. § 270.42(e). **[2 May 18, 2021 Tr. 34 ll. 23-35, 201, l. 22 – 207 l. 7; 136 RP 002290-002300].** 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. NMED thus stopped the construction. **[2 May 18, 2021 Tr. 206 ll. 3-17; 136 RP 002298-002300]**

78. DOE clearly plans to excavate the shaft and the associated drifts promptly once it is free to do so, to secure its foot in the door and prevent any court from reversing the permit modification. The affidavit of Steven Zappe, former leader of the NMED WIPP project, attests that continued

construction will render the shaft increasingly impossible to reverse. Zappe Affidavit ¶¶ 14-17, 21 (Exhibit 3 to Motion).

79. The Hearing Officer refused to believe that ongoing construction would affect the decision on the PMR. He demanded evidence of the fact. **[239 RP 005021 (CL 51)]**. Obviously, one may not ask a decisionmaker to disclose unexpressed factors affecting his decision. At the same time, EPA has recognized that on-the-ground construction deters an agency from denying a PMR. (53 Fed. Reg. 37912, at IV.B(2)(ii) (Sept. 28, 1988)).

80. In *Sierra Club v. Trump*, 2019 U.S. Dist. LEXIS 90962 (N.D. Cal. 2019), the federal government asked the court to allow construction of a federal project to proceed, although it had been held unlawful. The court refused, stating that construction would not maintain the status quo but instead moot the issue:

> Moreover, Defendants' request to proceed immediately with the enjoined construction would not preserve the status quo pending resolution of the merits of Plaintiffs' claims, and instead would effectively moot such claims.

at 3-4. In affirming, the Court of Appeals noted:

> At the same time, as the district court noted, allowing Defendants to move forward with spending the funds will allow construction to begin, causing immediate, and likely irreparable, harm to Plaintiffs.

929 F.3d at 688.

81. The affidavits of Cynthia Weehler and Kathleen Sanchez (Exhibits 1 and 2 to Motion) attest that, if the construction of the new shaft goes forward, DOE's $197,000,000 investment and its failure to develop alternative disposal sites will impel DOE to expand 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 (see page 12 and note 3 *supra*), 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 beyond what New Mexico agreed to in 1981.

C. Absence of prejudice to the Permittees

82. At the same time, the site is now safeguarded against deterioration and can be preserved for whatever interval is required to complete appellate review. **[AR 210102]**[10]. 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. **[29 RP 000619- 000843**

[10] See note 1, *supra*.

(Figure 3-1 at 000677)] (Surplus Plutonium Repository shipments scheduled to begin in mid-2024); 191 RP 003363- 003405 (Pit production commencing in 2030 at 003373)].

D. The public interest requires a stay

83. The public interest favors maintaining the status quo to allow appellate review. New Mexico 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. Pub. L. No. 102-579 (1992). The status quo thereby established by DOE, the State, and Congress was, presumably, in the interest of the public. Neither NMED nor this Court should upset those agreements by pushing forward with legally unsupportable modifications, breaking through the agreed limits by main force and preventing judicial review.

Argument

84. The primary duty of the Court, in ruling on a motion for relief pending appeal, is to preserve the status quo insofar as possible without injury to the rights of any of the contesting parties.

85. 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.

86. 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.

87. Here, the “last peaceable uncontested status” is the condition of the WIPP facility before the TA was issued on April 24, 2020. NMED itself has recognized that such condition should be preserved by requiring any construction to be reversible, by its TA approval and subsequent denial of

the TA extension in November 2020. **[136 RP 002290-002300, 2 May 18, 2021 Tr. 34 ll. 23-35, 201, l. 22 – 207 l. 7.]**

88. The burden of proof is on DOE, on this motion to determine the conditions during judicial review, 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.

89. The Supreme Court in *Grisham* cites repeatedly from *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 975 (10th Cir. 2004), and the following passage from that case emphasizes the types of orders that require an especially strong showing of the relevant factors:

> 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).

389 F.3d at 975.

90. Under *Grisham*, the party seeking to alter the status quo 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).

91. 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.

92. Here, maintaining the status quo clearly does not provide SRIC and Weehler with all the relief they could hope for, which is for the Final Order to be invalidated and the initial construction reversed. However, 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. v. Kunkel, 472 F. Supp.3d 926, 1023 (D.N.M. 2020), because completion of the shaft and drifts would be effectively irreversible.

93. Thus, on this motion the burden is on DOE, and the Court 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. No exigencies support an extraordinary order allowing construction to proceed pending review of the lawfulness of that PMR. Only a stay of active construction will allow the PMR to be reviewed for legal compliance. SRIC has shown several strong grounds on which it is likely to succeed on appeal. DOE can show no urgency to proceed to build the shaft. If there is no stay, and DOE proceeds with construction, NMED's erroneous ruling is likely to lapse into mootness before the Court can correct it. The Court should stay the active construction to allow judicial review.

Conclusion

In light of the schedule that DOE plans for construction and the time required for judicial review, a failure to stay active construction will, in all probability, prevent a ruling on appeal before the case becomes effectively moot. That result would deny the parties' right to judicial review. The Court should maintain the status quo by staying active construction pending judicial review.

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: January 12, 2022

Certificate of Service

I hereby certify that a copy of this Motion was served on the following via electronic transmission on January 12, 2022:

Sarah Izfar
sarah.izfar@usdoj.gov
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/s/Lindsay A. Lovejoy, Jr.
Lindsay A. Lovejoy, Jr.

EXHIBIT 1

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

AFFIDAVIT OF CYNTHIA WEEHLER

State of New Mexico)
) ss.:
County of Santa Fe)

Cynthia Weehler, being duly sworn, deposes and says:

1. My name is Cynthia Weehler.

2. I live at 20 Descanso Road, Santa Fe, NM 87508.

3. I am a retired high school teacher of chemistry and astronomy. I taught in public schools in San Antonio, Texas from 1985 to 2008 and Austin, Texas from 2012 to 2017.

4. I submitted written comments on the Draft Permit in this proceeding on July 24, 2020. AR 200805.16. I gave oral comments at the Public Hearing. May 17, 2021 Tr. 134 l. 12 – 136 l. 21. I submitted written comments to the Hearing Clerk for the Public Hearing on March 27, 2021 and May 18, 2021. EIB 21-07 Ex. 9-B.

5. I am a supporter of Southwest Research and Information Center ("SRIC").

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

SANTA FE COUNTY

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.

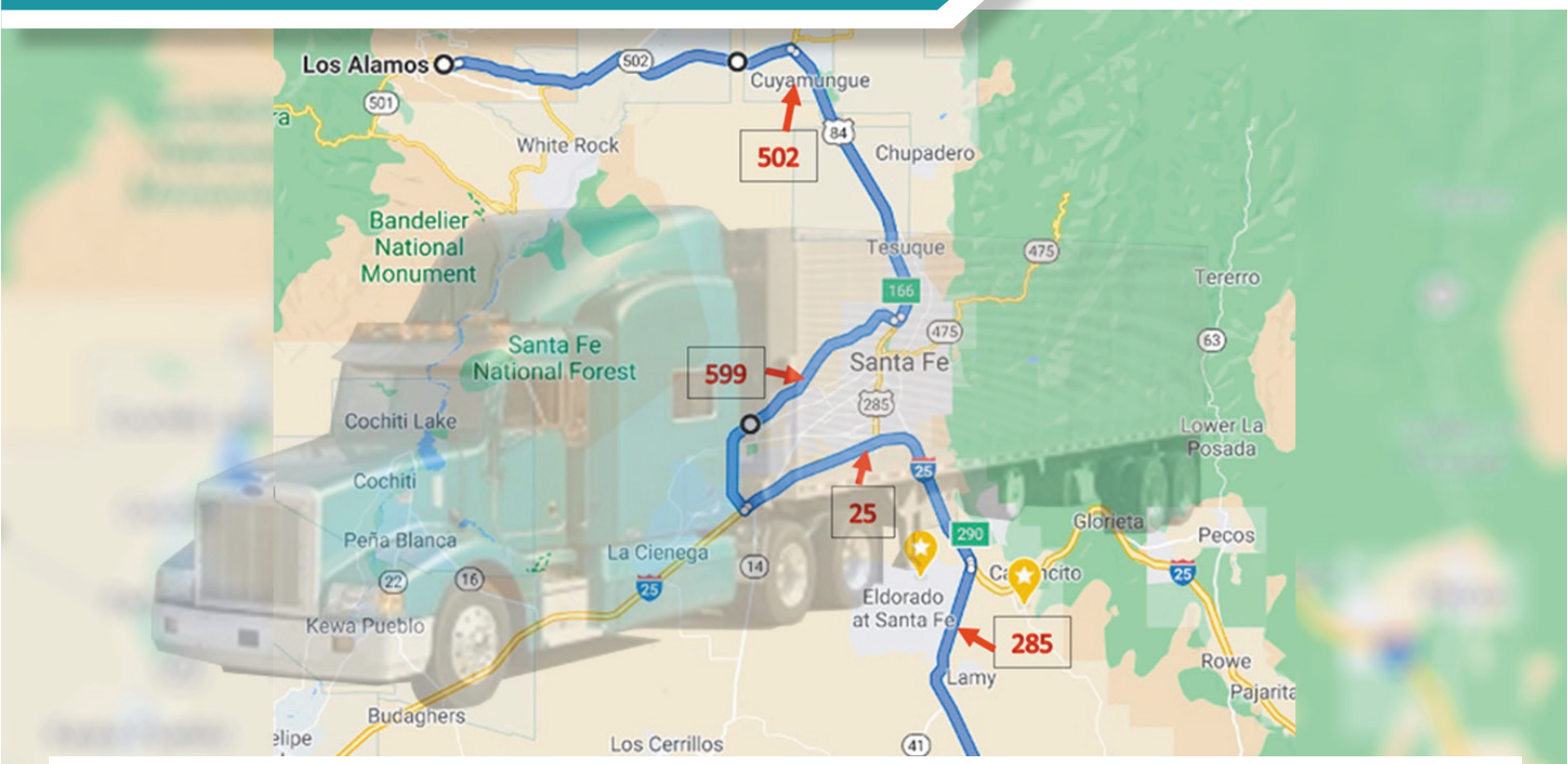
Please join Santa Fe County Commissioners Hank Hughes and Anna Hamilton for a town-hall regarding the County's emergency preparedness and response in the unlikely event of a toxic waste incident. Special presentation by Santa Fe County Emergency Management Team and opportunity to express questions and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

Weehler Exhibit 1

Santa Fe County Nuclear Waste Emergency Response Town Hall

SANTA FE COUNTY



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.

Weehler Exhibit 2

EXHIBIT 2

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

AFFIDAVIT OF KATHLEEN M. SANCHEZ

State of New Mexico)
) ss.:
County of Santa Fe)

Kathleen M, Sanchez, being duly sworn, deposes and says:

1. My name is Kathleen M. Sanchez. My given Tewa name is Wan Povi.

2. I currently live at 38 OTOHNAHPO, NM 87506. My life long ceremonial home is in San Ildefonso Pueblo, NM 87506

3. I am an Elder, a native spirit-rooted social activist, a community educator, and a traditional black ware potter from the Tewa Pueblo of San Ildefonso, New Mexico. I am among the founding mothers of Tewa Women United.

4. I submitted written comments on the Draft Permit in this proceeding on August 9, 2020. AR 200805.121. I gave oral comments at the Public Hearing. May 20, 2021 Tr. 159 l. 11 – 161 l. 24.

5. I am a supporter of Southwest Research and Information Center ("SRIC"). 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, the family sole source farming lands and drastically harm the air quality of Tewa peoples.

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

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, 2Notary Public

My commission expires: 7/1/2023

OFFICIAL SEAL
Lupita G. Sanchez
NOTARY PUBLIC - State of New Mexico
My commission expires: 7/1/2023

EXHIBIT 3

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT

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

AFFIDAVIT OF STEVEN ZAPPE

State of New Mexico)
) ss.:
County of Santa Fe)

Steven Zappe, being duly sworn, deposes and says:

1. My name is Steven Zappe, and I am a 28-year resident of New Mexico currently residing at 3 Escopeta Court, Santa Fe, New Mexico, 87506.

2. The New Mexico Environment Department (**NMED**) hired me in 1994 as a permit writer in the Hazardous and Radioactive Materials Bureau, the predecessor to the current Hazardous Waste Bureau (**HWB**). I served as the sole WIPP permit writer from 1994 with the initial disposal phase application, through the 1999 WIPP public hearing on the original disposal permit issuance, and on all subsequent permit modifications during my tenure. After the permit was issued, I served as the NMED WIPP project leader, supervising a staff of three to four environmental scientists from 2002 to 2011. During those 17 years, I oversaw all aspects of implementation of and compliance with the WIPP permit, including serving as an expert witness on WIPP permit issues for NMED at numerous public hearings. I retired from NMED at the end of 2014.

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

sustaining the permit modification and ultimately, if the project is completed, render the appeal moot.

21. DOE now projects that the new shaft and drifts project would be completed in 30 months from the restart of construction [Applicants' Exhibit 2, p. 18, Table 2-E]. The current appeal of the Volume of Record PMR has been pending in the Court of Appeals since December 2018, already more than 30 months. If the Final Order in this case is not stayed, there is a real risk that the courts will be unable to adjudicate the legality of the Final Order before the construction is completed, which would frustrate the application of the law.

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

Steven Zappe

State of New Mexico)
) ss.:
County of Santa Fe)

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

OFFICIAL SEAL
Eva Y Fierro
NOTARY PUBLIC-State of New Mexico
My Commission Expires 3-22-2025

Notary Public

My commission expires: 3-22-2025

Exhibit 4:

Appellants' Comments on Findings of Fact and
Conclusions of Law in Hearing Officer's Report

Appellants' Motion advances grounds for appeal that involve failure to consider legal issues and failure to admit evidence. However, the Hearing Officer's Report, which the Secretary adopted unchanged, contains numerous findings of fact and conclusions of law that are unsupported by substantial evidence or erroneous as a matter of law.

a. The Report states that the "purpose" of the PMR is to upgrade the permanent ventilation system. **[239 RP 004969-005026, at 2, line 16]**. The evidence showed that the purpose of the PMR is to construct a fifth shaft and associated drifts, which would enable the expansion of the underground repository. **[142 RP 002461-002462] (**and see exhibits cited in ¶ 18 and note 3).
b. FF 42: That the filtration system can accommodate only a small percentage of the original design airflow. This statement is misleading. It is true of today's filtration system, but today's system is already authorized to be augmented by the New Filter Building ("NFB") project, which is permitted under a PMR that was approved by NMED on March 23, 2018 **[AR 180310, 1 May 17, 2021 Tr. 80 ll. 13-23]** and will allow air flow to be restored to the pre-2014 volume.
c. FF 45: That full scale mining with filtered exhaust circuit is not practical with just the New Filter Building. This is not true. The evidence showed the contrary. **[1 May 17, 2017 Tr. 205 ll. 10-17]**.
d. FF 49: That the PMR will restore pre-2014 concurrent unfiltered mining and maintenance and filtered waste emplacement. This statement appears in the PMR and is true but misleading, because concurrent mining and maintenance and waste emplacement are feasible using the NFB modification, which is already authorized. The Permit says so: "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. Mr. Kehrman did not know the cost saving involved in using an unfiltered exhaust for construction. **[1 May 17, 2017 Tr. 86 ll. 13-25]**.
e. FF 51: That the benefits of the new shaft and drifts include increasing air intake volumes and facilitation of concurrent mining, maintenance, and waste emplacement. See the discussion of FF49, above. Mr. Kehrman

stated that the PMR would increase air flow **[1 May 17, 2021 Tr. 84 l. 22—85 l. 2]**, but he agreed that Permittees' response to NMED's direct question states that the present PMR will not increase air flow. **[1 May 17, 2021 Tr. 84 ll. 19-21, 86 ll. 2-12]**.

f. FF 56: That the regulations do not require the applicant to justify the decision to modify the facility. This is a statement of law and is incorrect, because 40 C.F.R. § 270.42(c)(1)(iii) requires the Permittees to explain why the modification is needed.

g. FF 62: That the permanent ventilation system restores the pre-2014 conditions. The "permanent ventilation system" includes the NFB authorization, plus the present PMR, and the statement is not correct, since the present PMR makes no increase in the volume of airflow. **[1 May 17, 2021 Tr. 84 ll. 19-21, 86 ll. 2-12]**.

h. FF 70: That the NFB ventilation capacity is meant as a "defense in depth." This statement implies that the ventilation capacity of the NFB is not normally used, but the NFB enables ventilation flow of 540,000 cfm, which is the same volume as was available pre-2014. **[1 May 17, 2021 Tr. 205 ll. 7-17; 131 RP 002076, ll. 8-10; 142 RP 002486]**.

i. FF 76: That the PMR will "significantly increase ventilation flow." This is incorrect. Mr. Kehrman stated that the PMR would increase air flow **[1 May 17, 2021 Tr. 84 l. 22—85 l. 2]**, but he agreed that Permittees' response to NMED's direct question states that the present PMR will not increase air flow. **[1 May 17, 2021 Tr. 84 ll. 19-21, 86 ll. 2-12]**. FF 82, 83: That the PMR will enable concurrent mining (unfiltered) and disposal (filtered flow). See the discussion of FF 49.

j. The evidence showed that concurrent mining and disposal are possible with the NFB, completed pursuant to the PMR approved in 2018, and also possible with the changes sought by the present PMR. **[1 May 17, 2017 Tr. 81 l. 4—82 l. 14); Tr. 84 ll. 7-13; Tr. 114 ll. 10-20; Tr. 215 ll. 9-17)]**.

k. FF 87: That the PMR will furnish "increased flow to the underground." Mr. Kehrman stated that the PMR would increase air flow **[1 May 17, 2021 Tr. 84 l. 22—85 l. 2]**, but he agreed that Permittees' response to NMED's direct question states that the present PMR will not increase air flow. **[1 May 17, 2021 Tr. 84 ll. 19-21, 86 ll. 2-12]**.

l. FF 147: That the order in limine excludes evidence of expansion as irrelevant. This statement about the terms of the order is true as a matter of fact. Such exclusion is erroneous and unlawful, since it prevents the admission of relevant evidence concerning the purpose of the PMR, the credibility of Permittees' commitments, the lawfulness of the PMR, and its impact upon communities within the State. See Motion at ¶¶ 33-38.

m. CL 8: That the PMR shows why the modification is needed. Incorrect. The modification is needed to enable expansion of the underground repository, as is shown by numerous DOE documents cited by Appellants. Evidence of such purpose was erroneously excluded. See ¶ 18 and note 3.

n. CL 24: That the PMR is "fully compliant." Incorrect. The regulations require the applicant to explain why the modification is needed. 40 C.F.R. § 270.42(c)(1)(iii). The PMR does not disclose the actual purpose of the modification, which is to enable expansion of the underground repository, as is shown by numerous DOE documents cited by Appellants. See ¶ 18 and note 3. Evidence of such purpose was erroneously excluded. See ¶¶ 24-31.

o. CL 33: That future expansion is not relevant because it is not mentioned in the Permit sections sought to be modified in the PMR: This is incorrect. In a PMR proceeding admissible evidence is not limited to the proposed language changes in the permit. The remaining permit language is relevant, as for example it is relevant that the permit states that the disposal phase is expected to end in 2024. (Permit at G-6). Also, parties and the public should be allowed to show the impact of the proposed changes upon the environment in the future, and the proposed changes here will enable expansion of the repository with impacts upon the State for many years in the future. See Motion at ¶¶ 33-38.

p. CL 45: That opponents of the PMR failed to carry their burden of proof. Incorrect. SRIC put evidence in the record that the purpose of the PMR is to enable expansion of the repository, causing long-term impacts upon the environment of the State. See ¶ 18 and note 3. The purpose is contrary to law, as shown in this Motion. Much of SRIC's evidence was erroneously excluded. See ¶¶ 24-31. SRIC nevertheless showed that denial of the PMR is required.

q. CL 46: That more than an increase in air flow via the New Filter Building is needed to address the mission and operation needs of WIPP. The statement is not clear in failing to state what "more" is referred to. See note 9. The present PMR would not, if granted, increase the sir flow through the repository. **[1 May 17, 2021 Tr. 84 ll. 19-21, 86 ll. 2-12]**.

r. CL 47: That SRIC's objection fails to recognize that post-2014 WIPP's ventilation capacity is sharply reduced. Incorrect. After the 2014 incidents the air flow through the repository was intentionally reduced by limiting exhaust flow to filtered air. **[1 May 17, 2021 Tr. 41 ll. 1-8); Tr. 212 ll. 12-24)]**. However, the PMR for the NFB, granted on March 23, 2018, will enable air flow to return to 540,000 cfm, which is the pre-2014 level. **[1 May 17, 2021 Tr. 75 l. 6—78 l. 26; 142 RP 002486]**.

s. CL 48: The draft permit does not address added capacity to store waste: The present PMR and the draft permit associated with it do not show an increase in the disposal capacity. However, the purpose of the present PMR is to excavate a fifth shaft whose purpose is to enable construction of additional disposal panels, as is shown in, e.g., the plan to excavate so-called "replacement" panels using the new shaft and drifts. **[142 RP 002464, 002488]**. See also ¶ 18 and note 3.

t. CL 51: The possibility of prejudice to the PMR process arising from the Temporary Authorization is irrelevant: Incorrect. In decisionmaking on the present PMR, NMED must attempt to disregard the prejudicial fact that NMED itself has allowed Permittees to proceed with shaft construction for 180 days and to excavate the shaft to a depth of 116 feet. It is generally recognized that a project that has been allowed to commence is difficult for regulators to reverse. See ¶¶ 77-80.

u. CL 52: The impact of the C&C Agreement on expansion of WIPP is not raised here in the appropriate forum: Incorrect. The discussion in this motion shows that the C&C Agreement is properly raised here and forbids the granting of the PMR. See ¶¶ 55-70.

v. CL 53: The new shaft is an essential part of the permanent ventilation system and its benefits are synergistic with the SSCVS: Incorrect. The changes made by the construction of the NFB, as already authorized on March 23, 2018, restore ventilation capacity to the pre-2014 level. The changes sought in the present PMR are not necessary for that capacity and do not increase ventilation capacity. See note 8 and **[1 May 17, 2021 Tr. 84 ll. 19-21, 86 ll. 2-12]**.