IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

SOUTHWEST RESEARCH AND INFORMATION CENTER,
Petitioner,

-against- **No. S-1-SC-38372**

NEW MEXICO ENVIRONMENT DEPARTMENT,
Respondent.

PETITIONER'S REPLY MEMORANDUM ON PETITION FOR MANDAMUS

This proceeding poses the question whether the application of the hazardous waste laws shall recognize the interests of the public in participating in the process. A statute requires that any major modification of a Hazardous Waste Act, § 74-4-1 *et seq*. NMSA 1978 ("HWA"), permit be adopted after an opportunity for a public hearing. Regulations are called for,

> establishing procedures for the issuance, suspension, revocation and modification of permits issued under Paragraph (6) of this subsection, which rules shall provide for public notice, public comment and an opportunity for a hearing prior to the issuance, suspension, revocation or major modification of any permit unless otherwise provided in the Hazardous Waste Act [74-4-1 NMSA 1978] . . . .

§ 74-4-4 NMSA 1978. Regulations so require. 20.4.1.900 NMAC. Construction of a shaft and drifts is, by any standard, a major modification; the Permittees

("DOE" and "NWP") have so labeled it, and the Environment Department ("NMED") accepted that term. But the Permittees and NMED, acting in concert, have undertaken to defeat the Legislature's requirement of public participation by adopting a Temporary Authorization that will authorize a year's construction of the shaft and drifts and thereby force the adoption of the modification. Such action is not authorized by any statute or regulation and should be prevented by issuance of the writ of mandamus.

a. The imminent injury:

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

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

Zappe Affidavit, sworn to April 26, 2020, ¶ 15.E, at 8. Given that basic fact, the Court should order NMED to withdraw the Temporary Authorization.

NMED and NWP assert that the Temporary Authorization is a discretionary act, which may not be examined on petition for mandamus. (NMED Br. 9-11;

NWP Br. 9-10). But mandamus is clearly available to challenge an unlawful act or an abuse of discretion, exceeding the agency's lawful authority, which is this case:

> This court has no power to review reasonably exercised administrative discretion, but we can correct arbitrary or capricious action which amounts to an abuse of discretion and is thus contrary to law. Yarbrough v. Montoya, 54 N.M. 91, 214 P.2d 769; Parker, Administrative Law, p. 265; Davis, Administrative Law, p. 768; see also City of Albuquerque v. Burrell, 64 N.M. 204, 326 P.2d 1088; Ferguson-Steere Motor Co. v. State Corp. Comm., 63 N.M. 137, 314 P.2d 894; 33 Am. Jur., Licenses § 60, p. 37.

Ross v. State Racing Comm'n, 1958-NMSC-117, ¶ 18, 64 N.M. 478, 483, 330 P.2d 701, 704.

It is said that mandamus should not issue where there is an adequate remedy at law, *i.e.*, the PMR process followed by appeal. (NMED Br. 11-13; NWP Br. 11, 18-19). NMED repeatedly entreats SRIC to participate in the PMR process. (NMED Br. 12-13, 15). The remedy is not adequate. DOE and NWP are pressing forward with 360 days of construction. Meanwhile, there is no schedule for the required hearing before NMED. After NMED decides the PMR, appellate review will consume at least a year. To await the PMR process would delay examination of the lawfulness of the shaft and drift construction until after that construction is so advanced that it cannot reasonably be undone. To be sure, legal proceedings can be conducted, and SRIC has participated in the PMR proceeding since it

began,[1] but in the race against the Permittees' construction crews, the public and the judicial process will inevitably lose, unless mandamus relief is available.

b. The unlawful Temporary Authorization:

NWP and NMED tell the Court that "Temporary Authorizations are an allowable mechanism during a permit modification process" (NMED Br. 4; see NWP Br. 6), and NMED asserts that "[a]fter thoroughly evaluating the TA request, the Department determined that the Permittees' request met all the elements required under 40 C.F.R. § 270.42(e)" (NMED Br. 5), but no documentation of the supposed analysis is provided, and neither NMED nor NWP explains the

[1] NMED does not mention that the draft AR clearly shows that SRIC is participating at every opportunity, beginning on November 9, 2017 before the initial new shaft permit modification request was submitted. AR 171106.5. SRIC has further commented on February 2, 2018 (AR 180205), March 8, 2019 (AR 190308), April 15, 2019 (AR 190408), October 10, 2019 (AR 191019.23), October 16, 2019 (AR 191019.15, 191019.24, 191019.38), and January 27, 2020 (AR 200124), all before the Temporary Authorization was approved and any appeals filed. The record also shows that NMED has effectively ignored those comments demonstrating that the PMR should be denied, and those of more than 97 percent of the commenters who oppose the modification and WIPP expansion. Thus, the "robust modification process" (at 12) has been underway for 29 months before the TA was approved. NMED had numerous opportunities to deny the PMR, as SRIC and others have shown is required, and as provided by 40 C.F.R 270.42(b)(6)(i)(B) and 40 C.F.R 270.42(c)(6). Or it could have started the further required public process by issuing the draft permit months or years prior to the issuance on June 12, 2020. The AR Index is at: https://hwbdocuments.env.nm.gov/Waste%20Isolation%20Pilot%20Plant/200612.pdf

regulatory basis for the Temporary Authorization, which is only allowed under very specific circumstances. 40 C.F.R. § 270.42(e). NMED states that it specifically imposed the condition that, if the Permit Modification Request is denied, "the Permittees must reverse all construction activities associated with the Temporary Authorization" (*id.*), but there is no indication that NMED asked how that might be done or whether it is even possible.

Section 270.42(e) allows a temporary authorization here only if the order "meets the criteria in paragraphs (3)(ii)(C) through (E) of this section *and* provides improved management or treatment of a hazardous waste already listed in the facility permit." (*emphasis supplied*). (Paragraphs (C) and (E) state permissible "objectives" of Temporary Authorizations.[2]) "Improved management or treatment of a hazardous waste" is explicit limiting language. NWP argues that heavy construction to sink a 2,275-foot shaft and 1200 feet of drifts constitutes "improved management or treatment of a hazardous waste." (NWP Br. 13). But heavy construction is simply not waste "management or treatment." NWP's unbounded reading of specifically limiting language violates standards of regulatory

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

interpretation: "Unless a word or phrase is defined in the statute or rule being construed, its meaning is determined by its context, the rules of grammar and common usage." § 12-2A-2 NMSA 1978. If a definition be sought, a "hazardous waste management facility" is a facility used for "treating, storing, or disposing of hazardous waste," 40 C.F.R. § 270.2. These activities clearly do not include heavy construction; especially so where the same rule bars "preconstruction."

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

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

Most importantly, a court may sustain agency action only on the grounds stated by the agency in taking action; rationales devised by counsel after the fact

cannot sustain agency action. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Commission,* 2003-NMSC-005 ¶ 11, 133 N.M. 97, 61 P.3d 806 (courts are not free to accept post hoc rationalizations of counsel in support of agency decisions, because a reviewing court must judge propriety of agency action solely on grounds invoked by agency); *Atlixco Coalition v. Maggiore*, 1998-NMCA-134 ¶ 20, 125 N.M. 786, 965 P.2d 370. NWP argues that the Temporary Authorization is supported by subsections that refer to closure and waste management disruptions. (NWP Br. 12). NMED did not rely on these concepts, and so the Court may not. And NWP says that "the reasons for the PMR and the TA are explained as a response to the 2014 incident that has affected the capacity of the ventilation system needed for operations." NWP Br. 20. Such statements do not constitute a rationale for the Temporary Authorization within the terms of 40 C.F.R. § 270.42(e).

SRIC explained in its Petition that the reasoning offered in the Temporary Authorization itself (*i.e.*, no reasoning) and in Mr. Maestas's memorandum, dated April 24, 2020 (attached to Mandamus Petition), which states that a Temporary Authorization may be used for permanent construction, is plainly erroneous and does not support NMED's action. (Mandamus Petition at 16-18). EPA, in issuing the rule, expressly stated that preconstruction would not be allowed under a Class 3 modification, because of the concern that it would be used to create a fait

accompli, compelling the regulator to grant the underlying PMR. 53 Fed. Reg. 37912, 37918. Mr. Maestas's other interpretation—that EPA intended the Temporary Authorization procedure to enable "permanent activities"—is expressly rejected by EPA's preamble explanation[3]. *Id*. and see Mandamus Petition at 15-17; see also Zappe affidavit ¶¶ 7-10. And the idea that a subsequent public process may retroactively sustain a Temporary Authorization misses the whole point: that completion of construction creates a fait accompli, contrary to EPA's intent. Neither NMED nor NWP have responded to this fundamental failure of NMED's analysis.

NMED and NWP claim that the construction is needed for the health and safety of the WIPP staff. (NMED Br. 16; NWP Br. 20). But the Permittees recently obtained another PMR (the "New Filter Building"), issued on March 23, 2018, which NMED approved because "The Underground Ventilation Filtration System (UVFS) fans which are part of the New Filter Building (NFB) (Building 416) provide enhanced ventilation in the underground, sufficient to allow concurrent mining and waste emplacement while in filtration mode." Permit A2-9.[4]

[3] NWP states that the Court should disregard information "beyond the plain language of the rule," but such information is pertinent under § 12-2A-20.B NMSA 1978 as an official commentary used in issuing the rule.

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

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

NMED and NWP do not deny that a purpose of the shaft and drift construction in issue here is to expand WIPP, adding disposal panels exceeding the capacity allowed by law. DOE's own documents say so. (Ex. M, N, O, P). It is surely a misstatement to disparage SRIC's description of such unlawful expansion plans as a "conspiracy" theory (NMED Br. 16), when DOE has presented the plan in its public documents, and the National Academy of Sciences and Engineering has examined and reported on DOE's plan at the direction of Congress. Mandamus Petition at 10.

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

Conclusion

This Court sits to keep state agencies within their statutory authority and has the power to restrain departures by extraordinary writ when expedited relief is called for. There is clearly no legal authority for the Temporary Authorization to commence and continue heavy construction. The contention that SRIC will not be injured by delaying review for a year and more ignores the fact that the construction allowed by the Temporary Authorization is calculated to establish a fait accompli, improperly leaving the agency and the courts with no choice but to approve the Permit Modification Request—*without* participation by SRIC or other members of the public. The underlying purpose of the PMR is to advance DOE's unlawful plan to expand WIPP beyond the limits imposed by Congress and the terms imposed by the HWA permit. DOE's illegal actions should not escape public examination and judicial review.

For the same reasons, the Court should stay the effectiveness of the Temporary Authorization to prevent the imposition of a major permit modification upon the public and the State of New Mexico. NMED tells the Court that SRIC and the public will have no hardship if there is no stay. (NMED Br. 14-15). But to allow construction to go forward under the unlawful Temporary Authorization will deny SRIC and the public their statutory rights to a hearing and an appeal. This is plainly injury. It is clear from DOE's documents that DOE intends to expand

WIPP beyond its legal capacity and prolong the operations of WIPP to the year 2080 and beyond. Indeed, the PMR makes no sense in any other circumstances. This is further injury. For such a departure from the agreed-upon terms of WIPP's operation, the public must be consulted, and the courts must be allowed to rule. To make public consultation and judicial review effective, DOE's planned construction should be stayed.

Respectfully submitted,

/s/_____

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CERTIFICATE

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

/s/Lindsay A. Lovejoy, Jr.