

**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”  
PERMIT MODIFICATION TO THE WIPP  
HAZARDOUS WASTE FACILITY PERMIT**

**HWB 21-02 (P)**

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**NEW MEXICO ENVIRONMENT DEPARTMENT HAZARDOUS WASTE BUREAU’S  
RESPONSE IN OPPOSITION TO MOTION FOR STAY**

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COMES NOW, the Hazardous Waste Bureau (“Bureau”) of the Resource Protection Division (“Division”) of the New Mexico Environment Department (“Department” or “NMED”) and respectfully submits this Response in Opposition to the Motion for Stay Pending Appeal (“Motion”) filed by Southwest Research and Information Center (“SRIC”) in the above captioned matter on November 10, 2021.

In the Motion, SRIC argues that the Secretary should stay the Final Order in this matter because the New Mexico Court of Appeals would not be able to consider the case before progress on construction of Shaft 5 renders the appeal moot. In other words, SRIC is asking the Secretary to stay this matter for two to three years<sup>1</sup> while the Court of Appeals adjudicates this case. However, there is no need for the Secretary to speculate regarding whether the Court of Appeals can or cannot hear this case if construction on Shaft 5 commences in earnest. The Hazardous Waste Act allows SRIC to apply for a stay with the Court itself, which is the proper venue for SRIC’s Motion. Only the Court of Appeals can assess whether it needs to grant a stay in this matter.

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<sup>1</sup> In the experience of attorneys with the Department, two to three years is the current timeline for environmental administrative appeals before the Court of Appeals.

Denying SRIC's Motion at the Department level will not deprive SRIC of the possibility of obtaining a stay. Rather, denying SRIC's Motion will simply allow this case to move forward on appeal and put the question of a stay directly before the Court, which is where it belongs. The Secretary should deny SRIC's Motion for the reasons set forth below.

### **I. SRIC's Motion Belongs Before the Court of Appeals**

The Motion is 18 pages long with an additional 14 pages of exhibits. The central argument of the Motion is that SRIC is entitled to a stay under the legal standard set forth in *Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, 1986-NMCA-033, 105 N.M. 708. The standard in *Tenneco* hinges on an analysis of substantive legal claims before an appellate court. This is not applicable or relevant to *this* Motion because SRIC has not filed its docketing statement nor its Brief-in-Chief. Because of this, there is no way the Secretary can know what exactly SRIC will be arguing before the Court. Therefore, the Secretary cannot evaluate whether or not SRIC has a likelihood of prevailing in an appellate case.

Section 74-4-14(D)(2) of the Hazardous Waste Act provides the opportunity for SRIC to request that the Court of Appeals grant a stay of the Final Order if the Secretary denies such a motion. Because SRIC's Motion is based, in part, on a claim that they will prevail in the judicial appeal, a request for a stay should go before the Court. The judges assigned to the case can evaluate for themselves the merits of SRIC's request in light of the standards set forth in *Tenneco*.

### **II. The Court of Appeals is the Proper Venue to Determine Mootness**

In the Motion, SRIC argues that the Secretary should grant a stay because "[d]enial of a stay would make it nearly impossible for the Court of Appeals or the Supreme Court to review NMED's approval of the PMR." [Motion at pg. 10]. This argument is based on the assumption that the time it will take the Court of Appeals to adjudicate the appeal will allow the Department

of Energy to complete construction of Shaft 5, rendering the appeal moot. This, SRIC argues, would cause *irreparable harm* under the *Tenneco* standard should the Motion be denied. This is, however, speculation on the part of SRIC.

The only tribunal that can evaluate whether or not the Court of Appeals can adjudicate this matter in the absence of a stay is the Court itself. Any other prediction about Court logistics and scheduling on this issue is mere speculation, and therefore not proper grounds for a stay.

### **III. Only New Mexico Courts can Issue Injunctions**

To support the Motion, SRIC argues that case law regarding injunctions supports the granting of a stay. However, the case law on injunctions is not relevant to an administrative stay. New Mexico's constitution places the power to issue injunctions *exclusively* with the State's courts. See N.M. Const. art VI, secs. 3, 13, and 29. A stay is a pause that the Department may decide to take on its own action. An injunction is a legal order issued by courts to prohibit or command the actions of parties. They are completely different actions. The Secretary should decline to grant a stay based on irrelevant case law.

### **IV. Denying the Stay Would not be Arbitrary, Capricious, or Otherwise Unlawful**

The Secretary's authority to grant stays is found in Section 74-4-14(D)(1) of the Hazardous Waste Act. The rationale for granting or denying a stay is left entirely to the Secretary's discretion, although a predicate condition is that "good cause" must be shown. The standard by which a court would evaluate a decision regarding a stay is set forth in Section 74-4-14(C), under which a court would evaluate whether such a decision was "arbitrary, capricious or an abuse of discretion; . . . not supported by substantial evidence in the record; or . . . otherwise not in accordance with law."

In this case, because SRIC's motion hinges on the *Tenneco* standard and evaluations of whether the Court of Appeals can logistically hear the case in a timely manner, it is entirely

reasonable to allow the Court itself to decide the merits of a stay. If the Secretary denies the request to stay, then SRIC will almost certainly file a motion to stay with the Court of Appeals. Rather than spend NMED's resources on this, it would be more efficient to allow the Court to decide this issue. The Court of Appeals is much better suited to determine whether a stay is necessary for their judicial review and whether SRIC is likely to succeed on the merits of the case.

**V. Conclusion**

For the reasons set forth above, the Bureau respectfully requests that the Secretary deny SRIC's Motion to Stay the Final Order in this matter.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Response in Opposition* and was served by email on the following on November 22, 2021

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