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 LEAVE TO FILE REPLY MEMORANDUM ON MOTION FOR A STAY PENDING APPEAL ON BEHALF OF SOUTHWEST RESEARCH AND INFORMATION CENTER and CYNTHIA WEEHLER

Motion for Leave to Reply

COME NOW Appellants Southwest Research and Information Center ("SRIC") and Cynthia Weehler (collectively, "Appellants") and move the Court pursuant to Rule 12-310.F NMRA for leave to file the attached Reply Memorandum in support of their Motion for a Stay Pending Appeal, filed Jan. 12, 2022, and in response to opposing memoranda submitted by Appellees Nuclear Waste Partnership, U.S. Department of Energy, and New Mexico Environment Department.

Appellants submit that the Reply Memorandum will assist the Court in resolution of the pending Motion for a Stay Pending Appeal.

Counsel for all Appellees and all other parties have stated that they do not oppose this Motion for Leave.

Wherefore, Appellants respectfully request that the Court grant leave to file the attached Reply Memorandum.

Respectfully submitted,

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Dated: March 5, 2022

Certificate of Service

I hereby certify that a copy of this Motion for Leave was served on the following via electronic transmission on March 5, 2022:

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

Preliminary statement

This Memorandum is submitted on behalf of Appellants Southwest Research and Information Center ("SRIC") and Cynthia Weehler (collectively, "Appellants") in support of their Motion for a Stay Pending Appeal, Jan. 12, 2022, and in response to opposing memoranda submitted by Appellees Nuclear Waste Partnership, LLP ("NWP"), U.S. Department of Energy ("DOE"), and New Mexico Environment Department ("NMED").

Appellants have shown (Motion for a Stay at 3-40) that they are likely to prevail on the merits of the pending appeal, because (1) a public hearing was denied to Appellants and members of the public, contrary to In re *Rhino Environmental Services*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939, and related cases, (2) Permittees failed to disclose the actual need to be served by the proposed permit modification, contrary to 40 C.F.R.§ 270.42(c)(1)(iii), (3) Permittees' modification request violates the Consultation and Cooperation Agreement **[32 RP 000908-001120]** entered into pursuant to the direction of Congress in the WIPP Authorization Act, Pub. L. No. 96-164, § 213 (1979), which incorporates a staged process to establish the scope and design of WIPP, and (4) construction of the proposed modification would violate the Appropriations Clause, U.S. Const. Art. 1, § 9, Cl. 7, which limits permissible funding of WIPP to the scope and design determined through the Consultation

and Cooperation process. Appellants have further shown that the equities that must be considered on a motion for stay under *Tenneco v. N.M. Water Quality Control Commission*, 1986-NMCA-033, ¶ 10, 105 N.M. 708, 710; 736 P.2d 986, 988, favor issuance of a stay of active construction pending consideration of this appeal.

Background

Appellees cannot dispute that Congress in 1979 enacted the WIPP Authorization Act, Pub. L. No. 96-164, § 213 (1979), requiring the scope and design of WIPP to be established by DOE in consultation with the State, that the State and DOE entered into the Consultation and Cooperation ("C&C") Agreement in 1981, containing the specific process for such consultation, and that DOE, pursuant to its commitment in the C&C Agreement to set forth the design of the "full WIPP," published the Safety Analysis Report ("SAR"), showing the plan for the full WIPP consisting of eight panels and four shafts. Thus, the State of New Mexico's insistence on a nuclear waste repository that is limited in purpose and scope was fulfilled by the process of legislation and consultation that established the metes and bounds of the demonstration facility for disposal of defense transuranic waste.

The original design of WIPP that was developed at Congress's direction in an open public process, with full public comment and response, may not lawfully

be disregarded. Congress has declared that this is the process by which WIPP shall be designed, its construction funded, and it shall be built. There is no authority in the WIPP Authorization Act to build a different repository, or a second repository, or (as here) the beginnings of a second repository. It is now this Court's duty to recognize that process and its result.

This permitting proceeding constitutes an attempt by DOE to thwart the legal limits established by Congress and made specific in a congressionally-mandated public process and to physically expand the facility to become a different and bigger repository than the one authorized by Congress and detailed in the C&C Agreement, so that DOE may ship nuclear waste from across the country for decades past the original end date of WIPP waste disposal operations, subjecting New Mexico communities to radioactive risks for an indefinite period—contrary to the commitments of New Mexico leaders who insisted upon a limited repository—and contrary to the legislation in which Congress confirmed that the limits would be honored.

Supporting the physical expansion of WIPP are DOE, DOE's contractor, NWP, and DOE's regulator, NMED. They seek to prevent the Court's consideration of the true nature of the planned modification of the WIPP facility. Thus, they obtained the Hearing Officer's order *in limine*, barring evidence of the expansion of WIPP and impacts of such expansion on New Mexico communities,

and disregarding the requirements of the Hazardous Waste Act, 74-4-1 *et seq.* NMSA 1978 ("HWA"). They argue that WIPP's expansion is irrelevant, since WIPP's waste volume capacity is still limited by another law, the WIPP Land Withdrawal Act of 1992, Pub. L. No. 102-579. They argue that the proposed shaft and drifts must be viewed as a ventilation measure alone, although no government agency would spend $197,000,000 to improve ventilation if it planned to comply with the HWA Permit and stop waste disposal in 2024—before the "ventilation" shaft is even completed. They state that the purpose of the permit modification is to restore the ventilation capacity that existed before the radiation incidents in 2014, when the Permit and the record establish that such capacity is already being restored in its entirety by construction of the New Filter Building, permitted by NMED in 2018. They contend that they have shown the "need" for the shaft and drifts without mentioning WIPP's physical expansion, even though the shaft, standing alone, without any disposal areas, makes no sense, and their only expert witness on the issue testified that the shaft is only "necessary" if WIPP further expands its disposal areas—the very subject on which all other parties and witnesses were prevented from testifying. They urge that the limitations contained in the WIPP Authorization Act and the C&C Agreement may not be considered because they are "waived," despite the fact that the record shows that hundreds of people objected to the expansion;

Appellants sought to introduce evidence about the legal limitations on WIPP's expansion, and the Hearing Officer blocked its admission and ruled that such issues must, for some unstated reason, be considered in some other, unidentified forum. **[239 RP 005021-22 (CL 52)]**.

Appellees' arguments come to this: that this permit modification proceeding, and the Court's review, may and must be based on a fiction—that the new shaft and drifts are not part of DOE's plan to expand WIPP and that their purpose, need and legality must be judged on the assumption that DOE intends only to improve ventilation—an improvement that is already included in the Permit without the requested modifications. Appellants submit that the permit modification request must be decided on the basis of full disclosure and actual facts, not fiction.

I. *Denial of a public hearing as required by Rhino.*

In re *Rhino Environmental Services,* 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939, requires an environmental permitting proceeding to admit and consider evidence of the prospective community impact of a requested permit. In *Rhino,* public witnesses stated that their town "was in danger of being overrun by industrial sites and turned into a dumping ground." (at ¶ 5). Their testimony concerned "the impact on public health or welfare resulting from the

environmental effects of a proposed permit" (at ¶ 31). The New Mexico Supreme Court said:

> 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.

(at ¶ 30). Appellees here concede that members of the public testified to their concerns that WIPP would expand beyond its original design and operate for decades longer than originally planned and objected that DOE had violated its commitments. The Hearing Officer excluded such evidence from consideration by his order *in limine*, April 26, 2021, 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)]**.

In *Rhino* the New Mexico Supreme Court pointed out that statutory and regulatory provisions establish the relevance of testimony on future environmental impacts. See ¶¶ 14-18. Similarly, NMED is bound by regulations to examine the proposed permit modification to determine whether it meets environmental standards:

> 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. Permits for miscellaneous units are to contain such terms and provisions as necessary to protect human health and the environment, including, but not limited to, as appropriate, design and operating requirements, detection and monitoring requirements, and

> requirements for responses to releases of hazardous waste or hazardous constituents from the unit.

40 C.F.R. § 264.601.

In addition, in *Rhino* the hearing officer had made no findings about the future impact on the community, did not consider it in making her decision, and the Secretary likewise ignored the testimony. (at ¶¶ 24-27; 32). The New Mexico Supreme Court stated:

> The adverse impact of the proliferation of landfills on a community's quality of life is well within the boundaries of environmental protection. Thus, the testimony regarding the impact of the proliferation of landfills is relevant within the context of environmental protection promised in the Solid Waste Act and its regulations. For that reason, the Secretary must evaluate whether the impact of an additional landfill on a community's quality of life creates a public nuisance or hazard to public health, welfare, or the environment.

(at ¶ 32). The record showed that no such evaluation was had:

> The findings and conclusions adopted by the Secretary state that the social impact of living near a disposal facility is beyond the scope of the Secretary's authority for granting or denying a permit. By reaching this broad conclusion, the Secretary made clear that no matter how much evidence was presented, it would not be considered. The hearing officer characterized the evidence as irrelevant as to the three ultimate actions: granting, denying or conditioning a permit.

(at ¶ 38). The Supreme Court held that the Secretary had ignored relevant factors, and it reversed:

> Without a reasoned explanation relating to the subject of the social impact of the proliferation of landfills, it appears that the Secretary ignored an entire line of evidence in reaching his decision on the final order.

> "Allowing the Secretary to ignore material issues raised by the parties in this manner would render their right to be heard illusory."

Id. Here, likewise, the Hearing Officer ruled that "future uses outside of ventilation are not part of this PMR" **[239 RP 004982 (FF 40)]** and curtly dismissed evidence about the impacts of the construction of the new shaft, which constitutes physical expansion and would lead to additional disposal capacity:

> Comments dealing with expansion, closure date, and waste type and volume were related to portions of the Permit that were not being modified by the PMR.

[239 RP 005003 (FF 119)]. In both cases the Hearing Officer, and the Secretary, made no findings about the adverse future impacts. There is no difference between *Rhino* and this case.

The argument that *Rhino* does not apply to a permit modification (NWP Br. 8-9) has no basis in any statutes or rules governing the HWA permitting process or in any logic. EPA was emphatic that a Class 3 modification (*i.e.*, this modification) requires a full public process, just like an initial permit:

> Since Class 3 modifications involve substantial changes to facility operating conditions or waste management practices, they should be subject to the same review and public participation procedures as permit applications.

53 Fed. Reg. 37912, 37918, at IV(B)(3). The HWA calls for a public hearing on the issuance or major modification of a HWA permit, namely:

> public notice, public comment and an opportunity for a hearing prior to the issuance, suspension, revocation or major modification of any permit . . .

74-4-4.A.7 NMSA 1978. The regulations concerning a new permit and concerning a major modification do not treat the two cases differently as to the scope of the hearing. See 20.1.4.20.C NMAC; 20.4.1.901.A through D NMAC. This Court safeguards the public's right to comment on permit modifications equally with new permits. See *Martinez v. Maggiore*, 2003-NMCA-043, ¶ 13, 133 N.M. 472, 476-77, 64 P.3d 499, 503 (under Solid Waste Act). Here, the public notice of the Permit hearing (AR 210315) contained no suggestion that evidence of DOE's plan to expand WIPP—the actual purpose of the new shaft and drifts—would be excluded.

NMED asserts that the April 26, 2021 order *in limine,* barring testimony about WIPP's expansion, does not apply to testimony by the public. (NMED Br. 15). The Hearing Officer, however, directed lay witnesses to abide by his order *in limine* **[1 May 17, 2021 Tr. 132, ll. 18-24, 134, ll. 12-13)]**, ruled that evidence about WIPP expansion is irrelevant **[239 RP 005003 (FF 119), 005007 (FF147), 005017 (CL 33), 005020 (CL 48)],** and made no findings based on such evidence.

NWP defends exclusion of evidence of expansion **[239 RP 005007 (FF 147)]**, citing a rule stating that only those permit terms proposed for modification may be modified (20.4.1.901.B(7) NMAC), from which NWP argues that "future

uses of the proposed modifications outside of ventilation are not part of this PMR" (NWP Br. 10) and so cannot even be discussed. But no rule supports this result. The record shows that the purpose of the new shaft and drifts is to expand WIPP. (Motion for a Stay at 12, 16-19). This purpose and its consequences on New Mexico communities are plainly proper matters for citizen and technical testimony. Clearly, in considering a modification, the agency needs to examine how the modified facility would operate, taking into account the other parts of the facility permit, and based on plans about the future operation of the facility and the applicable laws and regulations. Appellants do not propose that other parts of the permit be modified. But one cannot discuss a major modification of the permit without referring to other permit provisions.

The regulation that NWP relies upon, 20.4.1.901.B(7) NMAC, is not a rule of evidence. If it were a rule of evidence, *Rhino* could not be decided as it was, because the proliferation of landfills and the community impacts held relevant in *Rhino* were certainly not mentioned in the permit in issue in *Rhino*.

NWP's claim (NWP Br. 11) that Appellants would require a hearing officer to admit irrelevant evidence is baseless, because a hearing officer can apply conventional standards of relevancy. But admissibility is not governed by 20.4.1.901.B(7) NMAC. It is governed by 20.1.4.400.B(1):

> [T]he Hearing Officer shall admit all relevant evidence that is not unduly prejudicial or repetitious, or otherwise unreliable or of little probative value.

Section 20.4.1.901.F(5) also applies:

> In hearings, the rules of civil procedure and the technical rules of evidence shall not apply, but the hearings shall be conducted so that all relevant views, arguments, and testimony are amply and fairly received without undue repetition.

Such rules would plainly allow evidence of DOE's plan to expand WIPP. The Secretary's order must be vacated.

II. Appellees have not disclosed the need for the modification, as the rules require:

One plainly relevant aspect of a permit modification is the need it will serve, which must be identified by the applicant under 40 C.F.R. § 270.42(c)(1)(iii). The Hearing Officer effectively nullified this requirement by ruling that the applicant must state only how the *permit* needs to be changed to reflect changes in the facility—not why the *facility* needs to be changed. **[239 RP 004984 (FF 48), 004986 (FF 56), 005015 (CL 8), 005021-22 (CL 47).]**. This is clearly wrong, since NMED's responsibility is protecting the environment, not editing text language. EPA's explanation of the rule when issued makes clear that the rule calls for explanation of the need to modify the *facility*. (53 Fed. Reg. 37912, 37919 at IV.B.5).

DOE concedes (DOE Br. 17) that the new shaft will not be available by 2024, when the Permit says waste disposal is expected to end, and that DOE plans to operate the facility beyond that date. (Motion for a Stay at 24-25; Permit at G-6). DOE is clearly planning to expand WIPP's disposal space. (See Motion for a Stay at 12 note 3). The expansion plan should be disclosed, so that its lawfulness and impacts may be examined.

NWP says that *Southwest Research & Information Center v. NMED*, 2014-NMCA-098, 336 P.3d 404, holds that the Court should accept DOE's explanation of "needs related to the efficiency of the facility" (NWP Br. 13)—but that is just the point. Such an explanation is far different from a statement of how the permit language must be modified, and it would show the need to be met by the modification, as required by 40 C.F.R. § 270.42(c)(1)(iii).

DOE's claims of needs served by the new shaft and drifts are plainly pretextual. The repeated statement that these modifications would restore the pre-2014 ventilation volume is simply false **[239 RP 004984 (FF 42), 004990 (FF 62), 005021-2 (CL 47]**, since the New Filter Building ("NFB") modification, already authorized and under construction, achieves that purpose. NMED approved that Class 2 PMR on March 23, 2018. (Motion for a Stay at 39 note 8). The Hearing Officer's finding that the present modification would

increase the volume of ventilation is unsupported and clearly erroneous. **[239 RP 004986 (FF 51), 239 RP 004993 (FF 76), 004996 (FF 87)]**.

NWP boasts of various benefits of the new shaft (NWP Br. 21-22), but the new shaft will not be functioning until *after* the last panel in WIPP's original design is filled, in 2024. A shaft, standing alone, without new disposal areas, makes no sense. The new shaft only serves a need if the repository is expanded. Appellees' complaint of "unfounded speculation that the modifications are needed for expansion" (NWP Br. 13) ignores the fact that the modifications will *only* function if WIPP is expanded.

III. Violations of the C&C Agreement.

NWP argues that Appellants do not have standing to assert that DOE would violate the C&C Agreement if it built a fifth shaft: "Appellants do not have standing to enforce the C&C Agreement." (NWP Br. 15). When an issue of standing is raised in judicial review of an administrative ruling, an appellant is allowed to address standing at any time in the briefing phase. *Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988); *U.S. Magnesium LLC v. U.S. EPA*, 690 F.3d 1157, 1164-67 (10th Cir. 2012).

In response, Appellants refer the Court to the passages contained in their Motion for a Stay (at 33-35), pointing out, inter ala, that private individuals and organizations have a cause of action to restrain a violation of the Appropriations

Clause, Art. I, § 9, Cl. 7 of the U.S. Constitution, which forbids DOE from using federal funds for purposes outside the WIPP Authorization Act, an Act which authorizes only construction of a facility pursuant to the C&C Agreement.

In the WIPP Authorization Act, Congress authorized construction of a single limited facility, the specific design for which would be developed in consultation between DOE and the State. Thus, the State was allowed to comment but not to veto DOE's plans, and DOE was authorized only to construct, in consultation with the State, a single repository, namely: a pilot plant for defense waste disposal. The plan they came up with was authorized; that was the limit of the authorization, and DOE may not exceed it. To provide a structure for the mandatory consultation, Congress further directed DOE to make the C&C Agreement. Pursuant to the congressionally-mandated consultations, DOE expressly committed to the original design as the "full WIPP," and this design is shown in the SAR **[142 RP 002485]** as comprising eight panels and four shafts. Thus, DOE and the State, in their consultations, established the detailed scope and footprint of the authorized repository. That is the limit of the authorization. "Prior use of this authority confirms this meaning." *California v. Trump,* 963 F.3d 926, 944 (9th Cir. 2020).

As to standing specifically, in *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020), the Ninth Circuit upheld the standing of affected persons (such as

SRIC, its supporters, and Weehler) to relief from a violation of the Appropriations Clause. Following *Bond v. United States*, 564 U.S. 211 (2011), the Ninth Circuit held that the Appropriations Clause gives rise to a cause of action by a private person, 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* in turn 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,'" *McIntosh*, 833 F.3d at 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.

The State of New Mexico was a party to the border-wall litigation in *California v. Trump* and maintained in that case that there is a cause of action to restrain a federal agency that exceeds the scope of an authorization act. (Motion for a Stay at 34).

> 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").

Sierra Club v. Trump, 963 F.3d 874 (9th Cir. 2020), upholds a private entity's equitable *ultra vires* cause of action to challenge a federal agency's use of funds in violation of an 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). Again, 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. See *Sierra Club v. Trump*, 977 F.3d 853, 878-79 (9th Cir. 2020), holding that private parties may challenge agency action taken in violation of an authorization act.[1]

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[1] 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).

There can be no claim that the limitations in the WIPP Authorization Act, made more specific in consultations under 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.

SRIC and Weehler also have standing to claim violations of the C&C Agreement as third-party beneficiaries. NWP disagrees, asserting that "the C&C Agreement states that 'the State has the right to comment on and make recommendations with regard to the public health and safety aspects of WIPP,' not the general public." (NWP Br. 18). But NWP cannot contest the numerous requirements in the C&C Agreement of an opportunity to comment by "the State and interested members of the public." (Motion for a Stay at 8-10).

NWP asserts that in *NWP v. Nuclear Watch*, No. A-1-CA-37894 (Nov. 29, 2021), this Court determined that the C&C Agreement is "not relevant to permitting issues." (NWP Br. 18). That case involved measurement of waste volumes, and the Court then stated carefully: "[W]e fail to understand how the C&C Agreement is relevant to *the permitting issues raised in this appeal*." (*emphasis supplied*). The issues here are different and involve a clear departure from the original design of WIPP, which *DOE publicly committed to* as

constituting the "full WIPP repository." This Court has not held that such commitment is irrelevant, as it clearly is not.

NMED's argument that WIPP's waste volume capacity cannot be expanded without congressional action (NMED Br. 11, 14) ignores the fact that the expansion in issue here is not expansion of *waste volume* capacity, but the addition of underground *disposal space*, which is limited by the WIPP Authorization Act and the C&C Agreement. Appellants concur that such expansion ought to require legislation, but here DOE, NWP, and NMED would carry out physical expansion in violation of law.

NWP argues that the C&C Agreement does not forbid construction of a fifth shaft: (NWP Br. 14). But the Stipulated Agreement **[32 RP 000918-00919]** that accompanies the C&C Agreement describes in ¶ 2 the process resulting in the decision to construct the "full WIPP." The Working Agreement, also part of the C&C Agreement, requires DOE to publish the WIPP Safety Analysis Report ("SAR"). **[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 published by DOE, incorporating **four shafts and eight panels**, plus possible Panels 9 and 10 formed from access drifts within the footprint. **[142 RP 002485** (*emphasis supplied)***].**

NMED says that "there is nothing in the C&C Agreement that prohibits Permittees from upgrading the ventilation system at WIPP or otherwise modifying the Permit through the PMR process established by the EPA and NMED." (NMED Br. 19). Similarly, DOE contends that the "Ventilation Modification" does not, in fact, expand WIPP." (DOE Br. 19 note 7). But it is undisputable that the fifth shaft expands WIPP's footprint beyond the design that DOE published as the "full WIPP." Appellees do not dispute the testimony of Dr. James Channell that the C&C Agreement specifically limits the WIPP project's footprint and prohibits the new fifth shaft. Motion for a Stay at 10-11. As Dr. Channell stated, "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]**. Moreover, the fifth shaft can have no function except to serve new waste disposal rooms and panels—additional expansion beyond the limits of the "full WIPP."

IV. The Appropriations Act bars expenditures to expand WIPP:

Appellees assert that Appellants have waived the argument that the expenditure of funds on WIPP's expansion by constructing a fifth shaft violates the Appropriations Clause of the Constitution (U.S. Const., Art. 1, § 9, Cl. 7). (NWP Br. 18-19; DOE Br. 18-19; NMED Br. 21-22). However, Appellant SRIC

has repeatedly argued that evidence should be introduced about the violation of the WIPP Appropriations Act and the C&C Agreement. SRIC emphatically opposed the NMED motion *in limine*, which sought to bar evidence regarding the expansion of WIPP, arguing that violations of the C&C Agreement are highly relevant. **[49 RP 001247-001394]**. In the hearing, SRIC attempted to present evidence concerning the violation of the C&C Agreement, the WIPP Authorization Act (and thus of the Appropriations Clause) but was prevented by the Hearing Officer:

> MR. STRANAHAN: The objection is [Mr. Hancock] is now discussing expansion, which is specifically prohibited by your order.
> HEARING OFFICER: Mr. Hancock and Mr. Lovejoy, I know that 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.
> MR. LOVEJOY: Your Honor, may I make a proffer?
> HEARING OFFICER: By all means.
> MR. LOVEJOY: Thank you. Mr. Hancock will testify, if permitted, that the real purpose and need of the new shaft is to facilitate enlargement of the repository, and the addition of panels and rooms that are not allowed under the present configuration and under the legal regime established by the C&C agreement, the Land Withdrawal Act, and the Authorization Act.

[3 May 19, 2021 Tr. 151 ll. 4-21]. Thus, the legal limitations imposed by the WIPP Authorization Act and the C&C Agreement—which is mandated by that Act—were squarely proffered. Their exclusion was directed by the Hearing Officer; this was erroneous, and the point was preserved, not waived.

NWP now says that DOE complied with the C&C Agreement by submitting to the permit modification process under the HWA (NWP Br. 15), but the C&C Agreement contains many additional obligations, apart from HWA compliance, including DOE's commitment to the "full WIPP." The Hearing Officer did not disagree. He said only that issues under the C&C Agreement, for reasons he did not explain, should be presented to another forum, which he did not identify. **[239 RP 004969--005021-22 (CL 52)]**.

DOE claims that annual appropriations bills have included funding for the modifications, but the Supreme Court has rejected DOE's theory of implied repeal. *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 670 (2007); *TVA v. Hill*, 437 U.S. 153, 189 (1978). Moreover, the WIPP Authorization Act contains special requirements for repeal or amendment, which clearly are not met here. Pub. L. No. 96-164, § 213(c) (1979).

NWP boldly asserts that the construction of the new shaft and drifts may well violate the WIPP Authorization Act, and the Appropriations Clause, but there is nothing that this Court can do about it, because "[a]n Appropriations Clause claim arises under the Constitution, and subject matter jurisdiction lies with the federal courts." Thus, NWP says, "it is outside the jurisdiction of this court." (NWP Br. 19).

This is a preposterous argument. Individuals and private organizations have rights under the Constitution that state courts must enforce: "[S]tate courts of general jurisdiction have the power to decide cases involving federal constitutional rights where, as here, neither the Constitution nor statute withdraws such jurisdiction." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 319 n. 3 (1977). Such power includes enforcement of the Appropriations Clause: "The 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). This Court, like all the courts of New Mexico and other states, is bound by the U.S. Constitution. *Manning v. Mining & Minerals Division*, 2006-NMSC-027, ¶ 32, 140 N.M. 528, 535, 144 P.3d 87, 94; *Zellers v. Huff*, 1951-NMSC-072, ¶ 18, 55 N.M. 501, 512, 236 P.2d 949, 956-57; *State v. Druktenis,* 2004-NMCA-032, ¶ 114, 135 N.M. 223, 257, 86 P.3d 1050, 1084. Appellees have no other response to the constitutional violation of the Appropriations Clause, U.S. Const., Art. I, §9, Cl. 7.

Moreover, this Court will consider a new *legal* argument, despite an opponent's contention that the point has been waived. Here, the legal argument that expansion would violate the Appropriations Clause requires no facts in addition to those already in the record. See In re *Dydek*, 2012-NMCA-088, ¶ 49, 288 P.3d 872, where this Court addressed a new argument raised in an answer

brief, "primarily because it is a legal argument not dependent on any further or different factual development than is in the record now." *Compare*: *Ettenson v. Burke,* 2001-NMCA-003, ¶ 23, 130 N.M. 67, 75, 17 P.3d 440, 448. *See also United States v. Krynicki,* 689 F.2d 289, 291-92 (1st Cir. 1982). This Court espoused the *Krynicki* reasoning in *State v. Alingog*, 1993-NMCA-124, ¶¶ 26-29, 116 N.M. 650, 654-56, 866 P.2d 376, 383-84, *rev'd on other grounds*, 1994-NMSC-063, ¶ 15, 117 N.M. 756, 761 877 P.2d 562, 567:

> In explaining why it reached the merits of the government's argument, the court outlined four factors: (1) the new issue was purely legal and its resolution would not have been aided by further fact development; (2) the proper resolution of the issue was not in doubt; (3) the issue was almost certain to arise in other cases; and, "most important," (4) declining to reach the issue would have resulted in a "miscarriage of justice" by denying the public's "legitimate and significant interest in prosecuting suspected criminals." *Id.* at 291-92.

Alingog, 1993-NMCA-124, ¶ 27. These factors apply here as well.

Application of the Appropriations Clause, U.S. Const. Art. 1, § 9, Cl. 7, is a purely legal issue, whose effect here has not been disputed by Appellees and is not seriously in doubt. The issue is bound to recur if DOE pursues expansion of WIPP through HWA permitting, and failure to address the issue now would frustrate the strong public interest in timely application of the statutory limitations on the WIPP project. Further, this Court in *Alingog* ruled that the *Krynicki* analysis parallels the principle of fundamental error, which error the

Court may address even if it was not raised below. *Alingog* ¶¶ 28-29; § 12-321.B(2) NMRA.

V. Equitable considerations call for a stay of active construction:

NWP urges that it need not prove the matters required for a stay under *Tenneco*, since, NWP says, the status quo is the present situation, where the permit modification has been issued, and NWP does not seek to change *that* status quo. (NWP Br. 4-5).

But NWP very much wants to change the status quo at WIPP, specifically, by completing construction of the new shaft and drifts. Construction stands at a depth of 116 feet. NWP wants to carry the shaft downward to the repository level 2150 feet below ground surface. That would be a major change in the status quo. And it is quite unreal to say that the construction would not affect the Court's (or another court's) consideration of the permit modification request.

In *Grisham v. Romero*, 2021-NMSC-009, restaurant owners had obtained from a district court a temporary restraining order ("TRO") blocking statewide health orders, and Petitioners, state officials, sought a writ of superintending control to vacate the TRO. The New Mexico Supreme Court observed that an injunction of statewide health orders "would supply the [restaurant owners] with all the relief [they] could hope to win from a full trial." (at ¶ 21, *quoting from Legacy Church Inc. v. Kunkel,* 472 F. Supp.3d 926, 1023 (D.N.M. 2020)). The

same situation—that of a party seeking to proceed with its challenged behavior in defiance of legal restrictions—is presented here, where Appellees seek to preempt this Court's (and all other courts') judicial review. Under *Grisham v. Romero*, Appellees have the burden of establishing that they may go forward, and they have not attempted to carry that burden.

Regardless of the burden of proof, the undisputed facts all favor a stay of construction pending appeal. Appellants will be prejudiced if Appellees continue with construction, because the new shaft and drifts will commit DOE to expansion of WIPP and to extend WIPP's period of operation, continuing the exposure of the State's communities to the consequent risks. (Affidavit of Weehler ¶¶ 5, 10, 1, 13; Affidavit of Sanchez ¶¶ 5, 6, 9-12). DOE states that it is "highly unlikely" that this Court would rule after the shaft and drifts are completed (DOE Br. 20), but the risk is different: that the project will proceed *far enough* that the Court, or another court, would be inclined to let it continue. Permittees plan to complete the construction within 30 months, which is less time than has been required for this Court to rule on a WIPP appeal. (Motion for a Stay at 11). In addition, there is no urgent need for the disposal space afforded by expansion. (See Motion for a Stay at 43).

NWP claims that EPA has determined that construction would *not* influence a court's decision. (NWP Br. 20). In the passage NWP cites, EPA

responded to comments about "preconstruction" under the Class 2 modification rule, commenting that "the permitting Agency would be less inclined to deny a modification that had already been constructed." 53 Fed. Reg. 37918 at IV(B)(2)(iii). EPA then said that preconstruction of minor modifications would not influence an agency's decision: "Because of the limited nature of Class 2 modifications and the need for flexibility in maintaining permits, preconstruction will be allowed for this category of modification." *Id.* In contrast, Class 3 modifications (*i.e.*, this case) involve major and unlimited changes, and the implication is clear that the opposite would be true, *i.e.*, construction *would* influence the agency's decision. EPA determined, therefore, that "there is no preconstruction allowed with a Class 3 modification." 53 Fed. Reg. at 37918. EPA is plainly alive to the prospect of a Class 3 modification being allowed because it is a fait accompli.

Appellees protest that they will suffer irreparable injury if the construction is delayed pending appeal. Thus, they refer to the Hearing Officer's finding that the modifications would reduce particulate buildup on the exhaust filters, aid in increasing intake volumes, reduce concentrations of gases and diesel particulates, enhance ventilation control, and increase worker safety. (NWP Br. 21-23). DOE exalts the improved ventilation afforded by the proposed new shaft, calling it the "fresh air intake shaft," that "restore[s] ventilation capacity" and "a reliable

source of ambient air—which is not present now" which is "needed to ensure [workers'] health and safety" (DOE Br. 1, 3, 4, 12, 21). NMED asserts that the "WIPP workforce is forced to continue to work in an underground mine with poor ventilation" (NMED Br. 2) and that "There is an imminent health concern, and improved ventilation at the facility is a necessity." (NMED Br. 24).

However, there is no evidence in the record of the quality of the air in the repository nor about WIPP personnel being forced to endure unhealthy conditions. Mr. Kehrman stated:

> If you're asking am I here to testify whether or not the facility needs additional ventilation, the answer is, no, I'm not here to testify to that.

[1May 17, 2021 Tr. 52, ll. 8-10. See also 1 May 17, 2021 Tr. 174, l. 14—175 l. 1].

There is no basis for Appellees' claims of a need for additional ventilation. In 2018 NMED authorized the New Filter Building ("NFB") permit modification, which increased the underground ventilation capacity compared to the capacity available since the 2014 radioactivity release. The NFB permit modification request states that

> the new UVFS and NFB increase the ventilation airflow to allow for safe concurrent work activities such as mining, waste disposal, and ground support maintenance which is vital to the safety of the underground worker.

[1 May 17, 2021 Tr. 77 ll. 2-6; AR 171112]. The existing Permit now states, in accordance with the Permittees' request to add the NFB **[(AR 171112 at A-3, B8]**:

> 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.

Thus, the statement that, without the modifications contested here, "the WIPP facility cannot simultaneously perform underground maintenance, mining, and waste disposal" (DOE Br. 8) and the passage in the present permit modification request, quoted by DOE (DOE Br. 12-13 and see 14, 17), that it "will provide a new intake and exhaust system capable of restoring full-scale, concurrent, mining, maintenance and waste emplacement operations" are erroneous, as are the Hearing Officer's similar findings (FF 49, FF 82), because those capabilities will be restored when the NFB, already authorized and under construction, comes on line.

In addition, Permittees have told NMED in this proceeding that with the new shaft and drifts "the ventilation capacity for the underground repository is not increasing over the previous airflow design." **[AR 200114; 1 May 17, 2021 Tr. 86, ll. 2-12)]**.

Most importantly, the benefits (if any) touted by Appellees would *only* become available if WIPP expands and adds additional disposal space. The

repository built to the original design will be filled by 2024. The new shaft and drifts would not be finished until 2025. DOE's claim that "Petitioners are mistaken when they allege that the WIPP must expand in order for waste disposal to continue past 2024" (DOE Br. 17) is simply untrue. But adding only the new shaft and drifts makes no sense. Appellees' expert witness, Bob Kehrman, *would not testify* that the requested modifications were "necessary" for WIPP unless the repository continued operating past 2024:

> 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.

[1 May 17, 2021 Tr. 89 ll. 17-22]. Mr. Kehrman assumed that WIPP would continue to receive waste for decades. **[1 May 17, 2021 Tr. 96 l. 19-97 l. 9]**.

But the Hearing Officer's order *in limine* kept other parties from contesting WIPP's expansion, suppressing evidence of the impact of WIPP's expansion or of the illegality of expansion under the WIPP Authorization Act, the C&C Agreement, and the HWA permit itself. Such issues are clearly pertinent to the

permit modification, and their suppression is grounds for vacating the Secretary's order. Active construction should be stayed, because Appellants are very likely to succeed on appeal.

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,

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Certificate of Service

I hereby certify that a copy of this Memorandum was served on the following via electronic transmission on March 5, 2022:

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