



SOUTHWEST RESEARCH AND INFORMATION CENTER

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September 11, 2020

Stephanie Stringer
New Mexico Environment Department (NMED)
1190 St. Francis Drive, Suite N4050
Santa Fe, NM 87505

Via email: stephanie.stringer@state.nm.us

RE: WIPP Temporary Authorization Reissuance Request, dated September 9, 2020

Dear Ms. Stringer:

Southwest Research and Information Center (SRIC) provides these comments in opposition to the “Request for a Reissuance of the Temporary Authorization (TA) for the Class 3 Permit Modification Request to the Waste Isolation Pilot Plant,” dated September 9, 2020. You should deny the TA reissuance request and stop the construction of the new shaft.

While SRIC strongly objects to the existing TA and any re-issuance, any decision to re-issue the TA must include a timetable to complete that Class 3 PMR process by the end of the TA term, as the regulations require and the permittees concede in their request. An adequate PMR process may not be possible by April 2021, which would be the end of a re-issued TA.

Instead of re-issuing the TA, you should – or cause the Hazardous Waste Bureau to – withdraw the draft permit and fact sheet because they are deficient under 20.4.1.901.D(1) NMAC. If the draft permit is not withdrawn and the class 3 permit process for the new shaft proceeds, NMED, the permittees and the multiple parties that have requested negotiations and a public hearing must convene to discuss and agree on how such negotiations can be safely and appropriately conducted, as required by 20.4.1.901.A.4 NMAC. Further, NMED must disclose who the Hearing Officer will be at the required public hearing.

1. The regulations (20.4.1.900 NMAC (incorporating 40 CFR 270.42(e)(4)) state:
(4) A temporary authorization may be reissued for one additional term of up to 180 days provided that the permittee has requested a Class 2 or 3 permit modification for the activity covered in the temporary authorization, and:

...

(ii) The Director determines that the reissued temporary authorization involving a Class 3 permit modification request is warranted to allow the authorized activities to continue while the modification procedures of paragraph (c) of this section are conducted. (*Emphasis supplied.*)

Thus, the reissuance is not required and is not a rubberstamp. You, based on the January 15, 2020 delegation of authority, must make a new determination. Your previous TA approval of April 24, 2020 explicitly stated that the re-issuance request “is subject to re-evaluation by NMED.” at 2.

Your April 24, 2020 approval also stated: “This authorization is temporary and does not constitute a final agency action on the pending Class 3 PMR, nor does it prejudice or presuppose the outcome of the final action on the PMR.” at 2.

The new determination must be made based on your most current information. Relevant information that you must consider since the April 24 TA approval include:

- NMED issued a draft permit for the new shaft on June 12, 2020. Public Notice No. 20-03.
- 255 commenters responding to the Public Notice specifically objected to the TA approval and shaft construction that prejudices the Class 3 process. 89 additional commenters objected to the draft permit and the new shaft. 11 commenters supported the draft permit. AR 200805. Thus, 97 percent of those commenting object to the draft permit.
- At least six parties requested a public hearing on the draft permit – George Anastas (AR 200805.12), Deborah Reade (AR 200805.247), SRIC (AR 200805.252), Steve Zappe (AR 200805.259), CCNS (AR 200805.266), and Nuclear Watch New Mexico (AR 200805.274). At a minimum, you must fully review the comments of those six parties and address their specific concerns and provide an acceptable timeline for the negotiations and full public hearing process before making a determination to reissue the TA.
- All of those parties specifically oppose the TA. Mr. Anastas stated: “Withdraw the Temporary Authorization to Construct, follow the law, follow your procedures and cease being a rubber stamp for the Department of Energy.” at 3 of 3.
- Ms. Reade stated: “The *Temporary Authorization* makes a mockery of public participation. There's now barely any pretense at all that public comment is taken seriously by NMED or that it has any possibility to influence the Permit or the course of DOE's plans.” at 3 of 9.
- Don Hancock for SRIC stated: “NMED’s actions in approving the TA and vigorously defending that decision in legal filings and issuing a draft permit with no significant changes from the PMR are sufficient demonstration that NMED has pre-determined its decision to approve the request. But, in the Fact Sheet, NMED specifically admits that it has concluded that the new shaft is important. That final conclusion was made before the public comment and hearing process started on June 12, 2020. Such a conclusion is clearly contrary to the requirements of 20.4.1.900 NMAC (incorporating Title 40 CFR §270.42(c)(6)) that such a final conclusion can be made only after the public comment and hearing process is finished.” at 4 of 12.

- Mr. Zappe stated: “The TA approval simply provided the Permittees a head start in excavating Shaft #5, with no environmental benefit achieved during that time, and allowed a practically irreversible activity – construction of a 2100’ deep, 26’ diameter shaft– to commence without prior public notice and comment. I have read the “Memo to File – NMED Temporary Authorization Analysis” (AR 200415.1) justifying the decision to approve the TA request and find it to be non-persuasive. I have attached an affidavit prepared by me on this subject as an expansion of my comments, both for inclusion in the record and for response by NMED to any statements to which they disagree.” at 3 of 13.
- Joni Arends for CCNS stated: “CCNS reiterates: NMED must withdraw their approval of the temporary authorization for proposed Shaft No. 5. The public process must be allowed to proceed without the taint and prejudice of the temporary authorization.” at 2 of 9.
- Scott Kovac and Jay Coghlan for Nuke Watch stated: “We oppose NMED’s draft permit because the department improperly approved the Permittees’ temporary authorization (TA) request to start construction of the new shaft prior to any public involvement or comment on the draft permit – in fact, NMED didn’t issue the draft permit for public comment until seven weeks after the TA approval. The Permittees slanted the TA process by proposing (and NMED slanted it by approving) an activity that was neither necessary nor able to achieve the stated objectives to “facilitate other changes to protect human health and the environment” or “provide improved management of hazardous wastes” at the facility within the time limitations of the TA approval.” at 3 of 14.

In light of overwhelming public comment that the TA has prejudiced the Class 3 PMR process, it is not credible for NMED to re-issue the TA on the basis that there is no such prejudice. The public perception clearly is that the process is prejudiced. NMED re-issuing the TA and proceeding with a deficient draft permit that rubberstamps the PMR request only further demonstrates the actual prejudice and pre-determined final approval before completing the required public process.

2. The Fact Sheet is clearly deficient, so the Fact Sheet and draft permit must be withdrawn and reissued for additional public comment. SRIC’s comments on the draft permit (AR 200805.252) detailed that the Fact Sheet was grossly deficient and does not meet the minimum requirements of 20.4.1.901.D(1) NMAC that the fact sheet “shall briefly set forth the principal facts and the significant factual legal, methodological and policy questions considered in preparing the draft permit.” at 10 of 12.

Since the fact sheet is deficient and it is required for “every draft permit,” the draft permit itself is deficient. The draft permit and the fact sheet should be withdrawn and reissued for additional public comment.

If the fact sheet and draft permit are withdrawn and re-issued for additional public comment, clearly such a process and the required negotiations and public hearing cannot adequately be completed within the 180 days of a re-issued TA. In such a circumstance, the TA cannot be reissued, since it would be contrary to the requirement of (20.4.1.900 NMAC (incorporating 40

CFR 270.42(e)(4)(ii)) that the Class 3 PMR process be completed. That required process includes public comment, negotiations, a public hearing, post hearing procedures including a transcript, proposed findings of fact and conclusions and closing argument, Hearing Officer's Report, Comment on the Report and Argument before the Secretary, the Secretary's Final Order (20 NMAC 1.4.501, 502, 503, 504), and response to all significant comments received on the draft permit. All of those requirements could not adequately be met by April 2021, when the re-issued TA would expire and construction would have to cease.

3. If the Class 3 process is to proceed, there must be negotiations, as required by 20.4.1.901.A.4 NMAC. In all past WIPP Class 3 PMR processes and on the WIPP Permit Renewal Process, such negotiations were conducted face-to-face among most or all parties. In a few cases, some people have participated by phone, while most parties have been in the same room. However, under the current Public Health Order, new procedures may be needed for the negotiations (and public hearing). It would be inappropriate for NMED (or NMED and the Permittees) to dictate those negotiation procedures, so all parties that have requested a public hearing must be convened under methods that accommodate their needs to discuss and agree on negotiation procedures. Adequate time must be given to notice the parties and agree on the procedures, including the timeframe for negotiations and the public hearing.

4. NMED must disclose who the Hearing Officer will be for the required public hearing. Various independent Hearing Officers have conducted, e.g., the original WIPP permitting process in 1999, Class 3 hearings, and the Permit Renewal. There are concerns about the Hearing Officer in the Volume of Record (VOR) PMR, which SRIC and Nuclear Watch have raised in their appeal to the New Mexico Court of Appeals (Case No. A-1-CA-37894). SRIC inquired about the Hearing Officer for the new shaft PMR in a meeting on March 5, 2020 at the Hazardous Waste Bureau with the Bureau Chief and WIPP Team Leader. The discussion included how it can take some time to identify and retain such an independent hearing officer. More than six months has passed since that meeting, and SRIC has still not heard who the Hearing Officer will be, or, if he or she has not yet been selected, what the hiring process will be. To avoid the possibility of delays in the hearing process because of challenges to the Hearing Officer, SRIC requests that the person and process be publicly disclosed now.

In summary, the significant public concern about WIPP expansion and the new shaft have been clearly demonstrated in the administrative record, in addition to ongoing comments by SRIC. The overwhelming public comment has been that the TA should be withdrawn and that the TA should not be re-issued. The clearly articulated public perception is that the TA has prejudiced the Class 3 PMR process, in violation of the Hazardous Waste Act and regulations. Given the existing administrative record, it is clearly contrary to the regulations, to the required public process, and to the public interest to re-issue the TA. Instead, the TA should not be re-issued and construction of the new shaft should be stopped.

NMED's present course, which includes no public plan to identify a hearing officer and no scheduled hearing, creates the impression that NMED wishes to push through the PMR to the

greatest extent without engaging the public, responding to public objections, and defending the legality of the PMR, which in a hearing would be shown to be part of DOE's program to expand WIPP beyond its legal limits.

Of course, NMED must also consider the two pending actions in the New Mexico Supreme Court to invalidate the TA - No. S-1-SC-38372 (Petition for Writ of Mandamus) and No. S-1-SC- 38373 (Petition for Writ of Certiorari).

These comments and the TA request are also being provided to the other parties that requested a hearing, since SRIC believes that they have not been notified about the re-issuance request.

Thank you very much for your careful consideration of, and your response to, these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Don Hancock". The signature is written in a cursive style with a large initial "D".

Don Hancock

cc: Kevin Pierard
Ricardo Maestas
George Anastas
Deborah Reade
Steve Zappe
Joni Arends
Scott Kovac/Jay Coghlan