

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

**IN THE MATTER OF:
HEARING DETERMINATION REQUEST
CLASS 3 “EXCABATION OF A NEW SHAFT
AND ASSOCIATED CONNECTING DRIFTS”
PERMIT MODIFICATION TO THE WIPP
HAZARDOUS WASTE FACILITY PERMIT**

Docket No. HWB 21-02

PERMITTEES’ RESPONSE TO MOTION FOR A STAY PENDING APPEAL

COME NOW, the United States Department of Energy (DOE) and Nuclear Waste Partnership LLC (NWP), collectively referred to as the “Permittees”, before the New Mexico Secretary of the Environment (Secretary) and file this Response to Motion for a Stay Pending Appeal on Behalf of Southwest Research and Information Center (SRIC), and would show the following:

I. The burden of proof in establishing a preliminary injunction lies with SRIC.

The movant for injunction bears the burden of persuasion. *Nat'l Tr. for Historic Pres. v. City of Albuquerque*, 1994-NMCA-057, 18, 117 N.M. 590, 874 P.2d 798. A movant must 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. *Grisham v. Romero*, 2021-NMSC-009, 20, 483 P.3d 545. Where injunctive relief is the ultimate relief sought, or where such relief seeks to alter the status quo, the movant must satisfy a heightened burden of proof showing that these four factors weigh heavily and compellingly in their favor. *Id.* These same factors are applied to consideration of a stay of any agency action. *Tenneco Oil Co. v. Water Quality Control Comm’n*, 1986-NMCA-033, 105 N.M. 708.

Here, SRIC is the movant because they are seeking an injunction preventing Permittees from constructing the shaft and drifts permitted by NMED's final order. This request places the burden of proving the four factors mentioned above solely on SRIC. Further, the relief sought seeks to disrupt the status quo, so it is of a type historically disfavored by the Courts. See *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973. Contrary to SRIC's suggestion, the status quo here was created by the Secretary's granting of the PMR. First, 20.4.1.901(a)(10) NMAC establishes that "[a] final permit decision shall become effective 30 days after notice of the decision has been served on the applicant These provisions shall not be construed to extend the time for appeal of a permit decision as provided by the Hazardous Waste Act." Next, 20.1.4.500.E NMAC provides that "[t]he filing of an appeal does not act as a stay of the final order, the permit, license, or variance, or any provision of the Act or the Regulations." And finally, "the filing of an appeal does not act as a stay of an action required by the secretary's decision." 20.4.1.901.H.(1) NMAC. Taken together, these provisions establish the status quo in relation to the injunction sought here: the approved PMR and permit conditions as modified by the Secretary's Final Decision issued on October 27, 2021.¹ Because the ultimate relief sought is a reversal of the Secretary's decision, SRIC is seeking to change the status quo and they bear the burden of showing that the four factors weigh heavily in their favor.

Without support, SRIC seeks to move the status quo back to before the PMR was ever filed. In *Grisham*, the New Mexico Supreme Court ruled on a TRO sought by restaurant owners that would prevent the implementation of an emergency public health order restricting indoor dining. *Grisham*, 2021-NMSC-009, 483 P.3d 545. The court identified the four factors, and

¹ Secretary's Final Order is based upon a Hearing Officer's Report that was prepared after a contested evidentiary hearing in which SRIC participated. The hearing process afforded to the parties delayed the final decision on the PMR by at least a year which further delayed construction of the much needed ventilation shaft at the WIPP facility.

acknowledged that an injunction seeking to alter the status quo is to be heavily scrutinized. *Id* at 20. In dicta, the Court noted that some courts have held that the status quo was not to be altered by defining the status quo as the “last peaceable uncontested status” between the parties. *Id* at 21. However, this is reserved for situations where it is necessary to compel a defendant to correct injury already inflicted. *Id*. Subsequently, the court did not cite a case that followed the “last peaceable uncontested status” holding, and neither does SRIC. Rather, the Court in *Grisham* likened the TRO at issue to one that was before the United States Supreme Court, holding that a TRO preventing the implementation of new regulations would alter the status quo. *Id*; See *Officer of Personal Management v. American Federation of Government Employees*, 473 U.S. 1301. By that logic, the *Grisham* court determined that the TRO *did* seek to alter the status quo and must be subject to heightened scrutiny. *Grisham* at 21.

SRIC's loose reference to the temporary authorization (TA) denial provides no credible basis for following the “last peaceable uncontested status” approach. This does not establish what injury Permittees have inflicted, or how the approval of the PMR creates the necessity to compel Permittees to correct said injury. Rather than justifying the reason for taking this approach, SRIC assumes it is proper and makes the naked assertion that the last peaceable status was before the PMR was filed. Remarkably, SRIC then posits that Permittees bear the burden of proof for SRIC's injunction because the PMR application seeks to alter the status quo that SRIC prefers. By SRIC's logic, every PMR that is approved can subsequently be blocked by an injunction if a motion for stay is filed and the PMR applicant is unable to establish why an injunction on their own PMR approval is (not) needed. In this light, the absurdity of SRIC's mental gymnastics that shift the burden to DOE is apparent.

In failing to recognize that the heightened burden of persuasion lies solely on it, SRIC's argument is void of facts to meet it. As the movant seeking to alter the status quo of an approved PMR through an injunction, SRIC's motion must be closely scrutinized to determine if it supports "the granting of a remedy that is extraordinary even in the normal course." *Grisham* at 21. Because SRIC chose to focus solely on DOE's irrelevant ability to meet the four factors for injunction, its argument is bereft of support and fails to meet its burden at first glance, let alone when closely scrutinized. For these reasons, an injunction and/or stay should not issue.

II. SRIC Has Failed to Demonstrate a Likelihood of Success on Appeal.

a. The Hearing Officer properly excluded evidence regarding speculative future expansion of the WIPP.

SRIC centers much of its argument around the contention that the Hearing Officer erroneously excluded all evidence of plans to expand WIPP during the Permit Modification Request ("PMR") hearing. It asserts that the exclusion of evidence of future expansion of WIPP was "a basic error" by the Hearing Officer, citing 20.4.1.901.A(1)(a) NMAC, which provides that a draft permit shall contain all permit terms in conditions upon *permit issuance*. This reliance is misguided, as SRIC has confused permit issuance with permit modification.

In a Class 3 PMR such as this, the permit has already been issued and only those conditions sought to be modified shall be reopened. 20.4.1.901(B)(7) NMAC. If the Secretary does approve a Class 3 PMR, a draft permit is prepared *incorporating the proposed changes*. 20.4.1.901(B)(5) NMAC. However, if a permit is revoked and reissued under the permit modification section, then the entire permit is reopened. *Id.* Here, the Secretary did not revoke the original permit, so it is not subject to 20.4.1.901.A(1)(a) as SRIC suggests. Further, throughout this entire process, at no point in the PMR application or during the contested case hearing have Permittees indicated a desire to change permit conditions as they pertain to future expansion or increased capacity. Any

suggestion otherwise by SRIC is wholly irrelevant and was properly excluded by the Hearing Officer under 20.4.1.901(B)(7) NMAC.

b. The PMR sufficiently discloses why the modification is needed in accordance with 20.4.1.900 NMAC.

DOE provided a “need” statement in the PMR to establish why the permit modification is needed as follows:

“This modification is needed to add descriptive information regarding Shaft #5 and connecting drifts into the Permit. As a result of the 2014 radiological event, portions of the WIPP underground facility and the existing surface mounted ventilation and exhaust systems became radiologically contaminated. Since the 2014 event the Permittees have operated the facility using continuous filtration of the underground Disposal and Waste Shaft Station Circuits exhaust air (filtration mode). Continuous filtration is used to mitigate any radioactive releases. The filtration system, as originally designed, can accommodate only a small percentage of the original design flow needed to support the normal operations of construction, maintenance, and waste emplacement. The addition of Shaft #5 and associated connecting drifts represents an upgrade to the [Underground Ventilation System] and will provide a new intake and exhaust system capable of restoring full-scale, concurrent, mining, maintenance, and waste emplacement operations”. [Applicants' Exhibit 1, pg. 41: 22 - 42: 16]

This statement was accepted by the Hearing Officer as satisfying the requirement under 20.4.1.900 NMAC notwithstanding SRIC's allegations of unstated actual needs for modification. SRIC is no stranger to this requirement. In a previous attempt by SRIC to allege a deficient need statement, the Permittees identified needs relating to the efficiency of the facility, not unlike the need statement above, and NMED granted the PMR despite SRIC's claims of an “unstated actual need that the modification serves.” *Southwest Research & Information Center v. Environment Department*, 2014-NMCA-098, 24, 336 P.3d 404. On appeal, the Court held that SRIC's arguments about an ulterior motive behind the need statement were speculative and lacked support in the

record, and this failed to demonstrate that the need statement was not justified and substantiated by data. *Id* at 26.

Here, Permittees' need statement is substantiated by expert testimony and a collection of carefully crafted exhibits. SRIC cannot be permitted to undermine the Hearing Officer's findings by offering its own interpretation of 20.4.1.900 NMAC that allows it to hypothesize as to the internal operations at WIPP. According to the Hearing Officer's report, an adequate need statement was included in the PMR, and it was justified by data during the hearing process. SRIC's continued speculation about the future, allegedly ulterior, plans at WIPP fail to demonstrate otherwise.

c. The Consultation and Cooperation Agreement

The Consultation and Cooperation Agreement (C&C) was entered into by the State of New Mexico and the United States Department of Energy pursuant to Pub. L. No. 96-164, § 213(b)(2) to set forth the procedures by which the Secretary of Energy shall consult and cooperate with the appropriate officials of New Mexico. This PMR process was in accordance with the C&C and afforded the State the opportunity to consult and cooperate with the Secretary through NMED's involvement. Article II, Section F of the C&C working agreement provides that "Where a State or Federal permit is a prerequisite to any action by DOE . . . that action shall not be carried out until the appropriate permit has been obtained." Permittees have clearly fulfilled this provision by seeking the PMR.

Regardless, SRIC is not a party to the C&C agreement, and it is not empowered by the agreement to define the standards by which the PMR process can proceed. The C&C agreement provides its own detailed process for conflict resolution. In the event that the State's concerns as to public health and safety are not satisfied, the principal representative of the State and the

Manager of the DOE Albuquerque Operations Office (Manager, ALO) shall meet and may ultimately appoint a conflict resolution hearing officer.

SRIC has previously acknowledged that the C&C agreement is independent of the WIPP permit, and it has not been shown here how the C&C agreement has any relevancy to the WIPP permitting issues being alleged. *Nuclear Waste Partnership, LLC v. Nuclear Watch New Mexico and Southwest Research and Information Center*, A-1-CA-37894.

III. SRIC has failed to prove that irreparable injury will result should a stay not issue.

SRIC further claims that it will face irreparable injury in the absence of a stay, alleging that there can be no judicial review without a stay. SRIC's right and responsibility to exhaust its administrative remedies should not also be considered an injury. However, like much of SRIC's arguments throughout its motion, its "irreparable injury" revolves around speculative future expansion of the WIPP facility which, as stated previously, is not currently permitted nor up for determination by NMED, the Hearing Officer, or the Appellate Court.

As explained in the approved statement of need, the PMR will allow the Permittees to restore "full-scale, concurrent, mining, maintenance, and waste emplacement operations" to pre-2014 levels—not expand. [Applicants' Exhibit 1, pg. 41: 22 - 42: 16] Furthermore, just as under the TA, continued construction of the authorized shaft and connecting drifts will be done at the Permittees' expense while SRIC's appeal is pending. Judicial review will be allowed to continue, and in the unlikely event the Hearing Officer's decision is overturned, the Permittees will bear the loss of resources expended in continuing with their validly permitted activities. Contrary to SRIC's position, the continued construction of the permitted shaft and connecting drifts will not

allow waste emplacement at WIPP to continue through 2080 under current permit conditions, and therefore will not irreparably injure the opposition in this case.²

SRIC would also mislead the Secretary into believing that the "EPA has recognized the realistic fact that on-the-ground construction deters an agency from denying a PMR." However, the Federal Register states the exact opposite of what SRIC suggests:

A number of State and industry commenters supported the preconstruction provision, saying that it will speed the implementation of Class 2 modifications, and allow flexibility to plan and schedule activities before approval is granted. However, several commenters opposed the idea since they believed that the permitting Agency would be less inclined to deny a modification that had already been constructed.

EPA believes that preconstruction by the permittee, as allowed under the final rule, will not influence the permitting Agency's decision. 53 Fed. Reg. 37918, at IV.B.2.iii (Emphasis added)

As is clear from the EPA's position on the issue, construction of the new shaft and connecting drifts will not deter a permitting Agency, or appellate court, from objectively reviewing the PMR. Therefore, judicial review will be possible and SRIC will not be irreparably harmed in the absence of a stay.

IV. Issuance of a stay pending appeal will prejudice the Permittees.

Contrary to SRIC's assertions, a stay pending appeal will prejudice the Permittees. Once again, SRIC misleadingly states, "[t]he waste that DOE would inter in the planned additional disposal panels is not yet ready for disposal . . . and delay pending judicial review would not compromise DOE's plans." [Motion for Stay Pending Appeal on Behalf of SRIC, at 13] However,

² SRIC continues to fail to recognize that any expansion of the WIPP mission, such as proposed new disposal units, will require the Permittees to seek modifications to the existing permit from the NMED that will in turn provide SRIC the full opportunity to participate in the permit modification process including participation in public meetings, submitting public comments on the proposed changes to the permit and the opportunity for another contested evidentiary hearing.

there are no currently permitted additional disposal panels, and the need for the PMR as stated in the PMR application is not about future expansion of disposal capacity. Rather, the purpose of the PMR—and the granted permit modification—is to provide a new intake and exhaust system to improve the underground ventilation system and return it to pre-2014 conditions. The WIPP has been operating at a reduced capacity since 2014 while SRIC has continuously and needlessly delayed these proceedings. The PMR will allow the Permittees to improve the efficiency of the operations at the WIPP and restore mining, maintenance, and waste emplacement operations, while a stay of the permit modification would effectively prevent the Permittees from operating their business in an effective and efficient manner. No grounds exist for preventing improvement of the underground ventilation system at the WIPP. Therefore, the prejudice faced by the Permittees should a stay issue outweigh any interests in favor of the stay.

V. The Public Interest Does Not Require a Stay.

Finally, SRIC argues that the public interest favors maintaining the status quo—which as explained above they mistake for the conditions pre-PMR—and preventing the Permittees from proceeding in light of the grant of the PMR. However, SRIC fails to explain what the basis is for gauging public interest. Most negative comments regarding the PMR were unrelated to the underground ventilation, which is the sole subject of this PMR. Instead, those negative comments addressed topics not included in the PMR, such as speculative increases in waste emplacement volume and disposal capacity. In reality, the affected public—which are those in vicinity of the facility—are in favor of the additional ventilation to the underground this PMR will bring. Upgrading the ventilation at the earliest possible date is spelled out in the PMR, the testimony, and the TA request. Improved underground ventilation will improve the safety of operations at the

WIPP, which is undoubtedly beneficial to the public interest. For these reasons, the public interest does not require a stay.

For the reasons discussed in this Response, Permittees' respectfully request the Secretary deny SRIC's Motion for Stay Pending Appeal and all relief requested therein.

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