



Mark Reynolds

**IN THE COURT OF APPEALS  
OF THE STATE OF NEW MEXICO**

**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**

**No. A-1-CA-40030**

**DOCKETING STATEMENT ON BEHALF OF  
SOUTHWEST RESEARCH AND INFORMATION CENTER  
AND CYNTHIA WEEHLER**

Appellants Southwest Research and Information Center (“SRIC”) and Cynthia Weehler, by their counsel, make the following Docketing Statement pursuant to Rule 12-208 NMRA.

1. Nature of the Proceeding: This is an appeal pursuant to §12-601 NMRA and §74-4-14 NMSA 1978 from the Final Order by the Secretary of the Environment Department (“NMED”), dated October 27, 2021, approving a modified Hazardous Waste Act, §74-4-1 et seq. NMSA 1978 (“HWA”) Permit (the “Permit”) for the Waste Isolation Pilot Plant (“WIPP”). The Secretary’s Order approved without comment or amendment the Report by the NMED Hearing Officer, dated September 14, 2021 (the “Report”), recommending approval of the Permit Modification Request (“PMR”) filed

by the Permittees U.S. Department of Energy (“DOE”) and Nuclear Waste Partnership, LLC (“NWP”) (collectively, “Permittees”) on August 15, 2019.

2. The PMR (AR 190815) seeks to amend the Permit to authorize the construction of a fifth vertical shaft from the surface to the underground repository, 2150 feet below the surface, and two associated drifts (tunnels) to connect the shaft to the existing underground workings. The project is expected to cost \$197,000,000. (May 17, 2021 Tr. 86 ll. 23-25 (Kehrman). Disposal operations in WIPP, as originally designed with four shafts and eight disposal panels, are expected to end in 2024. (Permit at G-6). Permittees project that the new shaft will be functioning by 2025 or later. (SRIC Ex.13; May 19 Tr. 176 l. 12; *Id.* 162 ll. 16-17 (Hancock). Thus, the new shaft will have no role in disposal operations in WIPP as originally designed. The main purpose of the proposed new shaft is to enable the underground expansion of the footprint of the WIPP facility, allowing WIPP to continue operating past the 2024 expected end date and, according to DOE’s published reports, until the year 2080.
3. Timeliness: The Final Order was entered on October 27, 2021. SRIC and Weehler filed a Notice of Appeal dated November 8, 2021, which was timely in accordance with Rule 12-601.B NMRA and 74-4-14.A NMSA 1978.

4. Statement of the Case: (a) Procedural background: On December 22, 2017 Permittees filed a Request for Class Determination with NMED, seeking a decision as to the PMR Class under 40 C.F.R. §270.42 to which the present PMR would belong. (AR 171222). Section 270.42 is incorporated as a Rule under the HWA. (20.4.1.900 NMAC). Permittees requested that the PMR be subject to Class 2 regulations (40 C.F.R. §270.42(b)), which do not include an opportunity for a public hearing.
5. SRIC commented to NMED that the PMR should be subject to Class 3 regulations, stating that the PMR would substantially alter the facility and its operations (40 C.F.R. §270.42(d)(2)(iii)), because its real purpose was to expand the disposal footprint beyond the original design of WIPP. (Letter, Feb. 2, 2018) (AR 180205). SRIC restated this point in a later letter, adding that there is significant public concern about the PMR. (Letter, March 8, 2018) (AR 190308).
6. On August 15, 2019 Permittees submitted a PMR containing the same substance as the PMR submitted on December 22, 2017 but specifically stated as a Class 3 PMR. The request for Class determination was withdrawn. (AR 190815).

7. SRIC on October 16, 2019 filed comments, stating that the PMR was incomplete and requesting negotiations and a public hearing. (AR 191019.15).
8. On December 6, 2019 NMED issued to Permittees a Technical Incompleteness Determination in connection with the PMR. (AR 191203).
9. On January 16, 2020 Permittees submitted to NMED a Request for Temporary Authorization, seeking leave to commence construction of the new shaft that is the subject of the PMR pursuant to 40 C.F.R. §270.42(e) (AR 200112).
10. On January 21, 2020 Permittees submitted a Response to the Technical Incompleteness Determination (AR 200114).
11. On January 27, 2020 SRIC filed comments that stated that the Temporary Authorization should be denied because it is not authorized by the regulations and would severely prejudice the Class 3 PMR process. (AR 200124).
12. On April 24, 2020 NMED granted the Temporary Authorization for the regulatorily prescribed 180 days. (AR 200415). NMED filed a Memorandum dated April 24, 2020, containing its justification for the Temporary Authorization. (AR 200415.1).

13. On April 27, 2020 SRIC moved that NMED stay its Temporary Authorization pending appeal. (AR 200422).
14. On April 27, 2020 NMED advised counsel for SRIC that “there are no motions available to you at this time,” effectively denying the motion for a stay. (AR 200422.5).
15. On April 27, 2020 SRIC filed a Notice of Appeal in this Court, appealing the Temporary Authorization, and moved for a stay of the Temporary Authorization. (No. A-1-CA-38924) (AR 200421, 200503).
16. On June 11, 2020 this Court dismissed the appeal in No. A-1-CA-38924 (AR 200605.5).
17. On June 12, 2020 NMED issued its Notice of Intent to approve this PMR with a Fact Sheet, announced the availability of a draft permit, initiated a 60-day comment period, and invited the public to request a hearing. (AR 200606, 200607, 200608).
18. On June 30, 2020, SRIC filed a Petition for a Writ of Mandamus with the New Mexico Supreme Court, seeking an order directing that the Temporary Authorization be vacated. (No. S-1-SC-38372) (AR 200637).
19. On June 30, 2020 SRIC filed a Petition for a Writ of Certiorari in the New Mexico Supreme Court, seeking review of the dismissal by this Court in No. A-1-CA-38924. (No. S-1-SC-38373) (AR 200636).

20. On September 9, 2020 Permittees requested NMED to reissue the Temporary Authorization for an additional 180 days. (AR 200907).
21. On September 11, 2020 SRIC filed comments, opposing the reissuance of the Temporary Authorization. (AR 200908).
22. On September 17, 2020 the New Mexico Supreme Court denied the Petition for a Writ of Certiorari in No. S-1-SC-38373 (AR 200918).
23. On September 17, 2020, the New Mexico Supreme Court denied the Petition for a Writ of Mandamus in No. S-1-SC-38372 (AR 200919).
24. On October 14, 2020, Mr. Maestas of NMED filed his report concerning a September 29, 2020 inspection of construction activities and Permittees' compliance with the terms of the initial Temporary Authorization. (AR 201011).
25. On October 16, 2020 Permittees filed a Response to an information request made by NMED during the September 29, 2020 inspection. (AR 201012).
26. On November 18, 2020 NMED denied the Permittees' request to extend the Temporary Authorization. (AR 201108).
27. On December 11, 2020 NMED issued an Information Request to Permittees concerning their compliance with NMED's direction to stop construction. (AR 201205).

28. On February 4, 2021 the NMED Secretary issued a Notice of Docketing and Order of Hearing and Appointment of Hearing Officer.

29. Statement of the Case: (b) Factual background: WIPP is regulated by NMED under a permit issued pursuant to the HWA. WIPP is also subject to the WIPP Authorization Act, Pub. L. No. 96-164, §213 (1979). The Authorization Act directs that WIPP may proceed:

for the express purpose of providing a research and development facility to demonstrate the safe disposal of radioactive wastes exempted from regulation by the Nuclear Regulatory Commission.

§213(a).

30. The Authorization Act continues, specifying the conditions under which the project may go forward:

(b)(1) In carrying out such project, the Secretary [of Energy] shall consult and cooperate with the appropriate officials of the State of New Mexico, with respect to the public health and safety concerns of such State in regard to such project and shall, consistent with the purposes of subsection (a), give consideration to such concerns and cooperate with such officials in resolving such concerns. The consultation and cooperation required by this paragraph shall be carried out as provided in paragraph (2).

31. The Authorization Act sets down specific terms for consultation and cooperation, which are, again, conditions upon the authorization of the WIPP project:

The Secretary [of Energy] shall seek to enter into a written agreement with the appropriate officials of the State of New Mexico, as provided by the laws of the State of New Mexico, not later than September 30,

1980, setting forth the procedures under which the consultation and cooperation required by paragraph (1) shall be carried out. Such procedures shall include as a minimum—

- (A) The right of the State of New Mexico to comment on, and make recommendations with regard to, the public health and safety aspects of such project before the occurrence of certain key events identified in the agreement;
- (B) Procedures, including specific time frames, for the Secretary to receive, consider, resolve, and act upon comments and recommendations made by the State of New Mexico; and
- (C) Procedures for the Secretary and the appropriate officials of the State of New Mexico to periodically review, amend, or modify the agreement.

32. By the statutory date in 1980, DOE had refused to sign the State's proposed C&C Agreement. SRIC Ex. 14 at 3. In early 1981 DOE determined to proceed with the first two shafts. In May 1981 New Mexico Attorney General Jeff Bingaman filed suit (*State ex rel. Bingaman v. U.S. Department of Energy*, Civil Action No. 81-0363 JB) (D.N.M.) to enjoin construction until there was a binding agreement to protect the state's rights and address concerns about site suitability and off-site impacts. *Id.*

33. The 1981 litigation is expressly brought on behalf of the State of New Mexico and its citizens. The rights and interests of citizens are repeatedly invoked. Complaint at ¶¶ 1, 4, 6, 9, 10, 45, 54, 101, 102, 103, 106, 130, Prayer at III.B, IV.B., *State ex rel. Bingaman v. U.S. Department of Energy*, Civil Action No. 81-0363 JB) (D.N.M.). The suit was brought under the Tenth Amendment, the National Environmental Policy Act, 42 U.S.C. §

4321 et seq. (“NEPA”), the Federal Land Policy and Management Act, 43 U.S.C. § 1701 *et seq.* (“FLPMA”), the WIPP Authorization Act, Pub. L. No. 96-164, § 213 (1979), and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (See Complaint ¶¶ 40-56 (Tenth Amendment), ¶¶ 49-56 (Authorization Act), ¶¶ 65-106 (NEPA), ¶¶ 107-130 (FLPMA)).

34. Settlement talks followed, and in the resulting Stipulated Agreement DOE agreed that the attached C&C Agreement is “binding and enforceable”:

This consultation and cooperation agreement shall be a binding and enforceable agreement between the Department of Energy and the State of New Mexico . . . .

AR 200503, Stipulated Agreement at 3.

35. The Stipulated Agreement and accompanying Consultation and Cooperation Agreement (“C&C Agreement”), filed in United States District Court on July 1, 1981, established a process for submission of data by DOE, review by the State and citizens, comment by the State and citizens, consideration of comments and response by DOE, and resolution of their comments *in advance* of key events.

36. The Stipulated Agreement (AR 200503) that stayed the 1981 litigation states specifically as follows in ¶ 2:

The United States Department of Energy shall prepare and provide to the State of New Mexico and the public a formal, public document containing a summation of the results of all experiments and studies conducted during the SPDV phase and site validation

phase of the WIPP project at least sixty (60) days prior to any decision as to whether the information obtained from the SPDV program and site and design validation tests warrants the commencement of construction of the permanent facility for the full WIPP repository which decision is now estimated to be no earlier than September of 1983. Within such period the State of New Mexico and interested members of the public shall have an opportunity to comment on that document as it relates to the decision to commence construction of the permanent facility for the full WIPP project. After receiving, reviewing, considering and responding to any comments made by the State and interested members of the public, the Department of Energy shall enter a final decision on whether the information obtained from the SPDV program and site and design validation tests warrants the commencement of permanent facility construction for the WIPP project.

Subsequent paragraphs call for interim and final reports to be provided to the public and a similar comment and response process. (¶¶ 3, 4, 5). Further language emphasizes that “interested members of the public” participate in the resolution of comments addressed to waste shipments:

The Department of Energy shall afford the State of New Mexico and interested members of the public a 45-day review and comment period and shall consider and respond to such comments prior to the decision to transport any waste into the State for emplacement at the WIPP site.

¶ 5. DOE agreed to give the State and the public a reasonable review period before any decision to change the WIPP project to a high-level waste repository. ¶ 6.

37. Under the C&C Agreement, the State may disseminate data furnished by the DOE and “may elicit comments and concerns from the public thereon

for communication to the DOE.” (AR 200503, First Modif. ¶ 3). Further, the State may solicit and transmit public input to the conflict resolution hearing officer. (AR 200503, C&C Agreement ¶ IX.M). DOE agreed that it shall not commence a “key event” if such is inconsistent with the State’s expressed concerns, except by order of the Secretary of Energy, which must include a statement of reasons. AR 200503, C&C Agreement, Art. IX.

38. As part of the C&C Agreement, DOE agreed to the Working Agreement AR 200503, Working Agreement. In that agreement (Rev. 1) (April 8, 1983), DOE agreed to issue the Site Validation Summary Report at least 60 days before a decision to construct “the full WIPP repository,” and to “review, consider and respond to any State or public comments before entering a final decision to construct the WIPP repository.” (At IV.F.6(e)(2)).

39. The Working Agreement details the information to be published, and therefore subject to comment and response, before a “decision to construct the full WIPP repository”:

Site Validation Summary Report containing a summation of the results of all experiments and studies conducted during the SPDV phase and site validation phase at least sixty (60) days prior to the issuance of the Final Validation Declaration, i.e., the “Decision to Construct the full WIPP Repository.”

(1) State and public shall have sixty (60) days in which to comment on the document.

(2) DOE shall review, consider and respond to any State or public comments before entering a final decision to construct the WIPP repository.

AR 200503, Working Agreement, Rev. 1 at 5.

40. Additionally, in the Working Agreement, DOE agreed to publish certain investigations and reports, to allow 45 days for comments by the State and the public, and to “consider and respond to such comments prior to the decision to transport any waste into the State for emplacement at the WIPP site.” At IV.K.8.

41. The Working Agreement requires DOE to publish the WIPP Safety Analysis Report (“SAR”). The SAR “constitutes the most comprehensive document concerning WIPP both in general and specifically as related to public health and safety as well as other matters.” AR 200503, Working Agreement at III.A. The SAR repeatedly describes and depicts the WIPP design of 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 presented by DOE, incorporating four shafts and eight panels, plus the possible Panels 9 and 10 formed from access drifts.

42. Dr. James Channell was a member of EEG, a State-sponsored environmental and scientific group chartered to give an independent assessment of WIPP, starting in 1979. May 20, 2021 Tr. 79 ll. 12-18. Dr.

Channell testified that “a limited scope for the WIPP project was a primary concern by New Mexico in order to prevent WIPP becoming the dumping ground for high-level waste and commercial spent fuel.” *Id.* Tr. 80 ll. 4-7 (Channell). Further, “The State of New Mexico engaged in a good faith effort with DOE to allow the original WIPP project to proceed. If they had not, it would never have proceeded.” *Id.* Tr. 81 ll. 19-21 (Channell).

43. Dr. Channell made clear that the C&C Agreement limited the permissible area of the WIPP project:

And there was a concern about limiting the project and including the underground footprint. 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.

(May 20, 2021 Tr. 81 l. 22—82 l. 2) (Channell).

44. DOE has now formed plans to enlarge WIPP beyond the limits of its area and period of operation that DOE originally planned and agreed to with the State under the C&C Agreement. For unstated reasons, DOE intends to pursue such expansion plans without disclosing in NMED proceedings the nature and extent of its plans to expand WIPP. In the absence of such disclosure, NMED has elected to support, *sub silentio*, DOE’s expansion plans and to disregard the limitations on WIPP’s design that DOE committed to in the C&C Agreement.

45. NMED has cooperated in DOE's concealment by excluding any evidence of DOE's expansion plans from the new shaft permit modification process and, specifically, holding a public hearing where NMED prevented the parties and the public from addressing the subject of WIPP's expansion. Such actions by DOE and NMED violate the statute and the rules governing permit modification and invalidate the result of that process. (74-4-4(7) NMSA 1978; 20.1.4.6 NMAC; 20.4.1.901.A(5) NMAC).

46. This original design of WIPP, with four shafts and eight disposal panels, was the basis for the Environmental Protection Agency's ("EPA") review of DOE's initial application for certification under the 1992 WIPP Land Withdrawal Act, Pub. L. No. 102-579 (1992) ("LWA"). It was also the basis for NMED's initial issuance of a Permit under the HWA in 1999.

47. WIPP has been built in accordance with the original design. The eight panels will soon be filled. Now, DOE has developed plans to enlarge WIPP beyond the limits of the original design, to which it committed in the C&C Agreement. The existence of such plans is disclosed in a series of publications issued by DOE, the National Academy of Sciences (NAS) and

the Government Accountability Office (GAO), which are public documents and are in the record of this case.<sup>1</sup>

48. These documents do not disclose the extent of the expansion that DOE plans. DOE does not disclose its expansion plans in this proceeding, even though the expansion conflicts with DOE's written agreement to the original design, with four shafts and eight panels, as the "full WIPP."

49. WIPP operates by mining underground disposal space, filling it with waste, and then closing the space that has been filled. DOE's main expert witness, Bob Kehrman, stated that in order to continue in operation, 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.

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<sup>1</sup> DOE Carlsbad Field Office Draft 2019-2024 Strategic Plan (WIPP to operate through 2050, receive entire "existing defense [transuranic] waste inventory."); Memorandum, R. Kehrman (Dec. 16, 2019) (WIPP to receive shipments through 2052); Final Supplement Analysis of the Complex Transformation Supplemental Programmatic EIS, DOE/EIS-0236-S4-SA-02 (Dec. 2019) (TRU waste from plutonium pit production in 2030-2080 will go to WIPP, at 65); Environmental Management Strategic Vision 2020-2030 (Utility Shaft will facilitate mining additional panels.); HWA Permit Renewal Application (March 31, 2020) ("a final waste emplacement date is unknown at this time.") (FR 200318 at 59-60); EIS for Plutonium Pit Production at the Savannah River Site, DOE/EIS-0541 (Sept. 2020) (TRU waste from pit production in 2030-2080 would go to WIPP) (at S-31)); Supplement Analysis for WIPP Site-Wide Operations, DOE/EIS-0026-SA-12 (April 8, 2021) ("DOE needs to excavate two replacement panels . . .", new shaft and drifts give access to "replacement" panels.); EM Strategic Vision 2021-2031 (April 13, 2021) ("WIPP is currently anticipated to operate beyond 2050," at 50). See AR 400422; SRIC Ex. 14 at 5-8.

Q. And if WIPP is to continue operating, it must continue mining disposal space, true?

A. Yes. Yes, sir.

May 17, 2021 Tr. 89 ll. 17-22 (Kehrman). He also stated that the PMR here assumes continued operation of the facility:

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.

May 17, 2021 Tr. 99 l. 12-16 (Kehrman).

50. Waste disposal operations in the original repository of four shafts and eight panels are expected to end in 2024. (Permit at G-6). When the eight disposal panels in the original design are filled and/or closed, WIPP can receive no more waste. At that point, to continue waste disposal, WIPP must expand, *i.e.*, excavate more disposal panels.

51. The PMR here proposes to construct a fifth shaft, which would not be operational until 2025 at the earliest. That shaft, in itself, is an expansion beyond the agreed-on design for the “full WIPP.” (May 20, 2021 Tr. 81 l. 22—82 l. 2) (Channell). The new shaft and associated drifts would cost \$197,000,000. To justify such expenditure, DOE plans to expand the underground repository by excavating additional disposal panels.

52. DOE’s publications disclose that DOE plans to dispose of waste at WIPP for several decades beyond 2024. Some documents refer to disposal operations

extending to the 2050's. Some refer to plans to dispose of waste into the 2080's. Such plans would necessarily include thousands of shipments of radioactive waste across New Mexico highways and use of WIPP's mining, maintenance and disposal infrastructure for many decades beyond 2024.

53. NMED, siding with DOE, moved before the hearing to exclude from the public process any evidence of the expansion of WIPP. (Motion in Limine, March 31, 2021). The Hearing Officer issued a ruling *in limine* on April 26, 2021 that such evidence would be excluded. Counsel for the other parties, such as SRIC, were directed not to ask questions about WIPP's future expansion. Citizen witnesses were directed not to testify or ask questions about WIPP's future expansion. The Hearing Officer made no findings of fact concerning WIPP's future expansion.

54. WIPP's future is based on expansion, or it has no future. The new shaft and drifts would be an expensive investment in WIPP's future. But the Hearing Officer excluded, as irrelevant, any evidence or public comment from hundreds of people about the future operation of WIPP, about the impact of decades of additional operation upon communities through which the waste trucks would go, and upon communities exposed to the risks of radioactivity releases.

55. The Hearing Officer ruled:

I don't know if you know the subject matter of tonight's hearing, but this is regarding a permanent [*sic*; permit?] modification request made by the Department of Energy and the WIPP operator to add a fifth ventilation shaft and associated drifts. We're not here to talk about any future expansion of the WIPP facility. When you make a public comment, please make sure that it's relevant to that issue. (May 17, 2021 T. 132 ll. 18-24).

Ms. Weehler, before you begin, I hope that you heard what I said before about relevancy. (Id. 134 ll. 12-13.)

56. The Hearing Officer professed that he had excluded evidence about the expansion of WIPP because the Permittees and the HWB *stated* that the purpose of the new shaft and drifts was only ventilation:

HEARING OFFICER: But Mr. Lovejoy, the reason that I put future expansion out of bounds for this hearing was because the DOE, the WIPP operators and the New Mexico Environment Department have all—have all presented evidence that Shaft No. 5 and the associated drifts are needed to restore the air circulation that they had before the 2014 incident. Now, I'm not saying, sir, that it is not possible that the Shaft no. 5 could someday also facilitate future expansion. I'm not saying that at all. I don't know that. But it is not on the table because they have not come to the New Mexico Environment Department and said we have—we want a draft permit change, a modification for this expansion of the panels or whatever it is that they would say. And that's why that's not on the table for tonight's hearing.

(May 19, 2021 Tr. 177 l. 19 – 178 l. 8). Thus, the Hearing Officer ruled that, in this hearing, the purpose of the shaft and drifts must be deemed limited to ventilation. But the fact is, and the Record shows, that, without physical expansion, there can be no more waste disposal and no need to

ventilate anything. Thus, if ventilation capacity is added, it clearly serves the purpose of ventilating future disposal space.

57. The Hearing Officer also explained the exclusion of evidence of expansion based on the fact that only certain permit language was proposed to be modified in the PMR, and so only that language should be discussed in the hearing. (Report at 5-6, FF 119, 147, CL 33). But in a PMR proceeding, all relevant evidence is admissible (20.1.4.400.B(1) NMAC), and the draft permit is required to contain all permit terms and conditions, any and all of which clearly may be considered in ruling on a PMR. (20.4.1.901.A(1)(a) NMAC).

58. However, the Hearing Officer was emphatic: “My order precludes discussion of future expansion.” May 20, 2021 Tr. 122 ll. 5-6. He cautioned counsel:

HEARING OFFICER: Mr. Lovejoy, there’s been an objection based on asked and answered, and I’m going to sustain the objection, and I’m also going to caution you that you have been skirting very close, very close to the line that I established in my order in limine that said future expansion is not on the table for discussion during this hearing, that we’re here for the Permit Modification Request.

(May 19, 2021 Tr. 95 ll. 11-19).

59. The Hearing Officer had, in granting the motion in limine, said that the parties were free to offer evidence on the 40 C.F.R. § 270.42(c)(1)(iii)

“need” for the new shaft and drifts. (Order, April 26, 2021). But when Mr. Hancock of SRIC testified that the need for the proposed shaft and drifts was to expand the disposal facility beyond its original design, the Hearing Officer cut him off:

HEARING OFFICER: Mr. Hancock and Mr. Lovejoy, I know 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.

(May 19, 2021 Tr. 151 ll. 7-12.). He continued:

However, if you’re talking about future expansion, you are in violation of that order because what I said was future expansion is future expansion and when and if that comes in a draft permit, then we will go through the same process like we are tonight about that future expansion.

(May 19, 2021 Tr. 152, ll. 18-22).

60. The Hearing Officer refused to admit recent documents published by DOE and referring to its plan for additional disposal panels. (May 19, 2021 Tr. 167 ll. 9-22) (SRIC Ex. 6). A document issued by the GAO showing planned WIPP expansion, based upon DOE information, was also refused. (Id. 167 l. 24 – 168 l. 16) (SRIC Ex. 7). The Hearing Officer apparently dismissed these and other documents from several federal agencies as unreliable, without explaining why. (FF 48).

61. The Hearing Officer ultimately heard some testimony about DOE's evident intention to break its agreement with the State and expand WIPP beyond the physical footprint and the duration that it had committed to, extending the operating period by decades and affecting communities where waste is generated, or those along the transport routes to WIPP, or those near the disposal facility. (May 17, 2021 Tr. 135 ll. 18-19; *Id.* 138 ll. 20-25; 139 ll. 17-24, 140, ll. 4-11; May 18, 2021 Tr. 7 l. 20-8 l. 7; *Id.* 10 l. 1- 11 l. 15; May 19, 2021 Tr. 132 ll. 4-10, 133, ll. 8-13; *Id.* 136, l. 19- 137 l. 18.). Other witnesses expressed consternation that DOE, having committed to a repository with eight panels and operations ending in 2024, reneged on its commitments, and they questioned whether DOE would fulfill more recent promises about the management of hazardous and radioactive waste at WIPP. (May 19, 2021 Tr. 134 ll. 12-23, 135 ll. 7-18). But he then ruled such evidence irrelevant (FF 119; FF 147; CL 33; CL 48) and made no factfindings reporting these witnesses' descriptions of community impacts.

62. The public notice of the hearing stated that the public might attend and testify on non-technical subjects and cross-examine witnesses. (AR 210315 ) (March 18, 2021):

Through this Hearing Public Notice, NMED announces a public hearing to accept additional public comment on the draft Permit and provide persons a reasonable opportunity to present testimony,

as well as to examine witnesses on the draft Permit prior to issuance of a final decision. at 2.

The public hearing will provide interested persons a reasonable opportunity to present data, views, and arguments, as well as to examine witnesses. The hearing will also afford an opportunity for all persons to present comments. at 3.

At the public hearing, the Department will accept technical testimony and non-technical oral comments. The Hearing Officer may set reasonable limits on the time allowed for technical testimony and oral comments. Technical testimony and oral comments on the draft Permit shall be accepted at the public hearing, in accordance with the Department regulations as set forth below. at 4.

Pursuant to the February 12, 2021 Scheduling Order, the Hearing Officer will accept non-technical public comment at various and convenient times throughout the hearing. at 5.

63. However, 21 days before the hearing the Hearing Officer ruled *in limine*, in response to a motion by NMED (Motion in Limine, March 31, 2021), supported by the Permittees (Joint Response, April 14, 2021), that evidence of future expansion of the WIPP facility would not be admitted. (Order, April 26, 2021). And so the hearing proceeded. Although some testimony entered the record about the expansion of WIPP, the public was cautioned that the subject was “out of bounds,” parties were forbidden to address the issue of expansion, and the Hearing Officer made no mention of such evidence in his Report, which the Secretary adopted in toto.

64.SRIC offered evidence of the Permittees’ plans to expand the repository (Notice of Intent, Testimony at 6-9, May 3, 2021) and stated what should be obvious: that the construction of a \$197,000,000 shaft and drifts project would commit the Permittees to follow up with physical expansion of disposal capacity:

To propose a \$197,000,000 improvement, to be followed immediately by the shutdown of the facility, clearly makes no sense and fails to disclose the true purpose. The forthcoming expansion requires operations for decades beyond what has been agreed to in the social contract and stated in the WIPP Permit. The reason for the expansion and much longer lifetime is clearly to dispose of much waste that was never part of the WIPP mission and is a much greater volume than allowed by the legal and permitted limits, as the 2020 National Academy of Sciences (NAS) Report found. Exhibit B, Motion to Dismiss, Mar. 10, 2021. None of this essential information is disclosed in the PMR or draft permit.

(*Id.* 9). Nevertheless, the Hearing Officer refused to admit evidence about the planned expansion of WIPP, stating that the PMR “is needed to upgrade the ventilation shaft because of the 2014 event, bringing the system back to full scale operations.” But he required the parties to address the “need” for ventilation without discussing what may need to be ventilated.

65.The Hearing Officer’s Report contains numerous findings of fact and conclusions of law that are unsupported by substantial evidence or erroneous as a matter of law. We list important items:

- a. The Report states that the “purpose” of the PMR is to upgrade the permanent ventilation system. (at 2, line 16).
- b. FF 42: That the filtration system can accommodate only a small percentage of the original design airflow.
- c. FF 45: That full scale mining with filtered exhaust circuit is not practical with just the New Filter Building.
- d. FF 49: That the PMR will restore pre-2014 concurrent unfiltered mining and maintenance and filtered waste emplacement.
- e. FF 51: That the benefits of the new shaft and drifts include increasing air intake volumes and facilitation of concurrent mining, maintenance, and waste emplacement.
- f. FF 56: That the regulations do not require the applicant to justify the decision to modify the facility.
- g. FF 62: That the permanent ventilation system restores the pre-2014 conditions.
- h. FF 70: That the New Filter Building ventilation capacity is meant as a “defense in depth.”
- i. FF 76: That the PMR will “significantly increase ventilation flow.”
- j. FF 82, 83: That the PMR will enable concurrent mining (unfiltered) and disposal (filtered flow).

- k. FF 87: That the PMR will furnish “increased flow to the underground.”
- l. FF 147: That the order in limine excludes evidence of expansion as irrelevant.
- m. CL 8: That the PMR shows why the modification is needed.
- n. CL 24: That the PMR is “fully compliant.”
- o. CL 33: That future expansion is not relevant because it is not mentioned in the Permit sections sought to be modified in the PMR.
- p. CL 45: That opponents of the PMR failed to carry their burden of proof.
- q. CL 46: That more than an increase in air flow via the New Filter Building is needed to address the mission and operation needs of WIPP.
- r. CL 47: That SRIC’s objection fails to recognize that post-2014 WIPP’s ventilation capacity is sharply reduced.
- s. CL 48: The draft permit does not address added capacity to store waste.
- t. CL 51: The possibility of prejudice to the PMR process arising from the Temporary Authorization is irrelevant.
- u. CL 52: The impact of the C&C Agreement on expansion of WIPP is not raised here in the appropriate forum.
- v. CL 53: The new shaft is an essential part of the permanent ventilation system and its benefits are synergistic with the SSCVS.

66. Legal issues presented on this appeal: This case presents the question whether suppression of evidence of DOE's plan to expand WIPP, of which the new shaft and drifts are an essential part, and its impact upon affected communities was an error.

67. The New Mexico Supreme Court has held that public hearings on environmental permitting should address the applicant's entire plan and its impacts upon affected communities and that NMED must consider the testimony and report upon the impacts of the project. In *In re Rhino Environmental Services*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939, the Supreme Court ruled that evidence of the cumulative impact in the future of a proposed waste disposal facility, along with other facilities, upon a community must be admitted and considered. (¶¶ 20-27).

68. This proceeding raises the question whether, after numerous witnesses had voiced their concerns about the magnitude of future expansion and the integrity of DOE's commitments, when the Hearing Officer made no findings about such impacts (FF 119), he denied the hearing that the Supreme Court has demanded: "It appears that the Secretary ignored an entire line of evidence in reaching his decision on the final order." In *re Rhino Environmental Services*, 205-NMSC-024, ¶ 41, 138 N.M. 133, 143, 117 P.3d 939, 949.

69. It must also be considered that the Supreme Court held that the NMED Secretary abused his discretion by refusing to hear testimony about the cumulative impact of the proposed disposal facility:

As a result, we hold that the Secretary abused his discretion by limiting the scope of testimony during the public hearing and interpreting the Department's role as confined to technical oversight.

*Rhino* ¶ 27. *Rhino* specifically holds that evidence about the future impacts of a proposed project must be admitted and given consideration:

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.

*Rhino* ¶ 30. The Court emphasized that such testimony falls well within the scope of environmental concerns:

The adverse impact of the proliferation of landfills on a community's quality of life is well within the boundaries of environmental protection.

*Rhino* ¶ 31. Similarly, the permitting process for the WIPP repository is mandated by regulation to incorporate human health and environmental concerns:

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.

40 C.F.R. § 264.601.

70. The case presents the question whether these issues must also be addressed by NMED, bearing in mind that the rules applicable to an HWA permitting hearing call for liberal admission of evidence:

A. The New Mexico Rules of Civil Procedure, SCRA 1986, 1-001 to 1-102 and the New Mexico Rules of Evidence, SCRA 1986, 11-101 to 11-1102 shall not apply to proceedings under this Part. At the discretion of the Hearing Officer, the rules may be used for guidance and shall not be construed to limit, extend, or otherwise modify the authority and jurisdiction of the Secretary under any Act.

B. Liberal Construction: This Part shall be liberally construed to carry out its purpose and the purposes of the statute or statutes and regulations pursuant to which the proceeding at issue is conducted. This part shall also be liberally construed to facilitate participation by members of the public, including those who are not represented by counsel.

N.M. Code R. § 20.1.4.100. Further:

(1) General: Except as otherwise provided in this subsection, the Hearing Officer shall admit all relevant evidence that is not unduly prejudicial or repetitious, or otherwise unreliable or of little probative value.

N.M. Code R. § 20.1.4.400. And again:

5) No ruling shall be made on permit issuance or denial without an opportunity for a public hearing, at which all interested persons shall be given a reasonable chance to submit significant data, views or arguments orally or in writing and to examine witnesses testifying at the public hearing.

N.M. Code R. § 20.4.1.901.

71. There is relevant precedent that testimony, both technical and lay, about the impacts of construction of the shaft and drifts, including the projected future

expansion, should have been not only admitted but also reported by the Hearing Officer and acted upon by NMED. *See Southwest Org. Project v. Albuquerque-Bernalillo County Air Quality Control Board*, 2021-NMAC-005, ¶ 23, 482 P.3d 1273, 2020 N.M. App. LEXIS 44 (explaining that in *Rhino* NMED was required to consider “evidence and testimony impacting quality of life,” citing regulations requiring a permit to protect public health, welfare, and the environment).

72. There is also the question whether this proceeding violated decisions where the notice of a hearing invited public comment, but no opportunity for such comment was afforded. This Court has held that “In our view, this notice plainly fails to inform the public that the Board might well resolve the appeal by use of summary procedures prior to the November 5, 2014 public hearing.” *Freed v. City of Albuquerque*, 2017-NMCA-011, ¶ 15, 388 P.3d 287, 2016 N.M. App. LEXIS 84. There, the notice that was published

affirmatively misleads the reader by suggesting that the public would be given an opportunity to comment on the petition at the November 5, 2014 hearing, when in fact the hearing was never held. To say the least, misinformation does not comport with the publicly inclusive spirit of the applicable statutory framework.

*Freed v. City of Albuquerque*, ¶ 17, 388 P.3d 287, 292-93. Here, the public was told that public comment would be heard starting May 17, 2021, but when they arrived the key issue—WIPP expansion—had been excluded by

action of NMED, the Permittees, and the Hearing Officer: There would be no discussion of expansion, even though that is the main purpose of the permit modification. The public was denied its hearing, as were the parties presenting technical testimony.

73. The case also raises the questions whether, under the “binding and enforceable” C&C Agreement, DOE is prohibited to add a fifth shaft or additional disposal panels to the repository, and NMED’s action in approving the PMR violates the C&C Agreement. The Hearing Officer’s Report gives no consideration to the terms of the C&C Agreement and refuses, without any explanation, to enforce the limits on WIPP’s design and dimensions that DOE has agreed to.
74. To ignore the C&C Agreement, saying obscurely that NMED is “not the appropriate forum” (CL 52), is no explanation at all and denies any hearing and decision to the parties who are entitled to rely upon the C&C Agreement and offers no reasoning to a reviewing court.
75. There is a clear issue whether the C&C Agreement is enforceable, as to its specific requirement of an opportunity to comment and receive responses in advance of “key events,” by SRIC, which has participated in the WIPP authorization process since it began more than 40 years ago.

76. Caselaw establishes that a contract with a federal agency supports a third-party beneficiary claim in accordance with the federal common law that governs contracts with the United States. The essential element is the intent to benefit the third party. *Roedler v. DOE*, 255 F.3d 1347, 1351-52 (Fed. Cir. 2001). The contract may be a consent decree, which for some purposes is construed as a contract. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 237 (1975); *United States v. Manning*, 434 F.Supp.2d 988, 1020-21 (E.D. Wash. 2006). Here, the parties to the C&C Agreement intended to give citizens the right to submit comments on key events and to entitle commenters to consideration of and responses to their comments *before* DOE carries out the key event. An intended third-party beneficiary will be found when it is appropriate to recognize a right to performance in the third party and the circumstances indicate that the promisee intends to give the third party the benefit of the promised performance. *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566, 573 (2d Cir. 1991). *See also: J.G.B. Enters. v. United States*, 497 F.3d 1259, 1260 (Fed. Cir. 2007); *Flexfab, L.L.C. v. United States*, 424 F.3d 1254, 1259-60 (Fed. Cir. 2005); *Chevron U.S.A., Inc. v. United States*, 110 Fed. Cl. 747, 782-83 (Ct. Fed. Cl. 2013).

77. A third-party beneficiary is one who reasonably relied upon a promise to benefit him in the contract in issue. See Restatement (Second) of Contracts § 302(1)(b) cmt. D; *Montana v. United States*, 124 F.3d 1269, 1273 (Fed. Cir. 1997). Thus, for example, a labor union may make an agreement with an employer concerning worker benefits; all union members employed then or later are third-party beneficiaries. Restatement (Second) of Contracts § 302, illustration 14.

78. The agreement need not identify each beneficiary by name; it is enough that the class or category of persons intended to benefit from the contract be indicated. *Tradesmen Int'l v. U.S. Postal Service*, 234 F.Supp.2d 1191, 1202 (D. Kan. 2002). See also: *Owens v. Haas*, 601 F.2d 1242, 1250 (2d Cir. 1979); *U.S. v. Spencer*, 2011 U.S. Dist. LEXIS 16172 at \*14-15 (D. Okla. 2011); *United States v. El-Sadig*, 133 F. Supp. 2d 600, 608-09 (N.D. Ohio 2001).

79. At another DOE site in Hanford, Washington, the Department of Justice gave its opinion that a cleanup agreement among DOE, EPA, and the Washington State Department of Ecology is “binding and enforceable . . . by the State of Washington and any affected citizens.” Letter, D.A. Carr to C. Gregoire, Feb. 26, 1989, *quoted in United States v. Manning*, 434 F.Supp.2d 988, 1020-21 (E.D. Wash. 2006).

80. Third-party beneficiary status is appropriate where, if not deemed a third-party beneficiary, a person is meant to benefit from a contract would have no remedy: “The court will not lightly presume that the parties intended, with one hand, to create” a right to consultation and cooperation and, “with the other hand, take away any remedy” and thus “make a mockery of the whole program.” *Ungott v. Watt*, N82-004 Civ., slip op. at 7 n.3 (D. Alaska 1984), cited in *Dewakuku v. Cuomo*, 107 F.Supp.2d 1117, 1134 (D. Ariz. 2000).
81. There is an issue here of the impact of 20.1.4.500(D)(2) NMAC, which directs the Secretary to “set forth in the final order the reasons for the action taken.” The Secretary may not disregard difficult facts or challenging legal issues. Here, such action has denied parties the hearing promised by 40 C.F.R. § 270.42(c). *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶ 24, 125 N.M. 786, 793-94, 965 P.2d 370, 377-78. See also *Gila Resources Information Project v. N.M. WQCC*, 2005-NMCA-139, ¶¶ 33-38, 138 N.M. 625, 124 P.3d 1164.
82. Moreover, the regulations require a PMR to “Explain[] why the modification is needed.” 40 C.F.R. §270.42(c)(1)(iii). The new shaft would not be available for use until 2025. SRIC Ex. 13; May 19, 2021 Tr. 92 ll. 10-14 (Maestas); 162 ll. 12-17 (Hancock). Currently, WIPP is scheduled to be fully excavated in accordance with its original design by early 2022 (May

17, 2021 Tr. 89 ll.14-16 (Kehrman); SRIC Ex. 12) and filled within a few years after that. The Permit states that the disposal phase is expected to end in 2024. (Permit at G-6).

83. Here, the proposed \$197,000,000 shaft and drifts are clearly not needed to dispose of waste in WIPP, as built pursuant to the original design, because that facility is expected to conclude disposal operations before the new shaft and drifts are completed. Plainly, the only purpose that the new shaft could serve is the underground expansion of the repository by the addition of new disposal units. This purpose is not disclosed in the PMR, contrary to 40 C.F.R. § 270.42(c)(1)(iii). And the Hearing Officer made no findings of such facts. To the contrary, he stated that “future uses outside of ventilation are not part of this PMR” (FF 40). But WIPP does not exist for the futile purpose of ventilating itself.

84. The case presents the issue whether the Permittees have satisfied their burden of proof. Mr. Kehrman, Permittees’ main witness, was not willing to state that the new shaft and drifts are necessary to WIPP, as built based on its original design. (May 17, 2021 Tr. 103, ll. 6-10 (Kehrman)). Mr. Kehrman would only say that the new shaft and drifts would be necessary to WIPP, if disposal operations continue past the expected end date of 2024 (*i.e.*, assuming WIPP expanded) and until DOE ran out of waste or NMED

stopped the disposal. (*Id.* 96 l. 19-97 l. 5; *Id.* 99 ll. 7-16) (Kehrman). But the Hearing Officer barred evidence of future expansion as irrelevant and inadmissible—leaving Mr. Kehrman’s expert opinion bereft of factual support for its key assumption.

85. There is a question as to the application of the regulatory language—“Explain[] why the modification is needed.” This Court has relied upon evidence of how the proposed changes will function *at the facility in future operations*. *Southwest Research & Information Center v. Environment Department*, 2014-NMCA-098, ¶¶ 24-26, 336 P.3d 404. No such showing was made here.

86. In addition, there is the further question whether the Hearing Officer erred in finding that DOE is in compliance with 40 C.F.R. § 270.42(c)(1)(iii) if it merely shows how the language of the *permit* needs to be changed to account for the new shaft and drifts—not why the *facility* needs to be modified by constructing the shaft and drifts. (FF 48, 56). Such ruling relieves DOE of any duty to justify the changes to the facility and reduces the entire permit modification process to an exercise in descriptive exposition.

87. Appellants contend that the Hearing Officer’s interpretation rejects the plain meaning of the regulatory language, disregards EPA’s explanation of the

rule at the time of its issuance (53 Fed. Reg. 37912, at IV.B.5 (Sept. 28, 1988)), and ignores the HWB’s position that DOE must “show that the modification is needed by the facility.” (May 19, 2021 Tr. 85 ll. 16-19 (Maestas)). No explanation is offered for the rejection of EPA’s and the Bureau’s interpretation. Under that standard DOE has not shown why the modification is needed and has, again, not met its burden of proof.

88. There are other errors in the Record; for example, the Hearing Officer misstated the benefits available using the new shaft. See par. 65, *supra*. But such calculations, erroneous or not, all assume that the new shaft has any operational function at all, which it will only have if WIPP expands its disposal areas—a topic that the Hearing Officer refused to entertain.<sup>2</sup>

89. SRIC has presented its position in cross-examination of opposing witnesses, in documentary exhibits, which address the several ways in which the expansion of WIPP is unlawful, in testimony by Mr. Hancock, which to the

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<sup>2</sup> The Hearing Officer found that the existing ventilation system limits air flow to a small percentage of the flow before the 2014 radioactivity release (FF 42), but the new shaft will increase air flow to previous levels. (FF 49, 62). He found that the new shaft would “provide[] significantly increased ventilation flow.” (FF 76, 87). But the evidence clearly showed that the construction of the New Filter Building, already authorized by a March 2018 permit modification, will bring the flow volume back to pre-2014 levels, and the present PMR would not increase it further. May 17, 2021 Tr. 84 ll. 19-21, 86 ll. 2-12 (Kehrman).

extent his testimony was excluded, was supplemented by proffers (May 19, 2021 Tr. 151 l. 13—152 l. 10; *id.* 158 ll. 7-17), in testimony by Dr. Channell, and in Comments on the Hearing Officer’s Report (Sept. 29, 2021).

90. Judicial review: The Hazardous Waste Act, § 74-4-14(C) NMSA 1978, states the standard of judicial review:

Upon appeal, the court of appeals shall set aside the action only if it is found to be:

1. arbitrary, capricious or an abuse of discretion;
2. not supported by substantial evidence in the record; or
3. otherwise not in accordance with law.

91. Moreover, under the regulations a permit modification request should be denied if the application (a) is incomplete, (b) fails to comply with applicable requirements, or (c) fails to protect human health or the environment. 40 C.F.R. § 270.42(b)(7).

92. The meaning of a statute is an issue of law that is judicially reviewed *de novo*. *Southwest Research & Information Center v. State*, 2003-NMCA-012 ¶ 24, 133 N.M. 179, 62 P.3d 270. It is arbitrary and capricious for an agency to follow an erroneous interpretation of the applicable law. *Phelps Dodge Tyrone v. N.M. Water Quality Control Commission*, 2006-NMCA-115 ¶ 33, 140 N.M. 464, 143 P.3d 502.

93. New Mexico courts apply principles of judicial review similar to those used by federal courts. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Commission*, 2003-NMSC-005 ¶ 11, 133 N.M. 97, 61 P.3d 806; *Atlixco Coalition v. Maggiore*, 1998-NMCA-134 ¶ 16, 125 N.M. 786, 965 P.2d 370.
94. The Secretary must state reasons for his decision. *Citizen Action v. Sandia Corp.*, 2008-NMCA-031 ¶ 19, 143 N.M. 620, 179 P.3d 1228, *cert. denied*, 2008 NM LEXIS 135, 143 N.M. 666, 180 P.3d 673; *Atlixco Coalition v. Maggiore*, 1998-NMCA-134 ¶ 15, 125 N.M. 786, 965 P.2d 370; *Green v. New Mexico Human Services Department*, 1988-NMCA-083 ¶ 13, 107 N.M. 628, 762 P.2d 915.
95. Agency action must stand or fall on the basis of the agency's reasoning. The reviewing court may not supply a reasoned basis for the agency's action that the agency itself has not given. Thus, the Court may not make agency policy but only review it. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Commission*, 2003-NMSC-005 ¶ 11, 133 N.M. 97, 61 P.3d 806; *Atlixco Coalition v. Maggiore*, 1998-NMCA-134 ¶ 20, 125 N.M. 786, 965 P.2d 370.
96. Recording of the proceedings: A transcript of the public hearing has been prepared and appears in the Record.

97. Related or prior appeals: Another appeal of this same Final Order is A-1-CA-40074. Two related prior appeals were consolidated: A-1-CA-37894 and A-1-CA-37898. This Court has heard another appeal relating to WIPP expansion: No. A-1-CA-38924. The Supreme Court has entertained petitions for certiorari and for mandamus: No. S-1-SC-38372 and No. S-1-SC-38373.

Respectfully submitted,

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Dated: 6 December 2021.

## **CERTIFICATE OF SERVICE**

I hereby certify that this Docketing Statement was served electronically upon all parties to this proceeding, listed below, on December 6, 2021, in accordance with Rule 12-307.2 of the Rules of Appellate Procedure:

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