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COURT OF APPEALS OF NEW MEXICO  
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*Wandy Jones*

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

**SOUTHWEST RESEARCH AND  
INFORMATION CENTER, et al.,**

No. 32,499

**Appellants,**

**v.**

**NEW MEXICO ENVIRONMENT  
DEPARTMENT,**

**RECEIVED**

**AUG 29 2013**

**NMED  
Hazardous Waste Bureau**

**Appellee,**

**and**

**UNITED STATES DEPARTMENT  
OF ENERGY,**

**Intervenor-Appellee.**

**BRIEF OF THE  
NEW MEXICO ENVIRONMENT DEPARTMENT  
IN OPPOSITION TO MOTION FOR STAY OF PERMIT**

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## I. INTRODUCTION

This case is the appeal of a modification to the hazardous waste facility permit for the Waste Isolation Pilot Plant (“WIPP”), an underground repository for the disposal of transuranic radioactive waste mixed with hazardous waste, located near Carlsbad, in Eddy County, New Mexico. The facility is owned by the United States Department of Energy (“DOE”) and operated by DOE and Nuclear Waste Partnership LLC, a private contractor to DOE (collectively, the “Permittees”). The New Mexico Environment Department (“Department”) approved the modification on November 1, 2012, in accordance with the provisions of the New Mexico Hazardous Waste Act (“HWA”), NMSA 1978, §§ 74-4-1 to 74-4-14 (2006), and the Hazardous Waste Management Regulations issued thereunder, 20.4.1 NMAC (Oct. 5, 1978, as amended through June 14, 2000). The modification allows the Permittees to store, handle, and dispose of mixed transuranic radioactive and hazardous waste at WIPP in “shielded containers,” which are cylindrical steel containers fortified with a layer of lead. The Southwest Research and Information Center, a nonprofit organization, and Margaret Elizabeth Richards, a private citizen (collectively, “Southwest Research”), challenged the permit modification by filing a notice of appeal with this Court on November 16, 2012. DOE filed an unopposed motion to intervene in this appeal, which the Court granted on July 15, 2013. Southwest Research filed its Brief in Chief (“**BIC**”) on April 11, 2013; the

Department and DOE each filed an Answer Brief (respectively, “**DEPT AB**”; “**DOE AB**”) on July 1, 2013; and Southwest Research filed a Reply Brief (“**RB**”) on July 23, 2013.

On August 9, 2013, Southwest Research filed a motion for stay (“**8-9-13 MOT**”), asking the Court to “stay the effectiveness of the permit modification in issue” pending this appeal. [**8-9-13 MOT 1**]. In accordance with Rule 12-309(E) NMRA, the Department hereby submits its response. For the reasons set forth herein, the Department opposes the Motion.

## **II. STANDARD OF REVIEW**

To grant or deny a stay pending appeal is within the Court’s discretion. *Tenneco Oil Co. v. N.M. Water Quality Control Comm’n*, 1986-NMCA-033, 105 N.M. 708, 710, 736 P.2d 986, 988 (“Grant of an application for stay [pending appeal] is not a matter of right, it is an exercise of judicial discretion, and the propriety of its issuance is dependent upon the circumstances of each individual case.”); *cf.* Rule 1-062(C) NMRA (“When an appeal is taken from an interlocutory or final judgment granting, dissolving or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms . . . as it considers proper for the security of the rights of the adverse party”).

The New Mexico Court of Appeals in *Tenneco Oil* recognized four conditions to guide the determination whether, in the exercise of discretion, to grant or deny a stay from an order adopted by an administrative agency pending appeal. 1986-NMCA-033, 105 N.M. at 710, 736 P.2d at 988. The person seeking the stay (the applicant) must show: 1) a likelihood that the applicant will prevail on the merits of the appeal; 2) that the applicant will suffer irreparable harm unless the stay is granted; 3) that no substantial harm will result to other interested persons; and 4) that no harm will ensue to the public interest. *Id.* A stay pending appeal will not be granted “where the applicant has not made the showing of each of the factors required to grant the stay.” *Id.* The burden is on the applicant to make this showing. *See id.*

### **III. ARGUMENT**

Southwest Research has not made the requisite showing for the granting of a stay pending appeal under the standards set forth in *Tenneco Oil*. The Motion, therefore, should be denied.

#### **A. *Southwest Research Is Not Likely to Prevail on the Merits***

The first consideration in ruling on a motion for a stay is whether the applicant has shown that it is likely to prevail on the merits. *Tenneco Oil*, 1986-NMCA-033, 105 N.M. at 710, 736 P.2d at 988. Southwest Research has not shown that it is likely to prevail on the merits of its appeal. To prevail, Southwest

Research must show that the action of the Environment Department in approving the permit modification was (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. NMSA 1978, § 74-4-14(C) (1992). [See **DEPT AB 18-20** (discussing the standard of review)].

Further, where Southwest Research seeks additional permit conditions not required in the statute or regulations to address alleged omissions in the modified permit, it has the burden of showing that such conditions are necessary. *Pickett Ranch, LLC v. Curry*, 2006-NMCA-082, ¶ 56, 140 N.M. 49, 139 P.3d 209. Where Southwest Research seeks a public hearing on the permit modification based on the hazardous waste regulations, the Environment Department's interpretation of those regulations is entitled to deference. *Gila Res. Info. Project v. N.M. Water Quality Control Comm'n*, 2005-NMCA-139, ¶ 16, 138 N.M. 625, 124 P.3d 1164. Where Southwest Research seeks a public hearing on the permit modification based on significant public interest, the Secretary's determination is reviewable only for abuse of discretion. *Sw. Research & Info. Ctr. v. New Mexico*, 2003-NMCA-012, ¶ 39, 133 N.M. 179, 62 P.3d 270.

For the reasons set forth in the Department's Answer Brief, and as further set forth below, Southwest Research will not likely prevail on the merits of its appeal. It will likely lose.

**1. The Permit Modification Is Based on an Adequate Explanation of Need**

Southwest Research challenges the permit modification, first, by arguing that the permit modification request did not state why the modification is needed, as required by the hazardous waste regulations, 40 C.F.R. § 270.42(b)(1)(i), incorporated by 20.4.1.900 NMAC. [BIC 13-18; 8-9-13 MOT 4-8]. But Southwest Research completely ignores the plainly stated, logical, and adequate explanation of need in the permit modification request.

As described more fully in the Department's Answer Brief [see DEPT AB 21-24], the Permittees in their July 2012 revised permit modification request explained that the use of shielded containers would make the management and disposal of remote-handled waste at WIPP more efficient. [3 RP 01553-01554]. First, the Permittees explained that shielded containers will allow remote-handled waste to be sent to WIPP in fewer shipments. [3 RP 01553-01554; see DEPT AB 22-23]. Second, the Permittees explain that shielded containers will allow waste containers to move from unloading to final emplacement much more quickly. [3 RP 01554; see DEPT AB 23].

Aside from a brief paragraph in its Brief in Chief summarily dismissing these explanations as "general" and "never substantiated" [BIC 13], Southwest Research does not address these explanations; it ignores them [see RB 1-7; 8-9-13

**MOT 4-8]**. Instead, Southwest Research makes a lengthy, rather convoluted argument that the real “need” for the permit modification is to evade the waste volume limits in the permit. [**BIC 13-17; 8-9-13 MOT 4-7**]. This argument misses the mark.

Southwest Research argues that the unstated need for the permit modification is to make up capacity for the disposal of remote-handled waste, capacity that was lost due to inefficient disposal practices in the past. In Panels 1 through 5, the wall space that could have been used to dispose of remote-handled waste was not used to its full capacity. The floor space of those panels was filled with contact-handled waste, blocking access to the wall space. Thus, DOE needs additional capacity to dispose of its remaining inventory of remote-handled waste. [**BIC 13-15**]. Southwest Research then concludes that the disposal of remote-handled waste in shielded containers will cause the Permittees to exceed the limits for remote-handled waste in the remaining Panels 6 through 10. [**BIC 14**].

But this conclusion simply does not follow. DOE must comply with the volume limits in the permit [*see* **5 RP 02873**], and ultimately those in the Waste Isolation Pilot Plant Land Withdrawal Act, *see* Pub. L. No. 102-579, § 7(a)(2)(B). Nothing in the permit modification changes those limits.

As a point of clarification, the Department agrees with DOE that the volume limits for remote-handled waste set forth in Table 4.1.1 of the permit applies to

waste in shielded containers. Waste in shielded containers at WIPP will be managed and handled as contact-handled waste, but it will be counted as remote-handled waste for purposes of meeting the volume limits in Table 4.1.1 of the permit, and the radioactivity limit in the statute. [5 RP 02873]. As the Department explained in its Response to Comments,<sup>1</sup> “[o]nce the waste is in the shielded container and the surface dose rate is less than 200 millirem per hour, the waste can be *handled* as [contact-handled] waste.” [1 SRP 04468 (emphasis added)]. Likewise, “the waste in the shielded containers will meet the [contact-handled] waste criteria and may be *managed* in accordance with the [contact-handled] waste criteria.” [1 SRP 04469 (emphasis added)]. However, “the waste in the shielded containers will be counted toward the [remote-handled] waste volume limits.” [1 SRP 04482].

Thus, the modification request contains the requisite explanation of why the modification is needed. The permit modification is fully in accordance with law, and it is supported by substantial evidence in the record. Southwest Research is not likely to prevail in this challenge to the permit modification.

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<sup>1</sup> As explained in the Answer Brief [DEPT AB 17-18], the Department prepared a written response to each of the public comments it received on the permit modification request. [1 SRP 04465-04489].

**2. The Modified Permit Adequately Addresses the Possibility of Waste in Shielded Containers Shifting During Shipping**

Southwest Research next challenges the permit modification by positing the possibility that wastes in shielded containers may shift during transport or on-site handling, causing the surface dose rate of 200 millirem per hour to be exceeded. Because the modified permit does not address this contingency, according to Southwest Research, it fails to protect health and the environment and is therefore arbitrary and capricious. [**BIC 18-24; 8-9-13 MOT 9-11**]. The modified permit, however, especially in light of other regulatory requirements, adequately addresses such remote contingencies; Southwest Research fails to show otherwise.

As explained in the Department's Answer Brief [**DEPT AB 26-27**], the possibility of waste shifting during shipping such that the surface dose would be exceeded is entirely speculative, and there is nothing in the administrative record to suggest that it should be a significant concern. As the Department explained in its Response to Comments on the modified permit [**1 SRP 04466-04467**], the DOE generator sites are subject to packaging requirements to minimize any shifting of wastes. As also explained in the Response to Comments [**1 SRP 04473**], Attachment A to the modified permit contains provisions for the management of damaged containers. [**5 RP 02984-02985, 02995-02998**]. Further, the Contingency Plan, which is Attachment D to the modified permit, also contains

safeguards to prevent such risks from occurring. Section D-1e of the Contingency Plan governs the handling of transuranic wastes in the Waste Handling Building Container Storage Unit, the Parking Area Container Storage Unit, and other areas at WIPP where transuranic waste is managed. [5 RP 03561-03562]. In addition, as explained in some detail in the Answer Brief [DEPT AB 27-28], the WIPP facility is subject to federal regulations for occupational radiation protection. 10 C.F.R. Part 835.

Thus, the Department explained its reasoning on the possible shifting of waste during shipping in its Response to Comments on the proposed permit modification. [1 SRP 04466-04467, 04473]. Southwest Research has failed to demonstrate that the permit as modified is inadequate to protect health and the environment, *see Pickett Ranch*, 2006-NMCA-082, ¶ 56, or that the permit modification is otherwise arbitrary or capricious. Southwest Research is unlikely to prevail in this challenge to the permit modification.

### **3. The Modified Permit Adequately Addresses the Stacking of Shielded Containers**

Southwest Research next challenges the permit modification because it does not expressly prohibit the vertical stacking of three assemblies of shielded containers, which would be dangerously unstable. According to Southwest Research, the modified permit is therefore arbitrary and capricious. [BIC 25-26;

**8-9-13 MOT 11-12**]. Again, however, the modified permit adequately addresses this issue.

As explained in the Answer Brief [**DEPT AB 28-29**], the modified permit, in Attachment A2, section A2-2b, provides that “Containers will be stacked in the best manner to provide stability for the stack (which is up to three containers high) and to make best use of available space.” [**5 RP 03079**]. The modified permit, by its express terms, does not allow shielded containers, or any other containers, to be stacked in a manner that is unstable.

The Department explained its reasoning on the stacking of containers in its Response to Comments on the proposed permit modification. [**1 SRP 04480**]. Southwest Research has failed to demonstrate that the permit as modified is inadequate to protect health and the environment, *see Pickett Ranch, 2006-NMCA-082*, ¶ 56, or that the permit modification is otherwise arbitrary or capricious. Southwest Research is unlikely to prevail in this challenge.

**4. The Modified Permit Adequately Addresses the Overpacking of Damaged Shielded Containers**

Southwest Research also challenges the permit modification because it allows shielded containers that are damaged or leaking to be overpacked in containers that, according to Southwest Research, are not “authorized” to contain remote-handled waste. For this reason, Southwest Research argues that the permit

modification is arbitrary and capricious. [**BIC 27-29; 8-9-13 MOT 12-13**]. Again, the modified permit adequately addresses the overpacking of damaged or leaking containers.

As explained in the Answer Brief [**DEPT AB 29-31**], the modified permit does not contain an exclusive list of those containers that are “authorized” to contain remote-handled waste. Thus, contrary to the contention of Southwest Research, allowing shielded containers that are damaged or leaking to be overpacked into a standard waste box or ten drum overpack is not contrary to the permit provisions listing certain types of containers for remote-handled waste. More pointedly, as explained in the Response to Comments [**1 SRP 04465**], the modified permit properly and adequately addresses the issue of overpacking. Section D-4d(1) of the modified permit, part of the Contingency Plan, provides for the use of overpack containers in the event of a leak or spill. [**6 RP 03575**]. It provides that overpack containers must be “compatible with the hazards of the materials involved.” *Id.*

Again, the Department explained its reasoning on the overpacking of shielded containers in its Response to Comments on the proposed permit modification. [**1 SRP 04465**]. And again, Southwest Research has failed to demonstrate that the permit as modified is inadequate to protect health and the environment, *see Pickett Ranch*, 2006-NMCA-082, ¶ 56, or that the permit

modification is otherwise arbitrary or capricious. It is unlikely to prevail in this challenge.

**5. The Modified Permit Adequately Addresses the Possible Breach of Shielded Containers**

Southwest Research next challenges the permit modification by arguing that the environmental consequences of a breach of a shielded container have not adequately been assessed. Southwest Research argues that such an assessment is required by the hazardous waste regulations at 40 C.F.R. §§ 264.601 and 270.14(b)(8), and that the Environment Department has changed its position on this issue. [**BIC 30-34; 8-9-13 MOT 14-15**]. But Southwest Research's arguments have no merit.

As explained in the Department's Answer Brief [**DEPT AB 33**], analysis of potential releases from the WIPP facility was prepared for the original 1999 permit and the 2006 permit modification that allowed remote-handled waste to be managed at WIPP. Consequently, the modified permit contains innumerable provisions designed to protect public health and the environment from the hazards associated with the possible breach of waste containers, including containers holding remote-handled waste. [*See, e.g.*, **5 RP 02866, 02983, 03001-03002, 03560**]. The recent permit modification that Southwest Research challenges changed only the type of containers that are managed at WIPP. It did not change

the type of waste that may be handled at WIPP, nor did it change the quantity of waste that may be handled at WIPP. Further analysis is therefore not necessary under the regulations. Nevertheless, as also explained in the Answer Brief [**DEPT AB 33-34**], EPA has effectively conducted such an analysis. [**1 RP 00001-00080**]. Moreover, as noted in the DOE Answer Brief [**DOE AP 27**], Southwest Research did not reference these regulations in its comments. *See* [**3 RP 01645-01657**]. Finally, contrary to Southwest Research's assertion, the Department did not change its position on this issue. As explained in the Department's Answer Brief [**DEPT AB 33-34**], on December 28, 2011, the Department withdrew the December 22, 2011 letter [**2 RP 00871-00873**] that Southwest Research cites in support of its argument that the Department changed position. [**2 RP 00874-00875**]. The December 11, 2011 letter does not represent the Environment Department's position on this or any other issue; it is without effect.

On this issue, as well, Southwest Research has failed to demonstrate that the permit as modified is inadequate to protect health and the environment or that the permit modification is otherwise arbitrary or capricious. Southwest Research is not likely to prevail on this issue.

**6. The Permit Modification Did Not Increase Container Storage Capacity**

Southwest Research next challenges the permit modification on procedural

grounds, arguing that the Environment Department should have followed “Class 3” procedures in acting on the permit modification request. The hazardous waste regulations at 40 C.F.R. § 270.42(c) require a public hearing for a Class 3 permit modification. Class 3 procedures were required, according to Southwest Research, because the permit modification increases the container storage capacity for remote-handled waste by greater than 25 percent. [**BIC 34-37; 8-9-13 MOT 17-18**]; *see* 40 C.F.R. § 270.42, Appendix I, cl. F.1.a, incorporated by 20.4.1.900 NMAC. But the permit modification does not increase the WIPP storage capacity by any amount.

As explained in the Answer Brief [**DEPT AB 33**], as well as in the Response to Comments [**1 SRP 04467**], the waste in shielded containers meets the definition for contact-handled waste. It is stored, managed, and disposed of at WIPP as contact-handled waste.<sup>2</sup> Thus, there is no effective increase in the permitted storage capacity for remote-handled waste under the permit modification. The requirements of the regulations at 40 C.F.R. § 270.42, Appendix I, cl. F.1.a, incorporated by 20.4.1.900 NMAC, do not apply.

The Environment Department’s interpretation of the hazardous waste regulations in finding that Class 3 procedures do not apply is reasonable, and it is entitled

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<sup>2</sup> Although, as explained above, it is counted towards the waste volume limits in the permit for remote-handled waste. See discussion in section III.A.1.

to deference. *Gila Res.*, 2005-NMCA-139, ¶ 16. Thus, Southwest Research is not likely to prevail in its contention that Class 3 procedures were required.

**7. The Permit Modification Did Not Change Waste Management Practices**

Southwest Research next challenges the permit modification by arguing that the Department should have followed Class 3 procedures and held a public hearing on the permit modification for another reason. Class 3 procedures were required, according to Southwest Research, because the permit modification changes the waste management procedures at WIPP. [**BIC 38; 8-9-13 MOT 18-19**]; *see* 40 C.F.R. § 270.42, Appendix I, cl. F.3, incorporated by 20.4.1.900 NMAC. But the permit modification does not do so.

Southwest Research argues that the waste in shielded containers is “different waste” that is now introduced to the area of WIPP that was only authorized to manage contact-handled waste. [**BIC 38-39; 8-9-13 MOT 18-19**]. As explained in the Answer Brief [**DEPT AB 36-37**], however, waste in shielded containers meets the definition of contact-handled waste, and it is managed as contact-handled waste. Southwest Research also lists several changes that were made to the permit in support of its argument. [**BIC 39-40; 8-9-13 MOT 19-20**]. As explained in both the Answer Brief [**DEPT AB 38-39**] and the Response to Comments [**1 SRP 04479**], however, none of the listed changes is a “different

management practice[] from [that] authorized in the permit.” See 40 C.F.R. § 270.42, Appendix I, cl. F.3, incorporated by 20.4.1.900 NMAC. Moreover, as also explained in the Answer Brief [**DEPT AB 38-40**], the Department has treated very similar permit modification requests for the WIPP facility as Class 2 permit modifications – without public hearing – in the past. [**3 RP 01552-01552**]. The Department is obligated to apply its permitting procedures consistently to similar situations. See *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 216 (D.C. Cir. 2013) (agency action is arbitrary and capricious if the agency treats similar situations differently without sufficient reason).

The Department’s interpretation of the regulations is reasonable, and it is entitled to deference. *Gila Res.*, 2005-NMCA-139, ¶ 16. Southwest Research therefore is not likely to prevail on this argument for Class 3 procedures.

#### **8. There Was Not Significant Public Interest in the Permit Modification**

Finally, Southwest Research challenges the permit modification by asserting that Class 3 procedures are mandatory because of significant public interest. [**BIC 42-44; 8-9-13 MOT 15-18**]. Southwest Research cites the hazardous waste regulations allowing the Secretary to follow Class 3 procedures if he or she finds that “[t]here is significant public concern about the proposed modification.” 40 C.F.R. § 270.42(b)(6)(i)(C)(1).

As explained in the Answer Brief [DEPT AB 34], the Department has considerable discretion in deciding whether to hold a public hearing on a permit modification based on public interest. *Sw. Research*, 2003-NMCA-012, ¶ 39. And as also described in the Answer Brief [DEPT AB 40-41], there was rather little public interest in this permit modification. Two organizations submitted significant public comments [3 RP 01645-01664]; the other comments were mostly non-substantive “form” letters, or similarly non-substantive or irrelevant comments. [3 RP 01668-01918].

Southwest Research has not shown that the Secretary abused his discretion in concluding that there was not significant public interest. *Sw. Research*, 2003-NMCA-012, ¶ 39. Southwest Research is not likely to prevail on the issue of whether a public hearing was necessary for the permit modification.

**B. *Southwest Research Has Not Shown It Will Suffer Irreparable Harm If the Stay Is Not Granted***

The second consideration in ruling on a motion for a stay is whether there has been a showing of irreparable harm to the applicant unless the stay is granted. *Tenneco Oil*, 1986-NMCA-033, 105 N.M. at 710, 736 P.2d at 988. Irreparable harm must be “actual and substantial, or an affirmative prospect thereof, and not a mere possibility of harm.” *New Mexico v. City of Sunland Park*, 2000-NMCA-044, ¶ 19, 129 N.M. 151, 3 P.3d 128. Further, “[m]ere allegations of irreparable

harm are not . . . sufficient.” *Tenneco Oil*, 1986-NMCA-033, 105 N.M. at 710, 736 P.2d at 988. The person claiming irreparable harm “must come forth with evidence of the irreparability of his harm.” *Sunland Park*, 2000-NMCA-044, ¶ 19. Southwest Research has not made a showing of irreparable harm.

To support its allegation of irreparable harm, Southwest Research postulates that remote-handled waste in a shielded container might shift during transport so that it no longer meets the permit radiation limits, or that a shielded container might suffer a release or spill with no means of overpacking it, or that shielded containers might be improperly stacked and topple over. However, there is nothing in the record – or in the affidavits of George Anastas, James K. Channell, or Don Hancock attached to Southwest Research’s Motion – to indicate that there is a substantial likelihood of any of these events occurring. Indeed, Southwest Research concedes that “the actual likelihood that a shielded container shipped pending appeal will leak, or topple, or its contents will shift, cannot be forecasted.” [8-9-13 MOT 23].

Alternatively, Southwest Research suggests that shielded containers might be sent to WIPP, emplaced for disposal, and then become difficult or impossible to retrieve if this Court rules that such disposal was illegal. [8-9-13 MOT 23-26]. Again, there is nothing in the record or the affidavits indicating that there is a substantial likelihood of this scenario occurring. Southwest Research

acknowledges that waste containers have successfully been retrieved from WIPP in the past. [8-9-13 MOT 24-25]. In this respect, this case differs markedly from the case before the court in *New Mexico v. Watkins*, 783 F. Supp. 628 (D.D.C. 1991), which Southwest Research cites as “[c]losely in point.” [8-9-13 MOT 27]. In *Watkins*, the court found, “[t]he record shows . . . that there is a great likelihood that the wastes proposed to be emplaced in WIPP will not be retrievable after the test phase.” 783 F. Supp. at 632. There is no such record here.

These speculative and hypothetical possibilities that Southwest Research raises do not constitute irreparable harm. They are simply allegations of the “possibility of harm,” which will not suffice to support a finding of irreparable harm. *Sunland Park*, 2000-NMCA-044, ¶ 19.

**C. *Southwest Research Has Not Shown that No Substantial Harm Will Result to the Permittees if the Stay is Granted***

The third consideration in ruling on a motion for a stay is whether there has been a showing that no substantial harm will result to the other interested persons if the stay is granted. *Tenneco Oil*, 1986-NMCA-033, 105 N.M. at 710, 736 P.2d at 988. Southwest Research has failed to show that no substantial harm will result to the Permittees. As explained above (Section III.A.1) and in the Answer Brief [DEPT AB 21-24], the use of shielded containers will create significant efficiencies for the shipping of remote-handled transuranic mixed waste to WIPP

and for the management of such waste at WIPP. Any delays in implementing these efficiencies will likely result in harm to the Permittees. Moreover, a delay in the effect of the permit modification will likely cause delays in the removal and disposal of remote-handled transuranic mixed waste from the DOE nuclear weapons complex throughout the United States. Southwest Research has not met its burden of showing that such harm would not occur if a stay is granted.

**D. *Southwest Research Has Not Shown that No Substantial Harm Will Result to the Public if the Stay is Granted***

The fourth consideration in ruling on a motion for a stay is whether a showing has been made that no harm will ensue to the public interest if the stay is granted. *Tenneco Oil*, 1986-NMCA-033, 105 N.M. at 710, 736 P.2d at 988. Southwest Research has failed to show that no harm will ensue to the public interest if the stay is granted. Delays in implementation of the efficiencies in the transport and handling of remote-handled transuranic mixed waste, and delays in the removal and disposal of remote-handled transuranic mixed waste from other facilities around the United States, could result in significant harm to the public. Southwest Research has not addressed these issues.

#### IV. CONCLUSION

For the foregoing reasons, the Court should deny the motion of Southwest Research to stay the effect of the November 1, 2012 permit modification to the hazardous waste permit for the WIPP facility, which allows WIPP to receive transuranic mixed waste in shielded containers.

Respectfully submitted,

NEW MEXICO ENVIRONMENT  
DEPARTMENT:

Dated: August 27, 2013

  
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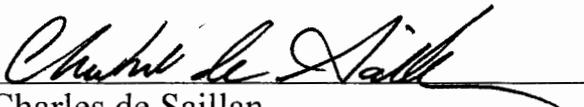
CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of August, 2013, a copy of the foregoing New Mexico Environment Department Brief in Opposition to Motion for Stay of Permit was sent by first class mail, postage prepaid, to the following:

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