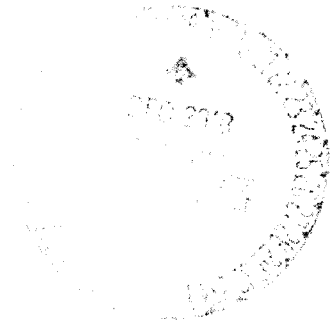


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STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF THE CLASS 3)
PERMIT MODIFICATION REQUEST)
OF THE U.S. DEPARTMENT OF ENERGY)
AND NUCLEAR WASTE PARTNERSHIP,)
LLC, FOR THE WASTE ISOLATION PILOT)
PLANT FOR CLARIFICATION OF TRU)
MIXED WASTE DISPOSAL VOLUME)
REPORTING UNDER THE)
HAZARDOUS WASTE FACILITY PERMIT)

HWB 18-19 (P)

CONCERNED CITIZENS FOR NUCLEAR SAFETY COMMENTS
ABOUT THE HEARING OFFICER'S REPORT AND
REQUEST FOR ORAL ARGUMENT

Pursuant to 20.1.4.500.C (2) NMAC, Concerned Citizens for Nuclear Safety ("CCNS") submits the following comments about the *Hearing Officer's Report*, filed with the Hearing Clerk on December 10, 2018. CCNS respectfully requests the opportunity to provide oral argument before the Secretary about the Hearing Officer's Report.

20.1.4.500.C (3) NMAC.

CCNS opposes the *Hearing Officer's Report*. The Secretary should set aside and/or reject the Hearing Officer's recommended decision for the reasons set forth below. 20.1.4.500.D (2) NMAC, and AR No. 180928, p. 4.

The regulatory timelines have been truncated at every turn in order to rush the Secretary's decision before the Governor Martinez Administration leaves office on Monday, December 31, 2018.

The permit modification request is not needed now because the Waste Isolation Pilot Plant ("WIPP") is approximately 55% full. It has taken nearly 20 years

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for WIPP to reach this level. This timeframe includes the three years WIPP was closed due to the underground explosion, contamination of 22 workers and large portions of the underground mine, and release of radionuclides and hazardous materials to the environment (February 2014 to January 2017).

The Department of Energy (“DOE”) and Nuclear Waste Partnership, a limited liability corporation (“NWP”), collectively the “Permittees,” could have waited until mid-2020 to include the proposed record of volume permit modification request with their permit renewal application to the New Mexico Environment Department (“NMED”). Such a consolidated effort would have saved NMED, the Permittees, and the public a lot of time and money.

The Permittees have not provided a cogent or compelling reason for the proposed permit modification request. The NMED has not required the Permittees to provide a compelling reason for said proposed request. As a result the NMED and the Permittees have failed to meet their burdens of persuasion. 20.1.4.400.A (1) NMAC.

The proposed permit modification request must be set aside and/or reject the *Hearing Officer’s Report* because of the on-going pattern and practice of discriminatory permitting processes and lack of access for limited-English proficient (“LEP”) Spanish-speaking residents to the public participation and permitting process as required by Title VI of the Civil Rights Act of 1964. 42 U.S.C. §§ 2000d to 2000 d-7 (Title VI) and the U.S. EPA regulations at 40 C.F.R. Part 7. As a recipient of federal financial assistance for its permitting programs, NMED is subject to the

provisions of Title VI and 40 C.F.R. Part 7.

Further, NMED did not comply with the requirements it agreed to on January 19, 2017, in the *Informal Resolution Agreement between the U.S. Environment Protection Agency and the New Mexico Environment Department* (“*Informal Resolution Agreement.*”) CCNS Ex. 3 (not admitted, but part of the Hearing Record).

NMED did not provide adequate accommodations for Low English Proficiency (LEP) Spanish speakers. CCNS Findings of Fact, Nos. 22 – 46.

NMED did not provide an adequate Public Involvement Plan for WIPP. The EJSCREEN analysis was inadequate. CCNS Findings of Fact, Nos. 47 – 57.

NMED did not require the Permittees to provide exposure information for releases from both normal operations and accidents at the facility as agreed to in the January 19, 2017 *Informal Resolution Agreement*. 40 C.F.R. §270.10 (j). CCNS Findings of Fact, Nos. 58 – 60.

The rush to approve the permit modification request is clearly demonstrated in the *Hearing Officer’s Report*. The Hearing Officer used each and every finding of fact submitted by the NMED in its *Hazardous Waste Bureau’s Proposed Findings of Fact and Conclusions of Law*. Further, the Hearing Officer omits cites to the three-day hearing transcript, and in some cases the transcript is mischaracterized.

The Hearing Officer failed to provide the process properly due to the noticed and participating public. *Notice of Public Hearing and Opportunity for Public Comment on*

*Draft Hazardous Waste Permit – English and Spanish Versions, AR 180928.*¹

CCNS contends that the hearing process was flawed because the process failed to address key issues CCNS raised in public comments, the public hearing, and in its post-hearing submittals. Further, the Hearing Officer did not address, nor provide any substantive consideration of the issues raised by CCNS in “formulating a decision on issuance of a final Permit,” the *Hearing Officer’s Report*.

The Hearing Officer wrote, “I find any arguments and proposed findings of fact and conclusions of law presented by the Concerned Citizens for Nuclear Safety to be either non-persuasive or irrelevant.” Finding of Fact No. 222, p. 44. The Hearing Officer did not provide any substantive consideration or rationale for his statement.

For these reasons and other, CCNS respectfully requests the opportunity to provide oral argument before the Secretary about the Hearing Officer’s Report.

20.1.4.500.C (3) NMAC.

CCNS wholeheartedly supports the Southwest Research and Information Center (“SRIC”) comments about the Hearing Officer’s Report.

HEARING OFFICER’S FINDINGS OF FACT – Some Errors

1. Finding of Fact No. 6 has an incorrect cite. AR No. 180804 is the draft permit, not the Applicants Exhibit 1, which is the *Written Testimony of*

¹ “The Department must ensure that the approved final permit is consistent with the HWMR [Hazardous Waste Management Regulations]. All comments submitted on the draft Permit will be considered in formulating a decision on issuance of a final Permit and may cause the draft Permit to be modified or rejected.” p. 4.

Robert F. Kehrman.

2. Finding of Fact No. 185 misrepresents the October 25, 2018 hearing transcript at 22; 11-16, which documents the question of Joni Arends, CCNS Co-founder and Executive Director, to Ricardo Maestas, of NMED's Hazardous Waste Bureau.

Arends asked,

"Your written testimony did not address issues raised by Concerned Citizens for Nuclear Safety and Deborah Reade in our September 20th, 2018 comments to the Department about the proposed Permit Modification Request. Our comments are at Administrative Record, 180914.36 [and 180914.36A]."

Finding of Fact No. 185 states in part,

"Both CCNS and Nuke Watch provided public statements and participated in cross examination at the public hearing, with CCNS stating that it was also speaking on behalf of Ms. Deborah Reade."

Clearly, CCNS did not state, "that it was also speaking on behalf of Ms. Deborah Reade." CCNS and Ms. Deborah Reade submitted joint public comments to NMED on September 20th, 2018 about the proposed permit modification request. AR No. 180914.36 and 180914.36A. During the permit hearing, however, CCNS did not speak on behalf of Ms. Deborah Reade.

If CCNS were speaking on behalf of Ms. Deborah Reade, CCNS would have filed a joint *Entry of Appearance* with her. But CCNS did not.

Ms. Deborah Reade did not file an *Entry of Appearance*.

Therefore, Finding of Fact No. 185 should be modified to omit the following language: “with CCNS stating that it was also speaking on behalf of Ms. Deborah Reade.”

3. Finding of Fact No. 222 omits evidence of any substantive consideration of CCNS’s submittals during the public comment period, the public hearing, nor post-hearing by the Hearing Officer.

Further, the Hearing Office did not provide any substantive rationale for his statement. The Hearing Officer did not provide cites to the Administrative Record, to any filing, or to the transcript to support his statement.

Finding of Fact No. 222, therefore, should be omitted from the *Hearing Officer’s Report*.

4. The Hearing Officer ignored the procedural flaws in the public notice and

comment issues raised by CCNS as detailed in its *Proposed Findings of Fact, Conclusions of Law, and Closing Argument*.

5. The Hearing Officer ignored the CCNS Exhibits 1 – 3,² (which are part of the Hearing Record). 20.1.4.7.A.14 NMAC. These three exhibits document the requirements for a government agency, such as NMED, which receives federal funding from the Environmental Protection Agency (“EPA”), to prohibit discrimination in its regulatory and administrative processes.
6. In order to resolve these matters, on January 19, 2017, NMED stated it is “committed to carrying out its responsibilities in a nondiscriminatory manner, in accordance with the requirements of Title VI and the other federal non-discrimination laws enforced by EPA regulation at 40 C.F.R. Part 7.”
7. But NMED did not provide adequate accommodations for Low English Proficiency (LEP) Spanish speakers in the WIPP permit modification process. It did not translate the Fact Sheet into Spanish. AR No. 180806.

2 CCNS Exhibit 1: Environmental Protection Agency (EPA) "Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs," also known as "EPA Public Involvement Guidance," published in the Federal Register Vol. 71, No. 54, pp. 14207 - 14217, on March 21, 2006.

CCNS Exhibit 2: Environmental Protection Agency (EPA) "Guidance to EPA Financial Assistance Recipients Regarding Title VI prohibition Against National Origin Discrimination Affecting LEP Persons," also know as "EPA LEP Guidance," published in the Federal Register Vol. 69, No. 122, pp. 35602 - 35613, on June 25, 2004.

CCNS Exhibit 3: U.S. Environmental Protection Agency (EPA) January 19, 2017, "Informal Resolution Agreement between the New Mexico Environment Department and the United States Environmental Protection Agency," External Civil Rights Compliance Office, Office of General Counsel, ECRCO Complaint No. 09R-02-R6.

No written NMED notice, however, was provided to the public about the availability of translators at the hearing to provide equal access to information that had not been translated. AR No. 180914.36, p. 4; AR No. 180806, August 6, 2018 Fact Sheet; AR No. 180805 Public Hearing Notice No. 18-07; and 10/25/18 Tr. 34, ll. 9 – 13.

Limiting the public process almost entirely to English, as has been done with the proposed permit modification request, creates disparate effects or impacts for most New Mexico communities located near the WIPP site and along the transportation routes in New Mexico. CCNS Ex. 3, the NMED Implementing Policies; and AR No. 180914.36, p. 4, and AR No. 180914.36A.

Limiting the public process almost entirely to English will foreclosure a meaningful opportunity for LEP community members to participate in the public permitting process. CCNS Ex. 3, NMED Implementing Policies, and AR No. 180914.36, p. 4.

The NMED has not met its Civil Rights Act of 1964, Title VI, obligations with the proposed permit modification request administrative process.

AR No. 180914.36, pp. 4 - 5.

As a result, the NMED continues to discriminate against LEP Spanish speakers. AR No. 180914.36, pp. 4 - 5.

8. NMED did not provide an adequate Public Involvement Plan (PIP) for the WIPP permit modification request process. CCNS Findings of Fact, Nos. 47 - 57.
9. NMED did not require the Permittees to provide exposure information for releases from both normal operations and accidents at WIPP. 40 C.F.R. §270.10(j), CCNS Findings of Fact, Nos. 58 - 60.

CONCLUSIONS OF LAW

1. The Hearing Officer denied the admission of CCNS Exhibits 1 through 3, thus prevents CCNS's ability to participate meaningfully in the permitting process. October 30, 2018 Order.
2. Record Proper means "the Administrative Record and all documents filed by or with the Hearing Clerk." 20.4.1.7.A.19 NMAC.
3. The Hearing Record means "the Record Proper and the written transcript or recorded tape of the public hearing, including all exhibits offered into evidence, *whether or not admitted.*" [Emphasis added.] 20.4.1.7.A.14 NMAC.
4. "Our courts have previously emphasized that legislative policy favors the public's ability to participate meaningfully in the [] permitting process. See

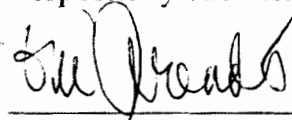
Martinez v. Maggiore, 2003-NMCA-043, ¶¶ 15, 17, 133 N.M. 472, 64 P.3d 499; id. ¶ 28 (Pickard, J., specially concurring).” Colonias Dev. Council v. Rhino Environmental Svcs., Inc., 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939.

5. Further, the public was unable to participate meaningfully in this permitting process because of the NMED’s lack of compliance with the January 19, 2017 *Informal Resolution Agreement* between the U.S. EPA and NMED to resolve violations of the 1964 Civil Rights Act, Title VI.

CONCLUSION

For the reasons set forth above, CCNS respectfully requests that the Secretary set aside and/or reject the Hearing Officer’s recommended decision about the proposed WIPP Class 3 permit modification request.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2018, the original of the *Concerned Citizens for Nuclear Safety Comments About The Hearing Officer's Report and Request For Oral Argument* was filed and served via the stated methods below to:

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