Court of Appeals of New Mexico
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Mark Reynolds

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

SOUTHWEST RESEARCH AND INFORMATION CENTER,

Appellant,

v.

NEW MEXICO ENVIRONMENT DEPARTMENT,

Appellee,

No. A-1-CA-38924

NUCLEAR WASTE PARTNERSHIP, LLC,

and

UNITED STATES,

Intervenors.

NEW MEXICO ENVIRONMENT DEPARTMENT'S RESPONSE TO MOTION TO STAY TEMPORARY AUTHORIZATION

COMES NOW, the New Mexico Environment Department ("NMED" or "Department") in response to Southwest Research and Information Center's ("SRIC") Motion to Stay Temporary Authorization for the Class 3 Permit

Modification to the Waste Isolation Pilot Plant Hazardous Waste Facility Permit, No. NM4890139088-TSDF ("Temporary Authorization"). SRIC has not met the four conditions articulated in *Tenneco Oil Co. v New Mexico Water Quality Control Commission*, 1986-NMCA-033, 105 N.M. 708, to merit a stay in this matter. Further, a close reading of SRIC's motion will show that SRIC is essentially asking this Court to adjudicate an active Class 3 Permit Modification Request ("PMR") currently before the Department as opposed to staying the Temporary Authorization. Much of SRIC's motion amounts to an allegation that the United States Department of Energy ("DOE") is conspiring to unlawfully expand WIPP under the cover of an upgrade to the WIPP facility's ventilation system.

The Temporary Authorization was granted by the Department in accordance with 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42(e) (2018)). In addition, the PMR that the Temporary Authorization is based on is part of an ongoing permitting process that includes an upcoming public comment period on the draft permit and the opportunity for a public hearing - so the Temporary Authorization is not a final agency action. Appellate review is not the proper mechanism to adjudicate a PMR and Temporary Authorization that are part of an ongoing permitting process in which no final agency action has been taken.

Therefore, the Court should deny SRIC's motion to stay for the reasons set forth below.

FACTUAL BACKGROUND

The Waste Isolation Pilot Plant ("WIPP") facility, located in Eddy County, New Mexico, is a facility authorized by Congress for the disposal of transuranic ("TRU") radioactive waste materials generated by atomic energy defense activities of the United States. Radioactive and mixed waste generated across the United States at DOE facilities is transported to WIPP for disposal. Mixed waste is radioactive waste that is also a hazardous waste as defined by the Hazardous Waste Act, NMSA 1978, §§ 74-1-14 to -14 (1977 as amended through 2018), and is thus subject to regulation by NMED. The Department provides regulatory oversight of WIPP's Hazardous Waste Facility Permit ("Permit") pursuant to the Hazardous Waste Act to ensure compliance, which includes review and issuance of permit modifications, and observation, review, and approval of site audits.

On August 15, 2019, DOE and its Managing and Operating Contractor, Nuclear Waste Partnership, LLC ("NWP"), collectively "Permittees," submitted to the Department a Class 3 Permit Modification Request ("PMR") for the WIPP Permit, Permit Number NM4890139088-TSDF, in accordance with Permit Part 1, Section 1.3.1, and 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42(c)). The purpose of the PMR is for the excavation of a new shaft and associated connecting drifts. The PMR proposes to revise the facility description in the Permit to include a new shaft ("Shaft #5") and additional drifts to connect Shaft #5 to the existing

underground WIPP facility. It proposes that Shaft #5 will be 1,200 feet west of the Air Intake Shaft and will be used as the primary air intake shaft for the underground repository. The PMR also proposes to update the description of the underground ventilation system to include new surface intake fans and describe the ventilation airflow pathway with the Shaft #5 configuration, modify the Property Protection Area, and make changes to the fire-water distribution system and evacuation routes in the Resource Conservation and Recovery Act ("RCRA") Contingency Plan.

On August 17, 2019, the Permittees provided notice of the PMR to the public in accordance with 40 C.F.R. § 270.42(C)(2), including distribution of the notice to all persons on the facility mailing list maintained by the Department, and publication in three major local newspapers of general circulation in both English and Spanish. In accordance with 40 C.F.R. § 270.42(C)(2)(ii), the public notice for the PMR announced two public meetings conducted by the Permittees, one in Carlsbad, NM on September 17, 2019, and the other in Santa Fe, NM on September 19, 2019, and provided information on how members of the public could view physical copies of the PMR, obtain additional information about the PMR, and submit written comments on the PMR by mail and by email. The 60-day public comment period lasted from August 17 to October 16, 2019, in accordance with 40 C.F.R. § 270.42(C)(5). On October 28, 2019, per 20.4.1.901(A)(1) NMAC, the Department

notified the Permittees that the PMR was deemed administratively complete, and that the PMR was under a technical review process.

On December 6, 2019, the Department issued to the Permittees a notice that the PMR was technically incomplete and requested more information to assist in the technical review, per 40 C.F.R. 124.5(c). The Permittees provided the additional technical information to the Department on January 21, 2020.

On January 16, 2020, the Permittees submitted to the Department a request for Temporary Authorization ("TA Request"). The TA Request sought to begin construction activities within the scope of the Class 3 PMR (i.e., to begin excavating Shaft #5). Temporary Authorizations are an allowable mechanism during a permit modification process pursuant to the federal regulations, which have been incorporated by reference in the New Mexico Hazardous Waste Management Regulations, 20.4.1 NMAC. Specifically, a permittee may request a Temporary Authorization for any Class 3 modification that meets the criteria in 40 C.F.R. 170.42(e)(3)(ii)(A) or (B); or that meets the criteria in paragraphs (3)(ii)(C) through (E) and provides improved management or treatment of a hazardous waste already listed in the facility permit. Five Temporary Authorization objectives are outlined at 40 C.F.R. 270.42(e)(3)(ii) and the Secretary of Environment must find that the Temporary Authorization must be necessary to achieve one of the objectives,

including "to facilitate other changes to protect human health and the environment." 40 C.F.R. 270.42(e)(3)(ii)(E).

On January 21, 2020, SRIC submitted extensive comments on the request to the Department. The comments were submitted outside of a formal comment period.

After thoroughly evaluating the Temporary Authorization request, the Department determined that the Permittees' request met the elements required under 40 C.F.R. § 270.42(e) and granted the Temporary Authorization on April 24, 2020 for a period of 180 days, with the caveat that if NMED ultimately denies the PMR after the conclusion of the permitting process, the Permittees must reverse all construction activities associated with the TA Request at their expense and within the timeframes specified by the Department. The Temporary Authorization also stipulates that if the Permittees are not able to complete the activities associated in the TA Request within 180 days, the Permittees may request the re-issuance of the Temporary Authorization for one additional term of 180 days, pursuant to 40 C.F.R. § 270.42(e)(4), and is subject to re-evaluation by NMED. The Temporary Authorization also emphasized that it is temporary and does not constitute a final agency action, nor does it prejudice or presuppose the outcome of the final action on the PMR. Per 40 C.F.R. § 270.42(e)(4), the Temporary Authorization is explicitly limited to those activities contained in the Permittees' request and is not subject to prior public notice and comment, per 40 C.F.R. § 270.42(e)(1).

On April 27, 2020, SRIC filed a Notice of Appeal with this Court that alleges that the Temporary Authorization is a final agency action. The same day, SRIC filed a motion to stay the Temporary Authorization with the Department. Because the Temporary Authorization is part of the ongoing PMR administrative process, and there was not yet a docketed administrative matter under which the motion could be adjudicated, the Department declined to entertain the motion.

The Department is scheduled to issue a draft permit within the next several months, at which time a 45-day public comment period (which will be extended to 60 days in this instance) will commence in accordance with 20.4.1.901(A)(3) NMAC, which includes the opportunity for any interested persons, including SRIC, to request a public hearing on the PMR. In accordance with 20.4.1.901(A)(5) NMAC, "[n]o 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."

If a hearing is granted, a public notice for the hearing is issued at least 30 days prior to the scheduled date of the hearing, per 20.4.1.901(F)(1) NMAC and the comment period is extended to the close of the hearing per 20.4.1(A)(6) NMAC. Hearing procedures are outlined in 20.4.1.901(F) NMAC and 20.1.4.500 NMAC. In determining whether to grant or deny a permit modification request, "[t]he secretary

shall give due consideration and the weight he/she deems appropriate to all comments received during a public comment period and to all relevant facts and circumstances presented at a public hearing." 20.4.1.901(A)(7) NMAC

A final order by the Secretary is required no later than 30 days after the expiration date for the submittal of comments on the Hearing Officer's Report, per 20.4.1.500(D)(1) NMAC. The effective date of the permit is 30 days after notice of the decision has been served to the applicant. 20.4.1.901(A)(10) NMAC. The Secretary's decision to grant or deny a permit modification request may be appealed to the New Mexico Court of Appeals within 30 days after the final administrative action per NMSA 1978, Section 74-4-14(A).

ARGUMENT

SRIC DOES NOT MEET THE FOUR CONDITIONS REQUIRED FOR A STAY OF THE TEMPORARY AUTHORIZATION

The Court should not grant a stay of the Temporary Authorization, because SRIC's motion does not meet the four conditions set forth in *Tenneco*, 1986-NMCA-033. Under *Tenneco*, in determining whether a stay is appropriate, an appellate court should consider "whether there has been a showing of: (1) a likelihood that applicant will prevail on the merits of the appeal; (2) a showing of irreparable harm to applicant unless the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public

interest. *Tenneco*, 1986-NMCA-033, ¶ 10. The motion submitted by SRIC fails to establish these conditions, and the Court should deny the stay.

A. SRIC IS UNLIKELY TO SUCCEED ON THE MERITS OF AN APPEAL OF THE TEMPORARY AUTHORIZATION

The Temporary Authorization that is the subject of this appeal has been undertaken in accordance with 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42(e)). SRIC's motion for stay does not argue a coherent legal basis for appellate review of the Temporary Authorization, but instead much of the motion argues against the PMR associated with the Temporary Authorization. The issue of WIPP's capacity is not properly before the Court in this proceeding. SRIC's appeal in this matter is asking the Court to adjudicate a hypothetical future outcome of a PMR that is still in an ongoing permitting process.

The Temporary Authorization was granted to DOE in accordance with 40 C.F.R. § 270.42(e), which provides that "[u]pon request of the permittee, the [Department] may, without prior public notice and comment, grant the permittee a temporary authorization" under Class 3 PMRs for up to 180 days, with the possibility of a 180-day extension. 40 C.F.R. § 242(e) and (e)(4). For a Temporary Authorization to be granted, permittees must provide in their request sufficient information to establish one of five required criteria for issuing a Temporary Authorization. The criteria DOE cited in their request for the authorization was that the shaft project excavation at the WIPP facility intended "to facilitate other changes

to protect human health and the environment," and "provide improved management or treatment of a hazardous waste already listed in the facility permit." 40 C.F.R. § 270.42(e)(2)(b) and (e)(3)(ii). Once a request for Temporary Authorization is submitted, the Department is required to determine whether one of the five criteria apply to the requested project and to "approve or deny the temporary authorization as quickly as practical." 40 C.F.R. § 270.42(e)(3). Both DOE and the Department have complied with all the requirements for requesting and approving a Temporary Authorization.

Citing the Federal Register, SRIC claims that EPA commentary on the promulgation of 40 C.F.R. § 270.42 asserted that preconstruction activities were "expressly unavailable" for a Temporary Authorization under a Class 3 PMR. In support of this claim, SRIC provides a lengthy quote from 53 Fed. Reg. 37913 (July 28, 1988) that says in relevant part, "[40 C.F.R. § 270.42] allows the facility to begin construction of a Class 2 modification 60 days after the modification is requested, although such construction would be at the permittee's own risk if the [Class 2 PMR] is ultimately denied . . . [h]owever, the default and preconstruction provision of Class 2 do not apply" [to Class 3 PMRs]. However, SRIC omits the reason why Class 3 PMRs cannot use the preconstruction provision for Class 2 PMRs.

Under CFR 270.42(b)(8), permittees seeking a Class 2 PMR can automatically undertake any construction activities 60 days after submitting a PMR

without any additional requests or authorizations. This is because Class 2 PMRs are less intrusive to the facility and require less oversight than a Class 3 PMR. To address the need for preconstruction activities under a Class 3 PMR while allowing for closer oversight by regulators, the Temporary Authorization provision was included to "allow a facility to initiate a necessary activity while its permit modification request is undergoing the Class 2 or 3 review process." 53 Fed. Reg. 37919 (July 28, 1988) After considering public comment in 1988, the EPA concluded that the "temporary authorization procedure will provide important flexibility to permitted hazardous waste facilities without sacrifice to public health or the environment." There is no black-letter limitation on the type of activities undertaken in a Class 3 Temporary Authorization, rather it is left to the discretion of the Department, provided that the permittee establishes that their request meets one of the five criteria listed in 40 § C.F.R. 270.42(e)(3)(ii). EPA included the Temporary Authorization provision to give regulatory agencies "the authority to grant a permittee temporary authorization, without prior public notice and comment, to conduct activities necessary to respond promptly to changing conditions." 53 Fed. Reg. 37919 (July 28, 1988). EPA also noted that "…temporary authorizations will be useful in the following two situations: (1) To address a one-time or short-term activity at a facility for which the full permit modification process is inappropriate; or (2) to allow a facility to initiate a necessary activity while its permit modification

request is undergoing the Class 2 or 3 review process" 53 Fed. Reg. 37919 (July 28, 1988).

Because the Temporary Authorization was properly granted through an allowable mechanism contained within the permit modification process, and because the current permitting process is not completed, the Court does not have jurisdiction over the Temporary Authorization or the PMR. Therefore, SRIC is unlikely to succeed on the merits in the appeal and the stay should not be granted.

B. SRIC WILL NOT SUFFER IRREPARABLE HARM IF THE STAY IS NOT GRANTED

If the stay is not granted, SRIC will not suffer irreparable harm because the PMR related to the Temporary Authorization has not been approved and is still in the permitting process. The opportunity for submitting comments and requesting a public hearing is still available to SRIC, and in fact, SRIC has participated in this matter from the beginning. Contrary to what SRIC alleges, the Temporary Authorization does not guarantee that the PMR will be granted, or that if granted will be done so as a surreptitious attempt to circumvent federal and state law. The appropriate way for SRIC to have its concerns addressed is to participate in the permitting process. Because the permitting process is ongoing, SRIC has a robust set of administrative remedies still available to exhaust. The Court should not stay the Temporary Authorization because it cannot be shown that irreparable harm will result when robust administrative remedies remain for SRIC to pursue.

Simply being opposed to the Temporary Authorization is not irreparable harm and is not grounds for a stay. New Mexico courts adhere to the principle that "[t]he mere fact that an administrative regulation or order may cause injury or inconvenience to applicant is insufficient to warrant suspension of an agency regulation by the granting of a stay." *Tenneco,* 1986-NMCA-033, ¶ 11 (internal citations and quotation marks omitted). The Court should not issue a stay simply because SRIC's motion portrays their opposition to the Temporary Authorization as irreparable harm.

C. NMED AND THE PERMITTEES WILL SUFFER SUBSTANTIAL HARM IF A STAY IS GRANTED

The Permittees currently have employees working over 2,000 feet underground who are regularly exposed to mineral particulate and diesel fumes during worktime. This is an imminent health concern, and improved ventilation at the facility is a necessity. Because the entire project under the PMR is estimated to take over three years to complete, the Permittees requested the Temporary Authorization so that "additional, unfiltered ventilation will be available to the Permittees and their workforce at the earliest possible date." **[SRIC Ex. C, pg. 2]**.

In addition to the concern for an expedited improvement in worker safety, the stay will also consume unnecessary time and resources of the Department when it properly granted an allowable Temporary Authorization as part of a larger permit modification process. As set forth above, SRIC is unlikely to prevail on the appeal

in this matter because they have not exhausted the administrative process and no final administrative action has been taken. Essentially, SRIC seems to be asking this Court to hold the administrative permit hearing itself and weigh the evidence of an alleged conspiracy before allowing the Department to proceed in the permitting process. This is a court of review and has a limited fact-finding role in an administrative appeal. See *Tallman v. ABF*, 1988-NMCA-091, 108 N.M 124 (holding that "the whole record standard of review for findings of fact does not abrogate the substantial evidence rule as that rule has existed in New Mexico. A reviewing court may not reweigh the evidence and reassign the preponderance of evidence under either standard."). The proper venue to litigate SRIC's allegations and concerns is the permitting process itself. Anything contrary to that circumvents the administrative process set out by the legislature and threatens to harm both the current permit proceeding and future permit proceedings.

D. DENYING THE STAY IS IN THE PUBLIC INTEREST

Denying the stay will serve the public interest for both New Mexico and the United States as a whole. The WIPP facility disposes mixed radioactive waste in a highly regulated environment for the protection of the public. It is in the public interest that DOE be able to make upgrades to the WIPP facility. It is also in the public interest that the WIPP workforce can operate the facility in a safe work environment. The maintenance of WIPP and the safety of the WIPP workforce is in

the public interest. While issuing 40 C.F.R.§ 270.42 in 1988, which provides for Temporary Authorizations, EPA explained that without the new provisions, "improvements in the handling and treatment of hazardous waste will be delayed, and the regulated community will find itself unable to obtain modified permit conditions in a timely manner. The net result could well be an increased threat to human health and the environment." 53 Fed. Reg. 37919 (July 28, 1988).

The public interest is also served by state agencies executing the regulations in the manner contemplated and allowed by the public's duly elected representatives. The public interest is not served by the stalling of a lawful administrative process because SRIC chose to file an unripe appeal when it has not exhausted its administrative remedies. The choice of SRIC to attempt to have the Court review the permitting process before it has finished is a poor use of public resources, and the Court should deny SRIC's motion.

CONCLUSION

SRIC has failed to establish the four conditions required under *Tenneco Oil Co.*, 1986-NMCA-033, to merit a stay in this matter. Therefore, the New Mexico Environment Department respectfully requests that the Court deny the Motion to Stay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the forgoing Response was served electronically on all parties in this proceeding in accordance with Rule 12-307.2 NMRA on May 19, 2020.

__/s/_Christopher J. Vigil_____
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