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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

SOUTHWEST RESEARCH AND INFORMATION CENTER,

Appellant,

v. **No. S-1-SC-38373**

NEW MEXICO ENVIRONMENT DEPARTMENT,

Appellee,

NUCLEAR WASTE PARTNERSHIP, LLC,

and

UNITED STATES,

Intervenors.

NEW MEXICO ENVIRONMENT DEPARTMENT'S RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Chris Vigil
Assistant General Counsel
Special Assistant Attorney General
Jennifer Hower
General Counsel
Christal Weatherly
Special Assistant Attorney General
Assistant General Counsel
New Mexico Environment Department
121 Tijeras Ave. NM Ste. 1000 - Albuquerque, NM 87102
(505) 383-2060 – christopherj.vigil@state.nm.us
Counsel for the New Mexico Environment Department

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INTRODUCTION

The New Mexico Environment Department ("NMED" or "the Department") submits this Response to the Petition for a Writ of Certiorari ("Petition") filed in the above captioned matter by Southwest Research and Information Center ("SRIC"). The Petition seeks review of the New Mexico Court of Appeals' Order of Dismissal ("Dismissal") in No. A-1-CA-38924. The New Mexico Court of Appeals dismissed the matter for lack of jurisdiction over SRIC's appeal of NMED's granting of a Temporary Authorization ("TA") for a Class 3 Permit Modification to the Waste Isolation Pilot Plant Hazardous Waste Facility Permit, No. NM4890139088-TSDF. In the dismissal, the Court of Appeals rightly concluded that NMED's granting of the TA "did *not* constitute a final agency action" and that "the issue is not ripe for appellate review, and dismissal of this matter is appropriate." **[6-11-20 ORD 3]** (emphasis in original).

In the current Petition, SRIC, as it did before the Court of Appeals, continues to misrepresent the applicable law and make unsupported allegations regarding the intentions of the Department of Energy ("DOE"), Nuclear Waste Partnership, LLC ("NWP") (collectively "Permittees") and NMED. Rather than participate in the permitting process as provided for by law before seeking appellate review, SRIC is essentially asking this Court to adjudicate an active Class 3 Permit Modification Request ("PMR") that is currently before the Department.

The New Mexico Court of Appeals was correct to dismiss this case as a matter of law. Because the TA in question is part of a larger PMR that is currently subject to a permitting process in which no final decision has been issued, the Court of Appeals did not have jurisdiction to review the matter. The decision to dismiss SRIC's appeal does not conflict with prior New Mexico decisional law, nor does it present any significant question meriting this Court's certiorari review. *See Morris v. Apodaca*, 422, 1960-NMSC-021, ¶ 5, 349 P.2d 335 (holding that certiorari is appropriate only when lower tribunals have exceeded their jurisdiction, or have proceeded in a matter contrary to law, and there is no other available path for review.) (internal citation omitted). The Petition should be denied.

ARGUMENT

I. The New Mexico Court of Appeals Dismissed SRIC's Appeal as a Matter of Law

In the Order Dismissing Appeal, the New Mexico Court of Appeals found that the granting of the TA was not a final administrative action, and rightly concluded that "[w]hen an appellate court does not have jurisdiction, it must dismiss." **[6-11-20 ORD 2]**. In the Petition, SRIC ignores the jurisdictional basis for the dismissal, and asks this Court to review whether the New Mexico Court of Appeals "must accept NMED counsel's statement that an order is nonfinal, or instead examine the facts." **[PET 2]**. Neither NMED counsel's statements nor fact-finding by the New Mexico Court of Appeals were dispositive regarding dismissal. Because the TA was

not a final administrative action, and because participation in the PMR process is currently open to SRIC, the New Mexico Court of Appeals concluded that the matter was not ripe for review, and therefore it did not have jurisdiction. Dismissal was required as a matter of law.

a. The Granting of the Temporary Authorization Was Not A Final Administrative Action

Because NMED has not yet issued a final decision on the PMR, there has been no final administrative action taken in the matter. The granting of the TA was not a final decision, but rather one component of a larger permit modification request process, which includes the opportunity for both public comment and a public hearing. The public comment period for the PMR opened on June 12, 2020 and will remain open until August 11, 2020. Because the PMR process is currently proceeding, the matter was not ripe to be heard by the New Mexico Court of Appeals. Pursuant to Section 74-4-14(A) of the Hazardous Waste Act, NMSA 1978, Sections 74-4-1 to -14 (1977 as amended through 2018), only contests of final administrative actions taken by NMED (or the Environmental Improvement Board, which is not applicable in this instance) may be brought before the Court of Appeals.

While "final administrative action" is not defined within the Hazardous Waste Act, *Citizen Action New Mexico v. NMED*, 2015-NMCA-058, ¶ 17, 350 P.3d 1178 held that under Section 74-4-14, it would "determine finality based on pragmatic consideration of the matters at issue and analysis of whether the administrative body

has in fact finally resolved the issues." Further, the courts' "pragmatic consideration of the administrative agency's action includes considering, among other things, whether certain issues will be revisited by the agency and whether the agency will engage in further fact finding that will elicit more evidence illuminating the issues." Id. ¶ 17 (internal citations and quotation marks omitted).

In this instance, the TA is not a final administrative action subject to judicial review because a final decision on the PMR, will only be made after public comments are considered, and after any requested public hearing is held. Fact finding will occur through the public comment and public hearing process, after which the Secretary of Environment will ultimately decide the outcome of the PMR. This is the process provided for in the Hazardous Waste Act and 20.4.1.901 NMAC (Hazardous Waste Management, Permitting Procedures).

A final decision on the PMR will also dictate the ultimate outcome of the TA. As the New Mexico Court of Appeals noted in its Dismissal, if the Class 3 PMR is not ultimately issued by NMED, any work done by Permittees under the TA would have to be undone at Permittees' expense. If Permittees refuse to undo the work, then NMED will use its enforcement powers, likely in district court, to compel them to comply.

Until the permitting process proceeds to its conclusion, the administrative record will not be complete, and legal and factual issues will not be resolved such

that they are ripe for appellate review. Because of procedural posture of the PMR, of which the TA is just one portion, no final administrative action in the matter has been taken. As a result, the Court of Appeals was required to dismiss SRIC's appeal as a matter of law.

b. SRIC's Appeal Was Not Ripe for Appellate Review

The issue of appellate ripeness is at the core of Section 74-4-14(A) of the Hazardous Waste Act, which provides that "any person who is or may be affected by any final administrative action of the board or the secretary may appeal to the court of appeals for further relief." This is the procedure the Legislature decided upon to ensure that the necessary work of NMED in protecting public health and the environment would not be bogged down in litigation designed to hamstring the agency before final decisions could be made. If would-be litigants were allowed to entangle NMED in appellate litigation for every interim decision the litigant construed to be a final administrative action, then the agency would struggle to fulfill its statutorily mandated responsibilities. Blocking the legal permitting process does seem to be a strategy that SRIC is employing to accomplish its goal.

As stated, the TA is one component of a larger permit modification request process, which includes the opportunity for both public comments and a public hearing, both of which are happening at this time. Therefore, the matter was not ripe to be heard by the New Mexico Court of Appeals. Appellate review of agency

actions "must be ripe for judicial review, with a final resolution of the relevant issues by the agency and with a concrete, developed factual record." *New Mexico Indus. Energy Consumers v. New Mexico Public Service Commission*, 1991-NMSC-018, ¶ 7, 111 N.M. 622. New Mexico courts adhere to the proposition that judicial review should wait "until an administrative decision has been formalized and finalized and its effects felt in a concrete way by the parties." *American Federation of State v. Board of County Com'rs of Bernalillo County*, 2016-NMSC-017, ¶ 21, 373 P.3d 989 (internal citations omitted).

As provided for in *American Federation of State*, "[r]ipeness analysis involves a two pronged inquiry. We evaluate both the fitness for the issues for judicial decision and the hardship to the parties of withholding court consideration." Id. ¶ 19 (internal citations omitted). In evaluating fitness, "[t]he ultimate question… is whether agency action is sufficiently final or definitive so that there is no judicial interest in awaiting a more concrete formulation of the issues." *New Mexico Indus. Energy Consumers*, 1991-NMSC-018, ¶ 26. "Decisions of administrative entities are fit for review only when the agency's decision is final." *American Federation of State*, 2016-NMSC-017, ¶ 21.

As to the first prong of *American Federation of State's* inquiry, as set forth above, the New Mexico Court of Appeals rightly concluded that the issuing of the TA was not a final administrative action. The PMR proceeding is currently moving

forward, and SRIC currently has the opportunity to provide comment and request a hearing until the public comment period closes on August 11, 2020. Instead, SRIC has chosen to misuse judicial resources and use the appellate courts to circumvent the permitting process.

To meet the hardship standard of the second ripeness prong, appellate courts "ask whether the challenged action creates a direct and immediate dilemma for the parties. The mere possibility of future injury, unless it is the cause of some present detriment, does not constitute hardship." *American Federation of State*, 2016-NMSC-017, ¶ 28. As a close reading of the Petition will show, SRIC is subject to no real hardship, and any alleged hardship is speculative at best. A theoretical approval for an expansion of WIPP is not part of the current Class 3 PMR and would require the submittal of a specific, separate Class 3 PMR to request approval to mine additional panels. Arguing hypothetical future injury by alleging that increased ventilation will lead to proposed expansion is a textbook example of what doesn't constitute a hardship under *American Federation of State*. Further, SRIC's appeal was a contest of the granting of a TA, which, as stated, is part of a larger permitting proceeding. The TA creates no hardship to SRIC, as SRIC will still have significant opportunity before the Secretary of Environment to make its case for the denial of the overall permit action.

Neither prongs of the ripeness analysis in *American Federation of State* were met by SRIC's appeal. The reason is because the PMR process is currently underway. There has been no final administrative action in the matter, and NMED cannot decide on the matter until all the legal requirements are met, including any public hearing in which SRIC can offer evidence.

In the Dismissal, the New Mexico Court of Appeals included a citation to paragraph 11 of *State ex rel. Dept. of Human Servs. v. Manfre*, 1984-NMCA-135, 693 P.2d 1273, in support of the Court's conclusion that "the Decision is not final, the issue is not ripe for appellate review, and dismissal of this matter is appropriate." While the New Mexico Court of Appeals did not elaborate on its use of *Manfre*, the implication of the citation in context is clear: statutory provisions that provide for appellate review of agency actions are controlling law. It follows that the appellate path provided in Section 74-4-14, defines when an agency action is ripe for review. Seen in the light of the analysis of "final administrative action" in *Citizen Action New Mexico v. NMED*, 2015-NMCA-058, it is clear that this was the legal basis for the Court of Appeals dismissal.

II. The Granting of the Temporary Authorization was not Arbitrary, Capricious, nor an Abuse of Discretion

The Hazardous Waste Act provides that "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." § 74-4-14(C). New Mexico appellate jurisprudence applies the same review standard to agency actions outside the context of hazardous waste. *See Team Specialty Prods. v. N.M. Taxation and Revenue Dep't.*, 2005-NMCA-020, ¶ 8, 107 P.3d 4 (stating that New Mexico courts apply the arbitrary and capricious standard when reviewing actions of state agencies). Courts will find arbitrary and capricious action by an administrative agency when there is a "ruling or conduct which, when viewed in light of the whole record, is unreasonable or does not have a rational basis, and is the result of an unconsidered, willful and irrational choice of conduct and not the result of the winnowing and sifting process*." Perkins v. Dep't of Human Servs*., 1987-NMCA-148, ¶ 19, 748 P.2d 24 (internal citations and quotation marks omitted). An agency abuses its discretion if "the agency . . . has not proceeded in the manner required by law, [the] decision is not supported by the findings, or the findings are not supported by the evidence." Id. ¶ 19 (internal citation and quotation marks omitted). Courts will also find an abuse of discretion when an agency decision is unreasonable and illogical. Id.

Under the legal standards set forth above, the granting of the TA was neither arbitrary, capricious, unsupported by substantial evidence, or otherwise not in accordance with the law. In fact, it is the opposite. In granting the TA, NMED adhered to the law, carefully considered the available evidence, and exercised its statutory and regulatory discretion in a reasonable manner. The fact that SRIC

disagrees with the decision and prefers a denial of the TA is not enough to create appellate ripeness. *See* Id. ¶ 20 (affirming that "[w]here there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though another conclusion might have been reached.") (internal citation omitted).

The use of a TA is an allowable mechanism during a PMR process pursuant to the federal regulations, which have been incorporated into the New Mexico Hazardous Waste Management Regulations, 20.4.1 NMAC. Specifically, a permittee may request a TA for any Class 3 modification that meets the criteria in 40 C.F.R. §§ 270.42(e)(3)(ii)(A) or (B); or that meets one of five objectives in paragraphs (3)(ii)(C) through (E) and provides improved management or treatment of a hazardous waste already listed in the facility permit. NMED has the discretion to grant or deny a TA request but only after finding that the TA is necessary to achieve one of the five objectives, one of which is "to facilitate other changes to protect human health and the environment." 40 C.F.R. 270.42(e)(3)(ii)(E).

After thoroughly evaluating the TA request, NMED determined that the Permittees' request met the elements required under 40 C.F.R. § 270.42(e) and granted the TA 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 timeframes specified by NMED. The TA 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 TA for one additional term of 180 days, pursuant to 40 C.F.R. § 270.42(e)(4). The TA explicitly states that it 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 TA 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).

At every step, NMED proceeded in strict accordance with state and federal regulations in granting the TA; and the TA request submitted by the Permittees met the federal regulatory requirements. Since WIPP is a geologic repository, ventilation and the necessity to maintain a safe environment for WIPP staff is extremely important, therefore the construction of a component of the underground ventilation system is reasonable and necessary. Allowing for some excavation that can be reversed if the PMR is denied is reasonable given the scope and complexity of the project; and given that the entire project will take over three years to complete. It is also reasonable in light of the currently ongoing PMR process which allows for public input and a public hearing.

It is notable that SRIC is not asking this Court to review the granting of the TA under the substantial evidence prong in *Perkins v. Dep't of Human Servs* and its progeny. Presumably this is because SRIC knows that the record is not yet complete because the PMR process is currently active.

It appears that SRIC is asking this Court to pre-adjudicate the PMR process concurrently with the open NMED proceeding, then render an impermissible advisory opinion on the legality of the TA and PMR that is binding on NMED. The New Mexico Court of Appeals avoided this issue with an appropriate dismissal. Because this matter is not ripe for review, any substantive appellate review would amount to an advisory opinion, which is not permitted in New Mexico. *See City of Sunland Park v. Harris News, Inc.*, 2005-NMCA-128, ¶ 50, 124 P.3d 566 (stating that "ripeness is a tool of the court, which is used to . . . [avoid] rendering an advisory opinion on some future set of circumstances.") (internal quotation marks and citation omitted). *See also Wolcott v. Wolcott*, 1987-NMCA-038, ¶ 4, 735 P.2d 326 (affirming the principle that appellate courts in New Mexico do not render advisory opinions) (internal citation omitted).

The granting of the TA by NMED was neither arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, nor contrary to law. It was a lawful exercise of NMED's statutory responsibility to protect public health and the environment. Granting the TA was reasonable given the large scope of the PMR, the

three-year project timeline, the opportunity for the public to comment and request a hearing, and by the explicit condition that any work under the TA would have to be reversed if the PMR is denied. The record for the PMR is not yet complete because the process is not complete. It is not ripe for review, and this Court should deny the Petition.

III. The TA is not an Effective Approval of the PMR

As set forth in cited detail above, the TA is a sub-process contained within the larger PMR process. The language of the TA specifically states that if the PMR is not approved after the public comment period and any public hearing, that any work done under the TA would have to be reversed at the expense of the Permittees. Non-compliance with any reversal would be enforceable by NMED, likely in a district court action.

CONCLUSION

The Petition for a Writ of Certiorari should be denied for the reasons set forth above.

Respectfully submitted,

/s/ Chris Vigil
Chris Vigil
Assistant General Counsel
Special Assistant Attorney General

Jennifer L. Hower
General Counsel
Special Assistant Attorney General

Christal Weatherly
Assistant General Counsel
Special Assistant Attorney General

New Mexico Environment Department
121 Tijeras Ave. NE, Suite 1000
Albuquerque, NM 87102
Ph: (505) 383-2060
Facsimile: (505) 383-2064
christopherj.vigil@state.nm.us
jennifer.hower@state.nm.us
christal.weatherly@state.nm.us

STATEMENT OF COMPLIANCE

This Response complies with Rule 12-502(D)(3) NMRA. The body of this Response contains 3,134 words as counted by *Microsoft Word for Office 365 MSO*.

/s/ Chris Vigil
Chris Vigil
Assistant General Counsel
Special Assistant Attorney General
New Mexico Environment Department

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 July 15, 2020.

/s/ Chris Vigil
Chris Vigil
Assistant General Counsel
Special Assistant Attorney General
New Mexico Environment Department