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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

SOUTHWEST INFORMATION AND RESEARCH CENTER,

Petitioner,

v. **No. S-1-SC-38372**

NEW MEXICO ENVIRONMENT DEPARTMENT,

Respondent,

NUCLEAR WASTE PARTNERSHIP, LLC,

and

UNITED STATES,

Real Parties in Interest.

NEW MEXICO ENVIRONMENT DEPARTMENT'S RESPONSE TO VERIFIED PETITION FOR EMERGENCY WRIT OF MANDAMUS AND REQUEST FOR STAY

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I. INTRODUCTION

Pursuant to Rule 12-504(C)(1) NMRA, Respondent the New Mexico Environment Department ("NMED" or "the Department") hereby submits the following Response to Petitioner Southwest Research and Information Center's ("SRIC") Verified Petition for an Emergency Writ of Mandamus and Request for a Stay. NMED will show that SRIC has not met its burden for the issuance of a Writ of Mandamus, nor has it met its burden for the granting of a stay in this matter.

II. FACTUAL BACKGROUND

The Waste Isolation Pilot Plant ("WIPP"), located in Eddy County, New Mexico, is a U.S. Department of Energy ("DOE") 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 therefore subject to regulation by NMED. Pursuant to the Hazardous Waste Act, the Department provides regulatory oversight of WIPP's Hazardous Waste Facility Permit ("Permit"), Permit Number NM4890139088-TSDF, 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 in accordance with Permit Part 1, Section 1.3.1, and 20.4.1.900 NMAC (incorporating 40 C.F.R. § 270.42(c)(2018)). 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, 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).

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

After thoroughly evaluating the TA Request, the Department determined that the Permittees' request met all 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 Temporary Authorization at their own expense and within 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 TA 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 emphasizes 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 the New Mexico Court of Appeals (No. A-1-CA-38924) contesting the Temporary Authorization. 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 because there was not yet a docketed administrative matter under which the motion could be adjudicated, the Department declined to entertain the Motion. SRIC filed a similar Motion to Stay with the New Mexico Court of Appeals on May 4, 2020. On May 19, 2020, NMED filed both a Response to the Motion to Stay and a Motion to Dismiss with the New Mexico Court of Appeals, which was followed by a Motion to Dismiss by the United States on May 29, 2020. SRIC submitted a Motion for Leave to Reply and its Docketing Statement on May 27, 2020. On June 11, 2020, the Court of Appeals issued an Order dismissing SRIC's appeal on the basis that it was premature, and therefore the court did not have jurisdiction.

On June 12, 2020, the Department issued a draft permit associated with the PMR via a public notice, which commenced a public comment period in accordance with 20.4.1.901(A)(3) NMAC. The public comment period, which will be open until August 11, 2020, 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).

III. ARGUMENT

A. Mandamus is Improper in this Matter

"Mandamus is a drastic remedy to be invoked only in extraordinary circumstances." *Kerpan v. Sandoval County Dist. Atty's. Office (In re Grand Jury Sandoval County)*, 1988-NMCA-007, ¶ 10, 106 N.M. 764 (internal citations omitted). While SRIC alleges that an emergency Writ of Mandamus is necessary, it merely cites a random accumulation of case law and does not provide supportive evidence in relation to why mandamus is appropriate in this matter.

"…[M]andamus lies only to force a clear legal right against one having a clear legal duty to perform an act and where there is no other plain, speedy and adequate remedy in the ordinary course of law." *El Dorado at Santa Fe, Inc. v. Bd. of County Comm'rs*, 1976-NMSC-029, ¶ 5, 89 N.M. 313. The inappropriateness of a Writ of Mandamus in this instance is exhibited when one applies the facts at hand to the standard for the issuance of a Writ of Mandamus.

i. The Issuance or Denial of a TA is not a Ministerial Act or Duty

"Mandamus lies to compel the performance of a ministerial act or duty that is clear and indisputable." *New Energy Econ., Inc. v. Martinez*, 2011-NMSC-006, ¶ 10, 149 N.M. 207 (internal citations omitted). A non-discretionary or ministerial act is defined as an act which an officer performs under a given state of facts, in a prescribed manner, in obedience to a mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done. *State ex rel. Perea v. Board of Commissioners of De Baca County*, 1919-NMSC-030, ¶ 6, 25 N.M. 338.

As stated, 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, pursuant to 40 C.F.R 270.42(e)(2)(i)(B), a permittee may request a Temporary Authorization 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 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. The referenced 40 C.F.R. 270.42(e)(3) is the regulatory basis for which a Temporary Authorization can be issued, which states:

(3) The Director shall approve or deny the temporary authorization as quickly as practical. To issue a temporary authorization, the Director must find:

(i) The authorized activities are in compliance with the standards of 40 CFR part 264.

(ii) The temporary authorization is necessary to achieve one of the following objectives before action is likely to be taken on a modification request:

(A) To facilitate timely implementation of closure or corrective action activities;

(B) To allow treatment or storage in tanks or containers, or in containment buildings in accordance with 40 CFR part 268;

(C) To prevent disruption of ongoing waste management activities;

(D) To enable the permittee to respond to sudden changes in the types or quantities of the wastes managed under the facility permit; or

(E) To facilitate other changes to protect human health and the environment.

Therefore, as indicated, the evaluation required for a Class 3 Temporary Authorization is multifaceted, as 40 C.F.R 270.42(e)(2)(i)(B) first requires that the Class 3 PMR meet the threshold for TA Request submittal by fulfilling either two or three of the required objectives found in 40 C.F.R. 270.42(e)(3)(ii), and then a TA Request determination itself must be made in accordance with 40 C.F.R. 270.42(e)(3)(ii).

To argue that the review and approval of a TA Request is ministerial in nature ignores the intricacies of the review and approval of such an authorization. The regulation and permitting of hazardous waste is both technically complex and extremely important due to its potential impacts on public health and the environment. The U.S. Environmental Protection Agency, through it's Resource

Conservation and Recovery Act regulations, which have been adopted by reference by the New Mexico Environmental Improvement Board, has created a robust Temporary Authorization evaluation process which, as stated, requires the Department, using 40 C.F.R 270.42(e)(2)(i)(B) and 40 C.F.R. 270.42(e)(3), to evaluate Temporary Authorization requests against the requirements of the regulations. A significant amount of time and work went into evaluating the TA Request in question using the Department's best judgment and expertise in order to make a decision that the Department is confident comports with the regulations. If one were to adopt SRIC's view of the processing of TA Requests, insofar as a view can be deduced from SRIC's minimal argument associated with the matter, a permittee would submit a TA request, the Department would take the request and then summarily either approve or disapprove using no discretion or judgment. However, the reality is that the review of a TA Request is far from a "rubber stamp" effort.

ii. SRIC has Plain, Speedy, and Adequate Remedies at Law

SRIC has plain, speedy and adequate remedies at law, rendering mandamus inappropriate. NMSA 1978, § 44-2-5 (1953). "[A] writ shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law. It shall issue on the information of the party beneficially interested." *State ex rel. Coll v. Johnson,* 1999-NMSC-36, ¶ 12, 128 N.M. 154 (internal citations omitted).

SRIC previously filed SRIC v. NMED (No. A-1-CA-38924) before the New Mexico Court of Appeals on April 27, 2020 to challenge the approval of the TA Request. Upon Motion of the New Mexico Environment Department and the United States, the New Mexico Court of Appeals dismissed the appeal, stating that "…the administrative agency made clear that its Decision did not constitute a final agency action and, indeed, the relief granted is temporary in nature. Thus, the Decision is not final, the issue is not ripe for appellate review, and dismissal of this matter is appropriate." *SRIC v. NMED*, No. A-1-CA-38924, ord. at ¶ 5 (N.M. Ct. App. June 11, 2020) (non-precedential).

As indicated by the robust permit modification process described in the Background section of this Response, the Temporary Authorization is only one part of a greater regulatory framework to accommodate changes to complex hazardous waste permits. When the draft permit was issued on June 12, 2020, it opened a public comment period during which SRIC has the opportunity to submit comments and request a public hearing. 20.4.1.901(A)(3) NMAC. If a public hearing is granted by the Secretary of Environment, SRIC will have the opportunity to be a party to the proceeding, in which it will be able to provide evidence and argument through written and oral direct testimony and cross examination. NMSA 1978, § 74-4-4.2(H). After the Department issues a final decision on the PMR, SRIC can then appeal that final administrative action

pursuant to NMSA 1978, Section 74-4-14(A) if it is dissatisfied with the outcome. Therefore, SRIC has a plain, speedy, and adequate remedy that has been provided for by the New Mexico Environmental Improvement Board and the New Mexico Legislature.

B. SRIC Provides Argument Outside the Proper Scope of a Petition for Writ of Mandamus

The bulk of SRIC's argument is unrelated to the desired Writ of Mandamus and is instead a recitation of its continued appellate argument in which it attempts to have the New Mexico appellate courts act as finders of fact in lieu of a proper administrative permit proceeding. SRIC's extrapolation beyond the four corners of a Petition for Writ of Mandamus, along with its numerous filings in this Court, is creating procedural cloudiness.

If SRIC truly felt that this matter was so ministerial in nature, and for which no other remedy would suffice but a Writ of Mandamus, prudent action would have been to file for a Writ of Mandamus as soon as SRIC became aware of the approval of the TA Request, which was in April. Instead, SRIC chose to file an appeal before the New Mexico Court of Appeals, which was quickly dismissed based on prematurity and lack of jurisdiction. SRIC is now burdening this Court with both a Petition for Writ of Mandamus and a Petition for Writ of Certiorari, requesting that the Court exercise multiple simultaneous powers to direct NMED

to act on the TA Request in the manner that SRIC desires and to sit in its appellate capacity and accept SRIC's appeal of the TA for review. Such actions will inevitably harm the ongoing administrative processes associated with the PMR. 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.

C. A Stay is not Warranted in this Matter

A stay of this matter was already reviewed and denied by the Court of Appeals. As NMED argued previously, and in accordance with the requirements found in Rule 12-504(D)(2) NMRA, a stay is not warranted in this matter, and will be detrimental to the Department and the Permittees if allowed.

i. SRIC will not Suffer Immediate and Irreparable Injury, Loss, or Damage if the Stay is not Granted

If the stay is not granted, SRIC will not suffer immediate and irreparable injury, loss, or damage 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 immediate and irreparable injury, loss, or damage will result when robust administrative remedies remain for SRIC to pursue.

Simply being opposed to the Temporary Authorization is not an immediate and irreparable injury, loss, or damage 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 Oil Co. v. N.M. Water Quality Control Comm'n*, 1986-NMCA-033, ¶ 11, 105 N.M. 708 (internal citations and quotation marks omitted). The Court should not issue a stay simply because SRIC portrays its opposition to the Temporary Authorization as immediate and irreparable injury, loss, or damage.

ii. Loss or Damage Will Result to Respondent and the Permittees 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 to increase ventilation to its workforce at soon as possible.

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. SRIC continues to ask New Mexico appellate courts 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.

IV. CONCLUSION

Southwest Research and Information Center has not met its burden under the standard for Mandamus, nor has it met its burden for a stay. The New Mexico Environment Department respectfully requests that the Court deny any and all requested relief, dismiss Southwest Research and Information Center's Petition for Writ of Mandamus and Motion to Stay with prejudice, and grant any further relief this Court deems just and proper.

Respectfully Submitted,

/s/ Jennifer L. Hower

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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 July 15, 2020.

/s/ Jennifer L. Hower
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