NEW STATE OF NEW MEXICO

BEFORE THE SECRETARY OF THE ENVIRONMENT DEPARTMENT

THE MATTER OF HEARING DETERMINATION
REQUEST CLASS 3 EXCAVATION OF A NEW SHAFT
AND ASSOCIATED CONNECTING DRIFTS
PERMIT MODIFICATION TO THE WIPP
HAZARDOUS WASTE FACILITY PERMIT

HWB 21 02 P

CITIZEN ACTION NEW MEXICO (CANM) RESPONSE IN OPPOSITION TO THE NEW MEXICO ENVIRONMENT DEPARTMENT (NMED) HAZARDOUS WASTE BUREAU´S (HWB) MOTION *IN LIMINE* ("MOTION")

The HWB brings its Motion to silence public parties, several of whom represent thousands of constituents throughout the State of New Mexico, from presenting any form of evidence about the Permit Modification Request (PMR) to allow expansion of radioactive and hazardous waste disposal at the Waste Isolation Pilot Plant (WIPP). As discussed below, the HWB Motion should be denied entirely. The HWB seeks to exclude all forms of evidence by the parties regarding a factual matter that seeks permission to install a new ventilation shaft and expand new adjacent disposal panels. The HWB Fact Sheet (p.4) describes this expansion as a primary concern of numerous parties that sought the present hearing.

In arguing that any form of evidence regarding WIPP expansion should be excluded at trial as either irrelevant or prejudicial, the HWB overlooks that "Rules 401 and 402 [of the Federal Rules of Evidence] establish the broad principle that relevant evidence—evidence that makes the existence of any fact [that is of consequence] more or less probable—is admissible unless the Rules provide otherwise." *Huddleston v. United States*, 485 U.S. 681, 687 (1988). And, each category of evidence that HWB seeks to bar CANM and other parties from using is relevant to a key element in the case and, thus, should not be excluded. HWB'S arguments regarding "prejudice" are similarly unfounded. "Relevant evidence is inherently prejudicial; but it is only unfair prejudice, substantially outweighing probative value, which permits exclusion Defendants of

relevant matter under Rule 403." See *United States v. Hankey*, 203 F.3d 1160, 1172 (9th Cir. 2000) (citation omitted). Because none of the evidence identified by HWB is unfairly prejudicial and is relevant to the drifts and shaft that are part of the PMR, Rule 403 does not preclude CANM and other parties from providing evidence regarding WIPP expansion.

"The exclusion of critical evidence is an extreme sanction which is not normally imposed absent a showing of willful deception or flagrant disregard of a court order by the proponent of the evidence." *Kotes v. Super Fresh Food Mkts., Inc.*, 157 F.R.D. 18, 20 (E.D. Pa. 1994). Preclusion "is wholly unwarranted in the absence of any indicia of bad faith." *Amersham Pharmacia Biotech, Inc. v. Perkin-Elmer Corp*., 190 F.R.D. 644, 649 (N.D. Cal. 2000); *see also Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp*., 602 F.2d 1062, 1064 (2d Cir. 1979) (noting that preclusion of testimony "is an extreme sanction to be deployed only in rare situations").

In the *Matter of Valimet, Inc.,* the Administrative Law Judge held that "a motion in limine should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." Docket No. EPCRA-09-2007-0021,(A.L.J., Nov. 6, 2008) (Order Denying Complainant's Motion to Strike, Motion in Limine, and Motion for Accelerated Decision as to Liability, and Extending Time for Filing Prehearing Briefs) (quoting Noble v. Sheahan, 116 F. Supp. 2d 966, 969 (N.D. 111.2000)) Although the court further stated that "[m]otions in limine are generally disfavored." Id. (quoting *Hawthome Partners v. AT&T Technologies, Inc*., 831 F. Supp. 1398, 1400 (N.D. III. 1993) unless the evidence sought to be excluded meets this high standard.

The HWB paranoically frames the Motion as the need to exclude some sort of "ruse and conspiracy, with felony perjury, unfounded spurious allegations" lurking behind every factual assertion of the parties (with exception of DOE and NWP) that would [in an undescribed manner by HWB] be prejudicial to considering the ventilation shaft installation in conjunction with new disposal panels. Thus, with its Motion, the HWB would segment and partition consideration of the <u>basis of need</u> for approval of the ventilation shaft and disallow the relationship to the basis of need for expanded disposal panels *even though both are part of the permit request*. (40 C.F.R. 124.7 Statement of Need).

The Hearing Officer should deny this far-reaching exclusion of evidence requested by the HWB Motion. The HWB has not described how bringing evidence regarding ventilation and disposal panel expansion would be prejudicial since *both shaft and drifts are a part of what the HWB, DOE and NWP seek to permit*. Such presentation of evidence would bear heavily on the Resource Conservation and Recovery Act requirements to show factual need and provide protection of the public health and safety consequences related to approval of the ventilation shaft and drifts. RCRA regulations do include the need to comply with other federal laws. 20.4.1.900 NMAC (incorporating 40 CFR 270.3). Whether adequate documents exist, supported by National Environmental Policy Act (NEPA) document(s) is a legitimate inquiry for presentation of evidence relevant to the shaft and drifts.

The HWB Motion *itself* brings the appearance of a subterfuge to double WIPP disposal capacity without full information being presented to the public and to exclude the ability to comment on basis for need and health and safety factors. There is no showing in the HWB Motion for how it would be prejudicial to consider whether the expanded panels sought by the permit would or could lead to additional waste disposal and public health and safety consequences. 20.4.1.900 NMAC (incorporating 40 CFR 270.42(c)(1)(iii)) requires that the request explain why the modification is needed. Apparently, HWB seeks a discussion of only the half of the permit modification that speaks to the ventilation shaft and any discussion of the other half, i.e., panel expansion, is to be silenced as some sinister scheme brought by public parties.

Considering that WIPP experienced a fire and an explosion within its existing panels leading to the multi-state offsite environmental release and employee exposure to Plutonium and other toxic chemicals, and a $2,000,000,000 three-year repair shutdown, the public has every right to be concerned about even a remote possibility for factors of PMR approval leading to expansion of waste disposal panels.

The HWB Motion singles out legal actions brought by SRIC as "frivolous" although that was not a ruling of the Court. There was no Court ruling on the factual bases for the actions on either expansion or allegations of conspiracy. The HWB relies on *Proper v. Mowrie* but ignores *Mowrie's* citation to *Baldwin v. Inter City Contractors Service, Inc.*,

156 Ind. App. 497, 297 N.E.2d 831 (1973) where the Court found error in granting a motion *in limine* and states as follows:

> ISSUE ONE: The trial court committed error when it granted Inter City's "motion in limine." "Motions in limine" are limited to jury trials. They have no application to court trials. This court has held that the "motion in limine" has a very restricted use which flows from the trial court's inherent power. This restricted use is to exclude prejudicial matter. The exclusion by the trial court may be of both prejudicial and irrelevant matter, but the primary purpose for granting the "motion in limine" must be that the matter excluded would be prejudicial to the moving party during the jury trial. Burrus v. Silhavy (1973), Ind. App., 293 N.E.2d 794.

The HWB Motion must be denied since it is no more than a bald assertion that any discussion or evidence proffered by the parties regarding the basis for need of expansion of WIPP that may result from the instant permit is prejudicial -- even though the new shafts **and** drifts will cost the taxpayer $197,000,000 and are part of the PMR. An evidentiary challenge under RCRA is warranted regarding the basis of need – that the purpose and need for concurrent mining, maintenance, and waste emplacement operations will be met without the new shaft and associated drifts. The actual purpose, need and safety of the new shaft and associated drift is fair game for evidentiary challenge.

The HWB assertion that the WIPP expansion is an irrelevant issue is undermined by **t**he HWB's own assertion in the Fact Sheet that the "shaft could be used for future disposal panels." This is contrary to HWB Motion assertion that future expansion is merely a "hypothetical issue." Yet, HWB has made no representation that the new drifts and shafts will *not* be used for WIPP expansion. In fact, as of April 8, 2021, the DOE filed a Supplemental NEPA Analysis for WIPP operations (DOE/EIS-0026-SA-12) that additionally proposes "the excavation and use of two replacement panels for disposal of TRU waste." (p.16) The HWB cannot be blind to the National Nuclear Security Administration urging expansion of WIPP, the $9M requested by DOE in 2018 for the "dilute and dispose option" with disposal at WIPP, the General Accountability Office concerns for disposal of 34 metric tons of Plutonium at WIPP.

https://www.santafenewmexican.com/news/local_news/with-limited-room-at-wipp-feds-urged-to-study-expansion/article_d346c9e9-26ae-5a57-ab1c-998e3c5b940e.html

There are both legal and factual issues that are generated by the proposed permit modification. The HWB may well be exceeding its legal authority knowing that DOE submissions regarding limitations on WIPP disposal capacity (1992 Land Withdrawal Act) may ultimately be exceeded by approving the permit. There is no signature by the Secretary of NMED endorsing the lawsuit or any indication that the HWB even has independent authority to bring the Motion. If such additional disposal (expansion) exceeds state and federal agreements it goes to the issue of basis of need for the ventilation shaft and approval of addition disposal panels. The 40 CFR 270.42(c)(1)(iii) query as to "why the modification is needed" would be precluded by approval of the Motion.

The HWB Motion is a bald attempt by the HWB to silence public opposition to the betrayal of representations made to the public and government officials about the amount (a doubling) of radioactive and hazardous waste to be emplaced and the prolonged time limit (decades past 2024) for closure of the WIPP.

Although this PMR for WIPP is of national significance, HWB greatly prejudiced the public right to know and comment prior to allowing a vastly expensive undertaking to proceed with construction -- absent a RCRA permit. Now the HWB Motion seeks to further shut out and shut up the public by describing the public inquiry concerns for that project as "conspiratorial, ill-conceived, frivolous, prejudicial, delaying and irrelevant."

- In fact, it is the HWB that failed to timely initiate the permitting process for what it knew to be a politically and factually contentious project.
- In fact the HWB has brought prejudice and engaged in conspiratorial conduct toward the public in:
    - denying the right to timely information and opportunity for comment
    - while it allowed ongoing construction activity for a project that
    - first required a Level 3 Resource Conservation and Recovery Act (RCRA) permit before proceeding.

- The HWB was informed before the HWB issued a TA by some parties to this PMR that construction could not be completed within the 180 day period of the TA. HWB didn't listen. Construction proceeded past the TA cut-off date.

CANM has a similar experience and awareness of a long standing pattern and practice of the HWB to ignore the public and wrongfully hide information -- up to the present -- to obtain RCRA permitting decisions in the HWB's favor. Although not directly related to WIPP, the HWB tactics of disinformation, withholding information and misleading the public are a matter of administrative and court record for the Sandia National Laboratories' Mixed Waste Landfill as described below:

1. The NMED sued Citizen Action asking for a Declaratory Judgment of "executive privilege" to keep a public record secret -- a January 2006 TechLaw, Inc. report that pointed out defective construction, maintenance and monitoring problems for the dirt cover to be installed above Sandia National Laboratories' Mixed Waste Landfill including a flawed computer model for fate and transport of the wastes. The 2006 TechLaw, Inc. report described that the dirt cover would not be protective of public health and safety. The NMED lawsuit was dismissed in 2009 and CANM obtained the TechLaw report only after NMED appellate delay had allowed Sandia to install the defective dirt cover.
   http://www.democracyfornewmexico.com/democracy_for_new_mexico/2009/11/new-mexico-environment-department-obeys-court-order-to-release-secret-techlaw-report-to-citizen-acti.html
2. The 2016 Final Order of the NMED Secretary regarding the MWL described the lawsuit as having been "ill-advised." The Final Order described the dirt cover as not meeting RCRA liner requirements. For nine years, NMED delayed its own 2005 requirement for a 5-Year Review "every five years." A 5-Year review was ordered by the 2016 Final Order for submission by Sandia Labs by January 2019 with requirements for public comments and NMED response to comments. The Sandia Labs' 5-Review stated it could accomplish cleanup of the Mixed Waste Landfill but needed an Order from NMED to proceed. Two and a half years have now dragged by without any NMED Order for cleanup or response to citizen comments.
3. According to the April 14, 2010 EPA Office of Inspector General Hotline Report, NMED made an agreement with the technical staff at EPA Region 6 to not document

> conversations between NMED and EPA Region 6 regarding the Mixed Waste Landfill dump monitoring well network. The agreement was made so that Citizen Action could not obtain documentation regarding the discussions. Concerns in the EPA Region 6 Oversight Report for the groundwater monitoring well network were orally conveyed to NMED so that Citizen Action could not see the Oversight Report and know the EPA concerns. (https://www.epa.gov/office-inspector-general/report-region-6-needs-improve-oversight-practices , at p.3.

Unfortunately, similar tactics of the HWB are identifiable for the current WIPP PMR. Over the objection of some parties to this proceeding, the HWB allowed construction activities for the ventilation shaft and drifts to illegally proceed in the absence of a Level 3 Permit Application. The HWB knew that such a permit would be required along with giving notice and opportunity for the public to request a hearing in the matter. The public objected to the HWB for months regarding construction going forward without a permit under a temporary authorization (TA) that is not to be used for projects of such massive undertaking. (See the letters of Southwest Research and Information Center "SRIC" of April 15, 2019, October 16, 2019 and January 27, 2020).

In its January 27, 2020 letter to the NMED, citing 20.4.1.900 NMAC (incorporating 40 CFR 270.42(e)(3)), SRIC objected to the NMED Temporary Authorization as being illegal:

> SRIC strongly opposes the requested TA because there is no legal basis for a TA, as it is specifically precluded by the regulations, historic NMED practices, as well as case law, and it would severely prejudice the required Class 3 process, including public notice and comment, negotiations and hearings. Nor is there any legitimate basis for the permittees to complain about a "delay" from following required class 3 procedures, since the permittees themselves are the reason that the modification request is only now being considered. Thus, NMED must deny the TA and proceed with a draft permit or with a notice of intent to deny the modification request.
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> …
>
> In the case of a substantial construction project, such as the new shaft, that would be part of the facility for decades, a TA is not allowed by the regulations. Instead, Class 3 procedures must be followed. In developing the regulations that include Temporary Authorizations, the Environmental Protection Agency (EPA) explained:

> The rule also 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 modification request is ultimately denied. This is known as the "preconstruction" provision. Finally, if the proposed Class 2 modification raises significant public interest or Agency concern about protection of human health or the environment, then the Agency can the default and preconstruction provisions of Class 2 do not apply. 53 Fed. Reg. 37913 (September 28, 1988), emphasis added.

The NMED treatment of SRIC's legal and technical concerns for the lack of valid PMR level 3 permitting prior to construction at WIPP is thus similar to NMED withholding documents from CANM to allow worthless groundwater monitoring to become a basis for installation of a defective dirt cover at the Mixed Waste Landfill. It is completely disingenuous for HWB to come on claiming that it is a victim of the public, asking for repressive and unfair terms for the PMR public hearing.

The Motion should also be denied because it would create unnecessary public confusion if the Hearing Officer needs to explain to every commenter/caller on the virtual telephone that they can't speak about "expansion." And if the caller objects and does it anyway, will the caller be summarily cut off or will attorney objections be required even though the caller's other comments might be relevant? Will a caller's offer of proof be allowable for the record?

CONCLUSION

The Motion *in limine* should be denied entirely.

Respectfully submitted, April 15, 2021 by

David B. McCoy, Executive Director
Citizen Action New Mexico
dave@radfreenm.org

Certificate of Service

I hereby certify that a copy of this Response in Opposition to HWB Motion in Limine was served on the following via electronic transmission on April 15, 2021:

Corral, Madai, NMENV Madai.Corral@state.nm.us
James Angel James.Angel@emcbc.doe.gov
Myles Hall Myles.Hall@cbfo.doe.gov
Michael L. Woodward mwoodward@hslawmail.com
J.D. Head jhead@fbhg.law
Robert A. Stranahan, IV Rstranahan1@me.com
Dennis N. Cook dennis.cook@wipp.ws
Leslie Brett Babb Brett.Babb@wipp.ws
Chris Vigil christopherj.vigil@state.nm.us
Christal Weatherly Christal.Weatherly@state.nm.us
Ricardo Maestas Ricardo.Maestas@state.nm.us
Megan McLean Megan.McLean@state.nm.us
Steve Zappe steve_zappe@mac.com
Scott Kovac scott@nukewatch.org
Joni Arends jarends@nuclearactive.org
Deborah Reade reade@nets.com
George Anastas GAnastas5@Comcast.Net
Dave McCoy dave@radfreenm.org

David B. McCoy