

May 2, 2000

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

**IN THE MATTER OF THE APPROVAL
OF THE CLASS 1 MODIFICATION
ISSUED TO THE U.S. DEPARTMENT
OF ENERGY (DOE) AND THE WASTE
ISOLATION DIVISION (WID) FOR THE
WASTE ISOLATION PILOT PLANT
(WIPP)
U.S. EPA No. NM4890139088**

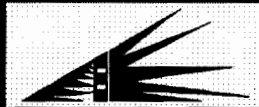
**MOTION OF
SOUTHWEST RESEARCH AND INFORMATION CENTER
("SRIC")
TO STAY THE EFFECTIVENESS OF THE CLASS 1
MODIFICATION
GRANTED ON APRIL 25, 2000**

Pursuant to § 74-4-14.D of the New Mexico Hazardous Waste Act ("HWA"), NMSA, Southwest Research and Information Center ("SRIC") hereby requests that the Secretary of the Environment Department ("NMED") stay the effectiveness of the Class 1 modification granted regarding Permit Condition IV.B.2.b pending resolution of the judicial challenge to the Class 1 modification, filed by SRIC, Dara Mark, and Wayne Gibson on May 2, 2000 (Exhibit 1).

In support of this motion, SRIC states as follows:

1. On April 24, 2000, SRIC notified NMED Secretary Peter Maggiore that it strenuously opposed approval of the "Class 1 Modification" regarding Permit Condition IV.B.2.b that the Department of Energy ("DOE") and the Westinghouse Waste Isolation Division ("WID") submitted to NMED on April 20, 2000.
2. On April 25, 2000, John E. Kieling, acting on behalf of the NMED Secretary, made a determination that "the modification identified in the Notice of Class 1 Modification has been put into effect." The modification was put into effect with no public notice and without any opportunity for public hearing.
3. The HWA, § 74-4-14.D. allows the Secretary for good cause shown to stay an action that he has taken.
4. Good cause exists because NMED's action on behalf of the Secretary in approving the modification of Permit Condition IV.B.2.b without public hearing or public notice violated the HWA, § 74-4-4.2.H which requires NMED to provide "an opportunity for a public hearing at which all

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interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing" prior to making a decision on a "major modification."

5. Good cause exists because the NMED's action on behalf of the Secretary in approving the modification of Permit Condition IV.B.2.b without public hearing or public notice violated the HWA, § 74-4-4.2.I, which requires him "to hold a public hearing if the secretary determines that there is significant public interest in the minor modification."

6. As set forth in its April 24, 2000 letter regarding the modification, SRIC has established that the change to Permit Condition IV.B.2.b. is a major modification, and cannot be approved without an opportunity for public hearing.

7. Even if NMED considers the change a "minor modification," it was required to hold a public hearing because there is demonstrated substantial public interest in Permit Condition IV.B.2.b.

8. Good cause exists for the issuance of a stay pending resolution of the appeal before the Court of Appeals based on the principles established in Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n, 105 N.M. 708, 736 P.2d 986 (Ct. App. 1986). The standards are: "(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 harm will result to other interested persons; and (4) a showing that no harm will ensue the public interest." 105 N.M. at 710.

9. SRIC seeks to stay the effectiveness of the modification to allow it an opportunity to seek review of the decision and a stay before the New Mexico Court of Appeals.

10. Because no public notice was given and no public hearing was held, in violation of the HWA, SRIC has a substantial likelihood of prevailing on the merits.

11. SRIC would suffer irreparable injury if the modification is effective because DOE would then be authorized to ship mixed radioactive and hazardous waste to WIPP and emplace it in Panel 1. Such shipment and waste emplacement would likely be irreversible and any subsequent public hearing could not redress the injury to SRIC.

12. No harm will come to other interested persons since no mixed waste is being shipped to WIPP, and DOE has not yet complied with all of the requirements of the permit related to shipping mixed waste to WIPP.

13. The public interest will not be harmed by a stay, since the public interest requires full public participation as set forth in the HWA.

14. In accordance with 20 NMAC § 1.4.204.C., SRIC did not attempt to

seek concurrence on this motion with the other parties to the Class 1 modification, since NMED, DOE, and Westinghouse have all stated their position that the Class 1 modification should be in effect.

Respectfully submitted,

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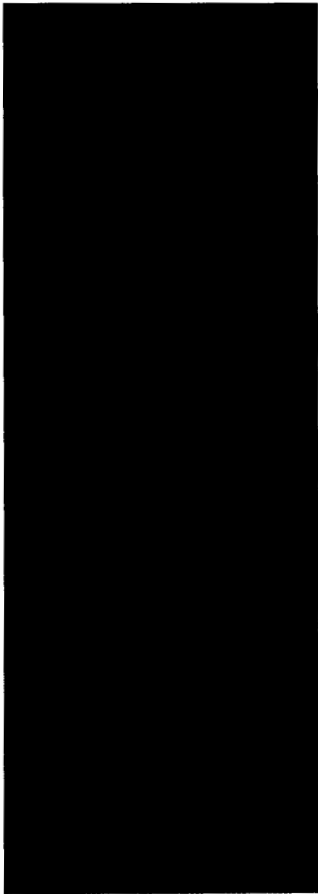
CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2000, I sent this motion for stay by facsimile to:

Peter Maggiore, Secretary
505/827-2836

Susan McMichael, Office of General Counsel
505/827-1628

I hereby certify that on May 2, 2000, I sent this motion for stay by first-class mail, postage paid, to:



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