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STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT

IN THE MATTER OF:
HEARING DETERMINATION REQUEST
CLASS 3 "EXCAVATION OF A NEW SHAFT
AND ASSOCIATED CONNECTING DRIFTS" **Docket No. HWB 21-02(P)**
PERMIT MODIFICATION TO THE WIPP
HAZARDOUS WASTE FACILITY PERMIT

JOINT CLOSING ARGUMENT OF
CONCERNED CITIZENS FOR NUCLEAR SAFETY ("CCNS")
AND DEBORAH READE

I. INTRODUCTION

The Hearing Officer for the WIPP proposed new shaft public hearing opened the hearing by stating that "[p]ublic participation is a critical component of the permitting process." (TR 1: 12: 6-7) and said that that:

> "all of the rules, all of the statutes, all of the administrative regulations and the rules that have been developed over the year really encourage public participation … Public participation is a critical component of the permitting process." (TR 1: 12: 2-6)

Unfortunately, public participation for this WIPP shaft Permit Modification Request ("PMR") and Draft Permit has been deficient from beginning to end and has not met legal and regulatory requirements. Because of this, the Secretary must deny the PMR.

Public participation, or public involvement for PMRs generally includes public notification, public meetings, opportunities for public comment, the opportunity to request a

hearing, a pre-hearing meeting, filing pre-hearing submittals, public hearing and post-hearing submittals and appealing the final decision to the New Mexico Court of Appeals. For this WIPP PMR, public participation included additional noticing requirements and additional opportunities for public comment on the issuance of a Temporary Authorization ("TA") to start excavating the shaft seven weeks before the Draft Permit for the PMR had been issued.

Unfortunately, the public notices throughout this process have been deficient and Hazardous Waste Bureau ("Bureau") fact sheets have not included critical regulation-required information and have included incorrect information. The Bureau and NMED followed some regulations but not others, followed some agreements that they made, but not others and followed parts, but not all applicable federal guidance. As a result, the general public struggled to inform themselves adequately about the PMR, the Draft Permit, and even about the WIPP site and project. An entire class of New Mexicans, Low English Proficiency ("LEP") Spanish speakers—a protected class under the Civil Rights Act of 1964—were denied the necessary information to participate in the PMR process. The Bureau made an effort two weeks before the public hearing began, to improve access for LEP Spanish speakers to the few translated documents on the WIPP webpage. This effort did not meet regulatory timeliness.

The hearing itself was also deficient. Though the Hearing Officer promised that all relevant facts would be fully developed and explored, (TR 1: 7: 1-3) that was not what happened. Critical and necessary information on why the Department of Energy ("DOE") needed a new shaft was not allowed even to be mentioned, let alone explored. Critical information about the Temporary Authorization ("TA") and about public participation for that TA were also not allowed to be discussed by most of the requesting parties. Some cross-examination on public participation was also improperly limited.

NMED did not meet its burden to provide the public with the necessary notice and information to participate fully in the PMR public process. The public participation process has been so deficient, in fact, and so many sections of the laws and regulations that apply to this PMR and Draft Permit Modification have been violated that the PMR must be denied. In the alternative, the Draft Permit must be withdrawn and combined with another, future proceeding, or the PMR public process must begin again, correct all public participation deficiencies, provide additional notice and comment periods and proceed from there. It is the responsibility of the NMED to provide the necessary info so that the public may participate fully, and without hindrance, in decision making that may impact their lives.

II. LAWS, REGULATIONS AND GUIDANCE

A. Resource Conservation and Recovery Act ("RCRA")

RCRA is a cradle to grave law or hazardous waste. It provides for strong public participation opportunities. This is reflected in federal law, state law and in the implementing regulations. That public participation is important and that public concerns must be addressed during the permitting process is also reiterated over and over in federal guidance about these laws and regulations.

Public input into the permitting process is, in fact, so important that no permit may be issued or denied without first consulting interested and affected segments of the public. (40 CFR §25.3[c][2]) NMED must provide "… ample opportunity for interested and affected parties to communicate their views, … [provide] access to the decision-making process, [and seek] input from …the public. (40 CFR §25.3[b]) This input can include facts and scientific data, but also must consider the views and arguments of the public (20.4.1.901.A[5]) NMAC) and most of all,

their concerns. Concerns are so important that they are mentioned 19 times in EPA's *RCRA Expanded Public Participation, Final Rule* (CCNS/Reade Exhibit 3) These concerns include being notified about the PMR, the WIPP facility, the draft permit, and the public process in a language and in a way they can understand. However, concerns that must be considered are not limited only to notification, translation, and disability accommodation needs. The law requires that "…the government fully considers the public's concerns" (40 CFR §25.3[c][1]) Needs include quality of life and social concerns. In southeastern New Mexico such concerns would include, among other things, health concerns, concerns about nearby planned High Level Radioactive Waste Consolidated Interim Storage (HLW CIS) facilities, and concerns about loss of property values and businesses.

Each step in the RCRA permitting process is accompanied by public participation requirements to assure that the government fully informs the public and fully considers the public's concerns. In fact, the government is prohibited from making any significant decision about a permit—that is, whether to issue or deny—without first "… consulting interested and affected segments of the public." (40 CFR §25.3[c][2]) The public participation requirements of RCRA and the implementing state regulations were often violated during the public process for this PMR even though they are every bit as important as the technical requirements. If members of the public are not provided with the necessary information from the regulatory agency for access to and meaningful participation in the process or are obstructed from having their concerns considered at all, the permitting process may not proceed to a final decision. As will be described here and is detailed more fully in *CCNS/Reade Exhibit 1* and in our *Findings of Fact and Conclusions of Law,* this is what happened with the public process for this Class 3 PMR and Draft Permit.

B. Environmental Protection Agency ("EPA") Guidance

EPA's *RCRA Expanded Public Participation Final Rule* ("Final Rule") (40 CFR Parts 9, 124 and 270; CCNS/Reade Exhibit 3), makes it very clear throughout how important it is to provide every opportunity for the public to inform themselves and participate in a meaningful way. It goes so far as to say that, "…[t]he **main benefit** of the expanded public participation requirements … is to provide earlier opportunities for public involvement and expand public access to information ... [giving] permitting agencies a better opportunity to address public concerns ..." [Emphasis added] (CCNS/Reade Exhibit 3: 63429) It is, in fact, in just those three areas, so important in the Final Rule—opportunities for public involvement, access to information, and addressing public concerns—where the public process for the PMR and Draft Permit falls apart.

Further supporting the requirements in the law that public concerns must be fully considered, the EPA also makes very clear in other guidance, including in their 2006 *Public Involvement Guidance ("Guidance"),* (CCNS/Reade Exhibit 17), EPA's 2004 *Low English Proficiency (LEP) Guidance ("LEP Guidance")* (CCNS/Reade Exhibit 17, incorporating EPA's *LEP Guidance,* 69 Fed Reg No. 22, 35602 - 35613), their *RCRA Orientation Manual 2014,* (CCNS/Reade Exhibit 2), and their 2015 *Guidance on Considering Environmental Justice During Development of Regulatory Action* (CCNS/Reade Exhibit 7), that public participation programs must identify and address community needs and concerns. These documents also state that the Bureau is required to understand the history, demographics and background of potentially affected communities, and must have an effective plan to address the community needs and concerns that have been identified. The Bureau has not fulfilled these requirements as was demonstrated during the hearing process.

NMED has agreed to follow these provisions of the *Guidance.* One element is a Public Involvement Plan ("PIP") for this PMR to identify needs and concerns, to describe the history demographics and background of affected communities, and to address those needs and concerns in the public participation process. As the *Guidance* states,

> "[a] Public Involvement Plan…is a document that serves as the basic foundation of any good public involvement program. PIPs serve as early involvement tools to identify community concerns and lay out approaches…to address those concerns." (CCNS/Reade Exhibit 17: 14211)

Because the Bureau failed to explore community needs and concerns for the current public process outside of minimal notification and translation needs, never contacted and involved community leaders and organizations to understand those needs, and never explored the history and background of potentially affected communities outside of some basic demographic data; the Bureau was unable to write a draft permit or provide a public process for the PMR that actually addressed those community needs and concerns. EPA's *Public Involvement Guidance* further states that "…all those affected by the decision outcome should be involved in developing the PIP as well as ensuring that the planning efforts of the [Bureau] … address those issues that are important to them." Instead, NMED and the Bureau obstructed the public from any involvement in creating a PIP for this proceeding that would reflect the communities' needs and concerns. NMED still considers the PIP to be a private, internal document despite EPA guidance that makes it clear that "… PIPs are public documents …" (CCNS/Reade Exhibit 17: 14211)

Statutes, regulation and guidance all require NMED to be proactive in involving the public throughout the permitting process, starting from the earliest stages, and require that all persons, including LEP persons, must have **meaningful** access to NMED's permitting program. In fact, "[u]nder certain circumstances, the failure to assure that people who are not proficient in

English can have meaningful access to … [a] recipient's programs and activities may constitute national origin discrimination prohibited by Title VI [of the Civil Rights Act]." (CCNS/Reade Exhibit 17 LEP: 35603. *The LEP Guidance* is included by reference in the *Public Involvement Guidance)*

C. Title VI of the Civil Rights Act and the Informal Resolution Agreement

In addition to the public involvement requirements of the RCRA regulations, as a recipient of federal funds, NMED and the Bureau are also subject to the requirements of Title VI of the Civil Rights Act of 1964 (40 CFR §7.3[b]), a law that is applicable to the WIPP PMR public process because it includes certain requirements about how various protected classes of people must be treated during that process. Title VI forbids a recipient of federal funds from using criteria or methods of administering its programs that have the effect of subjecting individuals to discrimination because of their race, color or national origin. (National origin includes LEP persons.) NMED has been under investigation by EPA's External Civil Rights Compliance Office ("ECRCO") for more than 15 years because of a Title VI complaint alleging, among other things, a pattern and practice of discrimination throughout NMED's programs and activities. NMED and EPA signed an *Informal Resolution Agreement ("Agreement")* in 2017 in an attempt to resolve the complaint, but the investigation remains open. (CCNS/Reade Exhibit 8)

At the time of signing the *Agreement,* NMED said that they understood that "[m]eaningful public involvement consists of informing, consulting, and working with potentially affected and affected communities at various stages of the permitting process to address their concerns." They agreed to research the demographics, history and background of potentially affected communities and to create a plan of action to address community needs and

concerns. All of these points are described both in the *Agreement* and in *EPA's Public Involvement Guidance.*

D. Executive Orders

Finally, NMED and the Bureau were also required to provide meaningful and equitable public participation for this PMR and Draft Permit by two presidential executive orders *(Executive Order 12898* of 1994 [CCNS/Reade Exhibit 5] and *Executive Order 14008* of 2021 [CCNS/Reade Exhibit 6]) and by the New Mexico Governor's *Executive Order 2005-056* (CCNS/Reade Exhibit 4). Each of these orders addresses environmental justice, which expands the requirements of the Civil Rights Act to apply them to individuals and communities that are low income or have low education levels. Some of the requirements of these orders are quite specific and some are more general. But they all come down to EPA's definition of Environmental Justice as "… fair treatment and meaningful involvement of all people regardless of race, color, national origin or income…" and that meaningful involvement includes the ideas that potentially affected populations will have an opportunity to participate in decisions, that their participation and input can influence the Secretary's decision, that the concerns of all affected persons will be considered, and that the Bureau will seek out and facilitate the involvement of those potentially affected (CCNS/Reade Exhibit 7: 4)

NMED created a public participation process for this PMR and Draft Permit that was so poorly done, so deficient, and so discriminatory throughout, that it didn't meet the requirements for public participation under RCRA, the New Mexico Hazardous Waste Act, the Civil Rights Act or in the three Executive Orders. Such a deficient process weighs heavily against approving the PMR and towards denial.

III. PUBLIC PARTICIPATION: GENERAL ACCESS

A. NMED's Phone System

In the Public Involvement Plan for WIPP, the Bureau determined that there were significant numbers of people living near the WIPP site who were not fluent in English or spoke no English at all. This is the case for many of the facilities that the Bureau regulates. Despite this, during the time period of the proposed shaft public process, NMED's offices were closed because of the pandemic. NMED's entire phone menu system was English-only. This included the voice messages for the non-discrimination coordinator and the main NMED phone number. (505) 827-2855. The Bureau did have someone answering phone calls during business hours if someone knew that the PMR was regulated by the Hazardous Waste Bureau. (TR 2: 155: 13-25, 2: 156: 1-8) That information wasn't available to everyone. Bureau employees were also answering their office phones through personal cell phones. but again, not all members had access to those phone numbers. For instance, public notices also did not always include information with contact phone numbers about how Spanish speakers could receive information in Spanish about how to participate. This all resulted in a phone system that was fairly accessible to English speakers, but much less so to LEP Spanish speakers.

B. NMED's Website

Trying to use NMED's website was possibly worse. Despite the Governor's *Executive Order 2005-056* stating that NMED shall ensure "…that **all** publicly disseminated information, **including websites** is available in Spanish and in English…" [emphasis added] (CCNS/Reade Exhibit 4: 2) there was almost nothing, or sometimes actually nothing at all, in Spanish on the NMED website webpages during the entire permitting process for this PMR. The NMED

homepage had only three links in Spanish but you had to scroll through four screens in English to find even that. (CCNS/Reade Exhibits 9-1 through 9-5)

The Hazardous Waste Bureau webpage had not a single word of Spanish on it anywhere. (CCNS/Reade Exhibits 10-34 through 10-36) Even the Bureau's WIPP webpage, which is more than 30 screens long, had only a single link in Spanish on the entire webpage. To find that link, the public would have had to scroll through three screens of English to find this single link on the fourth screen. (CCNS/Reade Exhibits 10-1 through 10-33)

Because of comments made in CCNS/Reade/s Notice of Intent statement detailing this lack of accessibility for LEP Spanish speakers, about two weeks before the start of the public hearing the Bureau did add color coding to links on that webpage leading to translated documents. It also added a color coded explanatory note in English and. Unfortunately, it was again necessary to scroll through two or three pages of English before finding this explanation in Spanish. Even these additions came far too late in the process to be helpful to LEP Spanish speakers—far too late to help them provide public comments on the Draft Permit and far too late to become a party to the public hearing. Also, far too late for LEP Spanish speakers to ask for additional translated documents to supplement the dearth of translated documents available through the website.

C. Public Involvement Plan

As described above, the Bureau prepared a Public Involvement Plan to guide the PMR public process. However, like all the hundreds of PIPs NMED has prepared, it was not translated into Spanish, making it inaccessible to LEP Spanish speakers. Certainly, the website and the PIP, and perhaps the phone system as well, fell far short of the Governor's Executive Order requiring

that "…all public disseminated information, including websites, is available in Spanish and in English at a minimum…" (CCNS/Reade Exhibit 4: 2)

LEP Spanish speakers, a protected group under the Civil Rights Act, were particularly shut out of accessing or commenting on the PIP because the PIP was English-only. The PIP itself was also deficient in meeting requirements for the entire public. The PIP is required in NMED's *Public Participation Policy* for every action that includes public participation. (CCNS/Reade Exhibit 13: 5) In signing the *Informal Resolution Agreement,* NMED agreed to implement the following provisions, and others, listed not only in the *Agreement*, (CCNS/Reade Exhibit 8: 11-12) but also in EPA's *Public Involvement Guidance*, (CCNS/Reade Exhibit 17: 14211) in order to better understand and address community concerns,

1. an overview of their plan of action for addressing the community's needs and concerns

2. a description of the community (including demographics, history, and background)

3. contact information for agency officials so the public can communicate via phone or internet

4. a detailed plan of action to address concerns

5. a contingency plan for unexpected events

6. location of the information repository

7. develop, publish and implement written procedures to ensure meaningful access to all 8 NMED's programs and activities by all persons, including LEP individual and individuals with disabilities

9. conduct an analysis to determine what language services are needed to ensure that LEP persons can participate meaningfully in the public process. and develop a language access plan

10. ensure that all staff have been trained on these processes and procedures and on the nature of their federal non-discrimination obligations

NMED used the PIP for each of these and it served as the Bureau's plan of action to address community needs and concerns. It was also through the PIP that NMED was to research those needs and concerns and the history, background and demographics of potentially affected New Mexicans. It was through using the EJSCREEN program for the PIP that NMED discovered that there were significant numbers of people around the WIPP facility who were not fluent in English and needed language services.

However, the PIP only addresses minimal language and accommodation needs and some notification needs—though it does direct the Bureau to include specific information on how LEP persons can request information about how to participate, how to contact NMED employees for translation, and how to receive language services in general.

Key information, including detailed community needs and concerns, beyond basic demographic information, notification, and minimal translation needs, were not addressed in the PIP and even translation needs were barely addressed. No serious community concerns about the high cancer mortality rate, about the multitude of polluting facilities, (shown on the *New Mexico Threats Map,* CCNS/Reade Exhibit 14*)* already existing in the area, or concerns about the two nearby proposed High Level Radioactive Waste Consolidated Interim Storage Facilities (to name just a few) were even mentioned, let alone considered. When asked if the PIP addressed these kinds of concerns, Ms Mclean stated in her testimony that, "… we don't use it for such things." (TR 2: 160: 25)

Certainly, serious community concerns were ignored in the PIP, were also ignored during the public process, and were never incorporated into the Draft Permit in any way. This was

contrary to federal guidance which encourages the incorporation of community concerns into siting and permitting so that "… net increases of pollution in communities with disproportionately high exposures or that already host a number of facilities …" can be avoided. (CCNS/Reade Exhibit 17: 14215) Further, the same guidance states that, "PIPs serve as early involvement tools to identify community concerns and lay out approaches recipients plan to take to address those concerns …" (CCNS/Reade Exhibit 17: 14211) But serious concerns were not addressed in the PIP or incorporated into the permitting process as the only concerns addressed were language and disability accommodation and noticing. Even those were not fully supported as NMED stated on page 8 of the PIP that they only have sufficient funding to translate a very limited amount of information.

D. Vital documents

In the *Agreement* NMED agreed to, "… make all reasonable efforts to ensure that all "vital" information related to the … Permit Process is accessible to LEP persons in a language they can understand …" and that, "… [a]ny vital information regarding the Facility that is readily available to the public in English whether in written form or orally, will, at a minimum, be available to the non-English speaking public …" (CCNS/Reade Exhibit 8: 7). This follows both EPA's *Public Involvement* and *LEP Guidance* where classifying or "defining" vital documents is discussed at length. (CCNS/Reade Exhibit 17LEP: 35609-35610) Yet no vital documents at all are defined in the language access sections of the PIP. When asked if any vital documents were defined in the PIP, Ms Mclean stated that though "… we use [the PIP] to ensure that the public participation requirements are met. We don't define documents within it." (TR 2: 159: 14-15)

Other than Public Notices (which were never actually formally defined as "vital") no documents that could be considered vital (the PMR, the Draft Permit, Attachment L, for

instance) were ever translated or summarized and translated. The Bureau claimed it didn't have sufficient funds for further translation but the Bureau's argument is disingenuous as they did not pursue additional funding. In fact, the Permittees volunteered to pay for printed information to be sent to the public if requested (TR 2: 173: 4-9) yet NMED never approached even DOE to see if they would donate for additional translation. Clearly, "all reasonable efforts" to translate vital documents were never pursued.

IV. PUBLIC PARTICIPATION: TEMPORARY AUTHORIZATION ("TA")

A. Timeline

On July 13, 2017, the Department of Energy ("DOE") and Nuclear Waste Partnership, LLC (together "Permittees") submitted to the Bureau a *Notification of Planned Change to the Permitted Facility re: the Excavation and Construction of Shaft and Associated Drifts*. (AR 170715). On December 22, 2017, the Permittees submitted to the Bureau a *Request for a Determination of Class for a Permit Modification Request.* (AR 171222). On August 16, 2019, the Permittees submitted a *Class 3 Permit Modification Request and Notification of Withdrawal re: December 22, 2017 Determination of Class* to the Bureau. (AR 190815).

Note: On August 16, 2019, Permittees submitted a *Public Notice for the Requested Class 3 Modification – English and Spanish Versions* to the Bureau. (AR 190816). On October 16, 2019, the Permittees provided the Bureau with *Evidence of Mailing and Publication of Notification for a Class 3 Permit Modification.* (AR 191018).

On January 16, 2020, the Permittees submitted a *Request for a Temporary Authorization for the Referenced Class 3 Permit Modification.* (AR 200112). There is no evidence of mailing and publication of the Permittees' TA Public Notice provided in the AR. On April 24, 2020,

NMED granted the Permittees a Temporary Authorization to excavate the new shaft. (AR 200415) On September 9, 2020, the Permittees submitted a *Request for a Reissuance of the Temporary Authorization for the Class 3 Permit Modification Request – Shaft* to the Bureau. (AR 200907). On December 11, 2020, NMED denied the Permittees' Temporary Authorization Re-Issuance Request.

B. Relevance of the TA

On June 12, 2020—seven weeks after the Bureau approved the TA—the Bureau published the Public Notice and Draft Permit for this PMR for public review and comment. During this seven-week period DOE was drilling the shaft 24 hours a day, 6 ½ days a week. In fact, there is serious question about whether the TA should have been granted at all. During the hearing, Mr. Vigil, NMED's counsel, even admitted that "…an argument could be made that the TA was inappropriate, and that…in itself may have constituted… some grounds for…denial for the PMR." (TR 2: 226: 19-23)

Despite this, during cross examination of Stephanie Stringer, NMED's expert witness on the TA and the TA public process by Mr. Zappe, the Hearing Officer ruled that the TA wasn't relevant to whether or not the Draft Permit should be issued or denied and that the issues of the TA and the PMR are separate and distinct. (TR 3: 22: 8-9) He also ruled that public participation for the TA was also not relevant to the issue of whether to issue or deny the Draft Permit. (TR 3: 20: 22-25, 21: 1)

Even worse, this gag order was issued after NMED had already presented its own point of view on the TA and the TA public process but other requesting parties had not. Though some cross examination of Ms Stringer did take place, even that was improperly limited and cut short by the Hearing Officer.

On page 12 of her written testimony, Stephanie Stringer, NMED's expert witness and the decision maker on the TA, stated that one of the reasons the TA was granted was because of "…the explicit condition that any work under the TA would have to be reversed if the PMR is denied." However, this puts enormous pressure on NMED to approve the PMR. As Ms Stringer testified, "…we have a really close … working relationship with the Permittees." (TR 3: 48: 6-7) To force DOE—a good working partner—to spend tens of millions of dollars to fill in the shaft that they have already excavated at the cost of more tens of millions of dollars—taxpayer dollars—would be difficult for anyone. As Mr. Lovejoy stated during the hearing "…we're all human here, and the situation that's been created by six months of construction is not one that any tribunal would likely reverse." (TR 3: 18: 13-16)

That the TA could have been issued inappropriately—which even NMED counsel acknowledges is a possibility—further complicates the issue and increases the pressure on the Secretary to approve the PMR. Even NMED's counsel Mr. Vigil acknowledged that this alone could affect the PMR when he said, "… an argument could be made that the TA was inappropriate, and **that … in itself may have constituted … some grounds for …denial for the PMR."** [Emphasis added] (TR 2: 226: 20-23) If the courts eventually ruled that the TA was issued inappropriately, what does that do to DOE's agreement to fill in the shaft if the PMR is not approved? Would that invalidate DOE's pledge to reverse the TA and fill in the shaft? Even if this is only a small possibility, the idea of having to spend tens of millions dollars of *state* money could certainly influence the decision to issue or deny, if only unconsciously. As Mr. Lovejoy said, "…we're all human here…"

Another reason the TA is relevant to the final permitting decision because one of DOE's primary justifications for why they needed the TA was to be able to dig the shaft as quickly as

possible so as to provide better air quality for the underground workers at WIPP who needed it desperately. Air quality is indeed a problem underground, but this claim is quite disingenuous as DOE could have provided greatly increased air quality underground by a variety of means other than a $200,000,000 shaft and chose not to. The Permittees were in no hurry to clean up the air underground since the fire and release seven years ago. Yet, suddenly, and without providing any basis for the requested action, the excavation had to move as quickly as possible to provide better quality air. This contradiction between DOE's claims and the reality of its inaction is quite relevant to the PMR as DOE is making the same claims—that they need the shaft to improve air quality for underground workers—to "prove" the need to dig a new shaft. The continuity of this disingenuous claim from the TA to the PMR is completely relevant to whether or not the PMR should be approved or denied.

Thus, ruling that issues with the TA were irrelevant to the PMR final decision—especially ruling after allowing NMED's information into the record but not others'—was improper.

C. Relevance of the TA Public Process

However, even if the TA weren't relevant to the decision to issue or deny the PMR, the public process of the TA is completely relevant to the issue of whether or not the Draft Permit should be issued or denied. The Hearing Officer claimed that "…there is a process for a TA and there is a process for a Permit Modification Request. And I see them as distinctive processes. I don't see one interacting with the other." (TR 3: 20: 23-25, 21: 1) However, the Hearing Officer was incorrect. A plain reading of the regulations shows that the TA public process is thoroughly embedded in the PMR process. TA regulations are found at 40 CFR §270.42(e) *Temporary authorizations*. The heading for §270.42 is *Permit modification at the request of the permittee.*

Thus, TAs are not separate from Permit Modification Requests but *are a subpart of PMRs*. Indeed, TAs are seen in the regulations as part of the modification, and may be requested only for an already existing Class 2 or Class 3 modification request. Even NMED's counsel, Mr. Vigil stated that "I'm not entirely confident that the TA and the PMR can be so neatly separated." (TR 3: 15: 5-6) Ignoring the TA process when analyzing the PMR process would be like ignoring the Draft Permit process or the Public Hearing process. They are all part of a larger whole.

The Hearing Officer went on to say that he saw "…the process for approval and denial of the PMR as a very distinct and separate issue which began when it was filed in my office earlier this year and that was after the TA had been…not renewed…" (TR 3: 23: 10-14) This statement makes clear that the Hearing Officer did not understand the regulatory sequence required for the PMR public process. In fact, the public participation process for approval or denial of the PMR began at least as early as August 15, 2019 when the Permittees submitted their Class 3 Permit Modification Request to NMED, (AR 190815) and probably as far back as July 13, 2017 when he Permittees submitted their *Request for Class Determination* to the Bureau. This was nearly three years before the April 24, 2020 approval of the Permittees' TA request (AR 200415) or the 11-18-2020 denial of the Permittees' request for a reissuance of the TA. (AR 201205) Perhaps the Hearing Officer was referring to the beginning of the public hearing process when referring to a process that began "earlier this year." He was incorrect because the public hearing, like the TA public process itself, was just one step in the continuing public process for this PMR that began on July 13, 2017 and whose many steps will end when the Draft Permit modification is issued, denied, modified, or withdrawn.

The Hearing Officer's rulings on the TA were improper since they were based on an incorrect understanding of the TA process, not recognizing it as a subpart of the PMR. They

were also based on a misunderstanding of the regulatory sequence of events for the TA and PMR public process. If the TA approval were issued improperly, even NMED admitted that this could affect whether or not the PMR would be issued or denied. Despite the Hearing Officer's incorrect statements and rulings, the TA public involvement process was fully relevant to the PMR public process and even more so because the Bureau conflated the two processes, when it tried to claim that the public notice and comment period for the issuance of the Draft Permit satisfied the public notice and comment requirements for the TA. Even if they had been separate, which they were not, NMED made them even more inseparable.

D. TA Public Participation

The TA public noticing problems were part of a pattern of problems with public notice throughout the PMR public process. As part of a pattern showing a significantly deficient public process that could result in the Draft Permit being denied, the TA public process was relevant to that decision. Again, the Hearing Officer acted improperly when he ruled that they were not relevant.

Noticing and other problems occurred when the Bureau ignored regulatory requirements to provide a second public notice and opportunity to provide public comment for TA's that were going to last more than a few weeks or a few months. Although TAs are clearly designed for one-time or short-term projects that can be completed within 180 days (with a possible extension to completion within 360 days) (AR 200415.2: 37914, 37919, 37921) the Permittees were requesting a TA for an enormous, $200 million, multi-year, permanent project that had additional requirements for public involvement because of its extended length. In its *Memorandum* of April 24, 2020 (AR 200415.1), the Bureau's Ricardo Maestas acknowledged that this TA was for a long-term, "more permanent" project and quoted from EPA's *Final Rule on Permit*

Modifications for Hazardous Waste Management Facilities (AR200415.2) to justify NMED's approval:

> Temporary authorizations that involve more permanent activities (i.e. activities that extend beyond 180 days) are subject to Class 2 or Class 3 public participation procedures for permit modifications. (37914)

The Bureau then immediately noted in the *Memorandum* that "… during the Class 3 PMR process, the public is given an opportunity to review and comment on the modification to the Permit." (AR 200415.1: 2), With this statement, NMED is clearly claiming that the PMR notice and public comment on the Draft Permit satisfy the requirement that this TA is "…subject to … Class 3 public participation procedures for permit modifications." However, further in the *Permit Modification Final Rule* it states that,

> "… if the activity will continue beyond 180 days, the facility is obligated to follow the Class … 3 process which will provide for a **second notification and opportunity to comment."** [emphasis added] (37922)

The Bureau and the public knew full well that excavation of the shaft couldn't be finished in 180 days or even in 360 days, (TR 2: 29: 10-11 and Applicants Exhibit 2: 18: Table 2-E) but the Bureau ignored the requirement for a second notification and opportunity to comment that applied to "more permanent" TAs and simply omitted these important steps in the public process. In her written testimony on page 12, Stephanie Stringer stated that "Granting the TA was reasonable given…the opportunity for the public to comment and to request a hearing…" However, the opportunity referred to was not for comment on the TA at all, though NMED tried to make it serve as such. This is clear because the PMR Fact Sheet and PMR Public Notice provided for the comment period referred to by Ms Stringer, didn't include any information at all

about the TA—even that the shaft was being excavated. Indeed, during cross examination Ms Stringer admitted that no second notification or opportunity to comment on whether the TA request should be granted or not was ever provided to the public. (TR 3: 62: 8-11) Thus, the public never had a full and proper opportunity for comment on the TA before it was approved.

However, because interested members of the public provided information to the public about the TA during the PMR review and comment period, many people did find out that the shaft was being excavated. 97% of the hundreds of comments NMED received about the TA were opposed to it, but the TA was already approved. This truncated, illegal, public process for the TA, which did not come close to satisfying regulatory requirements for proper public notice and public participation, weighed heavily against approving the PMR.

There were serious problems with the rest of the PMR public process and with the PMR Draft Permit as well. However, some more experienced commenters, such as the requesting parties to this hearing who knew that the shaft was being dug while they were commenting, and also knew they could ask for an extension, were afraid to do so. If granted by the Bureau, such an extension might have allowed shaft excavation to an even greater depth than if their comments were considered immediately. (AR 200805.247)

The general public did not know they could request an extension of the comment period since, even though the PIP stated the public could ask for an extension and described how to do that, this information was never added to any public notice or fact sheet. Since the PIP was never translated and the regulations are English-only, LEP persons couldn't access this information anywhere. Nevertheless, even without extension requests, however, when the Bureau found out from public comments how badly public participation had been proceeding, it should have paused the TA, corrected the problems and extended the comment period. If there had been a

separate opportunity to comment on approval or denial of the TA, this would not have been an issue, but it was.

As discussed above, the Bureau failed completely to provide the required second notice of a second opportunity for public comment on the issuance of the TA. In addition, the first public notice for the TA, provided by the Permittees, was deficient as well since it wasn't published properly. At 40 CFR §25.2€(iii) and 40 CFR §124.10(ix) the Permittees are required to send notice about the TA to everyone on the facility mailing list and to appropriate units of state and local governments. (Because longer term TA's are subject to the public process for Class 3 modifications, requirements to publish notice in the newspaper may have applied as well.) cite language in FF.

On page 8 of her written testimony, Ms Stringer stated that all persons on the facility mailing list as well as state and local agencies were notified within 7 days of the Permittees submitting their TA application to NMED, as required. However, none of the parties who requested this hearing and who were supposed to be on the facility mailing list (Mr. Anastas was not on the facility mailing list at the time) actually received any notification at all, either by mail or email. All have received similar notices by mail and email in the past, just not for this TA. Requesting parties CCNS and Ms Reade did not receive the TA request public notice. All other requesting parties were questioned and also received no notification. That so many requesting parties were not properly notified as required by RCRA regulations is unlikely to have been caused by a mail delivery problem since most or all were also able to be notified by email. Thus, it is quite possible that an even larger number of interested people were not notified. These very interested individuals were not informed as early as they should have been and had to find out about the TA application from other sources.

Ms Reade, for instance, never knew about the TA until it was already approved. NMED never followed up with the Permittees to make sure this public notice was actually sent to the entire facility mailing list and there is no proof in the administrative record that this early notification ever took place.

E. Permittees' Construction Schedule and Public Comment

Ms Stringer also testified that the Bureau took the Permittees' construction schedule into consideration when approving the TA at the time that they did (TR 3: 62: 15-20). This approval took place on April 24, 2020—before the public had an opportunity for comment on the Draft Permit on June 12, 2020 or a second opportunity for comment on issuance of the TA. Since many of the hearing requestors were never noticed about the first opportunity for comment, the TA approval was issued before those parties had *any* opportunity for comment on the issuance of the TA at all. In a September 5, 2000 letter from NMED to WIPP denying a previous TA request, NMED stated that TA regulations "… are intended to allow the Permittees to conduct activities necessary to respond promptly to changing or temporary conditions, but **not to implement proposed permit modifications prior to public comment simply because of the Permittees' internal programmatic priorities**." [Emphasis added] (AR 200422: 415) Yet, not only could the shaft excavation in no way be described as a changing or temporary condition, but the excavation was implemented on April 27, 2020 seven weeks prior to the public comment period that began on June 12, 2020 in order to meet the Permittees' preferred construction schedule. Ironically, because of delays constructing the New Filter Building and the inability of the shaft to provide ventilation without the NFB, no matter how soon the shaft could have been finished, it can't come online until at least 2025.

F. Summary

The lack of proper notice to the public about the opportunities to comment on approval or denial of the TA and the complete lack of an entire section of the required public process were prejudicial to the public and perhaps the most blatant examples of the defective PMR public process. However, the lack of proper notice for the TA is just one example of a pattern and practice of defective public notice and participation throughout this PMR. Despite the fact that the TA was illegally approved, a large part of the shaft has already been excavated at great expense to the taxpayer.

V. PUBLIC PARTICIPATION: PMR PUBLIC NOTICES

A. Draft Permit Public Notice

The Bureau released two public notices—one about the availability of a Draft Permit in 2020, and one in 2021 about the May 2021 public hearing. Both were defective because of problems with publishing and content. The June 12, 2020 Public Notice (AR 200607) informed the public about the issuance of the Draft Permit for the PMR and that NMED was seeking review and public comment on that Draft Permit. It did not inform the public, even in the short history of the PMR, about the April 2020 approval of the TA and that the shaft was already being excavated. This public notice was translated into Spanish.

1. Language and Disability Services

NMED's expert on public participation, Megan Maclean confirmed that the Bureau used the PIP as a guide and that was the reason they reached out to the Spanish Community in Carlsbad. (TR 2: 163: 15-20) As required by NMED's *Public Participation Policy*, (CCNS/Reade Exhibit 13: 4) using EPA's EJSCREEN program, the Bureau had determined that

there were a significant number of individuals around WIPP that were not fluent in English and needed language services. (AR 200611: 2, 8) As a result of those findings, the PIP required that all public notices, including notices for meetings or hearings, include general "…information on how individuals may request non-English speaker language assistance as well as accommodation for persons with disabilities…" and that this information "…will include how to request materials in Spanish or to speak with [Bureau] staff through an interpreter." (AR 200611: 3, 4) Despite this requirement in the PIP, no language assistance information at all was included in the Draft Permit Public Notice. (TR 2: 169: 18-25, 2: 170: 5-10) The lack of information in the notice for LEP individuals also extended to disability accommodation where deaf English speakers were told how to access TTD or TTY services but deaf Spanish speakers were not referred to the Spanish version. (TR 2: 169: 10-20)

2. PIP Comments and Extending the Comment Period

The PIP states that it may be amended "…after considering public comments and feedback…" though there is no explanation about how the public could provide such comments and feedback. (AR 200611: 3) The PIP also states that the Bureau "…may extend the public comment period if a request is received during the public comment period…based on significant interest." (AR 200611: 6) However, the public was never informed of these options in the June 2020 Public Notice even though there is a statement on page 5 of the PIP that notices provide "…contact information for submitting comments…" (AR 200611: 5) This information about extending the comment period was difficult for the general public to know, since it was never noticed, and impossible for the LEP Spanish speaking public to know since the WIPP PIP, like all NMED PIPs, was never translated into Spanish.

3. Online Access to Information

The 2020 Public Notice did properly inform the public that various documents, including the Draft Permit, Public Notice, Fact Sheet, the PMR, previous public comments, Permittee responses to information requests, and an index of the Administrative Record were available on the Bureau's WIPP webpage. It omitted any mention of the availability of the TA documents, which were also online. (TR 2: 142: 14-16) The PMR Public Notice omitted information that the entire Administrative Record was also online and where it could be found. (TR 2: 142: 10-11) Finally, the 2020 PMR Public Notice omitted information about which documents were translated into Spanish.

In the Public Notice, the public was referred to the WIPP webpage (also titled the WIPP News) to link to these key documents, including to the translated documents. However, no links were provided in Spanish. In June 2020 when the PMR Public Notice was published, there was no translated information at all on the WIPP News page or on the Bureau homepage.

4. Ordering Printed Copies

The June 2020 Public Notice also included information on how to order a printed copy of the Administrative Record or any of its documents. Because of institutional knowledge from other public processes in the WIPP area, NMED and the Bureau have known for some time that in southeastern New Mexico around WIPP, internet access is poor and the demographics (poor, rural, many minority and older residents) decrease the likelihood that people will own a computer or be proficient with online research. There is a need for "hard copy" printed material. However, despite the unusual circumstances of the pandemic and the closure of NMED's offices, and despite knowing, from EJSCREEN data in the PIP, that much of the public living around the WIPP site was low income, the Bureau would only provide printed documents at a cost to the

requestor. Thus, the most potentially affected communities around the site were also the least likely to be able to access information about the PMR in a form they could use. For LEP Spanish speakers in the area, this problem was made far worse by the difficulty in accessing written information in Spanish by phone or through NMED's website.

5. Publishing the Public Notice

a. Information Repositories and Door Postings

Because of this need for printed material and following provisions in EPA's *Public Involvement Guidance* and in the *Agreement*, (CCNS/Reade Exhibit 17: 14211, 14215 and Exhibit 8: 12) the Public Notice also directed the public to information repositories to view the Administrative Record, including the Public Notice and the Fact Sheet, at NMED's offices and public libraries in Santa Fe and Carlsbad. However, NMED's offices were closed during the entire public participation period of the PMR (TR 2: 155: 10-12) and the Carlsbad Public Library was not open on weekends and only for an hour after 5:00 pm. Because of this short schedule, documents were barely accessible through the information repositories even to the public most potentially affected by the WIPP site.

The Bureau did make an effort with door postings of modified notices at these sites to direct people to the libraries. However, no effort was made to find out through local stakeholders and leaders better places to post materials or the Public Notice in areas frequented by Spanish speakers. (Certainly, NMED's Carlsbad office could not meet that description.) This is even less understandable because the Bureau already knew that some posting places reached a more diverse audience than others. Again, the Bureau had institutional knowledge about this from working with local stakeholders during the public process for the Triassic Park Facility where

they developed a list of such posting places for that facility area. This institutional knowledge on how to enhance posting was evidently not shared with the Bureau's WIPP Working Group.

b. Newspapers

The Bureau acknowledged problems with publishing the 2020 Public Notice as required by the regulations at 20.4.1.901.C(3) NMAC. (TR 2: 173: 15-18 and NMED Exhibit 1: 6: 4-5) As had been usual for WIPP-related public notices, the Bureau had intended that the notice be published in English and Spanish in the *Carlsbad Current-Argus*, a daily newspaper published in the area where the facility is located, and in the *Albuquerque Journal*, a newspaper of general circulation in the state. However, the *Current-Argus* never published the notice. (NMED Exhibit 1: 6: 4-5) Upon learning of the error, the Bureau did not stop the process to correct it. In addition, because the PIP incorrectly claimed that "…there is no Spanish language newspaper in southern New Mexico," (AR 200611: 5) no effort was made to place the Public Notice in a Spanish language newspaper. Thus, the notice appeared in no newspaper local to the site and in no Spanish language newspaper. Such a lack of notice for an important part of the public participation process violated the law and the regulations. For this reason alone, the Secretary must deny the PMR.

c. Radio Broadcasts

The 2020 Public Notice was not actually published by radio because the information broadcast didn't include all the information required to be in public notices by the regulations at 20.4.1.901.C(3) and (4) NMAC. Radio broadcasts were especially important, however, to reach the local LEP Spanish speaking community and because of other publishing limitations caused by the pandemic emergency. However, notice provided by radio was a legally insufficient substitute for the complete notice required by the regulations. As stated, not all required

information was included because the Bureau used only free public service announcements ("PSA"). These PSAs were broadcast only on a single day, and only using two, non-local, non-Spanish language stations, KUNM and KANW. Both Albuquerque stations do have some Spanish language programs, but almost all programming is in English and the signal doesn't even reach the southeastern New Mexico area around WIPP. Again, the Bureau had been providing notice for other permits in the same general area on local English and Spanish stations suggested by the local public for about a decade, but this institutional knowledge was also not passed on to the WIPP Working Group.

d. Local and LEP Spanish Speaker Access

For the PMR Draft Permit notice and opportunity to comment, the Bureau never connected with local leaders or stakeholders and never investigated local conditions as they should have. (CCNS/Reade Exhibit 8: 11 and Exhibit 17: 14212, 14215) Public notice writers didn't investigate posting and publishing institutional knowledge that the Bureau already had that would have improved information access for local and LEP Spanish speaking persons. Access to the PMR Public Notice and to information about the PMR was obstructed by notice that wasn't provided locally and wasn't provided in a way that was as accessible to Spanish speakers as it was to English speakers. NMED had agreed in the *Informal Resolution Agreement* to provide equal access to important information for Spanish speakers as well as for English speakers. Not to do so for this public notice violated provisions in the *Agreement*, in EPA's *Public Involvement* and *LEP Guidance* and violated Title VI of the Civil Rights Act. Access was also obstructed for local working people who only had access to documents in the information repositories for one hour a day after work on Monday through Friday. Finally, charging for documents in a low-income area with poor online access also obstructed access to documents.

Enormous barriers were placed before LEP persons due to a lack of translated information in the Draft Permit Public Notice and on the website about how to participate if the interested person is not fluent in English, and a lack of translated information in general about the PMR, the site and the Draft Permit. Being provided with only minimal translated information about such a complex permit modification request, LEP persons could hardly understand the purpose of the PMR, let alone participate in any meaningful way.

Ms Maclean testified that Spanish speakers could always request translation of additional documents (TR 2: 185: 13-25, 186: 1) but that wasn't really feasible. Despite her testimony, neither the Draft Permit Public Notice nor the Fact Sheet provided information in Spanish about how to request translation of additional documents or even that such translation could be requested. The Spanish speaking public were never told in either document that there was a PIP, but of course couldn't have read it even if they'd known about it since it was never translated.

The PIP stated that the Bureau "…currently has sufficient funding for fact sheet, public notice, and public service announcement Spanish translation services and to issue notices in Spanish and English in the *Albuquerque Journal* and the *Carlsbad current-Argus* and as public service announcements… on public radio stations …" (AR 200611: 8) Even if LEP individuals had been able to request that documents be translated, with their self-imposed financial limitations, would the Bureau actually have provided all translations requested?

e. "Remedies"

The regulations at 20.4.1.C(3) NMAC require publication of public notices in a newspaper of general circulation in the area where the facility is located. For unknown reasons, this publication did not take place at all for the June 2020 Public Notice. Instead of extending the comment period and properly publishing the notice, however, the Bureau felt instead that "…the

situation was remedied through the publication of the Hearing Public Notice …" (TR 2: 140: 11-17). However, providing proper public notice and proper publication of the notice for the public hearing does not, in fact, make up for some of the most potentially affected people around the site never having received notice that the Draft Permit existed, that there was an opportunity for public comment, and that they could request a public hearing.

The Bureau also stated that adding a local radio station for broadcasting PSAs before the Public Hearing "… cured the lack of not having broadcast for the draft permit notice in the area." (TR 2: 145: 16-21) Again, providing proper notice for a later event, like the hearing, does not make up for not providing proper notice for a separate, earlier event, the Draft Permit comment period. In addition, none of the stations, even the local station, was a Spanish language station. The main quality of the radio stations chosen appears to be that they were free. (TR 2: 145: 12-16) Many local members of the public did not receive proper notice, and never had an opportunity to provide input about the Draft Permit, or sometimes even to know that a PMR even existed. Trying to "cure" an earlier failed notice by providing improved notice months later is part of a pattern that started when NMED tried to "cure" the failure to provide notice and a second opportunity to comment on the TA by saying that failure was cured by the opportunity to comment later on the PMR.

B. Hearing Public Notice

1. Language and Disability Services

The Bureau put a lot of effort into providing simultaneous translation on Zoom for the Public Hearing and provided excellent information about that in the March 18, 2021 Hearing Public Notice. This allowed equal access at the Public Hearing for both English and Spanish speakers.

Other language services notification was not as comprehensive. Basic information on document translation and non-Zoom interpretation was included in the notice, but the notice did not include specific information about how to access other public involvement opportunities in Spanish or how to speak with Bureau staff through an interpreter. (TR 2: 176: 21-24) This information was required to be in the notice by the PIP. Again, equal access to information on how to obtain disability services for deaf TTD or TDY users was not provided in the Hearing Public Notice. This disability service information was provided for deaf English speakers but was omitted for deaf Spanish speakers.

2. Other Missing Information

Other problems still remained as well. Despite an expanded section on the PMR regulatory history, there was still no information at all about the Temporary Authorization or that a large part of the shaft that was the subject of the public hearing, had already been excavated. There was still no information that the public could request an extension of the comment period or that there was a PIP or that that they could comment on the PIP.

3. Online Access to Information and Ordering Printed Copies

Other improvement in the Hearing Public Notice were that the public was no longer charged for printed copies of documents and was notified that the Administrative Record ("AR") was online in addition to the documents listed in the previous Draft Hearing Public Notice. LEP Spanish speakers were notified that the AR Index was available in Spanish as well as in English. However, again, Spanish speakers were not notified which other documents were available in Spanish besides the AR Index. The public was also referred again to the WIPP News webpage to link to all documents, including to the translated documents. However, the only link in Spanish on the WIPP webpage throughout almost the entire Hearing comment period (which ended on

May 20, 2021) was the one to the translated AR Index. It was a difficult task to find that translated link though, since it required scrolling through three full screens of English before the link appeared in the middle of the fourth page. (CCNS/Reade Exhibits 10-1 through 10-4) Two weeks before the hearing began, in response to public comments, the Bureau color coded links to translated documents and added a note in Spanish and English that all links to translated documents were colored red. Unfortunately, finding the note also required scanning through two screens of English before it appeared. The color-coded "Spanish" links remained written in English.

5. Publishing

a. Information Repositories

The Hearing Public Notice still told people they could access the AR at NMED's offices in Carlsbad and Santa Fe even though those offices continued to be closed due to the Governor's Public Health Order. (TR 2: 146: 3-5) Libraries in Santa Fe and Carlsbad continued to serve as additional document repositories but there was still only one hour available in Carlsbad after 5:00 pm to review documents; no weekend hours were available. Thus, document access and particularly printed document access continued to be severely limited for LEP Spanish speakers and for working people in the potentially affected area.

b. Postings and Ordering Printed Copies

Based on public comment and encouragement to confer with local leaders and stakeholders, the Bureau improved posting physical copies of the Public Notice and information on access to the information repositories. Bureau staff, contacted local leaders and found two good posting places where Spanish speakers congregated to post the Hearing Public Notice in

Spanish and English. The Bureau also changed its policy on charging for printed copies so that the public was no longer charged for printed copies of documents in this notice.

The Bureau clearly made efforts to follow suggestions provided in public comments to make changes to the public notice and to connect with people who had local knowledge. This paid off with some improvements in the notice and in publishing and posting. Also following public comment, the Bureau made changes to their WIPP News page to improve access for LEP Spanish speakers. These actions, however, all were too little and far too late for the interested public who had already lost opportunities to know about the PMR or to comment on the Draft Permit.

c. Newspapers

Newspaper publishing was improved for the 2021 Public Notice. This notice was published in the *Albuquerque Journal*, in the *Carlsbad Current-Argus* and also in the *Roswell Daily Record* which has a bi-monthly Spanish page edition. (NMED Exhibit 1: 12: 16-23) This also involved contacting local leaders and businesses on the part of the Bureau and involved coordination so the notice appeared on "Spanish Day."

c. Radio Broadcasts

The Bureau still used only free PSAs on KUNM and KANW (Albuquerque-based public radio stations) on only a single day, but included PSAs on local KAMQ (Carlsbad Public Radio) for 5 days. PSAs were in English and Spanish. However, the PSAs were still not full public notices and didn't meet all regulatory requirements. Local broadcasts began just one day before the hearing. (NMED Exhibit 1: 13: 1-5) Listeners who found out about the hearing on radio had no time to plan ahead to attend the hearing, read available information, request further

translation, or ask to be a party to the hearing. Spanish language radio stations were still not included.

5. Summary

For the Hearing Public Notice the Bureau finally followed some of the suggestions in public comments and also contacted local stakeholders. This improved parts of the notice and postings. These actions, however, all were too little and far too late for the interested public who had already lost the opportunity to know about or comment on the Draft Permit or on the Temporary Authorization, or, if they were LEP, to ask for additional translated documents or to request interpretation to speak with Bureau personnel. Even with improvements, the Hearing Public Notice still had problems with missing information and still did not meet regulatory requirements. Publishing too, though improved, was still deficient. Not all door postings included full public notice and radio broadcasts clearly did not. Radio messages also were broadcast too late for the public to prepare for the public hearing. Though notice went out through the facility mailing list, other forms of publishing, though somewhat improved, still did not reach much of the general public and very little of the LEP public. Despite improvements to the Hearing Public Notice, its publishing and to the website, all continued to be deficient in providing proper notice and information, and still did not meet regulatory and legal requirements.

VI. PUBLIC PARTICIPATION: FACT SHEETS

A. Draft Permit Fact Sheet

40 CFR §124.8(a) and 20.4.1.901.D(1) NMAC require that a fact sheet be prepared for the Draft Permit and that it describe the "... principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit." Additional specific required information is listed and includes:

1. the type of facility or activity involved
2. the type and quantity of wastes
3. a summary of the basis for the draft permit conditions including references to statutory or regulatory provisions and supporting references to the administrative record.

The draft Permit Fact Sheet and the Hearing Fact Sheet, the associated public notices, and the Administrative Record Index were the only documents translated by the Bureau for LEP Spanish speakers. The Bureau did not summarize all the "vital" information in the PMR, the Draft Permit, and Attachment L about the facility, the waste and the site and include that information in the Fact Sheets. NMED agreed to provide this vital information for LEP Spanish speakers when it signed the *Agreement* in 2017. (CCNS/Reade Exhibit 8: 7) Defining or classifying documents as vital and then translating this vital information also followed EPA's *Low English Proficiency Guidance*. (CCNS/Reade Exhibit 17LEP: 35609-35610) But the Bureau never classified any documents as "vital," never translated the vital information in them, and included almost no vital information in the fact sheets.

EPA's *Public Involvement Guidance* states, "Complaints frequently note a failure to provide printed information in other languages … for non-English speaking community members to ensure their full participation in the public involvement process." (CCNS/Reade Exhibit 17: 14214) This, unfortunately, is exactly what has occurred with the fact sheets for the proposed Shaft PMR.

1. Type of Facility and Activities Involved

The required description in the 2020 Fact Sheet of the facility and the activities involved at WIPP was incomplete and inadequate. The Fact Sheet stated that WIPP is a "miscellaneous unit," that there are Hazardous Waste Disposal Units ("HWDU") within the repository that can be permitted, and that there are "openings" 2150 feet underground. Miscellaneous units and HWDUs were not defined, nor were "openings "further described. No waste panels or waste rooms were described. There was no information *at all* about hydrology at the site. There were two sentences to describe the geology. This is hardly a summary of the eight-page Permit Attachment L description of the very complex site geology and hydrology. The reader was also referred multiple times to English-only regulations and laws for more information. This deprived LEP Spanish speakers, who could not read the English-only regulations and laws, of full and equal participation in the permitting process.

There were also no descriptions of the activities that go on underground at WIPP, including the mining, waste emplacement and maintenance that DOE claims are key elements in the need for the proposed new ventilation shaft.

2. Type and Quantity of Waste

The required information about the type and quantity of waste involved was also deficient. Required information was omitted completely about quantities of waste stored and disposed, or how those quantities might change because of the proposed shaft. Waste descriptions were, again, filled with multiple references to the English-only regulations for more information. They also included many technical words and phrases that were not defined and that had particular meanings under the regulations (for instance, *ignitability, corrosivity, reactivity, toxicity).* English speakers could find this information relatively easily in the Administrative

Record; LEP Spanish speakers could not access it at all. The 2020 Fact Sheet, like the 2020 Public Notice, also contained no information about the TA, even in the PMR history section; nor did it tell the public that DOE was excavating the shaft while members of the public were commenting on the PMR.

3. Basis or Need for the Proposed New Shaft

In the Draft Permit Fact Sheet, the Permittees and the Bureau have failed to provide the required basis or need for the proposed new shaft. The Permittees and the Bureau insisted that the proposed new shaft was needed only as a ventilation shaft, yet the Fact Sheet included no descriptions of the original, pre-accident ventilation system or of the current ventilation system and failed to mention that there were already four existing shafts at WIPP. There was no explanation of why airflow became diminished or information on the 2014 accident and radioactive release that led to this diminished air flow. There was no explanation of why WIPP was closed for three years following the fire and release.

a. Missing and Incorrect Information About the Ventilation Systems

There was no description of the proposed new 5-shaft configuration in the Fact Sheet though the proposed Permanent Ventilation System ("PVS") was mentioned. However, information about the proposed PVS was incorrect and limited to saying only that it consisted of two parts, the proposed shaft and the New Filter Building ("NFB"). The Salt Reduction Building ("SRB") that is also a critical part of the PVS was omitted. The NFB and the SRB together are called the Safety Significant Confinement Ventilation System (SSCVS). The proposed, permanent ventilation system, the PVS, actually is made up of the SSCVS and the proposed new shaft. It is *not* made up of the NFB alone and the proposed new shaft. There was also no mention

that the SSCVS alone can provide increased and improved ventilation, with air quality adequate for workers' needs, without the shaft—a critically significant fact relevant to the PMR.

The Fact Sheet described the Permittees' justification of the need for a new intake shaft as including:

1. increased airflow
2. the ability to concurrently perform mining, waste emplacement and ground control (maintenance)
3. An unfiltered exhaust path for mining and reduction of salt and filter waste
4. Better air quality for underground workers and
5. Increased control of ventilation airflow and differential pressure between mining and waste emplacement

All of these however, can be provided without a new $200 million ventilation shaft, and sometimes in a more timely manner.

b. The New Filter Building Can Provide All Ventilation Needs Without Shaft 5

When completed, the New Filter Building will be capable of increasing and improving underground ventilation on its own (or as the SSCVS, with the Salt Reduction Building) without the proposed shaft. (TR 3: 86: 2-4 and TR 1: 218: 20-21) It would also be able to provide protection for underground workers and for the environment (TR 3: 99: 10-17) and air quality and quantity would be sufficient for concurrent mining, waste emplacement and "ground control" or maintenance. (TR 1-218: 7-12) Though designed to work together, the New Filter Building can function fully without the shaft, but the shaft can't function at all without the NFB. Without further delays, the NFB is expected to come online four years from now in 2025. (SRIC Exhibit 13: 1)

Though the NFB would not provide an unfiltered exhaust path for mining and would create somewhat more salt and filter waste than the shaft and NFB would if acting together, the

cost of processing this solid waste would be far less than the cost of excavating and constructing an almost $200 million shaft

As for air quality in the underground, the NFB could provide air quality protective of underground workers' health without the fifth shaft. (TR 3: 99: 10-17) Other methods, such as switching to electric vehicles and low emission diesel fuel, will enhance air quality even more could have provided air quality improvements sufficient to meet current higher standards, years ago. The Defense Nuclear Facilities Safety Board *January 2019 WIPP Report* said WIPP planned to use a variety of methods, other than a new shaft, to meet increased air quality standards, and expected to meet those standards in about four years. (CCNS/Reade Exhibit 22: 1)

Seven long years have passed since the drum explosion and release at WIPP and the earliest the New Shaft and NFB could come on line is four years from now. Eleven years is a long time for underground workers to wait for improved air quality. In fact, it is DOE's insistence on improving underground air *only* by using increased ventilation (despite NMED guidance to the contrary) (CCNS/Reade Exhibit 19: 11) that has already delayed air quality improvements for workers for years. If DOE were truly concerned for worker safety and their air quality, they would already have introduced all-electric equipment or a mix of electric and clean diesel vehicles.

Another significant question is, whenever it would come online, would the new shaft actually make the significant improvements to the quality of underground air that the Permittees claim? This has never been verified as the Bureau has never independently reviewed the assumptions and the calculations which support DOES's claims for improved worker safety and improved protections for human health and the environment. (TR 3: 97: 11-25, 3: 98: 1-25, 3: 99: 1-3) At this point these claims remain just speculation. The lack of attention to verifying the

assumptions and calculations that underlie DOE's claims for the proposed new shaft make NMED appear more concerned with facilitating construction of the new shaft than with conducting its own analyses of the Permittees' PMR.

Finally, even pressure differential requirements in the Permit that keep radioactive air from flowing into the construction circuit, can be met by the New Filter Building combined with the current ventilation system according to DOE's ventilation expert, Jill Farnsworth. Even the current, much reduced ventilation system provides this required pressure differential and the SSCVS alone, without Shaft 5, will be able to provide this as well. Ms Farnsworth admitted that the fans in the proposed shaft would only be "enhancing" the differential pressure when she stated, "Yes. That [the SSCVS] will create a differential pressure, but what I spoke of earlier is that we're enhancing that differential pressure with the fans on Shaft No. 5." (TR 2: 61: 12-14) Again, is this enhancement really worth an additional $200 million? By the earliest date (2025) that the proposed shaft could come online WIPP will be at or close to the end of waste emplacement and the beginning of closure—which includes filling up all the shafts. How long beyond 2025 would such a massive shaft be needed if WIPP does not expand the time, waste volume, and footprint limits it has today? The PVS could be delayed far beyond 2025 if any of the three projects are delayed past that date. The NFB was supposed to come online in 2021 and is already delayed for four more years. Other delays are quite possible as DOE has been on the GAO High-risk list for decades for its inability to keep capital projects on schedule and on cost.

The Permittees have the burden to show that the modification is needed (20.1.4.400.A[1]) NMAC)and they have clearly not met this burden. There is no "need" for a new shaft purely for ventilation as each of the Permittees' justifications can be satisfied by a combination of the current ventilation system with the New Filter Building (or SSCVS). For one

of the supposed justifications, improved air quality underground, reliance on the new shaft alone to solve this problem has actually caused harm and delayed fully improved air quality for years.

The real and only need for this shaft that makes sense is as a utility shaft for an expanded WIPP. This is how other government entities and even DOE itself describes the uses of the proposed fifth shaft. Its extra large diameter allows it to serve as a waste and personnel hoist and for a host of functions other than ventilation since a much smaller 14 foot diameter is all that is required for air intake alone. (TR 3: 107: 19-25, 3: 109: 2-23) Yet the Bureau omitted to state the real justification for the shaft in the Fact Sheet and kept this principal relevant fact and significant question from the public. The Fact Sheet included almost no information about ventilation at all and particularly didn't inform the public that the SSCVS and the current ventilation system could provide everything that the shaft could do but faster and cheaper. This major shortfall, especially when combined with the other omissions of required information in the Fact Sheet, makes the 2020 Fact Sheet wholly deficient. This alone should be enough to deny the Draft Permit.

4. "Draft" Fact Sheet

NMD at times referred to the 2020 Fact Sheet as a "draft" (TR 2: 143: 15). A draft, however, should never have been published as a final document on which the public was to depend for critical information. There should have been only one Fact Sheet that was adequate to serve for both comment periods, though updates might have been necessary. By calling the first fact sheet a draft, the Bureau acknowledged that the 2020 Fact Sheet was defective. Even if all its deficiencies had been corrected later in the Hearing Fact Sheet, however, that wouldn't have made up for the harm suffered by the public who weren't able to be fully and correctly informed by the Draft Permit Fact Sheet. This hampered the public's ability to provide input. Because of

their inability to supplement the "draft" Fact Sheet with information from the English-only PMR, Draft Permit, Attachment L and regulations, the LEP public was again, unequally burdened and their ability to access information and participate meaningfully was obstructed.

B. Hearing Fact Sheet

1. Facility, Site, Activities, Waste, TA, and Basis

Some improvements were made to the Hearing Fact Sheet, but they were not many and the Fact Sheet still did not meet all the requirements of RCRA and the regulations. The description of the facility was unchanged from the Draft Permit Fact Sheet and was thus still deficient, as was the description of the types and quantities of waste where information on the quantity of waste continued to be omitted. There was still no mention of the TA in the PMR regulatory history. Three paragraphs on WIPP site geology and hydrology were added to the Hearing Fact Sheet and did increase the information somewhat. However, the three new paragraphs did not come close to summarizing all the vital information about geology and hydrology in the eight pages of Attachment L and in the Draft Permit. A description of the karst and brine pockets above, below and around WIPP was omitted. No geological or hydrological information below WIPP was provided, and there was no mention of the intense oil and gas development around the WIPP site—some of the heaviest in the world— and the associated fracking, including in slant wells below the WIPP site. No justification was given for why the proposed shaft was sited on the west side of the facility. Finally, the justification given for the need for the shaft was still deficient as it continued to be limited to describing the need for the shaft as limited to ventilation.

2. Training

These deficiencies in the fact sheets were not necessarily the fault of the WIPP Working Group and the fact sheet writers, however. It is clear that the non-discrimination training required in NMED's Policies (CCNS/Reade Exhibits 11-1: 4, 12: 9-10, 13: 7) and provided to the WIPP Working Group, was deficient. This training is also required in the *Agreement* where it describes what should be covered including, "NMED non-discrimination policies and procedures as well as the nature of the federal non-discrimination obligations …" and specifically mentions training on "Public Participation Process/Procedures" (CCNS/Reade Exhibit 8: 11, 13) Training is described in both EPA's *Public Involvement Guidance* (CCNS/Reade Exhibit 17: 14211-14212) and *LEP Guidance* (CCNS/Reade Exhibit 17LEP: 35611-35612 and throughout). Considering the poor public process for this PMR, the training could clearly have benefitted from public input, but training is something that NMED considers to be wholly internal. It is only possible to know what is missing in the training indirectly, by seeing the omissions and deficiencies in the actual public process.

Although Ms Maclean, NMED's expert on public participation, said that she was familiar with both the PIP and the *Agreement,* her training had clearly not been comprehensive enough for her to understand how the provisions of the *Agreement* related to the PIP and the public process. It was also clear that she had not been adequately trained on the EPA *Public Involvement Guidance* and the EPA *LEP Guidance*. All of these documents discuss and require inclusion of community history, background, needs and concerns in the PIP. They also discuss at length, defining or classifying "vital" documents for translation. Ms McLean said she knew that in the *Agreement* NMED agreed to investigate community history, demographics, and background and to address community needs and concerns. (TR 2: 159: 16-21) The PIP is the

document NMED is using to address those community needs and concerns, but when asked if the PIP addressed or mentioned one serious community concern, High Level Waste Consolidated Interim Storage Facilities proposed for the area near WIPP, she stated that, "We don't use it for such things." (TR 2:160: 25) When asked if any vital documents were defined for translation in the PIP, she responded that "We don't define documents within it." (TR 2: 159: 14-15)

When asked if any documents, including the Draft Permit, were translated or summarized and translated beyond public notices and fact sheets, Ms Mclean said "… the draft permit is a gigantic document…" and that it wasn't translated. (TR 2: 181: 8-10) She didn't seem to understand that an entire large document doesn't need to be translated. This is clearly described in EPA's *LEP Guidance* and in the *Agreement* which also describe the need to translate or summarize and translate all vital information in such documents. (CCNS/Reade Exhibit 17LEP: 35609-35610 and Exhibit 8: 7)

Though the WIPP PIP was the planning document for public participation and Ms Mclean stated that the they used it to reach out to the Spanish speaking community, she didn't know about other information in the PIP or what was required to be in it by the provisions of the *Agreement,* guidance, and law. (TR 2: 159: 11-15 and 16-25, 2: 160: 21-25) The WIPP Working Group had clearly not been trained about how the *Agreement* and guidance applied to the PIP and then to the public process.

3. Summary

All vital information should have been included in the Fact Sheet because this was the only comprehensive translated information available for LEP Spanish speakers. Multiple references to supplement the information by reading English-only regulations or English-only documents were useless for LEP persons though those documents were easily accessible to

English speakers. Ms Mclean insisted that all documents were actually "available" to the LEP public because LEP persons could request document translation. (TR 2-181, 185-186) But in the *Agreement* NMED said they would

> "… make all reasonable efforts to ensure that all "vital" information …is accessible to LEP persons in a language they can understand. If it is not reasonable to translate an entire document, NMED must ensure that any vital information contained within such a document will be translated. … Any vital information … that is readily available to the public in English … will, at a minimum, be available to the non-English speaking public…" (CCNS/Reade Exhibit 8: 7)

Information is not easily available to the LEP public if they have to figure out what documents they need to have translated and then go through a complex process that is also mostly in English (non-discrimination coordinator's phone system, almost completely English-only website and for much of the public process no translated index of available documents in the AR). This was exacerbated for the PMR because for most of the public process LEP persons weren't even told in public notices that they could request translated documents or that interpretation to talk with NMED personnel was available. The only documents that were actually available for the LEP public were the fact sheets and public notices and later the translated AR Index.

Finally, no matter how well written, no fact sheet can be anything but deficient if policy requires that the true basis and need for the modification not be written into the fact sheet. By describing the shaft as only a ventilation shaft and then not providing any correct information at all in either fact sheet on the current or future ventilation systems or on how the shaft is supposed to work, or on how the New Filter Building can provide all the air and all the clean air needed underground at WIPP by itself; the public was led astray. With no information with which to judge if the shaft is a ventilation shaft or something more, it was impossible for the public to know whether the shaft was needed or not. This was worse for LEP Spanish speakers who

couldn't supplement the scanty information in the fact sheets by going to the English-only Draft Permit or Attachment L.

When full information about the only need for the shaft that makes sense—that it supports increased mining and waste emplacement in a future, expanded WIPP—is kept from the public and not included in the fact sheets (or the hearing, for that matter) the public cannot truly understand the requested modification.

VII. PUBLIC PARTICIPATION: PUBLIC HEARING

The Public Hearing was beautifully run by the Office of Public Facilitation and the Bureau and provided simultaneous translation of the entire hearing. Despite attempts to hack into the meeting and disrupt it, the parties, Hearing Officer, various NMED personnel and the general public were all able to participate comfortably and easily. Proper passwords were provided so people could call in even from non-smart phones. In addition, the Zoom format was far superior in providing accommodation for Ms Reade's hearing loss than the traditional in-person microphone system previously used by NMED.

A. Relevant Facts on Basis Not Fully Developed

However, there were serious problems with the hearing itself. The Hearing Officer opened the hearing by saying it was his responsibility to, "… conduct the hearing in a fair and impartial manner so that all relevant facts are fully developed …" (TR 1: 7: 1-3) Instead, significant relevant facts regarding the declared need and basis for the proposed shaft were not fully developed because the Hearing Officer ruled they were not relevant to the approval or denial of the Draft Permit. They were not allowed to be mentioned.

As described above, the shaft is not needed as a ventilation shaft, but this was the only "need" the Hearing Officer would allow to be discussed. Despite numerous government documents to the contrary from a variety of agencies including DOE, detailing the Permittees' plans to expand the footprint, waste volume, ending date and types of waste at WIPP, this planned expansion and the proposed shaft's relationship to the expansion were prohibited subjects for the hearing requestors. Yet when the Permittees stated that "… the proposed new shaft will support future disposal units by providing the airflow needed to mine, maintain, and subsequently emplace waste in new units" even NMED's expert witness Mr. Maestas admitted that he wasn't in agreement with those facts as stated. (TR 3: 86: 23-25, 3: 87: 1-9 and 18-25) Obviously, whether or not the proposed shaft is only a ventilation shaft is not a simple matter, but all relevant facts about this issue were never allowed to be discussed and fully developed during the hearing. The facts about the true reason DOE wants to modify the permit to build a fifth shaft were suppressed.

B. Prejudicial Ruling on Relevance of WIPP Expansion

Even worse, only some parties were prevented from discussing WIPP expansion. The Hearing Officer made a key ruling after the Permittees and the Bureau were able to provide testimony about they would need increased ventilation past 2024, which had been the original accepted date for the end of waste emplacement. DOE's expert witness, Mr. Kehrman described the need to mine new replacement waste panels in order to fulfill their original mission, requiring continuing mining, maintenance and waste emplacement for years past 2024. (TR 1: 61: 23-25, 1: 62: 1-6, 13-25, 1: 63: 1-3, 1: 96: 19-25, 1: 97: 1-9, 1: 102: 12-25, 1: 103: 1-2 and Applicants Exhibit 1: 14: 14-19, 16: 1-18) The new waste panels plus the new shaft and drifts would expand the WIPP footprint beyond the original footprint and the additional time needed for waste

emplacement, would expand the operational ending date. DOE and NMED were allowed to discuss this WIPP expansion both as to time and facility footprint and to testify about the role of and need for a new shaft to support such expansion. Limiting some parties but not others from discussing pertinent facts about expanding WIPP and how the shaft was needed for WIPP expansion was arbitrary and capricious. This was prejudicial against the hearing requestors and didn't allow the general public to see the fully developed facts about this PMR.

C. Prejudicial Ruling on Relevance of the TA

Further, the Hearing Officer repeated this improper limitation of some parties but not others when he allowed a Bureau witness to testify about the Temporary Authorization and about the TA public process, but then declared that both were irrelevant to the final decision about the Draft Permit. Although some parties were able to cross examine this witness, some were not, including one party, Mr. Zappe, whose cross examination was cut off in the middle and then limited. (TR: 2: 222: 1925) The Hearing Officer said he had read all the pre-hearing written statement and testimony, many of which had described the TA and issues with the TA in detail. Thus, he knew that this was a major issue before the hearing began. Instead of deciding whether the TA was relevant before testimony began, the Hearing Officer's decision was created "on the fly" in the middle of cross examination, allowing the Permittees and the Bureau to present all their facts into evidence but prejudicing the hearing requestors whose cross examination was cut off completely or unfairly limited.

D. Prejudicial Ruling on Relevance of the TA Public Process

Besides not understanding that Stephanie Stringer had testified as NMED's expert on the TA public process, (NMED Exhibit 3: 8: 6-21 and TR 2: 202: 23-25, 3: 54: 22-24) the Hearing officer also said he saw "… the process for approval and denial of a PMR as a very distinct and

separate issue [from the TA] which began when it was filed in my office earlier this year and that was after the TA had been…not renewed …" (TR 3: 21: 10-14) As described above, the Hearing Officer did not understand the regulatory sequence required for the PMR public process. In fact, the process for approval or denial of the PMR began much earlier—at least as early as August 15, 2019 (AR 190818) when the Permittees submitted their Class 3 Permit Modification Request to NMED, and possibly as early as December 22, 2017 when the Permittees submitted their Class Determination Request to NMED (AR 171222). At any rate, the process began years before the entire TA process began and ended. The Hearing Officer's ruling on the lack of relevance of the TA and the TA public process was based on an incorrect understanding of witness testimony, of the law, and of the regulations. Therefore, the ruling on relevance of the TA public process and the limitations on cross examination about the TA public process were improper and prejudicial to the requesting parties.

E. Prejudicial Ruling on Cross Examination

Ms Reade, for instance, tried to query Ms Stringer on additional public participation requirements for the TA including whether NMED had been as proactive in seeking people for the facility mailing list as the regulations at 40 CFR §124.10(c)(ix) require, and about whether the TA was implemented before the public had an opportunity to comment in order to meet the Permittees' preferred construction schedule. She had other questions to ask as well. As described above, Ms Stringer was put forth as an expert on TA public notice and participation in her written testimony. In her direct testimony she was asked specifically by Mr. Vigil to discuss public notice and public participation requirements for the TA. (TR 2: 202: 23-24)

However, Ms Reade was not allowed to explore these and other TA public participation questions fully because the Hearing Officer claimed, incorrectly, that Ms Stringer "…did not

testify in her direct to the subject matter of public participation…" (TR 3: 54: 22-24) When Ms Reade pointed out that Ms Stringer "… did talk about … public participation for the TA …" it made no difference. (TR 3: 55: 2-3)

F. CCNS/Reade Exhibit 8 Should be Considered an Offer of Proof

On day four of the hearing, the Hearing Officer ruled against entering CCNS/Reade's Exhibit 8, the *Informal Resolution Agreement,* into evidence. However, it should still be considered an Offer of Proof. It was never Ms Reade's intention that the *Agreement* be enforced in this PMR public hearing. It was Ms Reade's intention to use the *Agreement* to demonstrate that NMED is not fulfilling its public participation obligations and requirements as it agreed with EPA to do, which is relevant to the PMR. In addition, all of the pertinent public participation provisions agreed to are also found in EPA guidance. However, such guidance is non-binding whereas the *Agreement* is a binding contract between NMED and EPA. Signing the *Agreement* raised NMED's public participation obligations to an even higher level than the non-binding guidance documents. EPA continues to monitor NMED's compliance with the *Agreement*.

The Hearing Officer ruled earlier that same day that an exhibit of another party, Southwest Research and Information Center ("SRIC"), was already in evidence even though it had been objected to and the Hearing Officer had sustained the objection, because it was submitted with their pre-filed submission. SRIC objected to its exclusion and requested that it be admitted. The Hearing Officer stated, "… it has been objected to and I have sustained that objection, so … what that will mean is that … I, in my Hearing Officer report, will consider it an offer of proof." (TR 4: 21: 22-25)

Similarly, CCNS/Reade's Exhibit 8 was also submitted with their pre-filed submission, was objected to and the Hearing Officer also sustained that objection. (TR 4: 116: 11-12) Ms

Reade also objected to its exclusion. The Hearing Officer is charged with conducting "a fair and impartial proceeding … for the efficient, fair and impartial adjudication of issues arising in the proceedings…but is not limited to, authority to rule … on offers of proof." 20.1.4.100.E(2) NMAC. Given the similarity of the facts and rulings, the hearing Officer must consider the CCNS/Reade Exhibit 8 as an Offer of Proof in his Hearing Officer report.

The precedent of the ruling earlier that day led Ms Reade to expect Exhibit 8 also to be considered an Offer of Proof. The regulations at 20.1.4.100.B NMAC *Liberal Construction*, lent further support to this argument where it is stated, "This part shall also be liberally construed to facilitate participation by members of the public, including those who are not represented by counsel." Ms Reade is not represented by counsel.

G. Summary

The hearing, though a great improvement in providing language access through Zoom, otherwise continued the poor approach the Bureau and NMED have taken toward public participation throughout the public process for this WIPP PMR. For all the reasons cited above, the Secretary must deny the PMR.

VIII. CONCLUSION

The public participation process for this PMR was defective from beginning to end and did not meet the requirements of RCRA, the Civil Rights Act, the New Mexico Hazardous Waste Act, the state and federal executive orders, or the implementing regulations. Nor did it meet the provisions of federal guidance, of the *Informal Resolution Agreement*, or even of NMED's own Policies and the Bureau's Public Involvement Plan. The PIP itself didn't meet all provisions either, tainting the public process from the very beginning.

Multiple instances of incorrect notice publishing or no publishing at all led to interested parties and the potentially affected public not receiving notice about the TA request and the PMR. These circumstances violated the law and regulations not just once but many times and are themselves grounds for the Secretary to deny the Draft Permit.

For the TA public process, the first required public notice was not properly sent to all parties on the facility mailing list and the second required notice was never issued at all because an entire component of the TA public process, including an opportunity for comment, was simply omitted from the process.

For the Public Notice on the issuance of the Draft Permit and on the opportunity to provide input on that Draft Permit, critical information on language and disability services was omitted that the PIP had required to be in the notice to meet requirements of Title VI of the Civil Rights Act. Disability accommodation information for deaf English speakers was provided but the same information for Spanish speakers was omitted. Other information for the public that was described in the PIP was omitted as well.

Publishing of the notice was also defective. It was not published at all in a local newspaper as the regulations require, nor was it published in a local Spanish language newspaper, leaving information about the Draft Permit, the opportunity to comment, and the opportunity to request a public hearing, inaccessible to LEP Spanish speakers. Door postings and radio broadcasts did not make up for the defective publishing as neither included the full public notice and the radio broadcasts were on non-local and non-Spanish language stations. Though the notice directed the public to information repositories at NMED offices and public libraries to view documents, NMED's offices were actually closed during the entire public participation period of the PMR so this information in the notice was incorrect.

The Hearing Public Notice, though it included good language information about interpretation at the Public Hearing, only included very basic information on language services and still did not include all the language information required to be in it by the PIP. (AR 200611: 3-4) Disability accommodation information for deaf English speakers was provided in the notice but the same information for Spanish speakers was still omitted. Other information in the PIP for the public was also still left out of the Public Notice.

Publishing was somewhat better as the notice did appear in a local newspaper on "Spanish Day" and posting of information was better placed. However, the notice still directed the public to closed NMED offices to view documents and though radio broadcasts were now local, they still were not on Spanish language stations. Broadcasts were also not of the full public notice. Notice still did not reach many members of the public and even fewer LEP individuals.

RCRA also requires fact sheets be provided for the PMR process and two were created, one for the Draft Permit (AR 200608) and one for the Public Hearing. (AR 210316) The Bureau admitted that the first fact sheet was defective as they referred to it as a draft, acknowledged that there were problems with it and corrected some of those problems for the Hearing Fact Sheet. (TR 2: 142:25, 143: 1-25, 144: 1-4) However, both fact sheets omitted information that was required by the regulations, including the quantity of waste at the facility. Both fact sheets also did not describe the facility, activities at the facility or the waste with the specificity required by statute and regulations. Even though the PMR was supposedly about a ventilation shaft, no information at all was provided about the past, current or proposed ventilation systems except for incorrect information about the components of the proposed Permanent Ventilation System. Information on the Basis and Need for the shaft did not include the true need with even NMED's expert witness admitting that he was not in agreement with some of DOE's claims. (TR 3: 86:

23-25, 87: 1-25) No information at all was provided in either fact sheet to explain that NMED had already approved DOE's TA request and that a large part of the shaft that was the subject of the fact sheet had already been (or in the case of the Draft Permit Fact Sheet was currently being) excavated. The missing and incorrect, required information in both fact sheets again, led to interested parties, the potentially affected public, and particularly LEP members of the public, not receiving the information the regulations required them to receive. This violated the law and regulations not just once but twice and in itself is grounds for denying the Draft Permit.

Problems continued with the public hearing where again, the true reason for the shaft was not allowed to be discussed so that all the facts about the PMR could not be fully developed. More than once some parties were allowed to discuss the TA or WIPP expansion when others were not. This situation led to an unfair and partial proceeding that was prejudicial to many parties.

Besides not meeting the public participation requirements of RCRA, the New Mexico Hazardous Waste Act, the implementing regulations, and the federal and state Executive Orders, the public process also did not meet the requirements of Title VI of the Civil Rights Act of 1964 (40 CFR §7.3 [b]). As a recipient of federal funds, NMED is also subject to the requirements of Title VI of the Civil Rights Act which forbid a recipient from using criteria or methods of administering its programs that have the effect of subjecting individuals to discrimination because of their race, color or national origin. For this PMR an entire segment of the public, LEP Spanish speakers who are a protected class under the national origin provisions of Title VI, as documented above, were almost totally obstructed from meaningful participation in the public process. The Bureau did not define or classify vital documents and vital information in large documents as "vital." The Bureau did not make sure that all vital information that was easily

available to English speakers was translated for LEP Spanish speakers. Instead, information provided in Spanish about the PMR, the Draft Permit, the facility, the site, the waste, the ventilation systems, the TA, and more was inadequate for LEP persons to be properly informed about the PMR and consisted of the two public notices, the two fact sheets and later in the process, the index to the Administrative Record.

The notices and fact sheets omitted most required and critical information and directed the public to regulations and documents on NMED's WIPP webpage. This was easily accessible for English speakers but completely inaccessible for LEP persons as the regulations and documents were English-only, as was the webpage for much of the hearing until a single link in Spanish was added to the translated AR index. About two weeks before the hearing, the Bureau color coded links to the few translated documents on the webpage, but this was long after the TA and Draft Permit comment periods were over. It was also too late to prepare properly for the Public Hearing.

For the Draft Permit comment period there was no information at all in the public notice that language services of any kind were even available. Minimal information was provided in the Hearing Public Notice on language services but required information explaining how to obtain translated documents or talk through an interpreter with Bureau personnel was still omitted. Because of poor or non-existent publishing of public notices for the TA, Draft Permit and Public Hearing, LEP persons around the site, perhaps the most vulnerable to WIPP of any group, couldn't find out how to participate in a timely manner or even that the PMR existed. NMED's and the Bureau's disparate treatment of this protected class of people resulted in the disparate effect that they were not able to inform themselves about the PMR or how to participate in the public process and were prevented from participating in the PMR process in a fully meaningful

and equal way. This omission alone violated multiple provisions of Title VI (CCNS/Reade Exhibit 1) These violations are solid grounds for the Secretary to deny the PMR and the Draft Permit.

As documented in CCNS/Reade Exhibit 1 and this closing argument, throughout the PMR process, defective notice publication and content remained uncorrected. Despite public comments about problems with missing and defective content in the fact sheets, those omissions remained uncorrected as well. The fact sheets also both had missing and defective content. These problems were exacerbated by the lack of access for Spanish speakers to information through the website that was so easily available to English speakers. Though the Bureau made corrections to one webpage to increase access, it was far too late and far too little to be effective. As for the problems with the TA and Draft Permit components of the public process, the Bureau did not provide the proper second notice and second comment period as required by the regulations for the TA and did not correct all the content problems in the Draft Permit Public Notice and Fact Sheet. The Bureau made choices to ignore the public participation problems; did not provide another comment period; and did not pause the ongoing excavation of the shaft—all to the detriment of LEP Spanish speakers and the general public. The Bureau did not make these corrections, even though it acknowledged that the problems were pointed out in public comments and considered them serious enough to selectively correct many of them in the Hearing Public Notice and Fact Sheet. The Bureau claimed that improvements in publishing the Hearing Public Notice "cured" the failed newspaper and radio publishing of the Draft Permit Public Notice but actually the reverse is true. By not correcting the problems with the Draft Permit component of the process, the defective notice and defective fact sheet invalidate the subsequent administrative proceedings.

The public process for this PMR violated multiple requirements and provisions of RCRA, the Hazardous Waste Act, the implementing regulations and Title VI of the Civil Rights Act and Executive Orders of the President and the New Mexico Governor. For these reasons, the NMED Secretary must deny the PMR and the Draft Permit.

Respectfully submitted on August 16, 2021 by

/s/ Deborah W. Reade	/s/ Joni Arends
Deborah Reade	Joni Arends for CCNS

Certificate of Service

I hereby certify that a copy of the **Closing Argument** was served on the following via electronic transmission on August 16, 2021:

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