IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

SOUTHWEST RESEARCH AND INFORMATION CENTER,
Petitioner,

S-1-SC-38372

-against- **No. _____**

NEW MEXICO ENVIRONMENT DEPARTMENT,
Respondent.

VERIFIED PETITION FOR AN EMERGENCY WRIT OF MANDAMUS AND REQUEST FOR A STAY

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PRELIMINARY STATEMENT.

Petitioner, Southwest Research and Information Center ("SRIC"), is a New Mexico-based citizen organization which has monitored the Waste Isolation Pilot Plant ("WIPP") project of the U.S. Department of Energy ("DOE") for approximately fifty years from headquarters in Albuquerque. Members of SRIC reside near WIPP's location near Carlsbad and along highways used to transport waste to WIPP and stand to be affected by its operations.

Respondent, the New Mexico Environment Department ("NMED"), is a Department of state government, established pursuant to the Department of

Environment Act, 1991 N.M. HB 348. NMED is responsible for the enforcement of the Hazardous Waste Act, §74-4-1 *et seq*. NMSA 1978 ("HWA"), the statute that enforces the Resource Conservation and Recovery Act, 42 U.S.C. § 6921 *et seq*. ("RCRA"), in New Mexico.

Other parties in interest include DOE and Nuclear Waste Partnership, LLC, which are operators of WIPP and Permittees under the WIPP HWA Permit.

SRIC seeks a peremptory writ of mandamus[1], directing NMED to withdraw the Temporary Authorization issued to the Permittees on April 24, 2020 without the required public process, allowing Permittees to construct, for 180 days with a possible 180 day extension, a 2275-foot vertical shaft, 1200-foot horizontal drifts, and associated facilities at WIPP, which construction is the subject of a Class 3 Permit Modification Request ("PMR") dated August 15, 2019.

The Temporary Authorization violates the limits of NMED's authority, which prohibit a Temporary Authorization for construction under a Class 3, major, permit modification. DOE is using the unlawful Temporary Authorization to make a year's progress in construction of the new shaft and drifts, by which stratagem it will achieve a fait accompli, making it impossible for NMED to deny the PMR and nullifying the public process and judicial review. The new construction is part of

[1] SRIC is concurrently filing a Petition for a Writ of Certiorari, seeking review of the order of the Court of Appeals, dismissing SRIC's appeal of NMED's Temporary Authorization. (Court of Appeals Order, June 11, 2020, No. A-1-CA-38924).

DOE's plan, unstated in its submissions to NMED, to enlarge WIPP beyond the legal limits of the WIPP facility contained in federal laws and DOE's formal commitment to the State of New Mexico.

The Court's prompt intervention by mandamus is required to halt DOE's abuse of the RCRA permitting process to force the State to accept an unlawful expansion of WIPP.

BACKGROUND

WIPP is a federal repository for defense transuranic ("TRU") hazardous and radioactive waste, operated pursuant to:

(a) Environmental Protection Agency ("EPA") certification under the WIPP Land Withdrawal Act, Pub. L. No. 102-579 (1992) ("LWA"),

(b) the HWA Permit (the "Permit"), issued by NMED under the HWA, which applies the Resource Conservation and Recovery Act, 42 U.S.C. § 6921 *et seq.* ("RCRA"), in New Mexico, and

(c) the State-DOE Consultation and Cooperation Agreement, entered into in July 1, 1981 pursuant to the WIPP Authorization Act, Pub. L. No. 96-164, § 213 (1979).

DOE wants to expand its waste disposal site at WIPP beyond the capacity allowed by law and to operate the facility for decades longer than allowed by law, because DOE has not developed any other disposal site. The WIPP Land

Withdrawal Act, § 7(a)(3), fixes a maximum waste disposal capacity of 6.2 million ft^3. The WIPP HWA Permit contains the same 6.2 million ft^3 capacity limit and fixes WIPP's operational period at 25 years. Permit, Part A; pages B-10, G-6. The WIPP Consultation and Cooperation Agreement incorporates the 6.2 million ft^3 capacity limit and requires that DOE obtain a modified permit before expanding the facility, which DOE has not done. Exhibit E[2].

For undisclosed reasons, NMED has committed itself to help DOE to expand WIPP, regardless of the legal prohibitions. DOE's PMR seeks leave to construct a shaft and drifts to enlarge WIPP. The PMR says that the construction will improve underground ventilation, but ventilation upgrades were previously approved that "provide enhanced ventilation in the underground, sufficient to allow concurrent mining and waste emplacement while in filtration mode." Permit, Page A2-9, ll. 17-19. This PMR is not primarily for the purpose of ventilation.

The main purpose is to expand the underground facility so that additional disposal space can be excavated. Numerous DOE documents so state[3]. This

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[2] Note: Exhibits to this Petition are in the Record of this Court in connection with SRIC's Petition for Certiorari, seeking review of the decision of the Court of Appeals, June 11, 2020 (No. A-1-CA-38924). SRIC requests that, for efficiency, the Court take judicial notice of those Exhibits in connection with this Petition.

[3] (1) The 2018 WIPP Volume of Record PMR, issued in December 2018 and now on review in the Court of Appeals (No. A-1-CA-37894), purports to give DOE unrestricted authority to calculate the volume of waste disposed of with reference to the 6.2 million ft^3 limit. DOE's witness stated candidly that, after

obtaining power to calculate waste volume, DOE would request permit modifications to construct additional underground waste disposal panels to accommodate added waste capacity. Exhibit K.

(2) The DOE Carlsbad Field Office ("CBFO") Draft 2019-2024 Strategic Plan declares the objective of operating WIPP through the year 2050 to emplace, not the statutory limit of 6.2 million ft^3, but the entire "existing defense TRU waste inventory." Exhibit L at 1. CBFO contemplates expansion of WIPP beyond the legal limits:

> In addition to ongoing maintenance and recapitalization of existing infrastructure, our focus over the next five years is the construction of a new underground ventilation system consisting of two capital asset projects: 1) the Safety Significant Confinement Ventilation System and 2) the Utility Shaft. The existing underground ventilation system is currently operating in filtration mode at a reduced flowrate, which cannot provide adequate air quality to support concurrent ground control, mining, and waste emplacement activities to dispose TRU waste at the rates expected through 2050. The completion of both capital asset projects will provide the underground ventilation required for simultaneous mining, ground control, and waste emplacement operations at the facility to achieve shipping and waste emplacement rates needed to support the cleanup of defense TRU waste while protecting the health and safety of the public and our workers, as well as the environment from a future radiological release event.

Id. Part of the Plan is the addition of disposal panels:

> State and U.S. Environmental Protection Agency approval for the development and use of additional panels for emplacement beyond Panel 8 are necessary.

Id.

(3) DOE's agencywide Environmental Management Strategic Vision 2020-2030 states that "the new Utility Shaft will provide a new air intake shaft to support the SSCVS and facilitate mining additional panels." Exhibit M at 59.

(4) A memorandum submitted with DOE's draft renewal HWA Permit estimates that WIPP will receive its last shipments in 2052. Exhibit N:

> The recommended final waste receipt and emplacement date is 2052, and the final facility closure date is 2062.

(5) The Final Supplement Analysis of the Complex Transformation Supplemental Programmatic Environmental Impact Statement, DOE/EIS-0236-S4-SA-02 (Dec. 2019), states that TRU waste from 50 years of production of plutonium pits will be disposed of at WIPP. (Exhibit O at 65). If such production

purpose is not disclosed in the PMR documents, in violation of 40 C.F.R. § 270.42(c)(1)(iii).

The PMR seeks a major, or Class 3, modification, which requires NMED to take public comment, prepare a draft permit, and invite the public to comment and request a hearing. § 74-4-4.A.7 NMSA 1978; 40 C.F.R. § 270.42(c), adopted in New Mexico, 20.4.1.500 NMAC. SRIC and other entities oppose the PMR and have requested a hearing. But DOE has requested, and NMED granted on April 24, 2020, a Temporary Authorization to start constructing the new shaft and drifts for up to a year[4] *before* that required public process is carried out—and contrary to the position urged by more than 97 percent of public comments on the PMR. NMED issued a draft permit on June 12, 2020, essentially accepting the PMR. There is no schedule for a hearing.

Regulations narrowly restrict a Temporary Authorization to prevent it from being abused to create a fait accompli, *i.e.*, where a permittee constructs a project

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begins in 2030, it would end in 2080, indicating a closure date sometime after 2080.

(6) In April 2020 DOE released the Draft Environmental Impact Statement for Plutonium Pit Production at the Savannah River Site in South Carolina, DOE/EIS-0541. The document states that substantial quantities of TRU waste would be produced in the period 2030-2080, and it would all be disposed of at WIPP. Exhibit P at S-24, S-25.

[4] The regulation contemplates a duration of 180 days, plus a 180-day extension, for a TA—totaling 360 days or effectively a year. 40 C.F.R. § 270.42(e)(4).

before its legality and safety can be considered, to the point that the construction could not be undone, so that the agency is forced to approve the PMR.

SRIC seeks mandamus because timing is critical. DOE is already constructing the new shaft and drifts. It is inconceivable that NMED, after issuing the Temporary Authorization for a year's construction, and issuing a draft permit for the new shaft and connecting drifts, would turn around and deny the PMR and require the construction to be undone. By the Temporary Authorization, NMED, in reality, has granted the PMR, rendering any public hearing, further agency proceedings, and judicial review a meaningless formality.

APPLICABLE FACTS AND LAW

There are legal limits upon the waste capacity, the operational period, and permitting procedures for WIPP. These limits bind NMED, they bind DOE, and they bind this Court. Specifically, the WIPP Authorization Act, Pub. L. No. 96-164, § 213 (1979), calls for consultation and cooperation between DOE and the State concerning planning and operation of WIPP and a formal agreement to structure that process. In 1981 the State and DOE made a Stipulated Agreement, which includes the "C&C Agreement" and Working Agreement. The agreement states:

> This consultation and cooperation agreement shall be a binding and enforceable agreement between the Department of Energy and the State of New Mexico . . . .

Exhibit E, C&C at 8 (Page 30 of PDF). The Second Modification to the C&C Agreement states the overall waste capacity limit of 6.2 million ft^3. (August 4, 1987) (Pages 35 and 56 of PDF). Further, the Working Agreement states:

> Where a State or Federal permit is a prerequisite to any action by DOE (e.g., access roads, site development or discharge of pollutants), that action shall not be carried out until the appropriate permit has been obtained.

Working Agreement, Art. II.F. (Page 60 of PDF). Thus, DOE agreed not to undertake construction of the shaft and drifts until it obtained a modified permit, which it has not done.

In 1992 Congress enacted the LWA, which also contains a statutory capacity limit:

> CAPACITY OF WIPP.—The total capacity of WIPP by volume is 6.2 million cubic feet of transuranic waste.

LWA § 7(a)(3) [5]. The LWA also recognizes the C&C Agreement and states that it is not modified except by explicit legislation. LWA § 21.

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[5] This capacity limit is measured by waste container volumes. Congressional committees sought to impose hard-and-fast waste volume limits on the DOE's Test Phase, the then anticipated next step. The capacity limits for the Test Phase (which was deleted in 1996) and for the entire facility were in direct ratio to one another, so that total capacity is also subject to a hard-and-fast limit. LWA § 6(c)(1)(b) (as enacted). The LWA also incorporates volume limits imposed by EPA, which were stated both as the number of 55-gallon drums and as the total waste volume. LWA § 6(c)(1)(B), 55 Fed. Reg. 47700, at III, IV.B.2 (Nov. 14,Senate Report 102-196 on S 1671, by the Senate Energy and Natural Resources Committee, specifically states: "According to DOE's current plans, a total of 4,525 55-gallon drums of transuranic waste would be used during the experimental program." The House

WIPP's 6.2 million ft^3 (175,600 m^3) waste capacity limit is also imposed by the HWA Permit. Permit, Attachment B, Part A[6] application. The Permit also states a 25-year operational period:

> During the Disposal Phase of the facility, which is expected to last 25 years, the total amount of waste received from off-site generators and any derived waste will be limited to 175,600 m^3 of TRU waste of which up to 7,080 m^3 may be remote-handled (RH) TRU mixed waste.

B-13. Again:

> For the purpose of establishing a schedule for closure, an operating and closure period of no more than 35 years (25 years for operations and 10 years for closure) is assumed.

G-5. Yet again:

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bill (HR 2637) reported by the House Armed Services Committee, stated the volume limit both in cubic feet and in drums:

> CAPACITY OF THE WIPP.—The total capacity of the WIPP by volume is 6.2 million cubic feet of transuranic waste. Not more than 850,000 drums (or drum equivalents) of transuranic waste may be emplaced at the WIPP.

§ 9(a)(3). Similarly, House Report 102-241, Part 1, from the House Interior and Insular Affairs Committee, included capacity limits of 5.6 million ft^3 of contact-handled ("CH") waste and 95,000 ft^3 of RH waste. § 7(a). Test Phase waste was limited to no more than 4,250 55-gallon drums. Exhibit G. House Report 102-241, Part 3, from the House Energy and Commerce Committee, included a dissent, opposing the capacity limits "of not more than 5.6 million cubic feet of contact-handled transuranic waste and 95,000 cubic feet of remote-handled transuranic radioactive waste in WIPP" (§ 7(a)) and Test Phase limits of 4,250 barrels or 8,500 barrels of waste.

[6] The Permit is voluminous and is available at: https://wipp.energy.gov/Library/Information_Repository_A/Searchable_Permit_Fenceline_RCRA_EC%20additions_April%202020_1.pdf

> The Disposal Phase for the WIPP facility is expected to require a period of 25 years beginning with the first receipt of TRU waste at the WIPP facility and followed by a period ranging from 7 to 10 years for decontamination, decommissioning, and final closure. The Disposal Phase may therefore extend until 2024, and the latest expected year of final closure of the WIPP facility (i.e., date of final closure certification) would be 2034.

G-6.

DOE is proceeding by a series of permit modifications to violate the legal limits on WIPP. See note 3, *supra*. A recent National Academy of Sciences report criticizes DOE's segmented strategy:

> FINDING 5-7: A segmented and incremental approach to revealing the full inventory under consideration for disposal as diluted surplus plutonium transuranic waste in the Waste Isolation Pilot Plant (WIPP) (initially 6 metric tons [MT], then 7.1 MT, and 34 MT, and so on) obfuscates the total anticipated inventory expected for WIPP and its consequences. An incremental approach inhibits a comprehensive review by regulators and the public of the full impact of the proposed dilute and dispose program on a future WIPP. The punctuated (5-year) Environmental Protection Agency compliance recertification schedule and limited scope of the New Mexico Environment Department's reviews (which exclude nuclear material) add to these challenges.

NAS, Review of the Department of Energy's Plans for Disposal of Surplus Plutonium in the Waste Isolation Pilot Plant, at 104 (2020).

The attached affidavit of Steven Zappe, who managed NMED's WIPP regulation for 17 years, emphasizes that, once begun, the shaft and drifts construction project cannot be stopped:

> In granting the TA, NMED has in essence foreordained the outcome of the PMR without the benefit of public comment and hearing. After the Permittees spend millions of dollars *beginning* the excavation of a new shaft

> under the TA granted by NMED, it is unimaginable that NMED would be able to deny the PMR. Likewise, telling the Permittees that they would need to "reverse all construction activities associated with this Request" if the PMR were ultimately denied is technically infeasible.

Zappe Affidavit at ¶ 15.E. Attached.

The DOE Environmental Management Update (June 9, 2020) states that DOE is moving swiftly with construction:

> **Waste Isolation Pilot Plant**
>
> As the Waste Isolation Pilot Plant (WIPP) operated in a reduced operating posture, the site continued to receive five shipments of transuranic waste per week from EM's Idaho and Los Alamos sites, and workers completed one construction project while they ramped up another.
>
> WIPP's 3.3-mile bypass road opened in early May, carrying non-WIPP traffic away from the site, including a large construction zone where excavation has begun on the site's fifth shaft, known as the utility shaft. The shaft will reach 2,275 feet underground and provide increased air as part of the upcoming Safety Significant Confinement Ventilation System (SSCVS). Crews recently poured concrete equipment pads and started excavating the first 62 feet of the shaft.

DOE's approach follows its pattern of confronting its regulator with a fait accompli. DOE constructed WIPP itself before obtaining EPA's determination of compliance with radiation regulations. 40 C.F.R. Part 191, subpart b; EPA compliance determination, 63 Fed. Reg. 27354 (May 18, 1998). Now DOE has secured a Temporary Authorization that enables it to create another fait accompli, compelling NMED to grant the underlying PMR.

ARGUMENT

The Temporary Authorization is unlawful on several grounds. It violates DOE's commitment contained in the 1981 C&C Agreement, which includes the Working Agreement, to obtain a permit before beginning construction:

> Where a State or Federal permit is a prerequisite to any action by DOE (e.g., access roads, site development or discharge of pollutants), that action shall not be carried out until the appropriate permit has been obtained.

Exhibit E, Working Agreement, Art. II.F. Article II.F of the Working Agreement is designed to counter DOE's strategy to create a fait accompli. NMED ignored it.

The governing rule, 40 C.F.R. § 270.42(c), prohibits a Temporary Authorization of construction. DOE correctly classified this PMR as a major, Class 3, modification. A Class 3 PMR may be the subject of a Temporary Authorization *but only* for listed purposes[7], namely, if it concerns:

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[7] (i) The permittee may request a temporary authorization for:

* * *

(B) Any Class 3 modification that meets the criteria in paragraph (3)(ii)(A) or (B) of this section; or that meets the criteria in paragraphs (3)(ii)(C) through (E) of this section and provides improved management or treatment of a hazardous waste already listed in the facility permit.

* * *

(3) The Director shall approve or deny the temporary authorization as quickly as practical. To issue a temporary authorization, the Director must find:
(i) The authorized activities are in compliance with the standards of 40 CFR part 264.
(ii) The temporary authorization is necessary to achieve one of the following objectives before action is likely to be taken on a modification request:

a. closure or corrective action (40 C.F.R. § 270.42(e)(3)(ii)(A)),

b. treatment or storage of wastes subject to land disposal restrictions (40 C.F.R. § 270.42(e)(3)(ii)(B)),

c. improved management or treatment of wastes subject to waste management disruptions (40 C.F.R. §§ 270.42(e)(2)(i)(B), 270.42(e)(3)(ii)(C),),

d. improved management or treatment of wastes subject to sudden changes in types and quantities (40 C.F.R. §§ 270.42(e)(2)(i)(B), 270.42(e)(3)(ii)(D), or

e. improved management or treatment of wastes where there are other changes to protect human health and the environment, (40 C.F.R. §§ 270.42(e)(2)(i)(B), 270.42(e)(3)(ii)(E)).

None of these categories involves construction.[8] The permissible activities all involve "improved management or treatment of a waste already listed in the

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(A) To facilitate timely implementation of closure or corrective action activities;
(B) To allow treatment or storage in tanks or containers, or in containment buildings in accordance with 40 CFR part 268;
(C) To prevent disruption of ongoing waste management activities;
(D) To enable the permittee to respond to sudden changes in the types or quantities of the wastes managed under the facility permit; or
(E) To facilitate other changes to protect human health and the environment.

[8] EPA explains the limitations in the 1988 preamble: "An Agency-issued temporary authorization may be obtained for activities that are necessary to: (i)

permit." *Id.* A Hazardous Waste *Management* Facility is a facility "used for *treating, storing, or disposing* of hazardous waste." 40 C.F.R. § 270.2. In plain English, sinking a shaft and excavating drifts are not treatment, storage, or disposal of waste.

EPA intended a Temporary Authorization to allow a permittee to "conduct activities necessary to respond promptly to changing conditions." 53 Fed. Reg. at 37912, 37914, 37919. There are no "changing conditions" in the current scenario. The waste has not changed. DOE is not changing how it manages any waste. Constructing a shaft and drifts is not "necessary to respond promptly to changing conditions." The construction over 37 months of facilities that will operate until 2080 and beyond is not a prompt response to anything. EPA stated that "[t]he authorized activities must be completed at the end of the authorization." 53 Fed. Reg. 37912, 37920. The 37-month schedule for construction of the shaft and drifts

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Facilitate timely implementation of closure or corrective action activities; (ii) allow treatment or storage in tanks or containers of restricted wastes in accordance with Part 268; (iii) avoid disrupting ongoing waste management activities at the permittee's facility; (iv) enable the permittee to respond to changes in the types or quantities of wastes being managed under the facility permit; or (v) carry out other changes to protect human health and the environment. Temporary authorizations can be granted for any Class 2 modification that meets these criteria, or for a Class 3 modification that is necessary to: (i) Implement corrective action or closure activities; (ii) allow treatment or storage in tanks or containers of restricted waste; or (iii) provide improved management or treatment of a waste already listed in the permit, where necessary to avoid disruption of ongoing waste management, allow the permittee to respond to changes in waste quantities, or carry out other changes to protect human health and the environment." 53 Fed. Reg. 37912, 37919-20.

far exceeds 180 days or 360 days. 40 C.F.R. § 270.42(e)(1), (4). The construction here is not lawfully the subject of a Temporary Authorization.

EPA clearly did not intend to allow "preconstruction" under a Class 3 PMR. 40 C.F.R. § 270.42(e)(3). The PMR seeks a major, Class 3, modification. Under Class 3 regulations, preconstruction is expressly *unavailable*:

> The rule also allows the facility to begin construction of a Class 2 modification 60 days after the modification is requested . . . . This is known as the "preconstruction" provision. . . .
>
> Class 3 modifications are subject to the same initial public notice and meeting requirements as Class 2 modifications. *However, the default and preconstruction provisions of Class 2 do not apply*.

53 Fed. Reg. 37912, 37913 (*emphasis supplied*).

EPA was concerned that preconstruction might be abused to create a fait accompli. It allowed preconstruction only for changes of "limited" scope under Class 2 modifications:

> [S]everal commenters opposed [preconstruction] since they believed that the permitting Agency would be less inclined to deny a modification that had already been constructed.
>
> EPA believes that preconstruction by the permittee, as allowed under the final rule, will not influence the permitting Agency's decision. *Because of the limited nature of Class 2 modifications and the need for flexibility in maintaining permits, preconstruction will be allowed for this category of modification.*

53 Fed. Reg. 37912, 37918 (*emphasis supplied*). But for Class 3 modifications: "*[T]here is no preconstruction allowed with a Class 3 modification.*" *Id. (emphasis supplied).*

In addition, under NMED rules, the agency's order must be supported by a statement of reasons:

> The Secretary . . . shall set forth in the final order the reasons for the action taken.

20.1.4.500D(2) NMAC. A statement of reasons is essential for judicial review. *Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶¶ 17-18, 125 N.M. 786, 792, 965 P.2d 370, 376. Here, the Temporary Authorization contains only the terse conclusion that "NMED finds the documentation sufficient to support the issuance of a temporary authorization." (Att. to Notice of Appeal).

Sometime after the Temporary Authorization was granted, there appeared in the record a memorandum by Ricardo Maestas (Attached), current manager of the NMED WIPP program. EPA had disallowed construction that would predetermine the result of the PMR; thus, "there is no preconstruction allowed with a Class 3 modification." 53 Fed. Reg. at 37918. But Mr. Maestas claims that EPA intended Temporary Authorizations to authorize preconstruction with a Class 3 modification. (at 2). This claim is contrary to EPA's expressed intention.

Mr. Maestas argues that EPA stated, in issuing the rule, that permanent construction is suitable for a Temporary Authorization. (at 2). EPA's statement is the opposite:

> Temporary authorizations, for terms ranging up to 180 days, may be granted to Class 2 or Class 3 modifications that meet criteria specified in § 270.42(e). . . . *Temporary authorizations that involve more permanent activities (i.e., activities that are intended to extend beyond 180 days) are subject to Class 2 or Class 3 public participation procedures for permit modifications.*

53 Fed. Reg. at 37912, 37914. (*emphasis supplied*). Thus, EPA intended that, if a permittee requests a Temporary Authorization for permanent (exceeding 180 days) activities, that request is "subject to Class 2 or Class 3 public participation procedures for permit modifications"—precisely the Class 3 public process that NMED has preempted here, by allowing construction to proceed.

Mr. Maestas says that EPA's intention is satisfied because the PMR here is "subject to" Class 3 procedures *in the future*. But "subject to" means "following" or "conditioned upon"[9], and the Class 3 public process must be completed *before* approving the PMR. 40 C.F.R. § 270.42(c)(6). He suggests that the public submit comments *during* the Class 3 public process (at 2), but such comments are futile if the construction has proceeded and cannot be undone.

[9] A definition of "subject to" is "contingent or conditional upon." Webster's New World Dictionary, 2d College Ed.

Further, the PMR itself is fundamentally defective. Section 270.42 requires as follows:

> (c) Class 3 modifications.
> (1) For Class 3 modifications listed in appendix I of this section, the permittee must submit a modification request to the Director that:
> * * *
> (iii) Explains why the modification is needed . . .

40 C.F.R. § 270.42(c). The PMR describes the shaft and drifts as components of a new *ventilation* system to restore "full-scale, concurrent, mining, maintenance, and waste emplacement operations." Exhibit A at 9. However, those purposes are already achieved by the New Filter Building. Permit at A2-9.

More basically, the PMR is incomplete. It proposes excavation of a shaft and drifts, costing $197,000,000. (Exhibit S). Construction will take 37 months; if begun in June 2020, it will continue to July 2023. Exhibit A at 2; Exhibit R at 6, Table 1. But the capacity limit remains at 6.2 million ft^3, and the operating period still ends in 2024. It makes no sense to construct costly facilities that will be used for less than six months. The PMR does not disclose DOE's true plan to excavate additional disposal panels, to increase the waste capacity, and to operate beyond 2024. Such nondisclosure violates 40 C.F.R. §270.42(c)(1)(iii). The public should be able to evaluate DOE's entire plan for its safety and legality. DOE should not be allowed to conceal its plans, as it demands changes to facilitate such plans.

MANDAMUS IS THE APPROPRIATE REMEDY

Mandamus to a state official or entity is available to compel the performance of an act where the duty to perform the act is clearly enjoined by law and where there is no other plain, speedy and adequate remedy in the ordinary course of law. NMSA 1978, §§ 44-2-4, -5. The act to be compelled must be ministerial, that is, an act or thing which the public official is required to perform by direction of law upon a given state of facts being shown to exist, regardless of his own opinion as to the propriety or impropriety of doing the act in the particular case. *El Dorado at Santa Fe, Inc. v. Bd. of County Comm'rs*, 89 N.M. 313, 316-17, 551 P.2d 1360, 1363-64 (1976).

Mandamus is the proper remedy where the public official refuses or delays to act, and it will compel action if the law requires the official to act one way or another. *Id.* at 317, 551 P.2d at 1364. *Lovato v. City of Albuquerque,* 1987-NMSC-086, ¶6, 106 N.M. 287, 289, 742 P.2d 499, 501. *See also: New Mexico Building & Construction Trades Council v. Dean,* 353 P.3d 1212, 1215, 2015 N.M. Lexis 158 (2015); *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 21, 149 N.M. 330, 248 P.3d 878; *Cook v. Smith*, 1992-NMSC-041, 114 N.M. 41, 834 P.2d 418; *State ex rel. Four Corners Exploration Co. v. Walker*, 1956-NMSC-010, ¶ 7, 60 N.M. 459, 292 P.2s 329.

When an issue of public importance is raised, and an early decision is necessary, this Court will take jurisdiction of an original petition for mandamus in accordance with its constitutional authority.[10] *See: State ex rel. League of Women Voters v. Herrera*, 2009-NMSC-003, ¶¶ 11-13, 145 N.M. 563, 203 P.3d 94; *State ex rel. Sandel v. New Mexico Public Utility Commission*, 1999-NMSC-019, ¶ 11,127 N.M. 272, 980 P.2d 55.

It is critical that review take place now, before construction proceeds further. A peremptory writ of mandamus is called for when no valid excuse can be given for failure to perform an act. *State ex rel. State Highway Commission v. State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶16, 120 N.M. 562, 569, 904 P.2d 11, 18.

[10] Our state Constitution provides that this Court will "have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions." N.M. Const. art. VI, § 3. In seeming contradiction, NMSA 1978, Section 44-2-3 conveys upon the district court "exclusive original jurisdiction in all cases of mandamus." However, as one scholarly commentary has noted, this apparent conflict:

> has never given rise to difficulty since the supreme court, irrespective of the statute, has regularly exercised original jurisdiction . . . [and SCRA 12-504(B)(1)(b)] has given force and effect to the policy behind the statute, by requiring that an original petition which could have been brought in a lower court must set forth "the circumstances necessary or proper to seek the writ in the supreme court."
>
> [Charles T. DuMars & Michael B. Browde, *Mandamus in New Mexico*, 4 N.M. L. Rev. 155, 157 (1974)]. (quoting the predecessor to SCRA 1986, 12-504) (footnotes omitted). Such "circumstances" which justify bringing an original mandamus proceeding in this Court include "the possible inadequacy of other remedies and the necessity of an early decision on this question of great public importance." *Thompson v. Legislative Audit Comm'n*, 79 N.M. 693, 694-95, 448 P.2d 799, 800-01 (1968).

Quesenberry, 1964-NMSC-043, ¶ 5, 74 N.M. 30, 390 P.2d 273. Here, the illegality of the Temporary Authorization has been abundantly presented to NMED, and the agency has refused to withdraw its order and declined to stay its application pending appellate review. Exhibit Q. The Temporary Authorization is unlawful under the HWA regulations; it enables the violation of other laws and should be vacated.

REQUEST FOR A STAY

Injury to Petitioner and the public:

If the TA is not stayed, neither the Temporary Authorization nor the PMR can effectively be appealed. An appeal on the merits will probably require more than a year to obtain a ruling. For comparison, the Volume of Record PMR (appeal pending in No. A-1-CA-37894) was granted by NMED on December 21, 2018, and appeals were filed in January of 2019. They have been pending now for well over a year and have not yet been briefed. Since a Temporary Authorization lasts for 180 days and may be renewed for an additional 180 days, it is highly unlikely that the appeal can be heard and decided until well after the Temporary Authorization ends. A stay is necessary to preserve the case from mootness.

Moreover, as stated, once the construction of the shaft and drifts is begun, it cannot be stopped. The unlawful expansion of WIPP's capacity and extension of its operations for more than 50 years will be approved without the required public

notice, comment and hearing. SRIC (Exhibit B) and other parties have already requested a hearing on the PMR.

As to injury to Permittees:

If the Temporary Authorization is stayed pending appeal, the Permittees can nevertheless proceed with their PMR and obtain a ruling by the regular process of a draft permit, public comment, negotiations, public hearing, and final order. For comparison, the volume of record PMR was filed on January 31, 2018 and, following an accelerated schedule, granted on December 21, 2018. There is no reason such a schedule should be viewed as injurious to Permittees.

As to the public interest:

If the Temporary Authorization is stayed pending appeal, the public interest will be served in several ways: First, if, to the contrary, the Temporary Authorization were to remain in effect, NMED could not refuse DOE's PMR, after allowing DOE to construct the shaft for a full year at significant taxpayer expense. But if the Court stays the Temporary Authorization, NMED's and this Court's consideration of the PMR will not be prejudiced—indeed, manipulated—by the fact that a year is invested in construction.

Second, the issues raised by the PMR will be heard publicly, as the rule and the statute require. The U.S. Court of Appeals for the Fourth Circuit emphasized

the importance of public proceedings to consider expansion of a hazardous waste facility:

> As discussed above, South Carolina has a carefully crafted process for granting a waste disposal operator additional space. That process includes the opportunity for public notice and comment. Safety-Kleen seeks to bypass this procedure by demanding immediate additional capacity. The public has a strong interest in the opportunity for notice and comment. First, the notice and comment procedure allows individual citizens and groups that are affected by an expansion in waste operations to participate in the permitting process. If history is any guide, a number of citizens and interest groups will participate in any process for public notice and comment on whether Pinewood's capacity should be increased. Second, the notice and comment procedure allows for careful and deliberate consideration of whether it is environmentally safe to allow Safety-Kleen to store additional waste.

Safety-Kleen, Inc. v. Wyche, 274 F.3d 846, 863-64 (4th Cir. 2001). The PMR here involves the consequential issues of expanding the waste capacity of WIPP and extending its operations from 2024 into the 2080's. Surely such questions deserve careful and public discussion. It cannot be regarded as detrimental to afford such process.

CONCLUSION AND REQUESTED RELIEF.

This matter possesses great public significance and arouses acute and widespread public concern. In a case of this importance it is critical to have public confidence in the fairness of New Mexico's administrative processes. The NMED decision in issue here is clearly wrong on numerous grounds, but it may remain effective unless the Court intervenes. The Court should (1) stay the Temporary Authorization pending the Court's review and (2) direct that the Temporary

Authorization be vacated and withdrawn, so that NMED may conduct the required public process to address the permit modification request in a lawful manner.

Respectfully submitted,

/s/ Lindsay A. Lovejoy, Jr.
Lindsay A. Lovejoy, Jr.
Attorney at law
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June 29, 2020

VERIFICATION

I, Don Hancock, Nuclear Waste Program Director at Southwest Research and Information Center, under oath, do hereby verify that I have read the foregoing Petition and that the statements contained in the Petition are true and correct to the best of my knowledge, information, and belief.

Don Hancock

June 24, 2020

Don Hancock Date

CERTIFICATE

The undersigned certifies that the foregoing Petition conforms to the length limitations in Rule 12-504.G. The body of the Petition comprises 5,859 words.

The undersigned certifies that on June 29, 2020 he served the foregoing document upon counsel listed below pursuant to the Court's electronic service and filing procedures.

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/s/ Lindsay A. Lovejoy, Jr. _____
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ATTACHMENTS

#1 Affidavit of Steven Zappe, April 27, 2020

30 pages

#2 Ricardo Maestas Memorandum, NMED Evaluation for April 24, 2020 Approval of Temporary Authorization Request, April 24, 2020

2 pages

STATE OF NEW MEXICO

BEFORE THE SECRETARY OF THE ENVIRONMENT

No. HWB _____

NEW MEXICO ENVIRONMENT DEPARTMENT)
HAZARDOUS WASTE BUREAU)
CLASS 3 PERMIT MODIFICATION REQUEST:)
EXCAVATION OF A NEW SHAFT AND ASSOCIATED)
CONNECTING DRIFTS, WASTE ISOLATION PILOT)
PLANT, NO. NM4890139088-TSDF_____)

AFFIDAVIT OF STEVEN ZAPPE

State of New Mexico)
) ss.:
County of Santa Fe)

Steven Zappe, being duly sworn, deposes and says:

1. My name is Steven Zappe, and I am a 27-year resident of New Mexico currently residing at 3 Escopeta Court, Santa Fe, New Mexico, 87506.

2. I was hired by the New Mexico Environment Department ("NMED") in 1994 as a permit writer in the Hazardous and Radioactive Materials Bureau (HRMB), the predecessor to the current Hazardous Waste Bureau (HWB). I served as the sole WIPP permit writer from 1994, through the 1999 WIPP public hearing on the original permit issuance, and on all subsequent permit modifications. After the permit was issued, I served as the NMED WIPP project leader, supervising a staff of three to four environmental scientists from 2002 to 2011. During that time, I oversaw all aspects of implementation of and compliance with the WIPP permit.

3. After the issuance of the initial WIPP permit on October 27, 1999, which became effective 30 days later, Permittees submitted over 100 separate permit modification requests ("PMRs") and several temporary authorization ("TA") requests within the first ten years of the permit. I quickly became intimately familiar with the regulatory requirements contained in 20.4.1.900 NMAC (incorporating 40 CFR §270.42). In order to interpret and apply consistently the permit modification requirements specified in 40 CFR §270.42, "Permit modifications at the request of the permittee," HWB permitting staff generally rely upon two resources:

a) a clear and literal reading of the regulatory language in 20.4.1 NMAC and all regulations incorporated by reference therein, and

b) EPA guidance documents, especially preamble and explanatory language when EPA issues proposed and final rules constituting the regulations.

4. The RCRA regulations, 40 CFR §270.42, identify and distinguish between two classes of PMRs that require public notice and allow public comment prior to a final agency decision:

a. Class 2 permit modifications (40 CFR §270.42(b)) are either explicitly listed and identified as such in Appendix I to §270.42 or "*apply to changes that are necessary to enable a permittee to respond, in a timely manner, to*

"*(A) Common variations in the types and quantities of the wastes managed under the facility permit,*

"*(B) Technological advancements, and*

"(C) Changes necessary to comply with new regulations, where these changes can be implemented without substantially changing design specifications or management practices in the permit."

40 CFR §270.42(d)(ii).

b. Class 3 permit modifications (40 CFR §270.42(c)) are either explicitly listed and identified as such in Appendix I to §270.42 or "*substantially alter the facility or its operation.*"

40 CFR §270.42(d)(iii).

5. Both Class 2 and Class 3 PMRs require a 60-day public comment period. The Class 2 process then has a prescribed timeframe, leading to a final agency decision no later than 90 to 120 after receipt of the PMR. The Class 2 process includes a "default" provision (see 40 CFR §270.42(b)(6)(iii) and (b)(6)(v)), which says that, if the agency fails to make a decision on the PMR within 120 days of its receipt, the permittee is authorized to conduct the activities described in the PMR for up to 180 days. If the agency does not make a final decision before the end of the automatic authorization, the permittee is authorized to conduct the activities described in the PMR for the life of the permit.

6. In contrast, the Class 3 process timeframe becomes indeterminate following the initial public comment period, since it incorporates a draft permit, public comment, and a public hearing; it is referred to as "the more extensive procedures of Class 3." 40 CFR §270.42(b)(6)(i)(C)(2). Class 3 PMRs have no "default" provision.

7. The Class 2 PMR process includes a "preconstruction" provision (40 CFR §270.42(b)(8)), under which the permittee may perform construction associated with a

Class 2 PMR beginning 60 days after the submission of the request, unless the agency establishes a later date for commencing construction. EPA's preamble (*Permit Modifications for Hazardous Waste Management Facilities*, 53 Fed. Reg. 37913 (September 28, 1988)) states, "…such construction would be at the permittee's own risk if the modification request is ultimately denied."

8. EPA then adds, concerning Class 3 PMRs: "Class 3 modifications are subject to the same initial public notice and meeting requirements as Class 2 modifications. However, the default and *preconstruction provisions of Class 2 do not apply*." *Id.* The preamble discussion of the final rule is clear: "… there is no preconstruction allowed with the Class 3 modification…" 53 Fed. Reg. 37918.

9. Temporary authorizations were incorporated in the 1988 final rule to provide "…the [a]gency with the authority to grant a permittee temporary authorization, without prior public notice and comment, to conduct activities necessary to respond promptly to changing conditions." 40 CFR §270.42(e). EPA expected that temporary authorizations will be useful in the following two situations:

> "(1) To address a one-time or short-term activity at a facility for which the full permit modification process is inappropriate; or
>
> "(2) to allow a facility to initiate a necessary activity while its permit modification request is undergoing the Class 2 or 3 review process." 53 Fed. Reg. 37919.

10. The regulatory criteria for issuance of a TA (§270.42(e)(2)(i)) are [§270.42(e)(3)(ii)]:

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

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

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

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

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

A TA can be granted for a Class 2 modification that meets one or more of the five criteria. However, a TA can only be granted for a Class 3 modification if it meets criteria (A) and (B), or if it meets criteria (C) through (E) and provides improved management or treatment of a hazardous waste already listed in the facility permit.

11. On January 16, 2020, the WIPP Permittees submitted a TA request to NMED related to their August 15, 2019 Class 3 PMR entitled, "Excavation of a New Shaft and Associated Connecting Drifts." In their TA request, they requested authorization to "Excavate a new shaft, Shaft #5 (S#5), approximately 1,200 feet to the west of the existing Air Intake Shaft (AIS)." They explained that this TA "… is needed pursuant to 20.4.1.900 NMAC (incorporating 40 CFR Part 270.42(e)(3)(ii)(E)) 'to facilitate other changes to protect human health and the environment.'" They stated:

> Based on estimated timelines, it will take approximately seventeen months to excavate (sink) the shaft. It will take an additional eight months to mine the connecting drifts from S#5 to the existing repository. The start-up testing will take an additional twelve months to complete. The total estimated time to complete construction and implement the use of the S#5 ventilation system is thirty-seven months. Thus, there is a need on the part of the Permittees to start sinking the

> shaft as soon as possible so that the upgrade, which includes additional unfiltered ventilation, will be available to the Permittees and their workforce at the earliest possible date.

TA, at p. 2.

12. During my 17 years working on the WIPP Permit, I evaluated at least four TA requests from the Permittees and recommended appropriate action by NMED. Under the TA regulations, NMED is not required to give public notice of its final decision, but the Permittees are required to send notice to the facility mailing list within seven days of their submission of the TA. In response, Southwest Research and Information Center ("SRIC") has frequently submitted comments on TA requests.

13. The relevant TA decision documents that I was directly involved in are listed below. The decision letters are attached to this affidavit:

AR/Index Number	Date Issued	Action	Note
000904	09/05/2000	Denial	General inquiry from SRIC, no comment
001213.5	12/13/2000	Approval	SRIC comment sent 12/12, rec'd 12/15
001230	12/22/2000	Rescission of prior approval	Incorporated SRIC 12/12 comments in rescission
010955	09/24/2001	Denial	SRIC comment sent 9/6
040521	05/21/2004	Approval	No comment from SRIC

14. Public comment can be extremely helpful in providing an alternative perspective. It is crucial to informed decisionmaking by NMED.

15. For several clear regulatory reasons, NMED should not have approved the January 16, 2020 TA request to excavate Shaft #5. Any one of the following reasons would be sufficient grounds to deny this TA request. The combination of the following reasons makes an indisputable argument for denial:

A. <u>A TA for preconstruction activities is not allowed under Class 3 PMRs, and thus are inappropriate activities for a Class 3 TA request</u> – Preconstruction

activities are only allowed under Class 2 PMRs. EPA's preamble for the final rule clearly states that the preconstruction provisions available for Class 2 PMRs do not apply to Class 3 PMRs. Based on the regulation alone, approval of the TA is totally indefensible.

B. The proposed activity will not achieve the stated objective within the time limit for a TA – Permittees state that the purpose of the TA is "to facilitate other changes to protect human health and the environment," but the proposed activity is to "Excavate a new shaft…" The new shaft could not be connected to the existing WIPP repository for more than three years. Thus, the TA will have zero impact on human health and the environment within the 180-day or (if reissued for one additional term of up to 180 days) 360-day limit, which is the maximum allowed. Excavating a shaft in downtown Carlsbad (or Santa Fe) would have the same inconsequential effect on human health and the environment. Moreover, a Class 3 TA must "provide[] improved management or treatment of a hazardous waste already listed in the facility permit." This TA has nothing to do with "management or treatment" of waste.

C. The timeframe for the proposed activity does not fit within the TA time limit – Even if excavating a new shaft *did* have a positive impact on protecting human health and the environment, the Permittees estimate "it will take approximately seventeen months to excavate (sink) the shaft" and thirty-seven months in total "to complete construction and implement the use of the S#5 Ventilation system." EPA specifically states that the activities authorized by a TA must be completed at the end of the authorization. 53 Fed. Reg. at 37920. A

TA is limited to 180 to 360 days. 40 CFR § 270.42(e)(1), 270.42(e)(4). At the end of the TA, not even the excavation of the shaft will have been completed. At the same time, the Class 3 PMR will probably not result in a decision within the 360 days, due in part to competition with the permit renewal process currently in preliminary stages.

D. The Permittees have not demonstrated that the proposed activity is necessary – Even if this preconstruction activity were allowable in a Class 3 PMR process, which it is not, the Permittees are confusing "necessary" with "desirable." TAs are intended to authorize activities necessary to respond promptly to changing or temporary conditions (53 Fed. Reg. at 37919), not to circumvent the public process for permit modifications—based only on the supposed urgency of Permittees' self-imposed deadlines. Permittees have not demonstrated that the facility cannot wait until action is taken on the PMR in accordance with the Class 3 process. To construe this provision in any other manner would subvert the public regulatory process for permit modifications under the HWA and RCRA.

E. The nature of the actions authorized by the TA calls for denial of the TA – In granting the TA on April 24, 2020, NMED has in essence foreordained the outcome of the PMR without the benefit of public comment and hearing. After the Permittees spend millions of dollars *beginning* the excavation of a new shaft under the TA granted by NMED, it is unimaginable that NMED would be able to deny the PMR. Likewise, telling the Permittees that they would need to

"reverse all construction activities associated with this Request" if the PMR were ultimately denied is technically infeasible.

16. I have spoken only of the laws and regulations imposed under the Hazardous Waste Act that prohibit issuance of the TA here. It is notable that the Working Agreement executed as part of the State-DOE Consultation and Cooperation Agreement, dated July 1, 1981, states specifically as follows: "Where a state or federal permit is a prerequisite to any action by DOE . . . that action shall not be carried out until the appropriate permit has been obtained." Article II.F. That language, standing alone, prohibits a TA for an activity that requires a permit modification, as the excavation of a new shaft surely does. The TA violates the C&C Agreement.

The above matters are stated under penalty of perjury under the laws of the State of New Mexico.

Steven Zappe

State of New Mexico
County of Santa Fe

Signed and sworn to before me on the 27th day of April, 2020

Official Seal
CESAR LEON
Notary Public
State of New Mexico
My Commission Expires 03/26/23

Notary Public

My commission expires: 03/26/2023

State of New Mexico
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GARY E. JOHNSON
GOVERNOR

PETER MAGGIORE
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GREG LEWIS
DIRECTOR

CERTIFIED MAIL RETURN RECEIPT REQUESTED

September 5, 2000

Dr. Inés Triay, Manager
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Department of Energy
P. O. Box 3090
Carlsbad, New Mexico 88221-3090

Mr. Joe Epstein, General Manager
Westinghouse Waste Isolation Division
P.O. Box 2078
Carlsbad, New Mexico 88221-5608

RE: DENIAL OF TEMPORARY AUTHORIZATION REQUEST
WIPP HAZARDOUS WASTE FACILITY PERMIT
EPA I.D. NUMBER NM4890139088

Dear Dr. Triay and Mr. Epstein:

The New Mexico Environment Department (**NMED**) received your "Temporary Authorization Request, TRU Waste Characterization at the WIPP Facility" on July 25, 2000 as an attachment to your letter transmitting a request for a Class 2 permit modification to expand the storage capacity at WIPP under the facility's Hazardous Waste Permit. In the transmittal letter from DOE and Westinghouse (**the Permittees**) dated July 21, 2000, you stated "... DOE is requesting that the NMED issue a Temporary Authorization to allow the receipt and storage of waste at WIPP prior to final action on this modification request. The Temporary Authorization will allow DOE to initiate waste characterization activities for the purpose of assuring that the characterization equipment and processes meet the requirements of the Permit."

Under 20.4.1.900 NMAC (incorporating 40 CFR §270.42(e)), a permittee may request a temporary authorization to allow it to conduct activities necessary to respond promptly to changing conditions, without prior public notice or comment. NMED interprets this regulation to allow a temporary authorization only in situations where there is a one-time, short-term need at the facility for which the full modification process is inappropriate, or to allow a facility to initiate a necessary activity while its permit modification request is undergoing the Class 2 or Class 3 review process. See Fed. Reg. 37919 (Vol. 53, No. 188, September 28, 1988).

Following review of the temporary authorization request and the relevant regulations specified in 20.4.1.900 NMAC (incorporating §270.42(e)), NMED hereby denies the request for temporary authorization to receive or store waste as described in the proposed permit modification. The regulations governing approval or denial of such requests are specified in 20.4.1.900 NMAC (incorporating §270.42(e)(3)), which require that two independent criteria must be met:

- The authorized activities are in compliance with the standards of 20.4.1.500 NMAC (incorporating 40 CFR §264); and
- The temporary authorization is necessary to achieve one of five listed objectives before action is likely to be taken on the modification request.

With regard to the first criterion, NMED is currently reviewing the proposed Class 2 permit modification. Preliminary analysis indicates that the modification request is both administratively incomplete and technically inadequate compared to the standards specified in 20.4.1.500 NMAC (incorporating 40 CFR §264). Based upon this analysis, NMED cannot agree that the proposed activities comply with 20.4.1.500 NMAC.

Further, even if the proposed activities were in compliance with the prescribed standards, NMED would still deny the request because the temporary authorization fails to meet the second criterion. The 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. The justifications for the objectives identified in the temporary authorization request are refuted for the following reasons:

- To prevent disruption of ongoing waste management activities – failure to implement this temporary authorization will have no direct impact on "ongoing" waste management activities at the WIPP facility itself, because none of the sites envisioned as primary beneficiaries are currently characterizing or shipping waste to WIPP. While failure to implement this temporary authorization could impact "proposed" activities, it appears that the rationale for accepting waste for characterization is unwarranted at this time. The Permittees notified NMED on July 17, 2000 of their intent to "initiate modification activities in the Overpack and Repair Room and also in the site Generated Waste Room to allow for the installation of physical and chemical instrumentation necessary to characterize waste at the WIPP facility. These modifications include the installation of a Headspace Gas Sampling system, the construction of a containment structure to contain a Visual Examination facility, and the extension of utilities, ventilation and fire protection to accommodate these modifications." Thus, it appears that the Permittees may install

equipment, develop procedures, train operators, and test surrogate materials without having to accept waste, increase storage capacity or storage time, or create additional storage locations. Furthermore, the conclusory statement that approving this temporary authorization will reduce both cost and risk is unsubstantiated, as is the statement regarding "state agreements requiring schedules be met for waste disposition."

- To facilitate other changes to protect human health and the environment – the efforts of DOE to remove TRU waste from all defense related DOE facilities are admirable, but generalizing that the recent fires at Los Alamos, Hanford, and Idaho somehow translates into a greater risk to human health and the environment for those living adjacent to the remaining facilities is unsubstantiated. Lacking further information, NMED assumes that regulators in these other states have imposed regulatory requirements to protect human health and the environment upon facilities storing TRU and TRU mixed waste commensurate with those imposed by NMED upon WIPP through the permit.

Please note that this denial of the temporary authorization request does not prejudice NMED action on the actual modification request. This denial only means that the activities as proposed were not eligible for a temporary authorization, as explained above.

If you have any questions regarding this matter, please contact Steve Zappe at (505) 827-1560, x1013.

Sincerely,

Gregory J. Lewis
Director
Water and Waste Management Division

GJL/soz

cc: Paul Ritzma, NMED
James Bearzi, NMED HWB
John Kieling, NMED HWB
Steve Zappe, NMED HWB
Susan McMichael, NMED OGC
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Reading Mailed 12/14/00 CG

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PAUL R. RITZMA
DEUPTY SECRETARY

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

December 13, 2000

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Mr. Joe Epstein, General Manager
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Carlsbad, New Mexico 88221-5608

RE: APPROVAL OF TEMPORARY AUTHORIZATION REQUEST
WIPP HAZARDOUS WASTE FACILITY PERMIT
EPA I.D. NUMBER NM4890139088

Dear Dr. Triay and Mr. Epstein:

The New Mexico Environment Department (**NMED**) received your "Temporary Authorization Request, Drum Age Criteria" on December 7, 2000 as an attachment to your letter transmitting a request for a Class 2 permit modification to establish the drum age criteria (**DAC**) necessary for taking a representative headspace gas sample based on packaging configuration groups. In the temporary authorization request from DOE and Westinghouse (**the Permittees**), you stated that this change is necessary "to assure that TRU and TRU mixed waste were available to allow INEEL (Idaho National Engineering and Environmental Laboratory) to maintain current shipping rates to WIPP." You further stated that inability to implement these revised DAC "has caused a disruption in the shipping and disposal schedule for TRU and TRU mixed waste from INEEL."

As stated in our September 5, 2000 letter denying a previous request for temporary authorization, the regulations governing approval or denial of temporary authorization requests are specified in 20.4.1.900 NMAC (incorporating §270.42(e)(3)), which require that two independent criteria must be met:

001213.5

- The authorized activities are in compliance with the standards of 20.4.1.500 NMAC (incorporating 40 CFR §264); and
- The temporary authorization is necessary to achieve one of five listed objectives before action is likely to be taken on the modification request.

With regard to the first criterion, NMED has performed a preliminary review of the proposed Class 2 permit modification. This analysis indicates that the modification request is administratively complete compared to the standards specified in 20.4.1.500 NMAC (incorporating 40 CFR §264). With regard to technical adequacy, NMED recognizes that the technical basis for the proposed modification (the 1995 Lockheed report referenced in Permit Attachment B1) was incorporated into the permit, and that the recently issued technical report cited in the modification request (the 2000 Bechtel report) primarily extends this technical basis to additional packaging configurations and sampling scenarios. The proposed revision appears to maintain the requirement that the minimum DAC ensure that the drum contents have reached 90 percent of steady state concentration within each layer of confinement. Based upon this preliminary analysis, NMED believes that the proposed activities are in compliance with the standards of 20.4.1.500 NMAC.

With regard to the second criterion, the justification for the objective identified in the temporary authorization request is summarized below:

- To prevent disruption of ongoing waste management activities [§270.42(e)(3)(ii)(C)] – the Permittees state that INEEL has an inventory of retrievably stored debris waste, and that all the containers are unvented. Because INEEL does not sample at the time of venting, they are forced to wait an additional DAC prior to headspace gas sampling. The proposed modification indicates a much shorter DAC is sufficient to re-establish the required equilibrium after venting and prior to sampling. However, the requirement to wait an additional 100 or more days before sampling has created a bottleneck in the waste characterization process at INEEL and resulted in the cancellation of 8 out of 19 shipments from the facility to WIPP. As a consequence, WIPP has experienced a disruption in its ongoing waste management activities by reduced receipt of waste from INEEL.

  Based upon this information, NMED believes that failure to implement this temporary authorization will have a direct impact on ongoing waste management activities at WIPP.

Following review of this temporary authorization request and the relevant regulations specified in 20.4.1.900 NMAC (incorporating §270.42(e)), NMED hereby approves the request for temporary authorization allowing INEEL to use the revised DAC as described in the proposed permit modification. Please note that this approval of the temporary authorization request does not

prejudice NMED action on the actual modification request. If public comment identifies issues resulting in NMED approving the modification with changes, NMED will identify the corrective action necessary for the Permittees to ensure continued compliance with the permit.

If you have any questions regarding this matter, please contact Steve Zappe at (505) 827-1560, x1013.

Sincerely,

Gregory J. Lewis
Director
Water and Waste Management Division

GJL/soz

cc: Paul Ritzma, NMED
James Bearzi, NMED HWB
John Kieling, NMED HWB
Steve Zappe, NMED HWB
Susan McMichael, NMED OGC
David Neleigh, EPA Region 6
Connie Walker, TechLaw
File: Red WIPP '00

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GOVERNOR

PETER MAGGIORE
SECRETARY

PAUL R. RITZMA
DEUPTY SECRETARY

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

December 22, 2000

Dr. Inés Triay, Manager
Carlsbad Field Office
Department of Energy
P.O. Box 3090
Carlsbad, New Mexico 88221-3090

Mr. Joe Epstein, General Manager
Westinghouse Waste Isolation Division
P.O. Box 2078
Carlsbad, New Mexico 88221-5608

RE: RESCISSION OF TEMPORARY AUTHORIZATION REQUEST APPROVAL
WIPP HAZARDOUS WASTE FACILITY PERMIT
EPA I.D. NUMBER NM4890139088

Dear Dr. Triay and Mr. Epstein:

On December 13, 2000, the New Mexico Environment Department (**NMED**) approved a request from the DOE and Westinghouse (**Permittees**) for a temporary authorization submitted on December 7, 2000. This request was attached to your letter transmitting a Class 2 permit modification request to establish revised drum age criteria (**DAC**) necessary for taking a representative headspace gas sample based on various packaging configurations. In this request, you sought NMED approval of a temporary authorization to allow the Idaho National Engineering and Environmental Laboratory (**INEEL**) to use the revised DAC as indicated in the Class 2 modification request. You asserted this approval would allow them to continue shipping TRU waste to WIPP and would reduce delays in the closure and cleanup of INEEL.

Upon further analysis, NMED has determined that the temporary authorization request submitted pursuant to 20.4.1.900 NMAC (incorporating §270.42(e)(3)) should not have been approved for the reasons identified below. A temporary authorization is a mechanism that allows a permittee to quickly implement, without the benefit of public notice or comment, a proposed modification before NMED takes final action is on the modification request. Temporary authorizations are

intended to be used in limited circumstances where the permittee can demonstrate to the Secretary that the proposed modification: (a) complies with Part 264 and (b), in this instance, is necessary to "prevent disruption of ongoing waste management activities [at the facility]." The policy supportive of NMED's authority to grant a temporary authorization without prior public notice and comment is "to allow a facility to initiate a necessary activity while its permit modification request is undergoing the Class 2 or 3 review process." See Fed. Reg. 37919 (Vol. 53, No. 188, September 28, 1988) (emphasis added). In other words, the permittee must demonstrate that NMED should approve the proposed modification immediately because the facility cannot wait until action is taken on the modification request at the conclusion of the public comment period. To construe this provision in any other manner would subvert the regulatory process for permit modifications under the HWA and RCRA.

Upon review of both the Permittees' request for temporary authorization and the subsequent public comment received by NMED, it is clear that the Permittees' request failed to demonstrate how disruption at INEEL directly impacted WIPP operations, and why it was imperative for NMED to grant the temporary authorization in this case outside the regulatory process for Class 2 permit modification. Instead, the Permittees' request relies entirely upon arguments regarding INEEL's potential failure to achieve shipment milestones in a negotiated settlement agreement with the State of Idaho. Other than to obtain relief from a reduction in future shipments from INEEL, there is no compelling reason why the Secretary should immediately grant the Permittees a temporary authorization, without notice or comment, as necessary to prevent any disruption with ongoing management operations at WIPP prior to the conclusion of the regulatory process. NMED notes that WIPP continues to receive scheduled TRU waste shipments from all generator/storage sites with approved waste characterization programs.

We cannot approve a temporary authorization without, at a minimum, documentation supportive of the above factors. In the absence of such information, NMED rescinds the December 13, 2000 temporary authorization approval.

If you have any questions regarding this matter, please contact Steve Zappe at (505) 827-1560, x1013.

Sincerely,

Gregory J. Lewis
Director
Water and Waste Management Division

GJL/soz

cc: Paul Ritzma, NMED
James Bearzi, NMED HWB
John Kieling, NMED HWB
Steve Zappe, NMED HWB
Susan McMichael, NMED OGC
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GARY E. JOHNSON
GOVERNOR

PETER MAGGIORE
SECRETARY

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

September 24, 2001

Dr. Inés Triay, Manager
Carlsbad Field Office
Department of Energy
P. O. Box 3090
Carlsbad, New Mexico 88221-3090

Mr. John Lee, General Manager
Westinghouse TRU Solutions, LLC
P.O. Box 2078
Carlsbad, New Mexico 88221-5608

RE: DENIAL OF TEMPORARY AUTHORIZATION REQUEST, PROCESSING MODIFICATIONS UNDER CLASS 2 PROCEDURES
WIPP HAZARDOUS WASTE FACILITY PERMIT
EPA I.D. NUMBER NM4890139088

Dear Dr. Triay and Mr. Lee:

The New Mexico Environment Department (**NMED**) received your "Temporary Authorization Request, TRU Waste Characterization at the WIPP Facility" on August 29, 2001 as an attachment to your letter transmitting a request for previously submitted Class 1 modifications to be processed under Class 2 procedures. In the transmittal letter from DOE and Westinghouse (**the Permittees**) dated August 28, 2001, you stated "[b]ecause these modifications have already been put into effect and because they meet the requirements of §270.42(e)(3)(ii)(C) and (E), the Permittees request that NMED exercise its discretion under Part 270 to grant a temporary authorization for these modifications. Additional information setting forth the justifications for the temporary authorization is included in the enclosed documentation."

1. ***The Class 1 Modifications Are Rejected***.

NMED must first address the issue of the Class 1 modifications that the Permittees have "already put into effect." The Permittees proposed to modify the hazardous waste facility permit under

Class 1 procedures specified in 20.4.1.900 NMAC (incorporating 40 CFR §270.42(a)) to allow the following activities:

- Use of composited headspace gas data and to allow up to 20 composited samples
  - Item 14, July 20, 2000 Notice of Class 1 Permit Modification
  - Item 2, November 1, 2000 Notice of Class 1 Permit Modification
- Establishing safety conditions for visual examination
  - Item 4, November 1, 2000 Notice of Class 1 Permit Modification
- Requirements for sampling through the existing filter vent hole
  - Item 3, November 1, 2000 Notice of Class 1 Permit Modification
  - Item 1, December 12, 2000 Notice of Class 1 Permit Modification

NMED identified each of these modifications in the August 31, 2001 Administrative Completeness Determination letter by stating, "The Permittees' August 29, 2001 revised submittal for a temporary authorization and application of the Class 2 process on this previously submitted Class 1 modification is being evaluated and shall be addressed under a separate administrative action." These specific modifications, and the general issue of permit modification classification, were also the subject of several meetings between NMED and the Permittees, as summarized in NMED's letter of September 10, 2001 from Paul Ritzma, NMED General Counsel.

NMED hereby rejects all of these as Class 1 modifications under 40 CFR §270.42(a)(1)(iii) because they are not non-substantive changes. Examples of non-substantive changes provided by EPA in the preamble to the permit modification final rule (53 Fed. Reg. 37914-15, September 28, 1988) include "...correction of typographical errors; necessary updating of names, addresses, or phone numbers identified in the permit or its supporting documents; upgrading, replacement, or relocation of emergency equipment; improvements of monitoring, inspection, recordkeeping, or reporting procedures; updating of sampling and analytical methods to conform with revised Agency guidance or regulations; updating of certain types of schedules identified in the permit; replacement of equipment with functionally equivalent equipment; and replacement of damaged ground-water monitoring wells." Id. The preamble to the final rule also states, "the changes listed as Class 1 are minor in nature and for the most part should be easily reversible." Id. The preamble to the proposed rule (52 Fed. Reg. 35843, September 23, 1987) further portrays Class 1 modifications as being of a "trivial nature." These modifications clearly do not meet this standard of simplicity for Class 1 modifications.

NMED recognizes, however, that the Permittees may require some time to complete reversal of these rejected modifications. EPA guidance contemplates situations where a Class 1 modification reversal cannot be accomplished immediately, allowing the agency to establish an appropriate schedule for completion (See 53 Fed. Reg. 37915). For this reason, NMED requires the Permittees to comply with the following Schedule for Completion:

a) As of the date of this letter, the Permittees are hereby directed to comply with the original Permit conditions as required by 40 CFR §270.42(a)(1)(iii) ***for the characterization of waste***, and may not continue to use or implement the procedures previously submitted as Class 1 modifications that have been rejected in this letter.
b) From the date of this letter until November 27, 2001, the Permittees may ***manage, store, and dispose of waste*** which was characterized prior to the date of this letter using the procedures previously submitted as:
    i) Item 14, July 20, 2000 Notice of Class 1 Permit Modification (ref. SW-846 Method 8260B);
    ii) Item 3, November 1, 2000 Notice of Class 1 Permit Modification; and
    iii) Item 1, December 12, 2000, Notice of Class 1 Permit Modification.
c) After November 27, 2001, the Permittees shall comply with ***all requirements*** of the Permit (i.e., characterization, management, storage, and disposal of waste), as the Permit exists after that date.

2. ***The Permittees' Request For A Temporary Authorization Is Denied.***

The Permittees seek a temporary authorization for five Class 1 modifications put into effect between July 20 and December 12, 2000 (Permittees Temporary Authorization Request, pg. 2). Further, the Permittees also elected in their August 28, 2001 transmittal letter to follow the procedures set forth in 40 CFR §270.42(a)(3) for Class 2 modifications. For the reasons stated below, the Permittees have misinterpreted the procedural process for Class 1 modifications and requests for temporary authorizations.

A. A Temporary Authorization Is Not Proper For Class 1 Modifications.

The procedural process relied upon by the Permittees (e.g., 40 CFR §270.42(a)(3)) is inappropriate. RCRA regulations provide that the Permittees may "elect to follow the procedures under 40 CFR §270.42(b) for Class 2 modifications...[and] must inform the Director of this decision in the notice required in §270.42(b)(1)." As EPA explained in the preamble to the final rule, 40 CFR §270.42(a)(3)) was added explicitly for Class 1 modifications "that require prior approval" and "are identified in Appendix I with an asterisk." 53 Fed. Reg. 37915. The provision was added to assure the Permittees that the agency would make a decision for Class 1 modifications requiring prior agency approval within a specified timeframe of 90 to 120 days. Id. Under these circumstances, using the Class 2 procedures for public participation and decision deadlines would result in an approach that balanced the concerns of the agency, the public and the Permittees. Id. Thus, to invoke 40 CFR §270.42(a)(3), the Permittees must: (a) submit a Class 1 modification that requires prior agency approval, as identified with an asterisk in 40 CFR §270.42 Appendix I; (b) inform the agency of their decision to follow the procedures for a Class 2 modification; and (c) comply with the procedural requirements set forth in 40 CFR §270.42(b) for a Class 2 modification, including public notice and comment.

As explained above, the Class 1 modifications at issue here are not identified by rule as a type of modification requiring prior agency approval, and further are rejected as Class 1 modifications. For these reasons, NMED cannot approve these modifications as Class 1 modifications under 40 CFR §270.42(a)(3)).

The Permittees' request for a temporary authorization is internally inconsistent with regulations. Temporary authorization requests are only appropriate for Class 2 and Class 3 modifications, as clearly stated in 40 CFR §270.42(e)(2). A request for temporary authorization for Class 1 modifications is inappropriate and unnecessary, because these types of modifications are put into effect immediately and without notice and comment, unless the Class 1 requires prior agency approval. The modifications at issue here are not Class 1 modifications.

B. The Permittees Must Clarify The Classification Of The Modifications They Are Requesting.

It appears that the Permittees may have intended to submit a request for approval of the original Class 1 modifications as Class 2 modifications. If the Permittees seek approval of these modifications as Class 2 modifications, they appear to have satisfied the requirements of 40 CFR §270.42(b)(2) – (3). However, it does not appear that the Permittees' August 28, 2001 submittal satisfies 40 CFR §270.42(b)(1). To comply with the requirements of 40 CFR §270.42(b)(1), the Permittees must immediately (i.e., within 5 business days) transmit a revised permit modification request overview (pp 1 – 2). NMED also requires the Permittees to immediately re-notice their Class 2 modification request explicitly as a Class 2, instead of as a Class 1.

C. The Permittees Have Not Demonstrated That A Temporary Authorization Is Necessary.

Even if the Permittees properly submitted a temporary authorization request for a Class 2 modification, NMED still has several concerns that have not been addressed by the Permittees. Under 40 CFR §270.42(e), the Permittees may request a temporary authorization to allow them to conduct activities necessary to respond promptly to changing conditions, without prior public notice or comment. NMED interprets this regulation to allow a temporary authorization only in situations where there is a one-time, short-term need at the facility for which the full modification process is inappropriate, or to allow a facility to initiate a necessary activity while its permit modification request is undergoing the Class 2 or Class 3 review process. See 53 Fed. Reg. 37919.

The regulations governing approval or denial of such requests require that two independent criteria must be met, as specified in 40 CFR §270.42(e)(3)):

- The authorized activities are in compliance with the standards of 40 CFR §264; and

- The temporary authorization is necessary to achieve one of five listed objectives before action is likely to be taken on the modification request.

With regard to the first criterion, NMED has reviewed the proposed permit modifications for technical adequacy, and has found several deficiencies. NMED submits the attached comments to the Permittees, and suggests the Permittees address the deficiencies. At this time NMED has determined that the request to grant temporary authorization for use of composited headspace gas data does not comply with 40 CFR §264.

Even if the remaining two proposed activities were in compliance with the prescribed standards, NMED has serious concerns with the second criterion. The basis for a temporary authorization is to allow a facility to initiate a necessary activity while its permit modification request is undergoing the Class 2 or 3 modification review process. See 40 CFR §270.42(e)(2)(ii)(B); §270.42(e)(3)(ii); 53 Fed. Reg. 37919. In other words, the Permittees must demonstrate that NMED should approve the proposed modification immediately because the facility cannot wait until action is taken on the modification request at the conclusion of the public comment period. To construe this provision in any other manner would subvert the regulatory process for permit modifications under the Hazardous Waste Act (**HWA**) and RCRA.

Under 40 CFR §270.42(e)), the Permittees must demonstrate that one of the following objectives relevant here must be met to receive approval for a temporary authorization request.

- To prevent disruption of ongoing waste management activities – In their request, the Permittees seek a temporary authorization on the basis that they have already implemented changes to the WIPP permit as Class 1 modifications (Permittees Temporary Authorization Request, pg. 1). According to the Permittees, if they were not now allowed to continue implementing the activities implemented by these Class 1 modifications, the facility and generator sites would experience substantial disruption. Id. Thus, it appears that the sole basis for the alleged disruption stems from the Permittees' implementation of permit modifications that were neither proper Class 1 modifications nor approved by NMED. Further, the anticipated disruption would not have resulted from lawful "ongoing waste management practices" at WIPP or generator sites, but instead would be a direct result of improperly implementing Class 1 modifications without public notice and comment. Under these circumstances, NMED cannot agree that the Permittees have demonstrated that their request for temporary authorization is "necessary" such that they cannot wait until the outcome of the decision-making process on the proposed modifications. To temporarily authorize continuation under these circumstances would be unreasonable and inconsistent with the HWA and its regulations.

- To facilitate other changes to protect human health and the environment – The Permittees state that granting temporary authorization for two of the modifications will result in improvements to worker safety at generator sites (Permittees Temporary Authorization

Request, pg. 12). However, the Permittees' concerns are misplaced by focusing on worker safety issues at generator sites. The Permittees failed to provide sufficient evidence that the citizens of New Mexico would experience any greater protection of human health and the environment by the implementation of these modifications under a temporary authorization, and thus that a temporary authorization of these activities is necessary.

For the above reasons, NMED denies the request for temporary authorization for those modifications. Please note that this denial of the temporary authorization request does not prejudice NMED action on any Class 2 modification request. This denial only means that the activities as proposed were not eligible for a temporary authorization, as explained above.

If you have any questions regarding this matter, please contact James Bearzi at (505) 428-2512.

Sincerely,

Gregory J. Lewis
Director
Water and Waste Management Division

GJL/jpb

Attachment

cc: Paul Ritzma, NMED
James Bearzi, NMED HWB
John Kieling, NMED HWB
[redacted]
Susan McMichael, NMED OGC
David Neleigh, EPA Region 6
Connie Walker, TechLaw
File: Red WIPP '01

Attachment
NMED Technical Comments on August 28, 2001 Permit Modification Request

General Comments

The Permittees submitted a permit modification (Item 1, "Use of Composited Headspace Gas Data and to Allow Up to 20 Composited Samples") with significant technical implications. The primary issue with compositing headspace gas samples prior to analysis is the impact on identifying and reporting tentatively identified compounds (**TICs**).

Compositing as proposed by the Permittees impacts TICs because as diluted concentrations get closer to detection limits, the ability to discern sample peaks from instrument noise diminishes. The permit modification language must therefore ensure all TICs that would have been identified in single samples are also identified in composite samples (i.e., not identified as unknowns). Furthermore, although the proposed TIC identification method might allow composited TICs to be identified, it would not necessarily require their reporting. Therefore, the permit modification language must also ensure all TICs that would have been reported in single samples are also reported in composite samples. The permit modification must reflect both of these aspects, requiring generator sites to closely monitor results and taking necessary steps to identify unknown TICs in composite samples, up to and including cessation of compositing activities until the true nature of the TICs can be identified.

Specific Comments

1. The Permittees included an email response from EPA (in Attachment B, "Information Supporting Item 1") apparently as a result of the Permittees' question about the basis for compositing up to 5 samples prior to GC/MS analysis. The Permittees conclude from the response that the EPA representative agreed that the 20-sample composite is appropriate. However, the Permittees did not include the original inquiry, such that NMED is unable to determine if the question also asked about the impact of compositing on identification and reporting of TICs, or made it clear that the method as employed by the Permittees had been modified to analyze gas samples. It is unclear if the EPA representative was aware of the TIC criteria and subsequent implications that compositing may have on TIC reporting in a RCRA setting.

   Furthermore, although Section 7.5.7 of SW-846 Method 8260B indicates that up to 5 samples may be composited, it does not imply that compositing of more than 5 samples is acceptable. The ability to provide a larger sample aliquot alone does not endorse compositing. Thus, the conclusion in the email response stating that "there is nothing in the method" that precludes 20-sample compositing appears to be premature. Without the complete correspondence between the Permittees and EPA, NMED cannot determine whether the EPA representative was given sufficient information to render an informed opinion.

2. NMED has no concerns regarding the effect of compositing on UCL_{90} calculations. The Permittees appear to have adequately demonstrated that arithmetic averaging of analytical results from individual containers is equivalent to analytical results from composited samples.

3. Apart from the comparison provided in "Technical Evaluation of Headspace Gas Compositing, August 2001" (Attachment B, Section 2.4, pages 8 – 28), the Permittees failed to provide any information supporting the practical limitations for compositing up to 20 samples. The Permittees should evaluate the need to provide additional relevant quality assurance objectives (e.g., instrument MDLs, ability to identify and report TICs) whereby generator sites can determine whether it is both appropriate and practical for them to composite a greater number of samples.

4. In the "Technical Evaluation" discussion of TICs (Attachment B, Section 3.1, pages 29 – 30), the Permittees provide a calculation to demonstrate that no TICs will be "lost" to dilution. However, although the amount of TIC present in the composited sample (14.75 ng) is above the MDL of 10 ng and therefore would be *detected*, it is less than 10% of the nearest internal standard (59 ng) and therefore would not be *reported* as a TIC.

   Furthermore, the Permittees identify as a "factor" the EPA convention that TICs are to have "at least 10% of the nearest internal standard's area." NMED notes that this is only convention for Contract Laboratory Program methodology under the Superfund program:

neither SW-846 criteria for Method 8260B (Section 7.6.2) nor the Permit (Permit Attachment B3, Section B3-1, "Identification of Tentatively Identified Compounds") include this as a criterion for identifying TICs. If the Permittees intend for this to be an additional criterion for reporting TICs, they should propose it explicitly as revised text in the modification request. However, the criterion must be adapted to account for the number of samples being composited, such that TICs for composited samples are reported with the same level of accuracy as non-composited samples.

5. The Permittees must ensure the proposed revised permit text in the modification request conforms to the current language in the Permit. For example, Item 1.a.1 references Permit Attachment B, Section B-3a(1), but the text as provided fails to include the Class 2 modification language submitted March 30, 2000 and incorporated into NMED's August 8, 2000 version of the Permit regarding "statistically selected containers from waste streams that meet the conditions for reduced headspace gas sampling."

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RON CURRY
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DERRITH WATCHMAN-MOORE
DEPUTY SECRETARY

May 21, 2004

Mr. R. Paul Detwiler, Acting Manager
Carlsbad Field Office
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P.O. Box 3090
Carlsbad, New Mexico 88221-3090

Dr. Steven Warren, President
Washington TRU Solutions, LLC
P.O. Box 2078
Carlsbad, New Mexico 88221-5608

RE: APPROVAL OF REQUEST TEMPORARY AUTHORIZATION OF PERMIT MODIFICATION ENTITLED "CONTAINER MANAGEMENT IMPROVEMENTS," (JANUARY 7, 2004) TO ALLOW THE RECEIPT AND STORAGE OF ADDITIONAL TRUPACT-IIS IN THE PARKING AREA UNIT
WIPP HAZARDOUS WASTE FACILITY PERMIT
EPA I.D. NUMBER NM4890139088

Dear Mr. Detwiler and Dr. Warren:

The New Mexico Environment Department (**NMED**) received the aforementioned request for temporary authorization on May 21, 2004. Specifically, the U.S. Department of Energy Carlsbad Field Office and Washington TRU Solutions LLC (**the Permittees**) request temporary authorization to receive and store up to 28 TRUPACT-IIs containing transuranic mixed waste in the Parking Area Unit until 5:00 p.m. MDT on May 25, 2004. The Permittees state that this change is needed "because the waste hoist at the WIPP facility failed yesterday and the Permittees have been unable to repair it."

The regulations governing approval or denial of temporary authorization requests are specified in 20.4.1.900 NMAC (incorporating §270.42(e)(3)) and require that two independent criteria must be met:

- The authorized activities must be in compliance with the standards of 20.4.1.500 NMAC (incorporating 40 CFR §264); and
- The temporary authorization must be necessary to achieve one of five listed objectives before action is likely to be taken on the modification request.

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With regard to the first criterion, NMED has reviewed the limited scope of the temporary authorization request in light of the proposed Class 3 permit modification and the existing permit. NMED believes that the proposal to increase the storage capacity of the Parking Area Unit from twelve (12) to twenty-eight (28) Contact Handled Packages is in compliance with the standards of 20.4.1.500 NMAC.

With regard to the second criterion, the justification for the objective identified in the temporary authorization request is summarized below:

- To prevent disruption of ongoing waste management activities [§270.42(e)(3)(ii)(C)] – The Permittees have already moved the maximum allowable amount of waste into storage in the Waste Handling Building. There are already 11 loaded TRUPACT-IIs in storage in the Parking Area Unit. Up to 6 trucks carrying 17 TRUPACT-IIs are expected to arrive at the WIPP facility on May 22 and 23. Because waste cannot be emplaced in the repository due to the failure of the hoist, additional storage space is required on a temporary basis to accommodate the waste in transit. The Permittees state that the hoist is likely to be back in service by May 24, 2004.

Based upon this information, NMED believes that failure to implement this temporary authorization will have a direct impact on ongoing waste management activities at WIPP.

Following review of this temporary authorization request and the relevant regulations specified in 20.4.1.900 NMAC (incorporating §270.42(e)), NMED hereby approves the request for temporary authorization allowing the maximum capacity for the Parking Area Unit to increase from 12 to 28 Contact Handled Packages and from 45 to 105 cubic meters, as specified in Permit Condition III.A.2; Permit Attachment A, Section A-4, "Facility Type"; Permit Attachment F, Section F-1, "Parking Area Container Storage Unit (Parking Area Unit)"; Permit Attachment M1, Section M1-1c(2), "Parking Area Container Storage Unit (Parking Area Unit)"; and Permit Attachment O, Section XII, "Process Codes and Design Capacities."

This temporary authorization is effective immediately and expires at 8:00 a.m., May 25, 2004. Please note that this approval of the temporary authorization request does not prejudice final NMED action on the actual modification request. Please note that the Permittees must comply with the public notice requirements of §270.42(e)(2)(iii) within seven days of submission of the temporary authorization request.

If you have any questions regarding this matter, please contact James Bearzi at (505) 428-2512.

Sincerely,

Ron Curry
Cabinet Secretary

RC:brz (HWB)

cc: Charles Lundstrom, NMED WWMD
James Bearzi, NMED HWB
John Kieling, NMED HWB
Tracy Hughes, NMED OGC
Chuck Noble, NMED OGC
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Betsy Forinash, EPA ORIA
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File: Red WIPP '04

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James C. Kenney
Cabinet Secretary

Jennifer J. Pruett
Deputy Secretary

MEMORANDUM

TO: **File WIPP 2020**

FROM: **Ricardo Maestas, Staff Manager, HWB WIPP Group**

SUBJECT: **NMED Evaluation for April 24, 2020 Approval of Temporary Authorization Request for Class 3 Permit Modification: "*Excavation of a New Shaft and Associated Connecting Drifts*"**

DATE: **April 24, 2020**

On April 24, 2020, the New Mexico Environment Department ("NMED") approved the Department of Energy's ("DOE") and Nuclear Waste Partnership's ("NWP") (collectively the "Permittees") January 16, 2020 Request for a Temporary Authorization ("Request") for the August 15, 2019 Class 3 Permit Modification Request ("PMR") to the Waste Isolation Pilot Plant ("WIPP") Hazardous Waste Facility Permit ("Permit") entitled "*Excavation of a New Shaft and Associated Connecting Drifts*".

The Approval grants permission to begin construction activities within the scope of the Class 3 PMR. Specifically, the Approval allows the Permittees to begin excavating a new shaft, Shaft #5, approximately 1,200 feet to the west of the existing Air Intake Shaft.

The regulations governing approval or denial of temporary authorization requests are specified in 20.4.1.900 NMAC (incorporating 40 CFR §270.42(e)). The authorized activities must be in compliance with the standards of 20.4.1.500 NMAC (incorporating 40 CFR §264) and also require the following criteria be met:

- Pursuant to 20.4.1.900 NMAC (incorporating 40 CFR Part 270.42(e)(2)(i)(B)), the Request must provide improved management or treatment of a hazardous waste already listed in the facility permit; and

- The Request must satisfy one of five listed objectives at 20.4.1.900 NMAC (incorporating 40 CFR §270.42(e)(3)(ii)(a) through (e)).

The Approval of this Request does not impact the Permittees' continued compliance with the requirements of 20.4.1.500 NMAC (incorporating 40 CFR §264) because construction activities associated with the new shaft do not modify any Permit requirements nor do they reduce the ability of the Permittees to provide continued protection of human health and the environment.

The new shaft is one of two projects referred to as the Permanent Ventilation System ("PVS"), the other being the New Filter Building ("NFB"), submitted as a Class 2 PMR and approved in March 2018. The preamble to Permit Modifications for Hazardous Waste Management Facilities, 53 Fed. Reg. 37912, 37919 (Sept. 28, 1988) (codified at 40 CFR pts. 124, 264, 265, and 270) notes that "...temporary authorizations will be useful in the

following two situations: (1) To address a one-time or short-term activity at a facility for which the full permit modification process is inappropriate; or (2) to allow a facility to initiate a necessary activity while its permit modification request is undergoing the Class 2 or 3 review process." To align construction schedules for the two projects in order to complete the PVS as soon as possible, the Permittees submitted the Request for shaft excavation while the Class 3 PMR process is on-going.

The new shaft will improve management of hazardous waste by enabling an unfiltered exhaust path for the Construction Circuit (mining) exhaust airflow improving the performance of concurrent underground ("UG") operations (mining, waste emplacement, ground control), and also reducing the amount of solid waste produced during mining, resulting in less salt to be characterized from the Salt Reduction Building (a component of the NFB) and less replacement filters laden with salt.

The Request satisfies the criterion found at 40 CFR §270.42(e)(3)(ii)(e): "to facilitate protection of human health and the environment." The new shaft's use of variable frequency drive air-intake fans ("VFDs") to be installed at the new shaft collar, with their ability to automatically minimize differential air pressure effects in the underground and establish more control of the ventilation system, will result in better air quality for the facility's workers. The closed collar of the new shaft will reduce the impacts of natural ventilation pressure (the difference in air density between the surface and the UG) which fluctuates with changes in temperature, barometric pressure, and relative humidity. By controlling both the intake and exhaust airflow with automated VFDs, the resulting continuity of adequate airflow will ensure better air quality for UG workers who routinely face threats to their air quality with the use of diesel equipment necessary for their jobs. Better control over the differential pressures maintained between the Construction Circuit and the Disposal Circuit will also mitigate any potential leakage of contaminated air, increasing the Permittees' ability to prevent releases to the environment.

Pursuant to 20.4.1.900 NMAC (incorporating 40 CFR §270.42(e)(2)(ii)), the Request must include a description of the activities to be performed under the Temporary Authorization ("TA") and an explanation of why the TA is necessary. In the Request, the Permittees include a description of the activities to be performed under the TA and cite a need to start sinking the shaft as soon as possible so that the comprehensive upgrade to the PVS will be available to their workforce at the earliest possible date.

Initially, NMED considered whether construction activities could be approved for a TA while a Class 3 PMR is in process. The regulations at 40 CFR §270.42(b)(8) pertaining to the *Class 2* PMR process do allow preconstruction activities to occur after the 60-day public comment period has passed (the delay being included in the event the Class 2 PMR is elevated to a Class 3). Since regulations governing Class 3 modifications do not contain a preconstruction provision, the ability to request a TA is provided. Secondly, NMED recognizes that this authorization is temporary but allows activities that could be considered more permanent. The preamble to the final rule notes that TAs may be used for permanent activities: "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." 53 Fed. Reg. 37912, 37914. NMED has concluded that TAs may involve more permanent activities, and notes that, during the Class 3 PMR process, the public is given an opportunity to review and comment on the modification to the Permit.

NMED's Approval of this Request does not constitute a final agency action on the pending Class 3 PMR, nor does it prejudice or presuppose the outcome of the final action on the PMR. If NMED ultimately denies the PMR, the Permittees must reverse all construction activities associated with this Request. The Permittees accept all responsibility and risk in undergoing any permanent construction activities prior to a final action on the Class 3 PMR as clarified in the Federal Register: "Finally, in any case where construction occurs prior to final Agency action, the permittee assumes the risk that the request will be denied or changed." 53 Fed. Reg. 37912, 37918.