

**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 )**

**MOTION FOR A STAY OF  
TEMPORARY AUTHORIZATION  
ON BEHALF OF  
SOUTHWEST RESEARCH AND INFORMATION CENTER**

Southwest Research and Information Center (“SRIC”), a New Mexico nonprofit citizen organization that has participated in this permit modification proceeding since its inception, hereby moves the Secretary of the New Mexico Environment Department (“NMED”) for a stay of the NMED Temporary Authorization (“TA”) order, dated April 24, 2020, authorizing the Permittees, the U.S. Department of Energy (“DOE”) and Nuclear Waste Partnership LLC (“NWP”) (collectively, “Permittees”), to commence construction of a permanent shaft and underground drifts at the Waste Isolation Pilot Plant (“WIPP”), without conducting the public hearing required by 40 C.F.R. § 270.42 and 74-4-4.A.7

NMSA 1978. SRIC set forth the legal and regulatory obstacles to issuance of a TA in its letter to the Secretary dated January 27, 2020.

### **Factual background**

The TA authorizes the Permittees to execute their plan to violate the legal limits upon the size and operating period of WIPP, which are recorded in (1) the Consultation and Cooperation (“C&C”) Agreement, with attached Working Agreement, a binding agreement between the State of New Mexico and DOE (Exhibit A), (2) the WIPP Land Withdrawal Act, Pub. L. No. 102-579 (as amended)(“LWA”) (Exhibit B), and (3) the WIPP Hazardous Waste Act permit (the “Permit”), issued pursuant to the Hazardous Waste Act, 74-4-1 *et seq.* NMSA 1978 (“HWA”), and the Resource Conservation and Recovery Act, 42 U.S.C. § 6921 *et seq.* (“RCRA”). The construction of a fifth shaft and connecting drifts, sought by the pending permit modification request (the “PMR”), is a key element of Permittees’ program to violate those legal limits and prevent the enforcement of the HWA at WIPP, contrary to DOE’s solemn agreement with the State of New Mexico and the statutes enacted by Congress.

#### **a. Legal limits apply to WIPP.**

In 1981, the State of New Mexico sued DOE in Federal District Court, asserting the State’s concerns about the planning and construction of WIPP. Civil Action No. 81-0363 JB (D.N.M.). On July 1, 1981, after discussions, the State

Attorney General and U.S. Attorney filed a Joint Motion to Stay All Proceedings, with a Stipulated Agreement, which was approved that day by the court. Exhibit A. As part of the Stipulated Agreement, the Governor of New Mexico and DOE Secretary signed a C&C Agreement, with the attached Working Agreement, which is authorized by the WIPP Authorization Act, Pub. L. No. 96-164, § 213. Exhibit A. The Stipulated 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 and shall expressly provide that it does not constitute a waiver by the State of any right it may have to judicial review of federal agency actions with respect to the WIPP project.

C&C at 3. The C&C Agreement has since been modified. The First Modification of 1984 states the waste volume limitation of 250,000 ft<sup>3</sup> (equal to 7,080 m<sup>3</sup>) of remote-handled transuranic (“RH TRU”) waste (November 30, 1984); the Second Modification incorporates the waste volume limitation of 6.2 million ft<sup>3</sup> of transuranic (“TRU”) waste. (August 4, 1987). Exhibit A.

The attached Working Agreement sets out the framework for exchange of information and resolution of issues between the State and DOE. One significant provision states as follows:

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.

Art. II.F. Exhibit A. It is undisputed here that the construction of a new shaft and connecting drifts calls for a modified HWA permit. DOE is bound not to undertake construction of the additions requested in the PMR until such a permit has been obtained.

In 1991 the State sued again to prevent DOE from opening WIPP without congressional authorization. An injunction was issued. See *State of New Mexico v. Watkins*, 783 F. Supp. 628 (D.D.C. 1991), *affirmed*, 969 F.2d 1122 (D.C. Cir. 1992). The House passed the LWA on October 5, 1992, and the Senate did so on October 8, 1992. The LWA clearly states:

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

Exhibit B, Pub. L. No. 102-579, § 7(a)(3).

Congress understood that the total capacity limit was based on container volumes. The congressional committees were especially concerned to impose hard-and-fast waste volume limits on the DOE's Test Phase, which was planned for immediate implementation. 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." Exhibit C. The House 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<sup>3</sup> of contact-handled (“CH”) waste and 95,000 ft<sup>3</sup> of RH waste. § 7(a). Test Phase waste was limited to no more than 4,250 55-gallon drums. Exhibit C. 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. Exhibit C.

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 the total capacity is also subject to a hard-and-fast limit. See Exhibit B, LWA § 6(c)(1)(b) (as enacted). The limits are based on the volume of 55-gallon drums (or drum equivalents): 850,000 drums times 7.3 cubic feet (55-gallon drum volume) equals 6,205,000 ft<sup>3</sup>. Mr. Kehrman, witness for the Permittees, so testified in the 2018 WIPP PMR hearing. Exhibit D, HWB 18-19(P), 10/23/18 Tr. 168, ll. 10-20 (Kehrman).

The LWA (Exhibit B) states emphatically that RCRA, which is enforced in New Mexico by the HWA, applies to WIPP. The LWA expressly directs DOE *to comply with RCRA, RCRA regulations, and the RCRA permit*,<sup>1</sup> and to document its compliance with such legal requirements:

SEC. 9. COMPLIANCE WITH ENVIRONMENTAL LAWS AND REGULATIONS.

(a) In General.—

(1) Applicability. Beginning on the date of the enactment of this Act, the Secretary [of Energy] shall comply with respect to WIPP, with –

\* \* \*

(C) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.);

\* \* \*

(H) all regulations promulgated, and all permit requirements, under the laws described in subparagraphs (B) through (G).

(2) Periodic oversight by administrator and state. The Secretary [of Energy] shall, not later than 2 years after the date of the enactment of this Act, and biennially thereafter, submit documentation of continued compliance with the laws, regulations, and permit requirements described in paragraph (1) to the Administrator, and, with the law described in paragraph (1)(C), to the State.

(3) Determination by administrator or state. The [EPA] Administrator or the State, as appropriate, shall determine not later than 6 months after receiving a submission under paragraph (2) whether the Secretary is in compliance with the laws, regulations, and permit requirements described in paragraph (1) with respect to WIPP. AR 180706.03.

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<sup>1</sup>References to the Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.*, include RCRA, which is a part of that Act, 42 U.S.C. § 6921 *et seq.*, Subchapter III.

In addition, LWA § 9(d) underscores the State's authority under RCRA:

(d) Savings provision.—The authorities provided to the Administrator and to the State pursuant to this section are in addition to the enforcement authorities available to the State pursuant to State law and to the Administrator, the State, and any other person, pursuant to the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) and the Clean Air Act (40 U.S.C. 7401 et seq.).

Moreover, the LWA specifically states that nothing therein modifies the terms of RCRA or limits the State's or EPA's authority to enforce or DOE's obligation to comply with RCRA:

#### SEC. 14. SAVINGS PROVISIONS.

(a) CAA and SWDA. No provision of this Act may be construed to supersede or modify the provisions of the Clean Air Act (42 U.S.C. 7401 et seq.) or the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).

(b) EXISTING AUTHORITY OF EPA AND STATE. No provision of this Act may be construed to limit, or in any manner affect, the Administrator's or the State's authority to enforce, or the Secretary's obligation to comply with --

- (1) the Clean Air Act (42 U.S.C. 7401 et seq.);
- (2) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), including all terms and conditions of the No-Migration Determination; or
- (3) any other applicable clean air or hazardous waste law.<sup>2</sup>

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<sup>2</sup> The 1996 WIPP Land Withdrawal Amendments Act, Pub. L. No. 104-201, relieved DOE from compliance with the land disposal provisions of RCRA for waste designated for WIPP. These amendments have no effect on the case at hand. Section 14 of the LWA now reads as follows:

#### Section 14. Savings provisions.

(a) CAA and SWDA.—Except for the exemption from the land disposal restrictions described in Section 9(a)(1), no provision of this Act may be construed to superseded or modify the provisions of the Clean Air Act (42 U.S.C. 7401 et seq.) or the Solid Waste Disposal act (42 U.S.C. 6901 et seq.).

The LWA says that NMED's role is to enforce RCRA, and DOE's role is to comply with RCRA. Pursuant to its RCRA authority, New Mexico held hearings and issued the Permit here in issue, which includes the 6.2 million ft<sup>3</sup> waste capacity limit. Permit, Part A.

In addition, the Permit 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<sup>3</sup> of TRU waste of which up to 7,080 m<sup>3</sup> 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-6. Yet again:

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.

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- (b)EXISTING AUTHORITY OF EPA AND STATE.—No provision of this Act may be construed to limit, or in any manner affect, the Administrator's or the State's authority to enforce, or the Secretary's obligation to comply with—
- (1) the Clean Air Act (42 U.S.C. 7401 et seq.);
  - (2) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), except that the transuranic mixed waste designated by the Secretary for disposal at WIPP is exempt from the land disposal restrictions described in section 9(a)(1); or
  - (3) any other applicable clean air or hazardous waste law.

G-6. WIPP began operations in 1999; therefore, the stated period of operations under the Permit ends in 2024.

**b. DOE's plan to violate the legal constraints upon WIPP.**

DOE has adopted a strategy to violate the legal limits that DOE itself agreed to in the C&C Agreement and that Congress has imposed in the LWA and by directing application of RCRA and HWA. Beginning in 2018, DOE has expressed its intention to enlarge WIPP beyond its lawful capacity limits, thus also extending its period of operations beyond the 25-year operating time specified in the Permit, and expanding the repository outside the footprint described in the Permit. The strategy is reflected in the following:

The 2018 WIPP Volume of Record Permit Modification, issued in December 2018 and now on review in the New Mexico Court of Appeals, erroneously gives DOE unrestricted authority to determine compliance with the 6.2 million ft<sup>3</sup> statutory waste limit. DOE's witness in that case stated candidly that, with DOE's assumption of control over the waste volume, DOE would follow through with PMRs seeking additional underground waste disposal panels beyond those contemplated in the Permit proceeding, to accommodate the waste capacity that DOE's unlawful calculations create. Exhibit E, HWB 18-19(P), Kehrman prefiled testimony at 3 and 16; 10/23/18 Tr. 53, ll. 1-24; 215, ll. 15-19; 217, ll. 9-10 (Kehrman); 10/24/18 Tr. 175, ll. 3-9 (Maestas).

The DOE Carlsbad Field Office (“CBFO”) Draft 2019-2024 Strategic Plan (Exhibit F) declares the objective of operating WIPP through 2050 to emplace, not 6.2 million ft<sup>3</sup>, but the entire “existing defense TRU waste inventory.”

DOE/CBFO-19-3605 at 1. CBFO’s plan connects the completion of the fifth shaft, sought in the present PMR, directly to the planned expansion of WIPP beyond what the law allows:

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.* The CBFO Plan states candidly that future operations will require the addition of disposal panels beyond those contained in the original WIPP footprint contemplated by the Permit:

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

*Id.*

Likewise, 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 G at 59.

A memorandum submitted with DOE's draft renewal HWA Permit (Exhibit H) estimates that WIPP will receive its last shipments in 2052. Letter, Kehrman to Chavez, Dec. 16, 2019:

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

Another 2019 document, NNSA's Final Supplement Analysis of the Complex Transformation Supplemental Programmatic Environmental Impact Statement, DOE/EIS-0236-S4-SA-02 (Dec. 2019) (Exhibit I), states that TRU waste from 50 years of production of plutonium pits will be disposed of at WIPP. (at 65). If such production begins in 2030, it would end in 2080, indicating a closure date sometime after 2080.

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 (Exhibit J). Referring to pit production both at Savannah River Site and at Los Alamos National Laboratory, 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, for which (the report states) there is adequate capacity. Ex. J at S-24, S-25.

**b. This application**

Permittees' PMR describes its subject as a new shaft ("S#5") along with drifts to connect the new shaft to the existing underground workings. It presents the shaft and drifts as components of a new *ventilation* system. PMR at 1-4. Thus: "Drifts will be excavated to connect S#5 to the existing WIPP underground facility for access and ventilation purposes." PMR at 3. Nothing is disclosed about DOE's plan to excavate additional disposal panels, nor how such new panels would connect to and be served by the new shaft and drifts, nor how the waste capacity would be increased and the operational period extended beyond the limits contained in the Permit to accommodate additional waste.

The PMR makes no sense. Permittees propose to excavate a fifth 2150-foot shaft and underground drifts hundreds of feet in length (See PMR, at C-3) at a cost that can be assumed to be many millions. The construction program will take 37 months, so that if begun in April 2020, it will continue to May 2023. Letter, Sosson, DOE, and Dunagan, NWP, to Pierard, NMED, Jan. 16, 2020, at 2; same, Jan. 21, 2020 (Response to TID) at 6, Table 1. At the same time the PMR proposes no change in the capacity limit, 6.2 million ft<sup>3</sup>, contained in the Permit, and the facility, by the terms of its Permit, will conclude operations in 2024. But it makes no sense to construct complex new underground facilities that will only see use for seven months and will not affect the facility's capacity.

Under RCRA and HWA, NMED has the legal obligation to enforce the 6.2 million ft<sup>3</sup> capacity limit in accordance with NMED's understanding of the application of the limit, namely, measuring waste volume by the volume of the outer container. It is the purpose of the present PMR to cause NMED to violate that legal obligation. The PMR does not disclose that fact, because it does not disclose DOE's plans to expand WIPP. The PMR does not disclose the Permittees' actual planning nor the true purpose of the requested modifications, as the applicable rule requires. *See* 40 C.F.R. § 270.42(c)(1)(iii); *compare* PMR at 9-10.

**c. DOE's "fait accompli" strategy.**

DOE's request for permission to build the new Shaft #5 follows the pattern of its previous efforts to confront a regulator with a fait accompli. DOE constructed WIPP itself before obtaining EPA's determination of compliance with the applicable radiation regulations, 40 C.F.R. Part 191, subpart b. EPA compliance determination, 63 Fed. Reg. 27354 (May 18, 1998). When the compliance question was raised with EPA, that agency was under severe pressure to authorize use of the already-built billion-dollar facility. DOE began shipments to WIPP in March 1999, before the Permit was issued on October 27, 1999, thus requiring NMED to include additional provisions in the Permit. *See Southwest Research & Information Center v. State*, 133 N.M. 179, 62 P.3d 270, 2003-

NMCA-012. After the February 2014 radiation incident, DOE easily obtained permission to reopen the existing facility from NMED and from EPA. Now, DOE requests NMED's permission to sink an additional shaft and connecting drifts—without mentioning the additional panels intended to be added to the underground, but knowing that, when the shaft and drifts are built, it will be very difficult for NMED and EPA to deny leave to construct new disposal panels connected to them.

Indeed, by obtaining a TA, DOE has secured permission to build the shaft and drifts before the PMR is even considered in the full public process that the rule requires. 40 C.F.R. § 270.42(c). If DOE commences construction of the shaft and drifts before the PMR comes up for decision, it will be extremely difficult—effectively impossible—for NMED to deny the PMR. The attached affidavit of Steven Zappe, who managed NMED's WIPP regulation for 17 years, makes clear that, once begun, a major construction project like Shaft #5 cannot be stopped.

### **ARGUMENT**

A stay of the Temporary Authorization should be granted, so that the Court of Appeals may consider the lawfulness of the TA. The Court of Appeals held in *Tenneco Oil Co. v. N.M. Water Quality Control Commission*, 1986-NMCA-033, 105 N.M. 708, 736 P.2d 986, that “[d]uring the pendency of an appeal, a stay can be granted as an incident to this court’s power to review final administrative orders

or regulations.” ¶ 6. Further, “the party seeking the relief should first apply for a stay from the agency involved.” ¶ 8. This is that application.

The Court of Appeals in *Tenneco* outlined the showing required for the grant of a stay, listing

conditions which [courts] determined should guide an appellate court in determining whether its discretion should be exercised in the granting of a stay from an order or regulation adopted by an administrative agency. These conditions involve consideration of whether there has been a showing of: (1) a likelihood that applicant will prevail on the merits of the appeal; (2) a showing of irreparable harm to applicant unless the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest.

We address the conditions listed by the court:

**1. As to likelihood of success:**

The TA violates DOE’s commitment to the State contained in the 1981 C&C Agreement, which includes the Working Agreement, to obtain any necessary 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.

Art. II.F. It could not be more clear that NMED, which is obligated to represent the interests of the State, has failed to enforce the Working Agreement to defend the State from DOE’s strategy to create a fait accompli by beginning construction, which thereafter cannot be reversed. Article II.F of the Working Agreement is clearly intended to prevent exactly such a result, and NMED’s action in

authorizing construction before the PMR is granted violates the terms of the State-DOE agreement.

Further, the governing rule, 40 C.F.R. § 270.42, prohibits a TA of construction here. This PMR is classed as a Class 3 modification. DOE itself attached this classification to the request. Under this classification, a TA that permits a regulated party to proceed with construction is expressly unavailable.

Here is what EPA stated when the rule was issued:

The rule also allows the facility to begin construction of a Class 2 modification 60 days after the modification is requested, although such construction would be at the permittee's own risk if the modification request is ultimately denied. This is known as the "preconstruction" provision. Finally, if the proposed Class 2 modification raises significant public interest or Agency concern about protection of human health or the environment, then the Agency can require that the Class 3 procedures be followed instead.

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 (Sept. 28, 1988) (*emphasis supplied*). EPA explained that the permit modification rule recognizes the unavailability of preconstruction authority under a Class 3 modification:

The second aspect of today's preconstruction provision allows the Director to establish a preconstruction date of more than 60 days after application submission. This flexibility is needed for several reasons. . . . Another reason for the permitting Agency to be able to delay construction stems from the new provision in today's rule that would allow the Director to determine that a Class 2 request should instead follow the Class 3 procedures. (See above preamble discussion.) *Since there is no preconstruction allowed with a Class 3 modification*, and since the public has 60 days to comment and request that

the permittee's proposal follow the Class 3 procedures, the Director may not know by the 60th day whether there is sufficient merit to require the Class 3 procedures for the modification instead of Class 2. In such cases, the Director needs the ability to inform the permittee, by day 60, that construction should be delayed.

*Id.* (emphasis supplied).

EPA, in issuing 40 C.F.R. § 270.42, knew that a TA might be abused to make changes that could not be reversed when the Agency ruled on the PMR—*i.e.*, a fait accompli. EPA did not intend to allow such abuse:

Preconstruction. The proposed rule allowed the facility owner/operator to perform any construction necessary to implement a Class 2 change before the modification request is granted. . . . However, several commenters opposed the idea 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 (Sept. 28, 1988) (emphasis supplied).

But for the more substantial construction subject to Class 3 proceedings, as this PMR is, EPA was emphatic that preconstruction is not available:

*[T]here is no preconstruction allowed with a Class 3 modification.*

*Id.* (emphasis supplied). The language of the rule makes this clear:

(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) 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.

Thus, under the rule a Class 3 PMR may be the subject of a TA only if it concerns closure or corrective action ((3)(ii)(A)), treatment or storage of wastes subject to land disposal restrictions ((3)(ii)(B)), improved management or treatment of wastes subject to waste management disruptions ((2)(i)(B), (3)(ii)(C)), improved management or treatment of wastes subject to sudden changes in types and quantities ((2)(i)(B), (3)(ii)(D)), or improved management or treatment of wastes where there are other changes to protect human health and the environment, ((2)(i)(B), (3)(ii)(E)). None of these categories involves construction.<sup>3</sup>

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<sup>3</sup> EPA explains as much in the 1988 preamble: “An Agency-issued temporary authorization may be obtained for activities that are necessary to: (i) Facilitate timely implementation of closure or corrective action activities; (ii) allow treatment or storage in tanks or containers of restricted wastes in accordance with

EPA also stated in promulgating § 270.42 that “[t]he authorized activities must be completed at the end of the authorization.” 53 Fed. Reg. 37912. The 37-month schedule for construction of the shaft and drifts far exceeds the 180 days (or 360 days with a renewed authorization) available under a TA. Clearly, the construction that DOE seeks leave to carry out under the PMR cannot be the subject of a TA.

In addition, a temporary authorization should not be issued where the PMR itself is defective. Section 270.42 requires as follows:

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:
  - (i) Describes the exact change to be made to the permit conditions and supporting documents referenced by the permit;
  - (ii) Identifies that the modification is a Class 3 modification;
  - (iii) Explains why the modification is needed; and
  - (iv) Provides the applicable information required by 40 CFR 270.13 through 270.22, 270.62, 270.63, and 270.66.

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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.

The PMR does not comply with the rule. Most importantly, the PMR, which must “explain[] why the modification is needed,” makes no mention of DOE’s purpose to use the new shaft and underground drifts to excavate additional disposal panels and use them for waste disposal, in violation of legal limits. Based on DOE’s public planning documents, such purpose is clearly a principal motivation for the planned construction. Construction of the shaft and drifts would make it substantially easier to obtain a future modification to add the planned disposal panels. Instead of reviewing a PMR that omits to discuss the additional disposal panels that DOE plans to add to the newly constructed shaft and drifts, and omits to mention the additional quantity of waste to be emplaced, and omits to state the decades to be added to the operational period, NMED should be allowed to evaluate that entire plan, to examine the practical and safety implications of the project, its impact upon the planned period of operations, as well as the legality of the expansion in light of the Permit restrictions and legal limits upon waste in excess of 6.2 million ft<sup>3</sup> and operations beyond 25 years. Thus, the PMR does not present any of the necessary information about DOE’s actual purpose to enable NMED to consider the actual impacts of the modifications. NMED should not be prevailed upon to adopt an unlawful permit modification.

In addition, under the NMED rules, the agency's order must be supported by a statement of reasons. Here, the order issuing a TA contains only the terse conclusion:

Upon review of the documentation provided by the Permittees in the Request, NMED finds the documentation sufficient to support the issuance of a temporary authorization.

Although SRIC had pointed out in its letter dated January 27, 2020, that preconstruction authority like that granted by the TA is not allowed for the substantial construction that calls for a Class 3 modification, that the TA would effectively grant the entire PMR without any public process, and that there is no urgency to commence construction before the PMR could be heard and decided—the TA addresses none of these matters. There is, in sum, no reasoning to support the TA. But the NMED rules require a statement of reasons:

The Secretary may adopt, modify, or set aside the Hearing Officer's recommended decision, and shall set forth in the final order the reasons for the action taken.

20.1.4.500D(2) NMAC. The requirement of a statement of reasons is mandatory.

It is essential for judicial review:

Indeed, one of the purposes of requiring a statement of reasons is to allow for meaningful judicial review. *See Green v. New Mexico Human Servs. Dep't*, 107 N.M. 628, 631, 762 P.2d 915, 918 (Ct. App. 1988) (compliance with statute requiring agency to state reasons for its decision is "necessary for meaningful appellate review"); *Akel v. New Mexico Human Servs. Dep't*, 106 N.M. 741, 743, 749 P.2d 1120, 1122 (Ct. App. 1987) (requiring agency's decision to "adequately reflect the basis for [its] determination and

the reasoning used in arriving at such determination . . . so that this court may adequately perform its appellate review.").

*Atlixco Coalition v. Maggiore*, 1998-NMCA-134, ¶¶ 17-18, 125 N.M. 786, 792, 965 P.2d 370, 376. The agency's failure to consider and rule upon the fundamental issues presented by the TA request require the TA order to be vacated and remanded.

**2. As to irreparable injury:**

If the TA is not stayed, it cannot effectively be appealed. An appeal will probably require more than a year to present and obtain a ruling. For comparison, the Volume of Record PMR was granted 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 TA lasts for 180 days, and may be renewed for an additional 180 days, it is highly likely that the appeal cannot be heard and decided until well after the TA ends. A stay is necessary to preserve the case from mootness.

**3. As to injury to Permittees:**

If the TA is stayed pending appeal, the Permittees can nevertheless proceed with their PMR and obtain a ruling by the Class 3 PMR 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.

**4. As to the public interest:**

If the TA is stayed pending appeal, the public interest will be served in several ways: NMED's consideration of the PMR on the merits will not be prejudiced—indeed, controlled—by the fact that construction is already proceeding, rendering it impossible to deny the PMR. And, 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. The Pinewood facility is located in an environmentally sensitive area. The facility is a mere 1200 feet from Lake Marion, a popular recreational spot and a source of drinking water for several thousand people. The facility is adjacent to over 8500 acres of forest and wetlands. The public has a strong interest in ensuring that DHEC carefully considers whether additional capacity is warranted. See *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1307, 47 L. Ed. 2d 67, 96 S. Ct. 845 (1976) (vacating stay of enforcement of federal motor vehicle safety standard in part because of public's strong interest in

safety); see also *Ark. Peace Ctr. v. Ark. Dep't of Pollution Control*, 992 F.2d 145, 147 (8th Cir. 1993) (staying preliminary injunction in part because of potential environmental harm if an injunction was in force). We agree with the district court that the public interest weighs in favor of denying an injunction against DHEC.

*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 into the 2080's. Surely such questions deserve careful and public discussion. It cannot be regarded as detrimental to afford such process.

### **Conclusion**

The Permittees' effort to rush forward with construction without any public consideration should be denied. The Temporary Authorization should be stayed pending appeal.

Respectfully submitted,

BY:   
Lindsay A. Lovejoy, Jr.  
Attorney at law  
3600 Cerrillos Road, Unit 1001A  
Santa Fe, NM 87507  
(505) 983-1800  
[lindsay@lindsaylovejoy.com](mailto:lindsay@lindsaylovejoy.com)

April 27, 2020



## Certificate of Service

I hereby certify that the foregoing Motion for Stay was served electronically upon the following attorneys and parties on April 27, 2020:

Cody Barnes  
Office of Public Facilitation  
New Mexico Environment Department  
P.O. Box 5469  
Santa Fe, NM 87505  
Phone: (505) 827-2428  
Email: [cody.barnes@state.nm.us](mailto:cody.barnes@state.nm.us)

Gregory Sosson, PE  
Acting Manager  
Department of Energy  
Carlsbad Field Office  
P.O. Box 3090  
Carlsbad, NM 88221  
Email: [Gregory.Sosson@cbfo.doe.gov](mailto:Gregory.Sosson@cbfo.doe.gov)

Sean Dunagan  
President and Project Manager  
Nuclear Waste Partnership LLC  
Carlsbad, NM 88221  
Email: [Sean.Dunagan@wipp.ws](mailto:Sean.Dunagan@wipp.ws)

Jennifer Hower, Esq.  
General Counsel  
New Mexico Environment Department  
Harold Runnels Building  
1190 St. Francis Drive  
Santa Fe, NM 87505  
Email: [Jennifer.Hower@state.nm.us](mailto:Jennifer.Hower@state.nm.us)

  
Lindsay A. Lovejoy, Jr.

## **Exhibits to Motion for a Stay of Temporary Authorization**

Exhibit A: Motion for Stay, Stipulated Agreement, C & C Agreement, Amendments, Working Agreement.

Exhibit B: Land Withdrawal Act, as enacted in 1992.

Exhibit C: Congressional Reports (3 House, 1 Senate).

Exhibit D: HWB 18-19(P), 10/23/18 Tr. 168.

Exhibit E: HWB 18-19(P), Kehrman prefiled testimony 3, 16; 10/23/18 Tr. 53, 215-17; 10/24/18 Tr. 175.

Exhibit F: CBFO draft strategic plan.

Exhibit G: DOE Environmental Management Strategic Vision 2020-2030.

Exhibit H: Letter, Kehrman to Chavez, Dec. 16, 2019.

Exhibit I: Final Supp. Analysis of Complex Transformation SPEIS.

Exhibit J: Draft EIS for Pu Pit Production at SRS, April 2020.