Department of Energy
Idaho Operations Office
1955 Fremont Avenue
Idaho Falls, ID 83415

June 22, 2026

Ms. Megan McLean, WIPP Program Manager
Hazardous Waste Bureau
New Mexico Environment Department
2905 Rodeo Park Drive East, Building 1
Santa Fe, NM 87505-6313

SUBJECT: Comments Regarding WIPP Agency-Initiated Modification and Request for Public Hearing (CLN260773)

Dear Ms. McLean:

The following represents the consolidated comments of the U.S. Department of Energy (DOE) Idaho Cleanup Project (DOE-ICP), Idaho Operations Office (DOE-ID), their respective contractors Idaho Environmental Coalition (IEC) and Battelle Energy Alliance, LLC (BEA), as well as the DOE-ID Office of Chief Counsel, regarding the New Mexico Environment Department's (NMED) proposed permit modifications at the Waste Isolation Pilot Plant (WIPP). The above-named entities oppose the NMED's Agency Initiated Modification draft WIPP Permit and request that the AIM/draft Permit be rescinded. A public hearing is also requested.

Impacts to the Department of Energy's Idaho Cleanup Project Mission

Impacts to Operations and Shipping

The Draft NMED initiated permit modification will have significant impact on operations and shipping at the Advanced Mixed Waste Treatment Project (AMWTP) at the Idaho National Laboratory (INL). Current estimates indicate a reduction of shipments from AMWTP to WIPP from approximately 7 TRU shipments per week to an estimated 12 TRU shipments per calendar year. With an estimated 970 shipments from AMWTP remaining, this impact may require an additional 60 plus years to complete the AMWTP mission, with an estimated completion date in 2086.

This impact will result in the following impacts to human health and the environment:

- Container integrity concerns.
- Need for additional processing and treatment of waste streams.
- Increase in radiological dose to the work force.

- Prolonging management of legacy waste above the Snake River Plain Aquifer.

Prolonged management of legacy waste at the AMWTP will result in significant compliance challenges. Compliant management of degrading containers may require overpacking and additional treatment. Overpacking and retreatment of waste containers results in a net increase of waste that is required to be compliantly managed for longer periods of time, and will increase the number of shipments that ultimately must be sent to WIPP. Prolonged management of waste containers may result in an estimated cost impact of approximately $5.8 billion in Idaho. This cost impact includes not only an increase in operational costs but also includes potential penalties resulting from noncompliance with the Idaho Settlement Agreement.

Impacts to the 1995 Idaho Settlement Agreement

1. Percentage of Shipments Requirement

The 1995 Idaho Settlement Agreement (ISA) is an agreement between DOE and the State of Idaho concerning treatment and removal of various forms of waste and spent fuel located at the INL. In 2019 the parties negotiated a Supplemental Agreement that stipulates the following:

"DOE will allocate to and make from the State of Idaho at least fifty-five percent (55%) of all transuranic waste shipments received at WIPP for INL transuranic waste, including retrieved buried waste, each year until shipments from INL are complete."

"…DOE will give INL transuranic waste priority for shipments to WIPP. Priority means that if a shipment allotted to a generator site other than INL is not made, such shipment allotment will be made available to INL…"

DOE has consistently met the requirement that 55% of shipments to WIPP come from Idaho. While the ISA and its 2019 Supplemental Agreement drive waste shipment and the proposed permit modifications address waste emplacement, it does not appear as though these requirements can be reconciled. An estimated 970 shipments from INL to WIPP remain under the Idaho Settlement Agreement. This modification will result in a reduction from 364 mixed TRU waste shipments from INL to WIPP per calendar year to an estimated 12 shipments per calendar year.

2. Treatment of Offsite Waste

The Advanced Mixed Waste Treatment Project (AMWTP) located at the INL has the capability to receive, treat, and dispose of DOE complex wide mixed TRU waste (referred to as "offsite" waste). However, the 1995 Idaho Settlement Agreement stipulates that offsite mixed TRU waste approved by the Idaho Department of Environmental Quality must be treated within 6 months of receipt, and shipped out of the state within 6 months of treatment. This is often referred to as the "6 month in/6 month out" requirement. It reads:

"Any and all Treatable Waste shipped into the State of Idaho for treatment at the Facility shall be treated within six months of receipt at the Facility… Any transuranic waste received from

another site for treatment at the INEL shall be shipped outside of Idaho for storage or disposal within six months following treatment."

Under the proposed WIPP permit requirements, if waste shipments from the INL generator sites are halted, or significantly limited due to Los Alamos National Laboratory (LANL) prioritization, AMWTP will not be capable of treating and disposing of offsite mixed TRU waste DOE complex wide, including waste from LANL.

Impacts to DOE's Nuclear Energy Mission

The draft New Mexico Environmental Department agency-initiated draft hazardous waste facility permit modification for the Waste Isolation Pilot Plant Resource Conservation and Recovery Act Permit contains new proposed permit conditions which would cause the DOE Idaho Operations Office and the INL to become non-compliant with the Idaho Settlement Agreement and its 2019 Supplemental Agreement Concerning Conditional Waiver Of Sections D.2.E And K.1 Of 1995 Settlement Agreement.

Draft permit modification conditions 4.2.1.4.i & ii represent potential stipulated permit conditions on the WIPP which will reduce the anticipated transuranic waste shipments planned in calendar year 2027 from the INL in the State of Idaho to WIPP in New Mexico. These reduced INL transuranic waste shipments will impact two aspects of the 2019 Supplemental Agreement to the ISA. Section 4.a to the 2019 Supplemental Agreement to the ISA provides the requirement that the allocation of at least 55% of all transuranic waste shipments received at WIPP will be INL transuranic waste as calculated through a three-year running shipping average. In addition, Section 4.b to the 2019 Supplemental Agreement to the ISA provides the requirement where in addition to the fifty-five percent (55%) allocation of shipments of INL transuranic waste to WIPP, DOE will give INL transuranic waste priority. Both of these 2019 Supplemental Agreement to the ISA requirements are required to be satisfied to meet the overall stipulations within the Idaho Settlement Agreement.

Non-compliance with the Idaho Settlement Agreement will suspend the INL's ability to receive research quantities of spent nuclear fuel for research and development purposes. This spent nuclear fuel research and development is a vital component to the INL's Nuclear Energy mission areas and will negatively impact the progress seen by DOE and the INL on Executive Order 14301 mandates which have created the DOE reactor and fuel line pilot programs. The accelerated nuclear energy research and development and deployment seen over calendar year 2025 and 2026 will be negatively impacted. The designation of the INL in 2026 as the Center for Used Fuel Research will be impacted by the inability to receive vital used and spent nuclear fuel samples for the Center's research mission. DOE nuclear energy program goals and objectives as well as programmatic funding for the INL's nuclear mission will be at risk if non-compliance with the Idaho Settlement Agreement occurs as a result of the proposed permit modification. In addition, a 2025 Waiver to Section K.1 of the 1995 Settlement Agreement provides the allowance to receive the High Burnup Demonstration Cask from the North Anna Nuclear Power

Station as well as receipt of DOE owned spent nuclear fuel from research reactors. An inability to receive the High Burnup Demonstration Cask from the North Anna Nuclear Power Station due to potential Idaho Settlement Agreement non-compliance would put the entire United States Commercial Nuclear Reactor industry at risk. The data to be gained from examination of the nuclear fuel within the High Burnup Demonstration Cask from the North Anna Nuclear Power Station will be necessary to support all license renewals for Commercial Nuclear Power Plants to renew their Nuclear Regulatory Commission licenses for their Independent Spent Fuel Storage Installations, which store the commercial utility's spent nuclear fuel. The inability to receive the nine research reactor shipments identified in the 2025 Waiver to the ISA will cause the research reactors to shut down as the noted research facility will be unable to defuel and subsequently refuel their research reactor because space within their spent fuel storage is full as shipment to the INL will not be able to proceed.

The proposed WIPP permit modifications represent a significant mission impact to the INL, its stakeholders and its programmatic funding. The acceleration of Nuclear Energy deployment seen through Executive Orders will be negatively impacted as will the investment from private entities which have utilized the Executive Orders to deploy nuclear technology. The continued operation of the entire US commercial nuclear enterprise will be negatively impacted if non-compliance with Idaho Settlement Agreement occurs because transuranic waste shipments are reprioritized through the NMED agency-initiated permit modification.

Additional Legal Concerns and Deficiencies

The NMED agency initiated modification (AIM) to the WIPP Hazardous Waste Facility Permit proposes: (1) a rebuttable presumption for permit definitions, placing the burden of persuasion on Permittees; (2) new permit definitions ("Projected Waste" and "Legacy Waste"); (3) mandatory emplacement quotas of 55% (2027–2031) and 75% (2032+) for LANL "Legacy Waste"; (4) monthly and annual reporting of waste emplaced at WIPP for each generator/storage site that distinguishes between legacy and non-legacy waste; (5) a July 1, 2028 deadline to ship and emplace legacy waste stored above-ground at LANL Material Disposal Area G; and (6) a shipment cessation remedy if conditions are not met.

NMED's AIM is legally invalid. The AIM does not satisfy the 40 C.F.R. § 270.41(a)(2) "new information" standard. In addition, the AIM is beyond NMED's delegated authority under the Resource Conservation and Recovery Act (RCRA). Further, the AIM raises issues under the U.S. Constitution (notably, the Supremacy Clause and Commerce Clause), because the AIM conflicts with federal statutes and presents national security concerns. Moreover, the AIM includes provisions that are ambiguous and internally inconsistent. Therefore, NMED must rescind the AIM.

1. NMED's Failure to Present New Information, as required by 40 C.F.R. § 270.41(a)(2)

40 C.F.R. § 270.41(a) allows for modification of an existing Hazardous Waste Facility Permit only in limited circumstances. Under 40 C.F.R. § 270.41(a)(2),[1] a permit may be modified only if: (1) the information was unavailable at issuance; and (2) it would have justified different conditions at that time. NMED has failed to meet these requirements for its unilateral modification.

NMED's AIM cites "information not available at the time of permit issuance" as the basis for unilateral modification. The supporting documents, however, show no new technical data or risk analysis, and no analysis of the reduction of hazards to public health and the environment that could be realized by the permit modifications. Rather, they reflect only NMED's policy preference. Thus, NMED's AIM fails 40 C.F.R. § 270.41(a)(2).

NMED has taken action to unilaterally modify the existing WIPP permit, specifically to establish an intrastate, site-specific priority from LANL, for the transport and receipt of certain waste, stating "*there is sufficient basis to develop an agency-initiated modification that clarifies the priority to emplace legacy waste and reduce the risk of LANL legacy waste during the current permit term*."[2]

NMED asserts that it satisfies the federal/state regulation allowing for such unilateral Permit modification based on "the receipt of information not available at the time of permit issuance," and such "information would have justified the application of different permit conditions."[3] In its determination letter to DOE, NMED did not provide any explanation for its position that the standard required under 40 C.F.R. § 270.41(a) was satisfied. Instead, NMED's determination letter relies (for its underlying factual basis to support the regulatory standard) on the "background and administrative history presented by NMED in the associated April 23, 2026 Fact Sheet."[4]

NMED relies on 40 C.F.R. § 270.41(a)(2) "Information" which states:

Permits may be modified during their terms for this cause only if the information was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance.[5]

---

[1] 40 C.F.R. Part 270 is incorporated by reference into New Mexico's implementing regulations. 20.4.1.900 NMAC.
[2] NMED Fact Sheet of April 23, 2026, available at https://hwbdocs.env.nm.gov/Waste%20Isolation%20Pilot%20Plant/260421.pdf. Emphasis added.
[3] Letter from NMED to CBFO, April 22, 2026, available at https://hwbdocs.env.nm.gov/Waste%20Isolation%20Pilot%20Plant/260418.pdf.
[4] *Id.*
[5] *Id.;* 40 C.F.R. § 270.41(a)(2) (emphasis added).

However, a review of the Fact Sheet supporting NMED's AIM and NMED's April 22, 2026, Determination Letter, demonstrates NMED's failure to satisfy the information requirement. NMED's Fact Sheet indicates reliance on the information contained in the administrative record that supported the 2023 Permit issuance, as supplemented by yearly required certifications that: (1) "sufficient capacity exists in permitted Hazardous Waste Disposal Units to dispose of New Mexico generator/storage site waste"; and (2) "LANL legacy waste must be prioritized while the WIPP permit remains in effect."[6]

The LANL waste NMED seeks to prioritize by its unilateral modification consists of legacy waste—waste that has existed for decades that LANL has been working to properly dispose of by storage at WIPP. This is not new waste, nor is it new information.

NMED acknowledges that its AIM is based on NMED's "objectives" not being met related to the certification requirement (and not on new information that was not available at the time of permit issuance): "The process of providing these certifications is not accomplishing [the prioritization] objective."[7] Nothing in the Permit sections NMED cites support the AIM requirements that: (1) a specified amount of transuranic (TRU) waste from LANL be emplaced; (2) such emplacement be to the detriment of other DOE and/or National Nuclear Security Administration (NNSA) site emplacement needs; or (3) DOE make Panel 12 immediately available for emplacement. Instead, Section 4.2.1.5 simply states that Panel 12 (whenever available for emplacement) will prioritize LANL legacy waste.

While NMED claims that its "objectives" are not being met in the implementation of the Permit, those "objectives" are not Permit requirements, are not HWA requirements, and do not constitute "information that was not available at the time" the Permit was issued.

Therefore, NMED's supporting documents do not identify any new risk, monitoring data, or waste characterization information. NMED's alleged failure of DOE's certifications to accomplish prioritization "objectives" is not "information" per 40 C.F.R. § 270.41(a)(2). NMED asserts "new information" but presents none. Therefore, NMED lacks authority to initiate a modification; NMED must rescind the AIM

2. NMED's AIM Conditions are Outside the Scope of NMED's RCRA Permit Authority

A hazardous waste permit may address hazardous waste management performance (e.g., compliance with 40 C.F.R. Part 264), not national shipment quotas, generator sequencing, or panel construction schedules. NMED's AIM quotas (55%/75%), shipment embargo, and generator-specific mandates are programmatic conditions beyond RCRA scope. Therefore, NMED must rescind the AIM.

[6] Note 2, *supra*.
[7] *Id.*

RCRA does not authorize state regulators to set national TRU program priorities or dictate which DOE/NNSA site must fill a panel or in what sequence shipments occur. Additionally, NMED's AIM conflates "cleanup" policy aims with hazardous waste performance standards. Finally, the shipment quotas lack demonstrated ties to 40 CFR Part 264 environmental objectives.

The conditions proposed by NMED intrude into management of facilities and operations of permit holders. NMED's regulatory overreach is antithetical to the regulatory construct envisioned by Congress in enacting RCRA and every other major federal environmental law.

3. Constitutional & Preemption Issues

A. RCRA Consistency (40 C.F.R. § 271.4), The Dormant Commerce Clause, & Extraterritorial Regulation

NMED's AIM unreasonably restricts the free movement of hazardous waste across state borders to an authorized facility. For example, by seeking to impose quotas on the amount of intrastate waste (i.e., LANL legacy waste) emplaced at WIPP, the proposed modifications necessarily restrict the amount of out-of-state waste that could be emplaced. Therefore, it is inconsistent with RCRA's state program requirements for consistency between federal and state programs.[8] NMED's AIM also discriminates based on state of origin by privileging LANL waste (intrastate) over out-of-state DOE/NNSA generators. Such discrimination is facially and effectively protectionist, is an unconstitutional restriction on interstate commerce, and violates the dormant Commerce Clause.

RCRA authorizes the implementation of state-implemented hazardous waste programs.[9] In 1985, the United States Environmental Protection Agency (EPA) authorized the State of New Mexico to operate a hazardous waste management program.[10] New Mexico's hazardous waste program largely adopts or incorporates the federal RCRA regulations. Thus, New Mexico's authority to implement a hazardous waste program is derivative of the federal law, and such implementation includes limitations and restrictions: "[T*]he following provisions provide the legal basis for the State's implementation of the hazardous waste management program, but they are not being incorporated by reference and do not replace Federal Authorities.*"[11] Although a state may include "more stringent" standards in its implementation, or in some instances greater scope, those expansions do not become part of the federal RCRA program nor are they enforceable federally.[12] Additionally, EPA will not approve a state program if it is inconsistent with the federal program or inconsistent with other approved state programs.[13] Therefore, EPA will not authorize a state program if its implementation includes restrictions or impacts on the free

[8] 40 C.F.R. § 271.4; *see Environmental Technology Council v. Sierra Club*, 98 F.3d 774, 782-786 (4th Cir.1996).
[9] 42 U.S.C. § 6926(b).
[10] *See* 40 C.F.R. § 272.1601gg.
[11] 40 C.F.R. § 272.1601(c)(2) (emphasis added).
[12] *See* 40 C.F.R. § 271.1(i).
[13] *See* 40 C.F.R. § 271.4.

movement of hazardous waste or the treatment and storage of hazardous waste from other states. If a state adds a provision to a permit under its hazardous waste management program that prevents or impedes free movement across state borders of hazardous waste, that provision would violate the consistency requirement of 40 C.F.R. § 271.4.

The Fourth Circuit Court of Appeals in *Environmental Technology Council v. Sierra Club*[14] confirmed that EPA's consistency standard under 40 C.F.R. § 271.4 prohibits state discrimination against interstate hazardous waste shipments, noting that Congress did not authorize states to burden interstate commerce through their RCRA programs.[15]

The Commerce Clause's "dormant" aspect prevents states from discriminating against or imposing substantial burdens on interstate commerce,[16] and waste is considered an object of commerce for which state law restrictions invoke dormant commerce clause protections.[17]

RCRA contains a waiver of federal sovereign immunity, which requires federal agencies to comply with all substantive and procedural requirements of authorized state hazardous waste programs.[18] Although the federal entity must comply with the requirements of an EPA-authorized program, acquire a hazardous waste management permit for covered activities, and comply with specific permit conditions,[19] a permit that includes a prohibited standard is not enforceable. It would make little sense for EPA to only authorize state programs that adhere to RCRA's consistency requirement but then allow a permit requirement to violate that standard. A permit provision restricting interstate commerce would violate the consistency requirement of 40 C.F.R. § 271.4, be inconsistent with the authorized state program, and therefore be unenforceable as part of the federally authorized program under both the Supremacy Clause and the Commerce Clause. NMED's AIM conditions both restrict interstate commerce and violate 40 C.F.R. § 271.4. Therefore, NMED must rescind the AIM.

In addition, NMED's AIM imposes conditions that constitute impermissible extraterritorial regulation. NMED is seeking to impose these conditions on facilities operating under non-New Mexico regulatory authorities, permits and regulatory requirements, and compliance agreements. And NMED's conditions are without regard to how they limit generator/storage sites' ability to dispose of TRU waste. As such, these conditions infringe upon the purview of other regulatory jurisdictions. [20]

---

[14] 98 F.3d 774, 784 (4th Cir. 1996).
[15] *Id*. at 783.
[16] *Oregon Waste Sys. v. Department of Envt'l Quality*, 511 U.S. 93, 98 (1994).
[17] *Philadelphia v. New Jersey*, 437 U.S. 617, 622–23 (1978); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Resources*, 504 U.S. 353 (1992).
[18] 42 U.S.C. § 6961(a).
[19] See *U.S. v. State of N.M.*, 32 F.3d 494 (1994).
[20] *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only

B. Atomic Energy Act (AEA) Preemption & The Supremacy Clause

NMED's AIM is preempted by the AEA,[21] and it violates the Supremacy Clause. NMED's AIM requirements frustrate DOE's TRU and mixed TRU (MTRU) waste management activities, including all sites that manage and ship TRU waste to WIPP. RCRA's waiver of sovereign immunity does not insulate state regulators from federal preemption. And, even more stringent state hazardous waste regulations may be preempted if they frustrate federal law objectives.[22] Further, RCRA does not encompass materials regulated under the AEA.[23] The Supremacy Clause shields federal activities from state regulation absent unambiguous Congressional consent.[24] "[W]here Congress does not affirmatively declare its instrumentalities or property subject to regulation, the federal function must be left free of regulation."[25]

To the extent New Mexico seeks to regulate the management of TRU/MTRU waste—whether it be amounts of mandated legacy TRU/MTRU waste shipped from LANL each year, funding obligations to various sites for TRU/MTRU waste management/transport, or decisions regarding percentages of AEA-covered waste transported from other (non-LANL) sites to WIPP—the state overreaches into federal functions. Such overreach includes intruding into the field preempted by the AEA;[26] and intrudes into the exclusive management of mandated mission responsibilities of DOE/NNSA.

Regarding AEA preemption, the NMED AIM requirements are specific to "Legacy Waste," a newly defined term that includes waste "part of a TRU or TRU mixed waste stream," thereby encompassing non-mixed TRU. This is impermissible under AEA and RCRA's hazardous waste scope, thus "cross[ing] the line and impermissibly regulat[ing] the AEA" waste.[27] NMED makes no effort to disguise that New Mexico seeks to govern the management, storage, and transportation of AEA waste by DOE/NNSA, as NMED specifically mandates disposition of certain TRU/MTRU waste.

By sweeping TRU (covered by the AEA) waste into permit definitions and conditions, NMED's AIM directly governs DOE/NNSA management decisions involving AEA materials. This is preempted under the AEA, as RCRA's waiver of sovereign immunity does not extend to

---

by the comity of other States" (quoting *Huntington v. Attrill,* 146 U.S. 657, 669, 13 S.Ct. 224, 36 L.Ed. 1123 (1892))).

[21] Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 *et seq*.

[22] *See Colorado Dept. of Public Health and Env. v. U.S.*, 693 F.3d 1214 (2012).

[23] 42 U.S.C. §§ 6903(27) (excluding from the definition of "solid waste" source, special nuclear, and byproduct material), 6905(a) (specifying RCRA does not apply to "any activity or substance which is subject to" the AEA).

[24] U.S. Const. art. VI, cl. 2; *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, 180 (1988).

[25] *Hancock v. Train,* 426 U.S. 167, 179 (1976); *see United States v. Manning*, 434 F. Supp. 2d 988, 997 (E.D. Wash. 2006), aff'd, 527 F.3d 828 (9th Cir. 2008).

[26] 42 U.S.C. § 2011 et seq., "nothing ... shall be construed to affect the authority of any State or local agency to regulate activities for purposes ***other than*** protection against radiation hazards." 42 U.S.C. § 2021(k) (emphasis added).

[27] *See United States v. Manning*, 434 F. Supp. 2d 988, 1004 (E.D. Wash. 2006), *aff'd*, 527 F.3d 828 (9th Cir. 2008).

activities or substances subject to regulation under the AEA; thus, it violates the Supremacy Clause. Therefore, NMED must rescind the AIM.

C. Conflict with 10 U.S.C. § 6128 (Pit Production Requirements)

Mandatory quotas for LANL "Legacy Waste" would force storage saturation and halt pit-production (TRU waste disposition), conflicting with production requirements in 10 U.S.C. § 6128 and impairing DOE's mission. 10 U.S.C. § 6128 states:

(a) Requirement - Consistent with the requirements of the Secretary of Defense, the Secretary of Energy shall ensure that the nuclear security enterprise-

(1) during 2021, begins production of qualification plutonium pits;

(2) during 2024, produces not less than 10 war reserve plutonium pits;

(3) during 2025, produces not less than 20 war reserve plutonium pits;

(4) during 2026, produces not less than 30 war reserve plutonium pits; and

(5) during 2030, produces not less than 80 war reserve plutonium pits.

The AIM's 55%-75% emplacement modifications would preclude attainment of the requirements set forth in 10 U.S.C. § 6128 based on the current output of the pit production TRU waste stream. Pit production generates a TRU waste stream that must be stored, certified for shipment, shipped, and then disposed of in WIPP. To meet the 55% emplacement condition, the existing "Legacy Waste" stream would be prioritized over the pit production TRU waste stream. The rate of pit production TRU waste generation would then exceed the rate of shipment and disposal which, necessarily, will increase storage volume to full capacity and pit production would cease at that time. This NMED AIM driven outcome directly conflicts with 10 U.S.C. § 6128 and thus NMED's proposed modification is preempted by federal law.

The U.S. Supreme Court has ruled in multiple cases that where a state law conflicts with a federal statute or the Constitution, this is a violation of the Supremacy Clause. In certain cases, a state law may be expressly or impliedly preempted by a federal statute.[28]

New Mexico cannot affect a rule, regulation, or permit that conflicts with a federal statute. Although the emplacement ratios are not expressly preempted by federal law, the state issued permit would have the effect of frustrating the purpose of the federal law. The U.S. Supreme Court has repeated: "a state law is preempted where it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."'[29] The full

[28] *Kansas v. Garcia*, 589 U.S. 191, 203-03, (2020), *citing* PG&E. *Osborn v. Ban of US* 9 Wheat. 738, 865 (1824).
[29] *Arizona v. United States*, 567 U.S. 387, 406 (2012), *citing Hines,* 312 U.S., at 67, 61 S.Ct. 399. *See generally: Pacific Gas and Elec. Co. v. State Energy Resources Conservation & Development Com'n*, 461 U.S. 190 (1983); *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Doe v. Dynamic Physical Therapy, LLC*, 607 U.S. 11 (2025).

purpose and objective of Congress in this case is clearly specified in 10 U.S.C. § 6128. If NMED's AIM emplacement ratios are carried out, this will frustrate Congress' purpose. Therefore, NMED must rescind the AIM.

4. Definitional Issues & Administrative Incoherence

A. Rebuttable Presumption (Part 1, § 1.5)

The "rebuttable presumption" provision in Part 1, § 1.5 is inappropriate, contrary to applicable law, vague, ambiguous, and constitutes impermissible regulatory overreach.

NMED proposes a rebuttable presumption that applies to Permit definitions:

Unless otherwise expressly provided herein, the terms used in this Permit shall have the meaning set forth in RCRA, HWA, and/or their implementing regulations. A rebuttable presumption applies to permit definitions, placing the burden of persuasion on the Permittees to demonstrate otherwise.[30]

First, NMED's proposed "rebuttable presumption" provision is inappropriate. A rebuttable presumption is defined as an inference drawn from certain facts that establish a prima facie case, which may be overcome by the introduction of contrary evidence.[31] The Permit expressly states that unless otherwise expressly provided, the terms used within shall have the meaning set forth in RCRA, the New Mexico Hazardous Waste Act (HWA),[32] and/or their implementing regulations. Various laws (both statutes and regulations) and, often, documents, define key terms.[33] Black's Law Dictionary defines "definition" as the meaning of a term as explicitly stated in a drafted document such as a contract, a corporate bylaw, an ordinance, or a statute.[34] Both the WIPP Permittees and New Mexico have either already agreed to the definitions of terms in the Permit, or terms used therein are provided for by law (RCRA, HWA, or the Land Withdrawal Act (LWA)).[35] The Parties are thereby bound to the definitions of terms they agreed to, or as these terms are provided for within RCRA, HWA, LWA, and/or their implementing regulations. If a dispute were to arise between parties as to the meaning of a particular term, that dispute would be resolved through the means provided for such disagreements. The concept of a "rebuttable presumption" has no place in the definition of terms or resolutions of disputes over such terms. For example, if a party felt compelled to seek a judicial determination over a disputed term, it generally would be the party seeking relief that would have the burden to prove that its interpretation of a disputed term is the correct one.

---

[30] Emphasis added.
[31] *See* PRESUMPTION, Black's Law Dictionary (12th ed. 2024).
[32] Chapter 74, Article 4 NMSA 1978.
[33] A Guide to Reading, Interpreting and Applying Statutes, Kumar, S. and Beech, T. (2017) (https://www.law.georgetown.edu/wpcontent/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Applying-Statutes-1.pdf) (Last accessed: 07 May 2026).
[34] DEFINITION, Black's Law Dictionary (12th ed. 2024).
[35] WIPP Land Withdrawal Act, as amended, Pub. L. 102-579, 106 Stat. 4777 (1992).

Second, if implemented, NMED's proposed language would act to burden-shift from NMED to the Permittees, counter to 20.1.4.400(A) NMAC ("The Division has the burden of proof for a challenged condition of a permit or license which the Department has proposed."), and 201.5.400(C)(1) NMAC ("The Complainant [NMED] has the burden of going forward with the evidence and of proving by a preponderance of the evidence the facts relied upon to show the violation occurred and that the proposed civil penalty is appropriate.").

Third, NMED's attempt to incorporate the concept of a "rebuttable presumption" into the definitions section of the Permit is regulatory overreach. Pursuant to the HWA, NMED is supposed to operate under rules that are *"*equivalent to and at least as stringent as federal regulations adopted by the federal environmental protection agency pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended."[36] By including a "rebuttable presumption," which does not appear in the HWA and holds irrelevant meaning as applied from RCRA, NMED seeks to expand its powers beyond what has been granted under RCRA or the HWA.

Fourth, by placing the burden of persuasion on Permittees concerning permit definitions—while simultaneously proposing ambiguous and potentially outcome-determinative terminology—NMED's proposal invites inconsistent enforcement and due-process concerns.

Fifth, the rebuttable presumption language is vague and ambiguous as to what is presumed, how Permittees would demonstrate otherwise, and how any decision would be made.

B. "Projected Waste" Definition (Part 1, Section 1.5.23)

NMED proposes a defined term of "Projected Waste". NMED's proposed definition of "Projected Waste" is as follows:

The part of the Annual Transuranic Waste Inventory Report (ATWIR) inventory that has not been generated (does not physically exist) but is estimated to be generated at some time in the future by the TRU waste generator/storage sites. TRU waste in projected waste streams includes waste from programs that have not come on-line as of the data cutoff date for the 2025 ATWIR report, as well as waste from ongoing projects and decontamination and decommissioning (D&D) waste that has not yet been packaged.

First, NMED's proposed definition of "Projected Waste" is vague and ambiguous because it encompasses non-existent future waste, and includes waste from programs that do not yet exist.

Second, NMED's definition improperly extends hazard-management regimes to all future TRU, regardless of whether there is a mixed hazardous waste component—a prerequisite for NMED jurisdiction under RCRA. Projected waste is then excluded from NMED's proposed definition of "Legacy Waste".

[36] NMSA 1978, § 74-4-4(A).

Third, because "Legacy Waste", or any other waste stream, cannot contain currently non-existent waste, the definition of Projected Waste is superfluous and confusing.

C. "Legacy Waste" Definition (Part 1, § 1.5.24)

NMED proposes a defined term of "Legacy Waste". NMED's proposed definition of "Legacy Waste" is as follows:

"Legacy Waste" means waste placed in retrievable storage that is part of a TRU or TRU mixed waste stream without a projected waste component. This definition applies to all generator/storage sites except those with state agency adopted site specific 'legacy waste' definitions, in which case the respective state agency adopted definition applies.

First, NMED's proposed definition of "Legacy Waste", and the new requirements based on this definition, expressly exceed NMED's regulatory authority under RCRA. The definition includes waste that is part of a "TRU or TRU mixed waste stream." Under this definition, affected sites and entities would be required to manage TRU waste with no hazardous waste mixed component pursuant to NMED's hazardous waste requirements. This is impermissible under the Atomic Energy Act and RCRA.[37] NMED lacks authority to define hazardous or mixed waste beyond what is provided for under RCRA. RCRA, and its implementing New Mexico laws and regulations, establish categories and definitions for listed and characteristic waste. These laws and regulations do not provide NMED authority to define waste with the same or similar constituents differently based on when it is generated or where it is stored at the generator's site.

Second, NMED's proposed definition of "Legacy Waste" would apply to all DOE/NNSA generator sites nationally—including sites not within New Mexico or the jurisdiction of NMED. NMED's attempt to reconcile this overreach by giving primacy to other state agency definitions of legacy waste does not remedy this jurisdictional flaw. NMED lacks authority to define waste in other jurisdictions, regardless of the existence or non-existence of a conflicting definition. For example, through its proposed definition of "Legacy Waste", NMED is attempting to impose requirements on other EPA-approved state programs, such as those administered by the States of California, Idaho, South Carolina, Tennessee, and Washington, by simply declaring that the "definition applies to all generator/storage sites except those with state agency adopted site specific 'legacy waste' definitions." NMED's imposition of such requirements on other states is illegal and discounts the independent responsibilities for the RCRA programs managed by the several states. Further, establishing and imposing differing legacy waste definitions would create regulatory uncertainty in the already highly complex TRU mixed waste transportation and disposal process.

Third, NMED's proposed definition is not consistent with the foundational requirements of the LWA, which does not contemplate a definition or prioritization of "legacy" waste. The LWA defines only transuranic waste, contact-handled transuranic waste, remote-handled transuranic

[37] 42 U.S.C. §§ 6903(27), 6905(a)(1); 40 C.F.R. § 261.4(a)(4).

waste, and high-level waste. In the LWA, Congress did not anticipate or require additional differentiation of waste categories. The definitions supplied by Congress in the LWA are clear and unambiguous regarding implementation for WIPP. WIPP has successfully supported facility cleanup activities at 22 sites throughout the country to advance DOE/NNSA missions without a legacy waste definition.

Fourth, NMED has not defined "waste placed in retrievable storage" as used in its proposed definition of "Legacy Waste". However, "retrievably stored waste" is currently defined in Permit Attachment C, Waste Analysis Plan, Section C-0, Introduction, as shown below.

Retrievably stored waste is defined as TRU mixed waste generated after 1970 and before the New Mexico Environment Department (NMED) notifies the Permittees, by approval of the final audit report, that the characterization requirements of the WAP at a generator/storage site have been implemented.

This definition of "retrievably stored waste" was based on a March 20, 1970, Atomic

Energy Commission directive (Immediate Action Directive No. 0511-21). In 1970, the

Atomic Energy Commission ended shallow burial for disposal of TRU waste and required sites to store TRU waste in a retrievable fashion. Waste disposed prior to 1970 was referred to as buried waste. NMED's use of the term "waste placed in retrievable storage" in its proposed modification is ambiguous and conflicts with the existing Permit definition (i.e., "retrievably stored waste"). Moreover, NMED has not explained how the term "waste placed in retrievable storage" is meant to be used in relation to the definition of "Legacy Waste." Nor has NMED explained what would be included or excluded pertaining to retrievably stored waste.

Fifth, the "Legacy Waste" definition in NMED's AIM hinges on the absence of a "projected waste component," yet retrievably stored containers typically require future characterization/repackaging—creating circularity and uncertainty about eligibility.

5. Substantive AIM Conditions

A. Quota of 55% (2027–2031) for "Legacy Waste" from LANL (Part 4, Section 4.2.1.4.i)

NMED proposes the following substantive modification to the WIPP permit:

From January 1, 2027, through December 31, 2031, the Permittees shall emplace legacy waste from Los Alamos National Laboratory (LANL) such that LANL emplaced legacy waste is at least 55% of the total volume of waste emplaced from all generator/storage sites as calculated on a rolling monthly average based on the prior 12 consecutive months.

First, as discussed in Section 3.C, the 55% emplacement requirement for "Legacy Waste" from LANL conflicts with 10 U.S.C. § 6128, as it will prevent NNSA from completed its federally

mandated activity due to the direct impact this quota would have on the production of non-legacy waste resulting from pit production. Therefore, NMED's proposed modification is preempted by federal law.

Second, as discussed in Section 3.A, NMED's proposed condition compels intrastate preferences, burdens interstate commerce, intrudes on AEA covered activities, and attempts to influence national policy via a state permit modification, thus violating both the Supremacy Clause and the Commerce Clause of the U.S. Constitution.

Third, NMED's proposed condition is beyond what is authorized by RCRA or its implementing New Mexico hazardous waste statutes and regulations. RCRA does not authorize the regulation of the shipment and disposal of hazardous waste based on where or when the waste was stored or retrieved at a generating facility. Nor does RCRA, beyond well-established storage time limitations, allow an agency to determine for itself the timing and makeup of waste shipments to a disposal facility. Imposing requirements that mandate shipments by certain dates and consisting of specific waste from specified facilities is beyond NMED's statutory authority. NMED lacks statutory authority to dictate how or what waste can be disposed of at WIPP beyond what is required for NMED to oversee compliance with the Treatment, Storage, and Disposal Facility (TSDF) requirements in RCRA.

Fourth, NMED's proposed restraint of the shipment of TRU waste housed outside of New Mexico violates the state program requirements in 40 C.F.R. § 271.4(a), which holds that a state program is inconsistent with the federal RCRA program and the programs of other states if it "unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program."

Fifth, prioritizing disposal of LANL waste over other generator/storage sites is not compliant with the EPA Certification of Compliance. The certification assumes random emplacement of waste in rooms and panels. 40 C.F.R. § 194.24(d) states:

The Department shall include a waste loading scheme in any compliance application, or else performance assessments conducted pursuant to § 194.32 and compliance assessments conducted pursuant to § 194.54 shall assume random placement of waste in the disposal system.[38]

Sixth, NMED's proposal conflates distinct waste categories and risks creating uncertainty concerning prioritization obligations.

Seventh, NMED's proposal imposes mandatory emplacement quotas untethered to demonstrated hazardous waste management needs.

[38] Emphasis added.

Eighth, NMED has provided no explanation for why the 55% requirement is necessary, how NMED derived the quotas, or their nexus to risk reduction. Absent such explanation, this provision is arbitrary, capricious, and without support.

B. Quota of 75% (2032+) for "Legacy Waste" from LANL (Part 4, Section 4.2.1.4.ii)

NMED proposes the following substantive modification to the WIPP permit:

Beginning January 1, 2032, and until all LANL legacy waste has been emplaced at WIPP, the Permittees shall emplace legacy waste from LANL such that LANL emplaced legacy waste is at least 75% of the total volume of waste emplaced from all generator/storage sites as calculated on a rolling monthly average based on the prior 12 consecutive months.

First, as discussed in Section 3.C, the 75% emplacement requirement for "Legacy Waste" from LANL conflicts with 10 U.S.C. § 6128 in the same manner that the 55% quota would. Therefore, NMED's proposed modification is preempted by federal law.

Second, NMED's proposed condition compels intrastate preferences, burdens interstate commerce, intrudes on AEA covered activities, and attempts to influence national policy via a state permit modification.

Third, NMED's proposed condition is beyond what is authorized by RCRA or its implementing New Mexico hazardous waste statutes and regulations. RCRA does not authorize the regulation of the shipment and disposal of hazardous waste based on where or when the waste was stored or retrieved at a generating facility. Nor does RCRA, beyond well-established storage time limitations, allow an agency to determine for itself the timing and makeup of waste shipments to a disposal facility. Imposing requirements that require shipments by certain dates and consisting of specific waste from specified facilities is beyond NMED's statutory authority. NMED lacks statutory authority to dictate how or what waste can be disposed of at WIPP beyond what is required for NMED to oversee compliance with the TSDF requirements in RCRA.

Fourth, NMED's proposed restraint of the shipment of TRU waste housed outside of New Mexico violates the state program requirements in 40 C.F.R. § 271.4(a), which holds that a state program is inconsistent with the federal RCRA program and the programs of other states if it "unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program."

Fifth, prioritizing disposal of LANL waste over other generator/storage sites is not compliant with the EPA Certification of Compliance. The certification assumes random emplacement of waste in rooms and panels. 40 C.F.R. § 194.24(d) states:

The Department shall include a waste loading scheme in any compliance application, or else performance assessments conducted pursuant to § 194.32 and compliance assessments

conducted pursuant to § 194.54 shall assume random placement of waste in the disposal system.[39]

Sixth, NMED's proposal conflates distinct waste categories and risks creating uncertainty concerning prioritization obligations.

Seventh, NMED's proposal imposes mandatory emplacement quotas untethered to demonstrated hazardous waste management needs.

Eighth, NMED has provided no explanation for why the 75% requirement is necessary, how NMED derived the quotas, or their nexus to risk reduction. Absent such explanation, this provision is arbitrary, capricious, and without support.

C. Monthly Reporting (Part 4, Section 4.2.1.4.iii)

NMED proposes the following substantive modification to the WIPP permit:

Within 15 days of the last day of each month, the Permittees shall provide a written report and certification documenting all waste emplaced at WIPP on a LWA volume basis. The report shall distinguish between legacy and nonlegacy waste and include the percent of waste emplaced from each generator/storage site during the previous month.

First, this requirement constitutes regulatory overreach by NMED. NMED is requiring generator/storage sites outside of New Mexico to differentiate, prioritize, and track waste by legacy or non-legacy designation.

Second, NMED's proposed condition relies on undefined terms and unclear waste categories.

D. Deadline of July 1, 2028 for LANL Material Disposal Area G Above-Ground "Legacy Waste" (Part 4, Section 4.2.1.4.iv)

NMED proposes the following substantive modification to the WIPP permit:

Legacy waste stored above-ground at LANL Material Disposal Area-G shall be shipped and emplaced by July 1, 2028.

First, mandating shipment of waste to WIPP as a requirement of the WIPP Permit exceeds the scope of such RCRA permit—which is to regulate activity for which WIPP is responsible—not other federal sites.[40] WIPP is responsible for waste when it receives such waste, not before. New Mexico cannot mandate that a federal site ship to WIPP via the WIPP Permit.

---

[39] Emphasis added.

[40] Section 1.2 of WIPP Hazardous Waste Facility Permit states, in pertinent part, "*This Permit authorizes DOE and [the Management and Operating Contractor] (*the.Permittees*) to manage, store, and dispose contact-handled (*CH*) and remote-handled (*RH*) transuranic (*TRU*) mixed waste* at.WIPP." (emphasis added). https://hwbdocs.env.nm.gov/Waste%20Isolation%20Pilot%20Plant/260400/260400%20WIPP%20Permit%20PDF/Permit%20Part%201%2006-2024.pdf.

Second, it is beyond the purview of NMED's authority to demand that certain waste be shipped from other sites, or that certain amounts of waste from other sites be shipped to WIPP.

Third, NMED's condition is arbitrary and capricious. NMED has failed to demonstrate the feasibility of the requirement or explain the basis for selecting July 1, 2028 for shipment from LANL. As such, NMED has set an arbitrary requirement and deadline.

E. Annual Reporting (Part 4, Section 4.2.1.4.v)

NMED proposes the following substantive modification to the WIPP permit:

The Permittees shall submit an annual report by April 30 of each year. For each generator/storage site and for both legacy and non-legacy waste, the report shall detail, at a minimum, waste shipments, volumes of waste emplaced, volumes of waste remaining in retrievable storage, as well as any other information needed to demonstrate prioritization of LANL legacy waste and compliance with the requirements of this Permit section. The information shall be provided for the prior calendar year. Volumes shall be reported in LWA TRU Waste and TRU Mixed Waste volumes. Volumes shall be trackable in WWIS.

First, this requirement constitutes regulatory overreach by NMED. NMED is requiring generator/storage sites outside of New Mexico to differentiate, prioritize, and track waste by legacy or non-legacy designation. This would require generator sites to provide data on waste, even though that waste may not be MTRU waste and may never be emplaced in WIPP. Therefore, this condition is outside the scope of NMED's statutory authority under RCRA or the HWA.

Second, NMED's proposed condition relies on undefined terms and unclear waste categories.

F. Shipment Cessation (Part 4, Section 4.2.1.4.vi)

NMED proposes the following substantive modification to the WIPP permit:

If at any point any of the conditions required in this section are not met, all generator/storage site shipments (with the exception of LANL) must cease until all under deliveries are cured.

First, NMED's attempt to dictate, through a state-issued hazardous waste facility permit, the rate and sequencing of TRU waste shipments from federal facilities across the national DOE/NNSA complex to WIPP directly conflicts with federal law under the Supremacy Clause.[41] Congress enacted the LWA to authorize WIPP as a national repository for defense TRU waste and gave disposal authority to DOE at the federal level. A state permit condition that halts shipments from every other generator/storage site in the country unless LANL meets a state-imposed percentage quota directly obstructs that Congressionally authorized federal mission. This conflict between a

[41] U.S. Const. art. VI, cl. 2.

state regulatory condition and a Congressionally mandated federal program is preempted by the Supremacy Clause.

Second, NMED's condition is inconsistent with RCRA regulations. Generator/storage site priorities are driven by, at a minimum: the generator/storage facility's own RCRA permit and compliance orders, along with funding, regulatory priorities, state/federal commitments, and waste availability. RCRA regulations do not contemplate the management of generator/storage site activities through another site's RCRA TSDF Permit. The WIPP Permit cannot dictate the operation of other generator/storage sites who have independent RCRA permits and state requirements. Therefore, it is not appropriate for NMED to use the WIPP Permit to establish priorities and activities for generator/storage facilities.

Third, NMED's condition would operate as a ban on out-of-state shipments, inconsistent with 40 C.F.R. § 271.4 and case law.[42]

Fourth, NMED's condition creates an exceptionally severe remedy not tied to any imminent threat to human health or the environment and operates as a *de facto* automatic permit suspension. This is both an arbitrary and capricious provision, and inconsistent with the HWA, which requires a public hearing prior to a permit suspension or termination: "No ruling shall be made on permit issuance, major modification, suspension or revocation without an opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing."[43]

Fifth, NMED's condition is internally inconsistent and provides for the cessation of shipments upon failure to meet *any* condition in Section 4.2.1.4, which could include a failure to submit reports, but only allows resumption of shipments if "under deliveries are cured." Failure to submit reports and "under deliveries" are not necessarily related. Additionally, the 55%-75% quota requirement applies to "emplacement", not "deliveries", and it is thus unclear what would trigger this provision or how relief could be obtained.

G. Legacy TRU Waste Disposal Plan (Part 4, Section 4.2.1.5)

NMED proposes the following substantive modification to the WIPP permit regarding the Legacy TRU Waste Disposal Plan:

The Legacy TRU Waste Disposal Plan previously developed by the Permittees, in consultation with the generator/storage sites and stakeholders, shall be publicly posted on the WIPP website. The disposal of legacy waste, as defined in Part 1, Section 1.5.24, will be prioritized in all currently permitted HWDUs; the portion of all waste emplaced shall be at least 55% legacy waste, as demonstrated by reporting requirements in Permit Section 4.2.1.4. Beginning January

[42] *Environmental Technology Council v. Sierra Club*, 98 F.3d 774 (4th Cir. 1996).
[43] NMSA § 74-4-4.2.H.

1, 2032, and until all legacy waste has been emplaced at WIPP, the Permittees shall emplace legacy waste such that emplaced legacy waste is at least 75% of the total volume of waste emplaced, as demonstrated by reporting requirements in Permit Section 4.2.1.4.

As explained in Sections 2 and 3.A, NMED lacks authority to impose conditions in the WIPP Permit pertaining to waste management and shipping priorities at intrastate and interstate generator/storage sites. NMED's prescriptions of operational priorities and waste management planning are constitutional and regulatory overreach.

6. National Complex Impacts

NMED's AIM would create regulatory compliance issues with other states and impair operational activities at federal facilities across the national DOE/NNSA complex. For example: (1) at Hanford, unilateral prioritization by New Mexico would necessitate renegotiation of site-state commitments; (2) at Idaho National Laboratory, the NMED AIM would require DOE to violate the 2019 Supplemental Agreement to the 1995 Idaho Settlement Agreement with the State of Idaho; and (3) at Lawrence Livermore, insufficient storage for mixed TRU waste could create potential compliance issues with California's Department of Toxic Substances Control; (4) at Oak Ridge, DOE will be unable to meet its regulatory commitments to the State of Tennessee to have waste processed and ready for disposal (including WIPP acceptance) at WIPP; and (5) at Savannah River, where a compliance schedule would need to be established with the South Carolina Department of Environmental Services if WIPP is not available for disposal or is available at a reduced shipping level.

In general, NMED's AIM would require generator sites to potentially renegotiate and/or substantially revise legal commitments and explain impacts to surrounding communities, states, Tribal Nations and other stakeholders.

7. Reservation of Rights

A public hearing on, and a future appeal of, the draft Permit may prove necessary, along with any other judicial recourse available. DOE/NNSA expressly reserve, and do not waive, their right to contest any and all conditions in the draft Permit modification for any reason whatsoever, including, but not limited to, that NMED's proposed conditions: (1) fall outside and/or exceed the scope of NMED's regulatory authority under RCRA and HWA; (2) do not provide procedural safeguards and due process guaranteed by federal and state law; (3) are more stringent than federal RCRA requirements without complying with procedural requirements under NMSA 1978, Section 74-4-5, and without making the requisite finding that the more stringent requirements are "necessary to protect public health and the environment….";[44] (4) are more stringent than those imposed on other persons, or discriminate against the U.S., in a manner inconsistent with RCRA's limited waiver of sovereign immunity and/or the doctrine of intergovernmental immunity; (5) are arbitrary, capricious, an abuse of discretion, not supported

[44] NMSA 1978, Section 74-4-4(A).

by substantial evidence, or otherwise not in accordance with law; (6) are inconsistent with[45] and/or preempted by the AEA; (7) are inconsistent with and/or preempted by the LWA; (8) are inconsistent with and/or preempted by the Hazardous Materials Transportation Act;[46] (9) are inconsistent with and/or are prohibited by the United States Constitution; or (10) purport to regulate activities being performed in jurisdictions outside of New Mexico, and which are the proper jurisdiction of other federal and state regulatory authorities.

Additional issues may arise during the hearing as a result of changes to permit conditions that may be proposed by NMED, issues raised by other parties, or otherwise. As such, DOE/NNSA expressly reserve, and do not waive, their right to present additional or different legal arguments as changes and new issues arise during the hearing. DOE/NNSA further expressly reserve, and do not waive, each of the following rights: (1) to present evidence and legal arguments on all of these issues during the public hearing and post-hearing procedures; (2) to further seek to resolve these issues during and following the hearing; (3) to make a full administrative record for any appeals that might follow the public hearing; and (4) to take appeals as provided by law and to seek any other available legal remedies in the event differences cannot be resolved.

Sincerely,

TANNER CROWTHER Digitally signed by TANNER CROWTHER
Date: 2026.06.22 15:23:23 -06'00'

Tanner F. Crowther
Chief Counsel
Office of the Chief Counsel
DOE-Idaho Operations

[45] *See* 42 U.S.C. § 6905(a).
[46] 49 U.S.C. § 5101 *et seq.*