Department of Energy
Carlsbad Field Office
P. O. Box 3090
Carlsbad, New Mexico 88221

June 18, 2026

Ms. Megan McLean
WIPP Program Manager
Hazardous Waste Bureau
New Mexico Environment Department
2905 Rodeo Park Drive East, Building 1
Santa Fe, New Mexico 87505-6303

Subject: Permittees' Comments, Written Notice of Opposition to the Agency-Initiated Modification Draft Permit and Request for Public Hearing

Reference: NMED Letter from JohnDavid Nance to Mark Bollinger, Manager, Department of Energy Carlsbad Field Office and Ken Harrawood, Program Manager, Salado Isolation Mining Contractors LLC, dated April 22, 2026, Subject: Issuance of Agency-Initiated Modification (AIM) Draft Permit Waste Isolation Pilot Plant EPA I.D. Number NM4890139088

Dear Ms. McLean:

The purpose of this letter is to provide the New Mexico Environment Department (NMED) with the U.S. Department of Energy's (DOE) and Salado Isolation Mining Contractors' LLC (SIMCO) (collectively Permittees) enclosed written notice of opposition to the draft Permit modifications and to request a public hearing to be held in Carlsbad, NM, in accordance with to 20.4.1.901.A.4 NMAC.

Given the importance of the Permittees' issues of concern described in the enclosed comments, the importance of the Waste Isolation Pilot Plant's (WIPP) continued operation, and DOE's broader mission, the Permittees respectfully request a public hearing pursuant to 20.4.1.901.A.3 NMAC. In light of the possibility that these issues of concern may not be resolved before or through the public hearing, the Permittees reserve the right, as expressly stated and incorporated in the Permittees' Comments, to utilize appropriate judicial and appellate procedures, if it proves necessary to do so.

We certify under penalty of law that this document and enclosure were prepared under our direction or supervision according to a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on our inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of our knowledge and belief, true, accurate, and complete. We are aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Mr. Michael Gerle, Director, Environmental Regulatory Compliance Division, is your point of contact regarding any technical questions or comments. Mr. Gerle can be reached at (575) 988-5372.

Sincerely,

Mark E. Bollinger
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Date: 2026.06.18 09:20:50 -06'00'

Mark Bollinger
Manager
Carlsbad Field Office

KENNETH HARRAWOOD (Affiliate)
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Ken Harrawood
Program Manager
Salado Isolation Mining Contractors, LLC

Enclosures (2)

cc: w/enclosures

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CBFO:ERCD:MG:RS:26-0392

Permittees' Comments on the April 22, 2026, Waste Isolation Pilot Plant Agency-Initiated Draft Permit Modification

Permittees' Comments on the April 22, 2026, Waste Isolation Pilot Plant Agency-Initiated Draft Permit Modification Associated with the WIPP Hazardous Waste Facility Permit

The Department of Energy Carlsbad Field Office (CBFO) and Salado Isolation Mining Contractors, LLC (SIMCO) collectively, the Permittees, hereby provide the New Mexico Environment Department (NMED) with the following comments to NMED's April 22, 2026, Agency-Initiated draft permit modification associated with the Waste Isolation Pilot Plant (WIPP) Hazardous Waste Facility Permit (Draft Permit).

Part 1 – Technical Comments[1]

1. Draft Permit Part 1, Section 1.5, *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.

Permittees' Technical Comment: The Permittees object to the proposed amendment to Section 1.5. 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. *See* PRESUMPTION, Black's Law Dictionary (12th ed. 2024). NMED's attempted insertion of "rebuttable presumption" within Part 1, Section 1.5, DEFINITIONS is misguided and misplaced.

The Permit expressly states that unless otherwise expressly provided, the terms used within shall have the meaning set forth in the Resource Conservation and Recovery Act (RCRA), the New Mexico Hazardous Waste Act (HWA), and/or their implementing regulations. Definitions are contained within federal laws and statutes to define key terms used in the document. A Guide to Reading, Interpreting and Applying Statutes, Kumar, S. and Beech, T. (2017) (https://www.law.georgetown.edu/wp-content/uploads/2018/12/A-Guide-to-Reading-Interpreting-and-Applying-Statutes-1.pdf) (Last accessed: 07 May 2026). 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. DEFINITION, Black's Law Dictionary (12th ed. 2024).

Both the Permittees and the State have either: (1) already agreed to the definitions of these terms; or (2) these terms are provided for within RCRA, HWA, or the Land Withdrawal Act (LWA). The Parties are thereby bound to the definitions of terms they agreed to, or as these terms are provided for within RCRA, HWA, and/or their implementing regulations. If either Party sought to prove that the meaning of a term was contrary to the definition agreed to or provided for within RCRA, HWA, and/or their implementing regulations, that Party would bear the burden of proof and must provide

[1] Permittees hereby adopt by reference the legal comments contained in Attachment A, which have been included and incorporated into the technical comments herein.

evidence that the term is being interpreted contrary to the definition that the Parties agreed to, or the specific meaning and intent of the legislature. If implemented, the 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.").

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." NMSA 1978, § 74-4-4(A). 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.

Furthermore, the legal concept of "rebuttable presumption" is not a memorialized tenet within the HWA. In fact, the term "rebuttable presumption" is absent from the HWA. Moreover, "rebuttable presumption" only appears in RCRA as it relates to used oil. *See* 40 C.F.R. § 279.10(b)(1)(ii) and 40 C.F.R. § 279.63. Specifically, 40 C.F.R. § 279.10(b)(1)(ii) states that: "Used oil containing more than 1,000 ppm total halogens is presumed to be a hazardous waste because it has been mixed with halogenated hazardous waste listed in subpart D of part 261 of this chapter. Persons may rebut this presumption by demonstrating that the used oil does not contain hazardous waste…" It is clear that "rebuttable presumption" as defined and used within RCRA is not meant to translate to a legal concept and evidentiary burden for the Permittees as it applies to Permit definitions.

2. Draft Permit Part 1, Section 1.5.23, *Projected Waste*

> 1.5.23 Projected Waste
>
> 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.

Permittees' Technical Comment: The Permittees oppose a definition for projected waste. The term "Projected Inventory" in the Annual Transuranic Waste Inventory Report (ATWIR) (which is not required by RCRA, HWA, or the Permit)—upon which this definition appears to be based—is used specifically in the context of the ATWIR's purpose to provide "best estimates" of existing and future inventories of TRU waste at generator/storage sites in support of multiple National TRU Waste Program (NTP)

activities. It does not consider differentiation of waste streams by any type of "legacy" definition and is not intended to do so. NMED's proposed definition introduces numerous issues and challenges for progressing the national mission as intended under the LWA.

NMED's proposed projected waste definition, in tandem with the proposed legacy waste definition, also results in the exclusion of Decontamination and Decommissioning (D&D) waste that was contaminated years ago but has not yet been removed, stabilized, or generated as waste. For example, this would exclude Los Alamos National Laboratory's (LANL's) Chemistry and Metallurgy Research (CMR) building that is planned for future D&D. Excluding this waste and other similar waste creates significant waste planning and management issues at generator/storage sites, including LANL, as previously noted in the Permittees' November 4, 2024 Legacy TRU Waste Disposal Plan (LTWDP) (AR 241102).

3. Draft Permit Part 1, Section 1.5.24, *Legacy Waste*

   1.5.24 Legacy Waste

   "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.

Permittees' Technical Comment: The Permittees oppose a definition for legacy waste. NMED's proposed definition is ambiguous and inappropriately attempts to assert New Mexico jurisdictional control over other EPA-approved State programs.

NMED is not familiar with the intricacies and risks associated with TRU waste cleanup activities, since the risks are primarily associated with the radionuclide content of the waste, not the hazard associated with RCRA hazardous constituents.

At no point during the permit ten-year renewal process did NMED indicate that it would attempt to define "legacy waste", and the Permittees would not have agreed to a condition allowing NMED to develop such a definition. Moreover, there is no basis in RCRA for such a definition—which acts to inappropriately dictate intra- and interstate generator/storage site schedules, storage, processing, and shipping of compliant waste (beyond waste acceptance criteria)—within a RCRA Treatment, Storage, and Disposal Facility (TSDF) receiving facility permit. NMED's proposed definition of legacy waste has no relevance to RCRA waste management or characterization, and it will impede the efficient characterization and shipment of waste.

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 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 the DOE mission without a legacy waste definition. WIPP has sufficient remaining legislated capacity to accept currently identified inventories across the complex.

Further, NMED's proposed definition excludes entire waste streams with a "projected" component. Certain waste streams may have both a stored "legacy" component and a "non-legacy" component based on NMED's definition (*e.g.*, LANL waste stream LA-MHD01.001, Heterogeneous Debris).

Safely extricating legacy and non-legacy components in most instances would not be feasible, and artificially constraining disposal on this basis will force generator/storage sites to restructure waste management programs, with a strong potential to increase the amount of storage needed at those facilities, for which they may not have the regulatory approval or physical configuration to implement.

Significantly, 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.

The Permittees objected to the prioritization of generator/storage site waste cleanup and generator/storage site waste shipments to WIPP during the recent ten-year Permit Renewal Application process (AR 220709). When making this objection, the Permittees noted that the prioritization of generator/storage site waste cleanup and generator/storage site waste shipments to the WIPP facility is not a part of the Renewal Application, nor is it a requirement of RCRA. 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 Idaho, Washington, and South Carolina, 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.

4. Draft Permit Part 4, Section 4.2.1.4, *Prioritization and Risk Reduction of New Mexico Waste*

   ~~Pursuant to 20.4.1.900 NMAC (incorporating 40 CFR 270.10.k), within 15 days of publishing the Annual Transuranic Waste Inventory Report (ATWIR), the Permittees shall certify to the NMED that there is sufficient TRU Mixed Waste Volume capacity in permitted HWDUs to dispose of the New Mexico generator/storage site waste detailed in this report. The certification shall contain the underlying calculations and data used to validate the certification.~~ While this permit remains in effect, the Permittees shall prioritize by so certifying the emplacement at WIPP of stored (including buried) TRU mixed waste from the clean-up activities at the Los Alamos National Laboratory (LANL).

   i. 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.

   ii. 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.

Permittees' Technical Comment: The Permittees oppose NMED's proposed Permit revisions to Section 4.2.1.4. 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. The Permittees have complied with the existing requirements in Permit Part 4, Section 4.2.1.4, and they will continue to do so. NMED's proposed conditions are not practicable or consistent with RCRA (or RCRA regulations), the LWA, or the HWA.

NMED's proposed conditions are not applicable to the WIPP facility and should not be included in the Permit. The quantity of waste processed, characterized, and shipped from LANL are the responsibility of LANL leadership. The WIPP and LANL have separate missions, contracted managing organizations, budget, and priorities. Further, 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. Title 40 C.F.R. § 194.42(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.*

Although the total volume of LANL stored waste is small, extensive time is needed to address that inventory due to the complexity of retrieving and processing the LANL stored waste. For example, approximately 79% of the LANL WIPP-bound stored waste is buried (AR 240602). This waste must be excavated, processed, characterized,

repackaged, certified, verified, and confirmed prior to shipping to WIPP. Specifying volumes and timeframes for such activities cannot be achieved without considering/addressing risk to workers, the public, and the environment. Furthermore, establishing time frames and funding for these activities at LANL are not within the authority or purview of the Permittees. The time required to safely prepare currently buried waste for shipment would constrain the total volume to be expected from LANL annually and consequently further reduce the waste that may be shipped from all other generator/storage sites. Therefore, this is not an acceptable Permit condition.

Given the relatively low volumes of LANL stored waste and quantity of buried waste, the 55% and 75% requirements contained in NMED's proposed revisions would force non-LANL generator/storage sites to store waste that would otherwise be shipped and safely emplaced at WIPP. As a result, NMED's proposed revisions would prolong the mission duration for WIPP and generator/storage sites, and delay national cleanup efforts.

Significantly, 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."

iii. 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 non-legacy waste and include the percent of waste emplaced from each generator/storage site during the previous month.

Permittees' Technical Comment: This requirement is not a regulatory oversight function. Rather, it puts NMED in a management role over the WIPP facility. It is regulatory overreach for the WIPP permit to require generator/storage sites outside of New Mexico to differentiate, prioritize, and track waste by legacy or non-legacy designation. The Permittees can find no precedent in the RCRA regulations for requiring such a report. This monthly reporting obligation—in addition to the annual report NMED proposed in Draft Permit subsection v—imposes an unwarranted burden on the Permittees and generator/storage sites without benefit to facility operations, the public, or environment. Furthermore, a monthly report is not warranted because waste stream information is publicly available in the ATWIR and the WIPP Waste Information System (WWIS).

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

Permittees' Technical Comment: The Permittees oppose this condition. This condition is not appropriate in the WIPP Permit. WIPP has manifest verification record requirements. Shipping is the responsibility of generator/storage sites under RCRA and not of the receiving disposal facility. Specifying shipment of any waste in the Permit,

regardless of site, is outside the purview of NMED and outside the control of the Permittees.

v. 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.

Permittees' Technical Comment: The Permittees oppose this condition. The reporting condition in the current Permit Part 4, Section 4.2.1.4 adequately addresses the estimated capacity needs for New Mexico generated waste. Additional information relevant to the RCRA regulations is found in the publicly available WWIS, of which NMED makes frequent use pursuant to Permit Part 2, Section 2.3.1.7. Therefore, a separate report is not needed. Information such as volumes of waste remaining in retrievable storage at generator/storage sites is not a RCRA TSDF requirement, and, therefore, not applicable to the Permit.

Furthermore, there is no correlation between waste shipments and waste volume due to the variability in number and type of payload containers in each shipment. Prioritization of volume at LANL doesn't equate to prioritization of shipments at LANL and vice-versa.

vi. 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.

Permittees' Technical Comment: The Permittees oppose this condition. The condition is not practicable and cannot be achieved.

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 complex to WIPP directly conflicts with federal law under the Supremacy Clause. *See* U.S. Const. art. VI, cl. 2. 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 state regulatory condition and a congressionally mandated federal program creates a federal question arising under the Supremacy Clause.

Furthermore, this condition is inconsistent with the RCRA regulations. As explained in the Permittees' Response to NMED Improvement Requests on the LTWDP (AR 251105), 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. The

RCRA regulations do not contemplate the management of generator/storage site activities through another sites' 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 in an attempt to establish priorities and activities for generator/storage facilities.

NMED's proposed requirement also makes continued operation of the WIPP facility dependent on operation and execution of activities at LANL. Any issues or delays that arise at LANL that prevent preparation of legacy waste for shipment could effectively shut down WIPP, impacting employment, mission duration, and maintenance of the repository. This would also impact other generator/storage sites, which would not be able to ship any waste to WIPP, compounding compliance, operating schedule, and storage issues at those facilities.

5. Draft Permit Part 4, Section 4.2.1.5, *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. ~~To the extent practicable as articulated in the final Plan, Panel 12 will be reserved for t~~The disposal of legacy ~~TRU mixed~~ 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 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.

Permittees' Technical Comment: The Permittees oppose revision of this Permit condition. The current Permit condition was successfully met when the Permittees provided NMED with the Legacy TRU Waste Disposal Plan on November 4, 2024. The condition continues to be met, as the Permittees have publicly posted the LTWDP. NMED's proposed revisions to this Permit condition are inconsistent with the Permittees' Legacy TRU Waste Disposal Plan. This condition is inconsistent with the previous conditions specific to LANL waste as is the NMED specified basis for the AIM.

The WIPP Permit cannot impose conditions pertaining to waste management and shipping priorities at intrastate and interstate generator/storage sites. This is outside both NMED's and WIPP's purview. These facilities operate under their own RCRA permits (most of which are issued by states other than New Mexico), authorizations, compliance schedules, and facility configurations and priorities. They are also regulated by agencies other than NMED. NMED's prescriptions of operational priorities and waste management planning is constitutional and regulatory overreach.

Part 2 – General Comment

The WIPP Project provides for the safe characterization, transportation, and disposal of defense TRU waste in a manner that is protective of the workforce, the public, and the environment. To this end, Congress authorized disposal of 6.2 million cubic feet (175,564 m^3) of defense TRU waste at the WIPP facility in the Land Withdrawal Act, (Pub. L. 102-579, Section 7(a)(3)). The WIPP facility is the only authorized repository for this waste. DOE's current authorized option for disposal of this waste is the WIPP facility. As of May 2, 2026, approximately 80,916 m^3 of TRU and TRU mixed waste has been safely disposed of at the WIPP facility, which is approximately 46% of the WIPP 175,564 m^3 LWA TRU waste volume capacity limit. This leaves approximately 94,648 m^3 of available capacity for the remaining inventory of eligible TRU waste, for disposal at WIPP. When this remaining capacity is compared to the LANL stored waste inventory of 4,780 m^3, it is evident capacity is not the actual justification for imposing Permit conditions of what waste can or cannot be emplaced from LANL and other generator/storage sites. Accordingly, the Permittees are requesting the rescission of the AIM.

Part 3 – Regulatory Basis Comments

The italicized text below are direct quotes from the NMED Fact Sheet on the AIM dated April 23, 2026 followed by the Permittees' comment.

NMED Fact Sheet:

> *Regulatory Basis for Action*
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> *The New Mexico Hazardous Waste Regulations (20.4.1.900 NMAC [incorporating 40 CFR §270.41]) provide a mechanism for NMED to modify an existing RCRA permit for cause upon the receipt of information that was not available at the time of permit issuance if that information would have justified the application of different permit conditions at the time of issuance. Based upon the background and administrative history being presented in this Fact Sheet, NMED has determined 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.*

The NMED also stated the following.

> *Had NMED known during the renewal permitting process that Panel 12 would not be available until after the current permit term expires in 2033 leaving legacy waste shipments, including those prioritized from LANL, not accommodated as planned, NMED would have imposed different or additional permit conditions on waste prioritization and risk reduction during the renewal process.*

Permittees' Comment: The Permittees disagree that there is cause for an agency-initiated Permit modification. NMED asserts that new information was not available during renewal that would have imposed application of different permit conditions at the time of issuance. This assertion is not correct.

The Permittees can only prioritize waste that has been certified and is available to ship and emplace at the WIPP. The Permittees have no control over the rate and volume of generator/storage site's defense TRU waste inventory prior to that point. This is true regardless of whether information cited by NMED was available or not during the renewal. That is, the basis for the AIM is not relevant.

NMED's statement/assertion that it would have imposed different or additional permit conditions is not correct, since the renewal Permit condition in Permit Part 4, Section 4.2.1.5 was added to the Permit as a stipulated condition agreed upon by the Permittees, the NMED, and stakeholders present. It was **not imposed** by the NMED.

> *To the extent practicable as articulated in the final Plan, Panel 12 will be reserved for the disposal of legacy TRU mixed waste.*

The Permittees agreed on the condition in the renewal Permit Part 4, Section 4.2.1.5 with the inclusion of the phrase "To the extent practicable as articulated in the plan…" Practicable means "1: capable of being put into practice or of being done or accomplished FEASABLE 2: capable of being used: USABLE (https://www.merriam-webster.com/dictionary/practicable)."

The Permittees would have challenged any condition imposed by the NMED during renewal related to waste prioritization because such requirements are not mandated by RCRA or able to be controlled by the Permittees. In fact, the Permittees previously objected to the prioritization of generator/storage site waste cleanup and generator/storage site waste shipments to WIPP in the July 12, 2022, Response to the NMED Technical Incompleteness Determination on the WIPP ten-year Permit Renewal Application (AR 220709):

> *16. Please provide DOE documents that govern the prioritization of generator site waste cleanup and generator site waste shipments to WIPP.*
>
> *RESPONSE:*
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> *The prioritization of generator site waste cleanup and generator site wastes shipments to the WIPP facility is not a part of the Renewal Application, nor is it a requirement of RCRA. The Permittees object to any inclusion or reference to prioritization of generator site waste cleanup and generator site waste shipments to the WIPP facility in the Administrative Record for Renewal. Based on the WIPP cleanup mission and subject to generator site and mission-related considerations, the Permittees prioritize Los Alamos National Laboratory (LANL) shipments and routinely remove the TRU waste as it becomes certified.*

The Permittees agreed to the development of the LTWDP because it was the responsibility of the Permittees to develop and implement the plan, and NMED review or approval was not required. Anything further was not part of the negotiated permit renewal.

Regarding Panel 12 availability, the RCRA regulations anticipate Permit changes such as changes to anticipated Panel closure dates. Although the Permittees anticipated the

need for Panels 11 and 12 in the Permit Application, the availability of waste from generator/storage sites has changed as described in Permit Attachment G, Section G-1d(1). The Permittees have been very transparent about these changes as evidenced by the LTWDP submittals and previous Class 1* submittals. The Permittees recently submitted a Class 1* on March 04, 2026 to update the anticipated closure dates in Permit Attachment G, Table G-1. Note that the Permittees have no control over the anticipated earliest Panel "Operations Start" and "Operations End" dates in Table G-1 because they are based on availability of generator/storage site waste and other assumptions as described in the Permit. NMED is aware of how frequently changes in anticipated closure dates occur as several modifications have been made to Table G-1 since its initial issuance of the Permit in 1999.

NMED Fact Sheet:

> *Permit Intent Not Being Accomplished*
>
> *The permit conditions prioritizing both legacy waste and LANL legacy waste were added to the permit following a Settlement Agreement and Stipulation on the Draft Permit a during the last permit renewal in 2023. These two complementary permit conditions were added to address New Mexico citizen and NMED concerns about prioritization of disposal of New Mexico generator/storage site waste and legacy waste. These permit conditions address New Mexico efforts to reduce the risk associated with waste buried and in surface storage at LANL. The two new conditions were added to Permit Part 4 to work in concert to prioritize legacy waste and to prioritize and reduce the risk of LANL legacy waste, in particular, as explained below.*

Permittees' Comment: The Permittees object to the assertion that the intent or objective of the Permit prioritization was not met. The Permittees have no role in prioritizing rates of retrieval or processing at generator/storage sites. The Permit clearly provides the language stipulated during Permit renewal Permit Part 4, Section 4.2.1.4, which states what must be certified and how to meet the requirement in as shown in the excerpt below (emphasis added).

> *Pursuant to 20.4.1.900 NMAC (incorporating 40 CFR 270.10.k), within 15 days of publishing the Annual Transuranic Waste Inventory Report (ATWIR),* ***the Permittees shall certify to the NMED that there is sufficient TRU Mixed Waste Volume capacity in permitted HWDUs to dispose of the New Mexico generator/storage site waste detailed in this report****. The certification shall contain the underlying calculations and data used to validate the certification. While this permit remains in effect, the Permittees shall prioritize by so certifying the emplacement at WIPP of stored (including buried) TRU mixed waste from the clean-up activities at the Los Alamos National Laboratory (LANL).*

In the annual certifications, the Permittees clearly state that there is ample disposal capacity. The Permittees have the ability to receive New Mexico generated waste at higher rates than what have historically been available.

The Permittees fully complied with the above condition and submitted three certifications over a three-year period on schedule (AR 240312, 250105, 260107). NMED never notified the Permittees that they were not in compliance with this requirement.

NMED Fact Sheet:

• *Permit Part 4, Section 4.2.1.5, The Legacy TRU Waste Disposal Plan:*

Under this permit section, the Permittees are required to define the term "legacy" through the development of the Legacy TRU Waste Disposal Plan (LTWDP) in consultation with the generator/storage sites and stakeholders in order to prioritize legacy waste during the current permit term in Panel 12.

In response to the permit requirement, the Permittees began development of the first version of the Legacy TRU Waste Disposal Plan and submitted it on November 4, 2024 [AR 241102], after receiving an email request from NMED outlining expectations [AR 241004]. In response to a recommendation from NMED [AR 250514], the Permittees submitted a revised LTWDP [AR 251105] on November 17, 2025, which did not substantively address NMED's requested improvements or stakeholder feedback. Furthermore, while the Permittees originally agreed to reserve Panel 12 for legacy waste disposal within the current permit term ending in 2033, the revised November 2025 LTWDP revealed that Panel 12 will not be available for disposal until 2035, which is two years after the current permit expires and three years after the anticipated closure end date articulated in the permit. This delay, coupled with the previous assertion that Panel 12 was necessary for disposal within the current term, demonstrates that the Permittees have not met their obligation to prioritize and accommodate legacy waste, and LANL legacy waste in particular, during the current permit term, as required.

Permittees' Comment: The Permittees developed LTWDP in compliance with the applicable Permit condition. The Permittees went well beyond the Permit requirements as documented in the response to NMED recommendations/public comments on the LTWDP, Enclosure 2. The Permittees implemented some of the recommended changes and addressed all comments. The Permittees also responded to substantial proposed changes from interested stakeholders as recommended by NMED. Although an LTWDP and prioritization of any generator/storage site waste emplacement is not a requirement for RCRA Permitted disposal facilities under state or federal regulations, the Permittees stipulated to the text in Permit Part 4, Section 4.2.1.5 during the renewal process as shown below in good faith in the interest of working with NMED and interested stakeholders. Note the text "to the extent practicable as articulated in the final plan." This term is important to the stipulation and in the written LTWDPs. As previously stated, "*Practicable* means 1: capable of being put into practice or of being done or accomplished: FEASIBLE 2: capable of being used: USABLE" (https://www.merriam-webster.com/dictionary/practicable). Many of the recommendations by NMED and the stakeholders are not practicable because they cannot be implemented without

adversely impacting complex wide shipments, compliance with the LWA, the mission of the WIPP and day-to-day facility operations.

NMED Fact Sheet:

> *4.2.1.5 states the following: The Permittees shall define legacy TRU and TRU mixed waste and develop the Legacy TRU Waste Disposal Plan (Plan). The Plan will be developed in consultation with the generator/storage sites and stakeholders. Consultation with stakeholders shall begin within 90 days of the effective date of this Permit. The Plan shall be submitted to the Secretary within one year of the effective date of this Permit. The Permittees shall seek public input for 60 days following the submittal of the Plan and submit received comments to the Secretary. To the extent practicable as articulated in the final Plan, Panel 12 will be reserved for the disposal of legacy TRU mixed waste.*

Permittees' Comment: NMED states, "A new permit condition is needed to clearly establish how the risk from New Mexico waste will be reduced and how this waste will be prioritized for emplacement at WIPP." The fact sheet refers to the risk associated with waste buried and in surface storage at LANL and risk reduction at LANL. The Permittees oppose the NMED's assertions that new permit conditions are required to establish how risk will be reduced. The Permittees do not deny compliant TRU waste shipments from New Mexico waste generator/storge sites. NMED has never cited a risk analysis or delineated what specific risk it is referring to. The Permittees can only assume the risk is associated with RCRA hazardous constituents and not the radiological portion of mixed waste since NMED's authority is specifically for the RCRA hazardous waste constituent component of the waste only. For RCRA Permitted facilities, risk to human health and the environment is mitigated by operating under Permitted facility specific conditions. The definition of facility that applies to WIPP is found in 40 C.F.R. §260.10:

> *Facility means:*
>
> *All contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste, or for managing hazardous secondary materials prior to reclamation. A facility may consist of several treatment, storage, or disposal operational units (e.g., one or more landfills, surface impoundments, or combinations of them).*

The RCRA permit related risk associated with WIPP is associated only with the contiguous land, and structures, other appurtenances, and improvements on the land, used for storing, or disposing of hazardous waste at the WIPP facility. Obviously, the risk associated with LANL's storage facilities would not be applicable to WIPP from a RCRA perspective.

RESERVATION OF RIGHTS

Because a public hearing on, and a future appeal of, the draft permit may prove necessary, along with any other judicial venue and remedy available to the Permittees,

the Permittees reserve the right to contest any and all conditions in the draft Permit modification. For reasons that include, but are not limited to, the proposed conditions fall outside and/or exceed the scope of NMED's regulatory authority under RCRA and HWA; the conditions do not provide procedural safeguards and due process guaranteed by federal and state law; the conditions 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…." *Id*. § 74-4-4(A); the conditions 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; the conditions discussed are arbitrary, capricious, an abuse of discretion, not supported by substantial evidence, or otherwise not in accordance with law; the conditions are inconsistent with (*see* 42 U.S.C. § 6905(a)) and/or preempted by the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 et seq.; the conditions discussed in Part 1 comments 1, 2, 3, 4, and 5 are inconsistent with and/or preempted by the WIPP Land Withdrawal Act, as amended, Pub. L. 102-579, 106 Stat. 4777 (1992); the conditions are inconsistent with and/or preempted by the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 et seq.; the conditions discussed in Part 1 comments 1, 2, 3, 4, and 5 are inconsistent with and/or preempted by the Supremacy Clause, U.S. Const. art. VI, cl. 2; and the conditions discussed 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, and Permittees reserve the right to present additional or different legal arguments as changes and new issues arise during the hearing. Permittees reserve the right to present evidence and legal arguments on all of these issues during the public hearing and post-hearing procedures, to further seek to resolve these issues during and following the hearing, and to make a full administrative record for any appeals that might follow the public hearing. The Permittees further reserve the right to take appeals as provided by law and to seek any other available legal remedies in the event differences cannot be resolved.

CONCLUSION

The Permittees oppose the agency-initiated permit modification in its entirety for the reasons stated above and request that it be rescinded. NMED did not engage the Permittees to inform implications and impacts associated with the draft conditions and refused to discuss provisions of the draft Permit prior to its issuance. The proposed provisions are not practicable. NMED does not appear to have performed any technical assessment of the impact of the draft requirements upon the TRU waste cleanup program nationwide and to WIPP facility operations. The compliance schedules and percentages presented are arbitrary and without provision of a basis or consideration of practicability. This modification also places the onus for implementation of LANL cleanup activities and priorities upon the Permittees, as well as any compliance impacts

and outcomes. The new requirements impose conditions on facilities operating under other non-New Mexico regulatory authorities having jurisdiction, separate permits and regulatory requirements, and compliance agreements with no regard to how limiting generator/storage sites' ability to dispose of TRU waste impacts these facilities. NMED's proposed modifications to the Permit create collateral risk and impact generator/storage sites and their communities, infringe upon the purview of other regulatory jurisdictions, and threaten WIPP's continued operation, as it was intended under the LWA. Because the ongoing operation of the WIPP facility within appropriate regulatory parameters and controls is vital to DOE's mission, protection of human health and environment, and to national security, the Permittees also request a public hearing on the draft permit.

Attachment A

The New Mexico Environment Department's (NMED's) agency initiated modification (AIM) to the Waste Isolation Pilot Plant (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 Los Alamos National Laboratory (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*

[1] 40 C.F.R. Part 270 is incorporated by reference into New Mexico's implementing regulations. 20.4.1.900 NMAC.

*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]

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

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

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.

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.

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 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]

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[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.
[14] 98 F.3d 774, 784 (4th Cir. 1996).
[15] *Id*. at 783.

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]

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

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[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 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*.

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 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:

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[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).

(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 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.

[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).

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.

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[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.*

[36] NMSA 1978, § 74-4-4(A).

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".

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

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

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 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.

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.

[38] Emphasis added.

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

[39] Emphasis added.

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.

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.

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[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.

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

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

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 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.

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

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 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 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.

[44] NMSA 1978, Section 74-4-4(A).
[45] *See* 42 U.S.C. § 6905(a).
[46] 49 U.S.C. § 5101 *et seq*.