Los Alamos National Laboratory
PO Box 1663, MS A187
Los Alamos, NM 87545
505-667-3766

Office of General Counsel
General Law

Symbol: GC-GL-2026-TD-012
Date: June 22, 2026
LA-UR-26-25106

VIA NMED COMMENT PORTAL

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

Re: National Nuclear Security Administration and Triad National Security, LLC's Comments to the Agency-Initiated Draft Hazardous Waste Facility Permit for the Waste Isolation Pilot Plant Carlsbad, New Mexico

Dear Ms. McLean:

The National Nuclear Security Administration, Los Alamos Field Office (NA-LA), and Triad National Security, LLC (Triad), the management and operating contractor for the Los Alamos National Laboratory, submit the enclosed comments in response to the New Mexico Environment Department's (NMED) draft Hazardous Waste Facility Permit for the Waste Isolation Pilot Plant in Carlsbad, NM.

NA-LA and Triad oppose the proposed Agency Initiated Permit Modification and request a hearing pursuant to 20.4.1.901A(3) NMAC. NA-LA and Triad attach, and incorporate by reference, Attachment A setting forth categories of legal deficiencies in the proposed modification. Comments on the proposed language as well as information specific to LANL follow below.

Comments on Agency Initiated Modification, Part 1

Part 1 of NMED's AIM includes a rebuttable presumption provision and then proposes two newly defined terms.

1.5 <u>DEFINITIONS</u>
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.

1. The rebuttable presumption provision is ambiguous because it is unclear as to what in the definitions a presumption applies. If the presumption is that definitions have the meaning set forth in Resource Conservation and Recovery Act ("RCRA"), the New Mexico Hazardous Waste Act ("HWA"), and/or their implementing regulations, then the presumption language is superfluous. If the new language allows the permittee to rebut

defined RCRA/HWA terms, then it conflicts with the first sentence in Section 1.5. If the burden of persuasion is on the Permittees to demonstrate non-RCRA/HWA terms have a certain meaning, the provision is vague and ambiguous as to what the rebuttable presumption is and how the Permittee would meet its burden to demonstrate otherwise. This is of concern to Triad and NA-LA because, as explained below, the two newly defined terms are problematically ambiguous.

The AIM includes two new defined terms, "Projected Waste" and "Legacy Waste." The proposed definitions of those terms are as follows:

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.

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.

1. The proposed definition of Projected Waste is vague and ambiguous because it purports to define waste that does not yet exist and includes waste from programs that do not yet exist.

2. The 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. Similarly, it is unclear whether any waste, prior to characterization, could be defined as Legacy Waste because waste becomes hazardous only after it is determined to be a characteristic or listed hazardous waste. 40 C.F.R. 261.21-24; 40 C.F.R. 261.31-33.

3. NMED has no authority to define hazardous or mixed waste beyond what is provided for under RCRA. RCRA, and it's implementing New Mexico laws and regulations, establish categories and definitions for listed and characteristic wastes. 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.

4. The proposed Legacy Waste definition applies to all generator/storage sites, which necessarily means sites not within New Mexico or the jurisdiction of NMED. NMED cannot define waste in other jurisdictions regardless of the existence or non-existence of a conflicting definition. Further, establishing and imposing differing legacy waste definitions would create regulatory uncertainty in the already highly complex TRU mixed waste transportation and disposal process.

Comments on Agency Initiated Modification, Part 4

Part 4 of NMED's AIM proposes the following substantive modifications to the WIPP permit:

4.2.1.4 Prioritization and Risk Reduction of New Mexico Waste

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.

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.

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

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.

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.*

5. Sections (i) and (ii) impermissibly interfere with national security operations at LANL and are preempted by the requirements of 10 U.S.C. § 6128. That law provides:

10 U.S.C. § 6128

(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 55%-75% emplacement permit modifications would preclude attainment of these requirements. Pit production generates a TRU waste stream that must be stored, certified for shipment, shipped and then disposed of in WIPP. The current storage capacity for storage of the pit production TRU waste stream is 2720 containers. In order 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. Full storage capacity would be reached in July 2027 and pit production would cease at that time.

6. Implementing the 55%-75% emplacement permit conditions, along with the condition that all deliveries of other TRU waste will cease if those percentages are not met, will operate to stop most, if not all, shipments after Q3 2029. This is because, according to DOE-EM and its contractor, N3B, the currently ongoing shipments of the corrugated metal pipe TRU waste stream will not be completed until that time. Thereafter, there will be no readily available “Legacy Waste” streams for shipment and it will not be possible to meet the 55%-75% requirements. Upon failure to meet those requirements, pursuant to the proposed modification, all shipments from all sites except LANL would cease. Permit conditions that cause cessation of the disposal of TRU waste would directly conflict with the Waste Isolation Pilot Plant Land Withdrawal Act (Public Law 102-579, as amended) and the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1980 (Public Law 96-164). Both of these statutes require the construction, maintenance and operation of WIPP for the disposal of radioactive wastes generated through defense activities and programs of the United States.

7. Section (v) requires, among other things, an annual report detailing, for each generator site, volumes shipped, emplaced and remaining in retrievable storage. Necessarily, this will require generator sites to provide data on waste in retrievable storage even though that waste may not be mixed TRU waste and may not ever be emplaced in WIPP. This provision is thus outside the scope of NMED's statutory authority under RCRA or the HWA.

8. Section (vi) is internally inconsistent and provides for the cessation of shipments upon failure to meet *any* condition in Section 4.2.1.4, which includes any 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% requirement applies to "emplacement," not "deliveries" and it is thus unclear what would trigger this provision and how relief could be achieved.

General Comments

9. Storing waste on site for multiple years because of the inability to meet NMED's proposed 55%-75% emplacement requirements will raise container integrity concerns and may require re- or over-packing. This reduces efficiency in terms of worker resources and the use of space in shipments and in WIPP. Additionally, protracted storage and the associated increased volume and rehandling would create unnecessary worker health and safety risk.

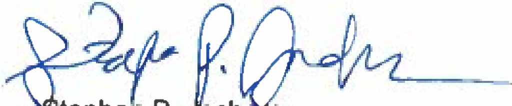
10. Long periods of non-operation at WIPP resulting from a substantial reduction or cessation of waste shipments could lead to staff reductions and the loss of institutional expertise and experience. This would weaken WIPP's long term ability to fulfill its mission and statutory obligations.

11. Similarly, the network of commercial entities relied upon to transport and handle TRU waste would also lose specialized experience and suffer economic loss. Increased storage nationwide would lead to increased costs to taxpayers for both storage and the cost of remedying the impacts of the AIM once it is possible to resume a steady state of operations.

12. There is no threat to human health or the environment underlying the proposed permit modification. TRU waste generation, management, and storage are highly monitored and regulated activities at LANL. There is no indication that any specific TRU waste should be transported to WIPP in greater quantities or on an expedited basis. Indeed, were there some imminent threat, NMED could order the entity responsible to take action regarding the waste at issue. Instead, NMED is implementing its own TRU waste policy preference which is preempted by federal law, beyond its statutory authority, is contrary to national security and would negatively affect all TRU waste generating sites.

13. Triad and NNSA urge NMED to reconsider and rescind its proposed WIPP permit modification.

U.S. DEPARTMENT OF ENERGY, NATIONAL NUCLEAR SECURITY ADMINISTRATION



Stephen P. Jochem
U.S. Department of Energy
NNSA Los Alamos Field Office

TRIAD NATIONAL SECURITY, LLC

Timothy Dolan Digitally signed by Timothy Dolan Date: 2026.06.19 15:05:23 -06'00'

Timothy A. Dolan
Office of General Counsel
Los Alamos National Laboratory

Attachment(s): Attachment A - Consolidated Comments

Copy: P. Prando, GC-DO, via pprando@lanl.gov
M. McReynolds, GC-DO, via mcreynolds@lanl.gov
T. Safarik, GC-GL, via tsafarik@lanl.gov
S. Coleman, ALDESHQ, via scoleman@lanl.gov
J. Payne, ALDESHQ, via jpayne@lanl.gov
J. Hyatt, ALDESHQ, via jhyatt@lanl.gov
K. Higgins, EPC-DO, via kwurden@lanl.gov
R. Garcia, WM-DO, via ronnieg@lanl.gov
J. Moseley, EPC-WMP, via jmoseley@lanl.gov
S. French, NPI-DO, via sbf@lanl.gov
M. Psaila-Dombrowski, PAT, via mjpd@lanl.gov
S. Stringer, NNSA, via stephanie.stringer@nnsa.doe.gov
rcra-permitting@lanl.gov

ATTACHMENT A

Legal Comments

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 modification that clarifies the **priority to emplace legacy waste** and reduce the risk of LANL legacy waste during the current permit term*."[2]

---

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

[2] NMED Fact Sheet of April 23, 2026, available at https://hwbdocs.env.nm.gov/Waste%20Isolation%20Pilot%20Plant/260421.pdf. Emphasis added.

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 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.

---

[3] Letter from NMED to Carlsbad Field Office, 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.*

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

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

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

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

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

---

[8] 40 C.F.R. § 271.4; *see Environmental Technology Council v. Sierra Club*, 98 F.3d 774, 782-786 (4th Cir.1996).

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]

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]

[9] 42 U.S.C. § 6926(b).
[10] *See* 40 C.F.R. § 272.1601.
[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.
[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).

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 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]

---

[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*.
[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).

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:

> *(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

[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).

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.

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

---

[28] *See, e.g.*: *Kansas v. Garcia*, 589 U.S. 191, 202-03, (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. 52, 67. *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).
[30] Emphasis added.

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.

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.

[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: 18 June 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).

[36] NMSA 1978, § 74-4-4(A).

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

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

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

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

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

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

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

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[37] and RCRA.[38] NMED lacks authority to define hazardous or mixed waste beyond what is provided for under RCRA. RCRA, and its implementing New Mexico laws and regulations, establish categories and definitions for listed and characteristic waste. These laws and regulations do not provide NMED authority to define waste with the same or similar constituents differently based on when it is generated or where it is stored at the generator's site.

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

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

[37] 42 U.S.C. § 2011 *et seq*.

[38] 42 U.S.C. §§ 6903(27), 6905(a)(1); 40 C.F.R. § 261.4(a)(4).

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****.*[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 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.

---

[39] Emphasis added.

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

NMED proposes the following substantive modification to the WIPP permit:

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

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

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

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

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

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

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

194.32 and compliance assessments conducted pursuant to § 194.54 ***shall assume random placement of waste in the disposal system**.*[40]

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

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

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

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

NMED proposes the following substantive modification to the WIPP permit:

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

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

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

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

NMED proposes the following substantive modification to the WIPP permit:

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

First, mandating shipment of waste to WIPP as a requirement of the WIPP Permit exceeds the scope of such RCRA permit—which is to regulate activity for which WIPP is

[40] Emphasis added.

responsible—not other federal sites.[41] 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.

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:

---

[41] 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.

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.[42] 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 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.[43]

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."[44]

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.

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

[43] *Environmental Technology Council v. Sierra Club*, 98 F.3d 774 (4th Cir. 1996).

[44] NMSA § 74-4-4.2.H.

Additionally, the 55%-75% quota requirement applies to "emplacement", not "deliveries", and it is thus unclear what would trigger this provision or how relief could be obtained.

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

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

> *The Legacy TRU Waste Disposal Plan previously developed by the Permittees, in consultation with the generator/storage sites and stakeholders, shall be publicly posted on the WIPP website. The disposal of legacy waste, as defined in Part 1, Section 1.5.24, will be prioritized in all currently permitted HWDUs; the portion of all waste emplaced shall be at least 55% legacy waste, as demonstrated by reporting requirements in Permit Section 4.2.1.4. Beginning January 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….";[45] (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[46] 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;[47] (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.

[45] NMSA 1978, Section 74-4-4(A).
[46] *See* 42 U.S.C. § 6905(a).
[47] 49 U.S.C. § 5101 *et seq.*