SOUTHWEST RESEARCH AND INFORMATION CENTER
P.O. Box 4524 Albuquerque, NM 87196 505-262-1862 FAX: 505-262-1864 www.sric.org

December 1, 2016

Kathryn Roberts
New Mexico Environment Department (NMED)
1190 St. Francis Drive, Suite N4050
Santa Fe, NM 87505 via email

RE: WIPP November 10 Temporary Authorization Request

Dear Ms. Roberts:

Southwest Research and Information Center (SRIC) appreciates that, as a result of our letter of November 29, 2016 pointing out that the WIPP permittees knowingly and willingly violated Sections 1.14.2 and 1.14.3 of the WIPP Permit, the Temporary Authorization (TA) request was posted on the WIPP website. Thank you also for posting the TA request on the NMED website.

SRIC is well aware that 20.4.1. 900 NMAC (incorporating 40 CFR §270.42(e)(1)) does not require the Secretary and NMED to consider public comment on a TA request. SRIC is also well aware that NMED can consider such comments, and, in fact, NMED has done so in the past.

For example, on December 7, 2000, the permittees requested a TA related to a pending Class 2 permit modification request to establish revised drum age criteria for WIPP. On December 13, 2000, NMED approved the TA without fully considering SRIC's December 12, 2000 letter of opposition. On December 22, 2000, in part because of "the subsequent comment received by NMED," the TA approval was rescinded.

A second example is the TA request submitted by the permittees on August 29, 2001 related to previously submitted Class 1 modifications. On September 6, 2001 SRIC submitted a letter strongly objecting to the TA. On September 24, 2001, NMED denied the TA request.

Based on the regulatory requirements and that established practice, SRIC requests and expects that NMED will consider the following comments before making a decision on the TA request.

SRIC concludes that the **TA request does not meet the regulatory requirements and should be denied**. Instead, the regulatorily required and NMED promised Class 3 modification procedures, including public comment and public hearing, should be implemented for panel closure.

The permittees' November 10, 2016 TA request is for three activities:
Item 1: Install closure bulkheads for filled underground HWDUs near the intersection of the E-300 drift and access drifts for Panels 1 and 2 and in the mains (W-170, W-30, E-140, E-300) north of Panels 3, 4, 5, and 6.
Item 2: Discontinue inspections of existing bulkheads and explosion isolation walls.
Item 3: Termination of hydrogen, methane, and VOC monitoring in filled panels.

According to 20.4.1. 900 NMAC (incorporating 40 CFR §270.42(e)(2)(ii)), a TA request "must include" a description of the activities to be conducted, "[a]n explanation of why the temporary authorization is necessary," and sufficient information to ensure compliance with 40 CFR 264 standards.

In addition to requiring an adequate TA request, criteria for approving a TA request are provided in 20.4.1. 900 NMAC (incorporating 40 CFR §270.42(e)(3)). NMED "must find" that "[t]he authorized activities are in compliance with the standards of 40 CFR part 264" and that the TA "is necessary to achieve one of the following [five] objectives before action is likely to be taken on a modification request." 40 CFR §270.42(e)(3)(i) and (ii). In its December 22, 2000 rescission of the TA, NMED stated its interpretation of those regulations:

> "In other words, the permittee must demonstrate that NMED should approve the proposed modification immediately because the facility cannot wait until action is taken on the modification request at the conclusion of the public comment period." Page 2. Emphasis in original.

In the September 24, 2001, NMED denial of the TA request stated:

> "The basis for a temporary authorization is to allow a facility to initiate a necessary activity while its permit modification request is undergoing the Class 2 or 3 modification review process... In other words, the Permittees must demonstrate that NMED should approve the proposed modification immediately because the facility cannot wait until action is taken on the modification request at the conclusion of the public comment period." Page 2. Emphases in original.

Regarding Item 1, the permittees propose to install eight "closure bulkheads" that do not meet the requirements of the existing permit, as specified in Permit Section 6 and Attachment G, for either "partial closure" or "final facility closure." The proposed bulkheads also are not consistent with the Class 3 Panel Closure modification submitted on March 18, 2013, for which a draft permit was issued by NMED on February 14, 2014. The draft permit was withdrawn by NMED on March 21, 2014. In that withdrawal notification, NMED stated:

> "NMED may issue a revised draft when it is appropriate. In such a case, a revised draft Permit will be issued for public comment and a new public comment period will begin in accordance with the requirements specified in 20.4.1.901 NMAC." Page 2.

On July 22, 2015, NMED issued a Technical Incompleteness Determination (TID) regarding the Class 3 modification request. The permittees delayed more than 15 months, until November 10, 2016, to respond to the TID and request the TA. The TA request provides no explanation for the long delay. Such an explanation is a minimum requirement to comply with 20.4.1. 900 NMAC

(incorporating 40 CFR §270.42(e)(2)(ii)(B)). Moreover, the purpose of the TA is to proceed with the activity before the extensive public comment and public hearing requirements for the Class 3 modification. Thus, the permittees did not have an immediate need for the necessary activity contained in the TA for more than 15 months since the TID and more than 31 months since the draft permit was withdrawn, but they now claim to have an immediate need, for which they cannot provide the required explanation! Such an explanation is required to be in a TA request. Since the explanation is not provided, the TA request must be denied and the normal Class 3 modification procedures should be used.

Among other things, an adequate explanation would discuss:
1. The imminent threat, if any, to worker health and safety. If there is no imminent threat, there would not appear to be an immediate need for the proposed activity.
2. If there is an imminent threat, an extensive explanation of why the situation has occurred now, when it was not present for the past 31 months, and why the permittees did not, during those 31 months, successfully preclude the threat from occurring.
3. What other measures could taken to address the threat in less than the 180 days or 360 days that the permittees request the TA to be in effect?
4. Whether any or all of the proposed bulkheads are necessary to re-open WIPP.
5. Why WIPP needs to be re-opened by any particular date.
6. If waste emplacement does not occur, why is the proposed closure immediately necessary?

Regarding compliance with the 40 CFR 264 standards, the TA request merely states: "This TA would not impact the Permittees' continued compliance" with those requirements. Pages 1-2. So the permittees assert, but do not demonstrate, that WIPP complies with the standards now and would continue to do so whether or not the TA is approved. There is no showing that there is the immediate need for the proposed activities such that normal Class 3 procedures should not be required prior to NMED's decision on the modification request.

On the second page of the request, the permittees identify "advantages" to installing the proposed bulkheads as compared with the existing Permit requirements. Those "advantages" are irrelevant to the TA requirements and any necessary activities that need to be immediately implemented. The existing panel closure provisions are not being required to be implemented at this time.

On the third page, the request states: "The closures would be the same design and construction of those proposed for the individual panels." That statement is at best misleading and appears to knowingly be false. The permittees are well aware that their 2013 Class 3 modification request and the 2014 NMED draft permit required:

> "The WPC design consists of a minimum of 100 feet of emplaced run-of-mine (ROM) salt configured between two steel bulkheads for panels that do not have explosion-isolation walls installed in them. For panels with installed explosion-isolation walls, an alternate WPC configuration consists of one steel bulkhead, a minimum of 100 feet of emplaced ROM salt and one block wall." Draft permit Attachment G1-1.

The TA request does not include ROM salt, which is part of the design of the original Class 3 request and the NMED issued and withdrawn proposed draft permit.

The TA request then lists "significant personnel safety benefits." Six of the supposed "benefits" are "reducing" potential exposures or other matters by some unquantified amount. What are the actual employee exposures to VOCs now and how much would they be reduced? What is available ventilation in Panel 7 and occupied areas of the mine and by how much would the air flow increase with all or some of the proposed bulkheads in place? As to reducing costs to maintain the underground, what are the existing costs and how much would those costs be reduced? Do the reduced costs result from laying off workers? In addition to being speculative assertions that cannot be measured, some of the "benefits" appear to conflict with the assertions of compliance with the 40 CFR 264 standards. For example, are the "ground control hazards" consistent with complying with 40 CFR §264.31 regarding "unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents"? If the workforce cannot now adequately focus on areas for ground control, how is that consistent with complying with 40 CFR §264.31 regarding "unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents"? Is the facility in compliance with the standards given the existing contamination? What is the measurable benefit of reducing the footprint? Why would there not be more "benefit" in reducing the contamination footprint by 75% or 100%? Why is that larger footprint reduction not being considered? The seventh "benefit" is eliminating the "requirement to further mine." But that requirement is self-imposed because of the new panel closure system, as compared with the explosion-isolation wall requirement of the permit.

The request then states: "From the standpoint of worker safety, it is commonly accepted that less time, transportation, handling, and reduction in complexity translates to lower risk to workers." In fact, that statement is directly contrary to what the permittees propose in the current Class 3 modification request for aboveground storage that would result in more worker time in contact with waste packages on the surface, more transportation of waste packages on the surface, several times more handling of waste containers on the surface, and an increase in complexity of the surface storage operations. Worker safety is very important, but the permittees can not have it both ways, just because there are separate Class 3 modification requests. Worker safety would better result from <u>not</u> emplacing waste in contaminated Panel 7. Worker safety would better result from <u>not</u> putting workers in areas with ground control problems, including Panel 7.

The request then states that "[t]here is some urgency in placing the closures." Why? Are the existing postings and non-permanent barriers insufficient? Why do those or other, less expensive, measures not provide "an obstacle that will prevent inadvertent entry into those areas"? Given that there have been ground control problems in Panel 7, including an evacuation of all underground workers, why are there no panel closures proposed for that panel?

Regarding meeting one or more of the five "objectives" of 40 CFR §270.42(e)(3)(ii), the permittees say that it is to "facilitate timely implementation of closure or corrective action activities" and to "facilitate other changes to protect human health and the environment." The request does not provide any explanation of currently required closure or corrective action activities that have not been met. On the contrary, the permittees have stated on numerous occasions that existing partial closures of Panels 1-6 are adequate. What are the timely closures that are required such that public comment on the Class 3 request cannot be provided before a decision is made? Why are the existing protections of public health and the environment not

adequate such that public comment on the Class 3 request cannot be provided before a decision is made?

Therefore, the request for the eight bulkheads is inadequate and incomplete and does not meet the required standards. The TA request must be denied.

Regarding item 2, there are only three brief paragraphs of explanation, which provide little required information for the conclusion that it meets the objective of "facilitate other changes to protect human health and the environment." Because of ground control problems, "[t[hese areas are not considered safe for normal access." That is not an adequate explanation.

Among other things, an adequate explanation would discuss:
1. Why are the areas not considered safe and what specific areas are so designated?
2. Since the areas are not considered safe, how is the facility in compliance with 40 CFR §264.31 regarding "unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents"?
3. What are the measured levels of exposure to VOCs in those areas?
4. What are the measured levels of exposure to radionuclides in those areas?
5. What are the expected levels of exposure in case of additional ground control problems or ceiling collapses?
6. What are the expected levels of exposure in case of additional ground control problems or ceiling collapses if a bulkhead were present?
7. Especially for Panel 6 that contains remediated nitrate salt containers, what are expected and potential levels of exposure if there is a ceiling collapse?
8. An extensive explanation of how long the areas have been considered unsafe. The explanation should include if it is a recent situation, why it was not avoided, and if it is not a recent situation, why the permittees did not take action sooner?
9. What other measures could taken to address the unsafe conditions in less than the 180 days or 360 days that the permittees request the TA to be in effect?
10. When did the permittees stop complying with the Permit inspection schedule?
11. How long until the permittees expect that the existing bulkheads and explosion isolation walls will fail with and without inspections?
12. What are the exposures or other consequences of such failures?
13. How will inspections of the proposed bulkheads not be affected by safety problems in those "unsafe" areas in which the bulkheads would be placed?
14. Since one of the reasons stated is the need for ventilation for waste emplacement, there should be an explanation of why WIPP needs to resume waste emplacement by some specific date and how long it will take to restore ventilation to the levels that existed before February 5, 2014.

The proposed change is to reduce monitoring, without providing any additional monitoring at the proposed bulkheads to measures levels of VOCs and radionuclides to actually measure the effects of any releases from ground control problems or other causes.

Therefore, the explanation of the request to discontinue inspections is inadequate and incomplete, and the request does not meet the required standards. The TA request must be denied.

Regarding item 3, there are only three brief paragraphs of explanation. The request states:

> "The reason for this item in the TA request is because placing closure bulkheads in the mains will prevent access to the monitoring locations, several of which are in prohibited areas in the underground."

That's a classic circular argument: because the permittees want to emplace the eight bulkheads, they could then no longer do the monitoring. Since the TA has not provided adequate explanation of and does not meet the standards for a TA, then that argument fails. If there are no bulkheads, the monitoring could be continued.

Regarding the five objectives, the request states that it is to facilitate timely implementation of closure. However, here again, the permittees have not described what closure is required by what dates that could not await the full public comment requirements on the Class 3 request.

Therefore, the explanation of the request to discontinue inspections is inadequate and incomplete, and the request does not meet the required standards. The TA request must be denied.

In summary, the permittees have not met the requirements of 20.4.1. 900 NMAC (incorporating 40 CFR §270.42(e)(2)(ii) and (e)(3)), so the TA request must be denied in its entirety.

If the permittees and/or NMED believe that action should be taken to address panel closure before completion of the Class 3 procedures, SRIC is ready and willing to participate in such discussions to identify measures that would protect worker and public health and the environment, as well as public participation rights.

Thank you very much for your careful consideration of these comments.

Sincerely,

Don Hancock

cc: John Kieling, Ricardo Maestas