

STATE OF NEW MEXICO



**STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF ENVIRONMENT**

**IN THE MATTER OF THE HAZARDOUS WASTE  
BUREAU CLASS 3 CLARIFICATION  
OF TRU MIXED WASTE DISPOSAL  
VOLUME REPORTING PERMIT  
MODIFICATION TO THE WIPP HAZARDOUS  
WASTE FACILITY PERMIT**

**No. HWB 18-19 (P)**

**HAZARDOUS WASTE BUREAU'S  
CLOSING ARGUMENT**

Pursuant to 20.1.4.500.B NMAC, and at the request of the Hearing Officer, the Hazardous Waste Bureau ("Bureau") of the New Mexico Environment Department ("NMED") hereby submits the following written Closing Argument in this matter.

**INTRODUCTION**

The Applicants/Permittees, the U.S. Department of Energy ("DOE") and Nuclear Waste Partnership ("NWP"), submitted a Class 2 Permit Modification Request ("PMR") on January 31, 2018 to differentiate between the way Resource Conservation and Recovery Act ("RCRA") waste volume is calculated versus the way Land Withdrawal Act ("LWA") TRU waste volume is calculated for the Waste Isolation Pilot Plant ("WIPP"). Administrative Record ("AR") No. 180121. After the conclusion of the standard Class 2 applicant-led public comment period prescribed by Class 2 procedures, the Secretary of Environment escalated the PMR to a Class 3 based upon significant public interested and the complexity of the modification being requested. AR No. 180602. In accordance with Class 3 permit modification request procedures, and pursuant to 20.4.1.901.A(3) NMAC, the Bureau issued a draft permit for a 45-day public comment on August 6, 2018. AR No. 180804 - 180805. During the public comment period, the



Bureau received approximately 37 public comments, both for and against the PMR, several of which requested a public hearing on the matter (and several of which requested that no hearing be held on the matter). AR No. 180914 – 108914.37ZD. A public hearing was held on October 23 through 25, 2018 in Carlsbad, New Mexico, the area of the state substantially affected by the proceedings in accordance with 20.4.1.901.F(2) NMAC. Parties to the proceeding were the HWB, the Applicants, Southwest Research and Information Center (“SRIC”), Concerned Citizens for Nuclear Safety (“CCNS”), Nuclear Watch New Mexico (“Nuke Watch”), and Mr. Steve Zappe. All but CCNS and Nuke Watch filed Statements of Intent to Present Technical Testimony.

As found in both written and oral testimony, the Bureau generally supported the PMR, but rejected certain requested modifications and added others to ensure that the Permit contained all necessary components. SRIC, CCNS, Nuke Watch, and Mr. Steve Zappe were in opposition to the PMR, arguing that it was in violation of federal law and contrary to past Bureau positions and practices.

#### **HWB HAS AUTHORITY TO APPROVE VOLUMETRIC CALCULATION CHANGES WITHIN THE RCRA PERMIT**

Currently, the method of volumetric calculation (regardless of the type of volume) is not defined within the facility’s RCRA permit, nor does RCRA or its correlated regulations provide direction on such calculations. Similarly, the LWA is silent on the manner in which DOE is to calculate the volumetric capacity of WIPP. Bureau Exhibit 2 at 7; *See* AR 180706.03 and AR 180706.04. With this PMR, the Applicants are requesting to bifurcate the manner in which volumes are calculated, which is in line with historical internal DOE practices. Bureau Exhibit 2 at 9. The RCRA volume would still be the outermost container volume, retaining the “footprint” volume currently in the permit. The LWA volume would then be the actual volume of waste

emplaced. Bureau Exhibit 2 at 6. As the LWA is silent on the methodology of calculation for the repository capacity limit, the Bureau concurs with the Applicants that DOE may determine the appropriate manner of calculation. Bureau Exhibit 2 at 7. DOE, in turn, has submitted the PMR to embed the LWA calculation methodology in its RCRA permit via a definitional change. Because the RCRA waste calculation will remain the same, and future permitting actions for the facility are dependent on the overall authorized repository capacity, which will necessitate the review of the LWA volume, the Bureau is operating wholly within its statutory authority in processing the PMR.

**IT IS NECESSARY FOR THE LWA VOLUME TO BE CONTAINED WITHIN THE PERMIT TO ENSURE THE PROPER EVALUATION OF PROPOSED HWDUS UNDER RCRA**

While the Applicants have requested and advocated for the cessation of the tracking of LWA volumes within its RCRA permit, the Bureau is not amenable to the requested modifications related to the removal of LWA volume references. The Bureau is not asserting that it has been provided jurisdiction over the LWA capacity by Congress. However, to effectively regulate the facility, which includes the possible permitting of future Hazardous Waste Management Units (“HWDUs”) that may be requested by the Applicants, the Bureau must be provided with the LWA volumetric data. Specifically, if the Applicants were to submit a PMR to request that another HWDU be added to the permit, the Bureau would need to evaluate not just the RCRA volume but also the LWA volume to ensure that it would not be approving a HWDU that would ultimately make the Applicants breach the LWA capacity limit. Bureau Exhibit 2 at Page 10; Hrg. Trans. 72;5-12, 109;15 to 110;2, 126;2-7. Oct. 24, 2018. Therefore, the Bureau’s recommendation is to not accept several of the Applicants’ requested modifications related to the LWA volume, and instead add an additional column to Table 4.1.1 that would require the Applicants to submit actual LWA volumes, based upon the new calculation methodology being

proposed, for each panel. Bureau Exhibit 2 at Page 10; Hrg. Trans. 72;5-12, Oct. 24, 2018. This addition will allow the Bureau to acquire the data it needs without having to actively seek it out on the Waste Data System, as suggested by the Applicants.

**STATEMENTS ABOUT HISTORY AND LEGISLATIVE INTENT ARE NOT SUPPORTED BY THE EVIDENCE**

In this proceeding, several parties have placed much emphasis on the legislative history of the LWA, and past Departmental permitting proceedings related to the facility's RCRA permit. However, the information provided by written direct testimony, and oral direct testimony and cross examination at the hearing, along with correlated exhibits entered into the record, offer no substantive evidence that the draft permit issued by the Bureau in response to the PMR is contrary to the LWA or RCRA. Significantly, language pointed to in the legislative history did not go towards what was ultimately included in the final bill that became law. In fact, the language allegedly supportive of the parties' position was specifically deleted from the final bill. *Compare* SRIC Exhibits 8 – 9C *with* AR 180706.03 and AR 180706.04. The statutory language found in the LWA is clear in regards to both state and federal roles, and overall TRU waste volume of the repository, including the conscious choice of silence by Congress when omitting calculation methodology. "The plain words and meaning of a statute cannot be overcome by a legislative history which through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsco v. Walling*, 324 U.S. 244, 260.

Additionally, as is argued by Mr. Zappe, the Bureau is not ignoring previous efforts by NMED in relation to the Applicants' permit, but instead has offered a reasoned explanation as to why it believes the draft permit correlated to this PMR is correct and appropriate. It is unrealistic to think that a long-term permit such as the WIPP RCRA permit would remain frozen in time,

and that the regulator would not have the capacity to analyze and approve (or disapprove) novel PMRs. It is also understandable that interested persons such as Mr. Zappe may have opinions about a particular PMR that necessitates the use of the public hearing process, as contemplated by the legislature in NMSA 1978, Section 74-4-4.2(H). Ultimately it will be up to the Secretary of Environment to weigh the evidence in this matter, including both the technical testimony from the Bureau's current WIPP group manager, Ricardo Maestas, who has relevant, up-to-date knowledge and experience related to the regulation of the facility, and technical testimony from Mr. Zappe, the former Bureau WIPP program manager who departed that role approximately seven years ago and is no longer employed by NMED. Zappe Exhibit 2.

#### **THE LOCATION OF THE HEARING WAS APPROPRIATE**

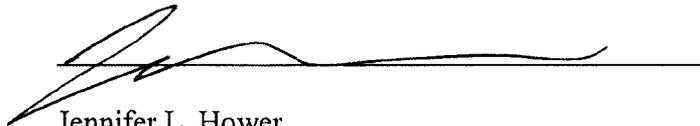
When the Secretary of Environment opts to hold a hearing related to a PMR, the Hazardous Waste Management Regulations state that “[h]earings shall be held in Santa Fe or within any area of the state substantially affected by the proceedings as specified by the secretary.” 20.1.4.901.F(2) NMAC. In this matter, it was determined that the hearing should be held in the “area of the state substantially affected by the proceedings.” As Carlsbad is the closest city to the facility, located approximately 30 miles to the west, it was decided that this would be the most appropriate location so that those in the communities surrounding WIPP would be able to meaningfully participate in the hearing and provide any public comment or testimony that they feel is necessary on the PMR. It would have been nonsensical to schedule a permit hearing for WIPP in Santa Fe, requiring those in the substantially affected area of the state to have to travel a significant distance to participate. The Bureau believes this would have detrimentally squelched public involvement. In 2014 in a Writ of Superintending Control proceeding, the New Mexico Supreme Court ruled in favor of a non-Santa Fe hearing in a

rulemaking before the Water Quality Control Commission. *Rio Grande Chapter of the Sierra Club v. Hon. Jennifer L. Attrep*, No. 35,001 (N.M. Sup. Ct. Dec. 15, 2014)(non-precedential). While the specific language in question was in the New Mexico Water Quality Control Act, specifically NMSA 1978, Section 74-6-6(C), as opposed to 20.4.1 NMAC, both are similar in that the option is provided to hold a hearing in Santa Fe or in the location impacted by the agency action.

#### CONCLUSION

The Hazardous Waste Bureau respectfully requests that the draft Permit, as issued on August 6, 2018, along with the agreed upon changes related to shielded containers, be approved by the Secretary for the reasons stated herein and based upon the evidence provided in its written and oral testimony.

Respectfully submitted,  
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**CERTIFICATE OF SERVICE**

I hereby certify that on November 28, 2018 a copy of the foregoing Closing Argument was sent via electronic mail to the following parties of record:

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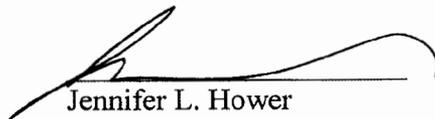
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