IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

NEW MEXICO ENVIRONMENT DEPARTMENT) **HAZARDOUS WASTE BUREAU)** **CLASS 3 PERMIT MODIFICATION REQUEST:)** **CLARIFICATION OF TRU MIXED WASTE VOLUME)** **REPORTING, PERMIT MODIFICATION TO THE)** **WIPP HAZARDOUS WASTE FACILITY PERMIT)** **NO. NM4890139088-TSDF)**	**A-1-CA-37894**

DOCKETING STATEMENT

Southwest Research and Information Center ("SRIC") and Nuclear Watch New Mexico ("NWNM"), by their counsel, make the following Docketing Statement pursuant to Rule 12-208 NMRA.

1. Nature of the proceeding: This is an appeal pursuant to § 12-601 NMRA and § 74-4-14 NMSA 1978 from the Secretary's Order Approving Draft Permit, dated December 21, 2018 (the "Secretary's Order"), by the Secretary of the New Mexico Environment Department ("NMED") concerning adoption of a modified Hazardous Waste Act (§ 74-4-1 *et seq.* 1978) ("HWA") Permit for the Waste Isolation Pilot Plant ("WIPP"). The Secretary's Order was made pursuant

to a Permit Modification Request ("PMR") submitted by the Permittees[1], dated January 31, 2018, and Hazardous Waste Management Regulations, 20.4.1 NMAC.

The PMR, submitted by the U.S. Department of Energy ("DOE") and its contractor, Nuclear Waste Partnership, LLC, seeks leave to account for the volume of waste emplaced in WIPP, with reference to the 6.2 million ft^3 volume limit stated in § 7(a)(3) of the WIPP Land Withdrawal Act, Pub. L. No. 102-579 (1992)("LWA"), which limit is incorporated into the HWA Permit—

(a) one way, to be used by NMED pursuant to its duty to administer the HWA Permit, by summing the volume of the outer containers of waste disposed of at WIPP, and

(b) a second way, to be used by DOE pursuant to an unidentified authority to measure what DOE claims is compliance with the LWA, using an undisclosed method.

2. Date of the Order on Review: The date of the Secretary's Order is December 21, 2018. A Notice of Appeal was filed by SRIC and NWNM in this Court (Docket No. A-1-CA-37898) on January 17, 2019, which filing is timely in accordance with § 12-601 NMRA. In addition, a Notice of Appeal was filed by Concerned Citizens for Nuclear Safety ("CCNS"), also seeking review of the Secretary's Order (Docket No. A-1-CA-37894), on January 22, 2019, which filing

[1] The PMR was submitted by the Permittees, U.S. Department of Energy and Nuclear Waste Partnership, LLC. DOE and Nuclear Waste Partnership, LLC are

is timely in accordance with § 12-601 NMRA. SRIC and NWNM have intervened in No. A-1-37894 (Order, Feb. 7, 2019).

3. Statement of the Case:

WIPP is a federal government repository for defense-related transuranic ("TRU") waste, operated pursuant to Environmental Protection Agency ("EPA") certification under the LWA and a Permit under the HWA, which is the statute that applies the Resource Conservation and Recovery Act, 42 U.S.C. § 6921 *et seq.* ("RCRA"), in New Mexico. This case involves the application of the HWA and the LWA. In § 7(a)(3) of the LWA, Congress established a total capacity limit for WIPP of 6.2 million ft^3 of TRU waste. Since it was issued in October 1999, the WIPP Permit has included the 6.2 million ft^3 capacity limit. The LWA also provides that DOE shall comply with the Solid Waste Disposal Act (which includes RCRA) and other applicable federal laws and regulations. LWA § 9(a).

(a) This proceeding: On January 31, 2018, Permittees submitted a Class 2 PMR pursuant to 20 NMAC 4.1.900, entitled "Clarification of TRU Mixed Waste Disposal Volume Reporting." The PMR sought Permit modifications to add new definitions in Section 1.5.21, TRU Mixed Waste Volume, and Section 1.5.22, Land Withdrawal Act TRU Waste Volume, to revise Permit Section 3.3.1.8 regarding Shielded Containers, to revise Table 4.1.1, Underground HWDUs [Hazardous Waste Disposal Units] to state that the LWA volume is tracked and reported by

DOE with respect to the 6.2 million ft^3 WIPP capacity limit, to revise Section 6.10.1 Panel Closure, to clarify that the final TRU mixed waste volume reported for a panel when it is full is based on the outer container volume, and to make other changes in Section 6.5.2, Attachments A1, A2, B, C, G, H, H1, and J regarding waste volume calculation and reporting. Modified language was presented in 16 pages, and there were three pages of attachments with figures showing Standard Pipe Overpack, Standard Waste Box, and Ten Drum Overpack containers.

Pursuant to 40 C.F.R. § 270.42(b)(2), Permittees gave notice of public meetings and a 60-day public comment period, ending April 3, 2018. Appellants SRIC and NWNM submitted timely comments, stating, inter alia, that:

1. The request is contrary to federal laws and must be denied,
2. The PMR should be denied as unneeded, because less than 55 percent of the WIPP capacity limit of 6.2 million ft^3 has been used, and the apparent purpose of the PMR is to expand WIPP for other wastes, which WIPP is not legally authorized to receive,
3. If NMED does not deny the PMR, it must be considered under Class 3 procedures because of the significant public concern and the complex nature of the request.

Eighteen other organizations and individuals submitted comments opposing the PMR as contrary to law and requesting that the PMR be denied or considered under Class 3 procedures. On June 1, 2018, the NMED Secretary determined "there is significant public concern and the complex nature of the proposed change requires the more extensive procedures of a Class 3 modification."

On June 27, 2018, the NMED Hazardous Waste Bureau ("HWB") sent a Technical Incompleteness Determination ("TID") to the Permittees, requesting additional information on the PMR. On July 12, 2018, the Permittees submitted a response to the TID.

On August 6, 2018, the HWB issued a draft Permit for a 45-day public comment period, ending on September 20, 2018. On August 20, 2018, SRIC, NWNM, and 19 other organizations requested an extension of the comment period to 90 days, which the Secretary denied on August 22, 2018.

The HWB proposed that negotiations required by 20.4.1.901.A.4 NMAC be held on September 24, 2018. On September 19, 2018, SRIC, NWNM, and two other organizations objected to the HWB's proposed schedule, issued after the notice of public hearing was issued, because of the shortness of time. The groups further objected to the schedule and location of the public hearing that would deprive a large majority of the state's population from attending the hearing and providing public comment.

On September 20, 2018, SRIC and NWNM submitted timely comments on the draft Permit, stating, inter alia, that:

1. They requested a public hearing and negotiations, and that negotiations be held before a public hearing notice was issued,
2. They objected to the schedule for the planned negotiations and public hearing,
3. They objected to the Administrative Record, which did not include many references that had been used throughout the PMR public comment process,
4. They stated that the draft permit should be denied, because it was contrary to federal law,
5. They asserted that DOE practice, including reports to Congress, used outer container volume as the basis to calculate the WIPP capacity limit,
6. They stated that the Permit has always incorporated, and correctly calculated and enforced, the capacity limit based on outer container volume,
7. They asserted that the draft Permit violates DOE's commitments to the State under the New Mexico-DOE Consultation and Cooperation ("C&C") Agreement,

8. They asserted that the draft Permit is not needed because, as of September 15, 2018, less than 54 percent of the WIPP capacity limit waste had been emplaced, indicating that the purpose of the PMR was to expand WIPP to include several missions not allowed by the LWA,
9. They asserted that the outer container volume is the longstanding DOE practice for calculation TRU waste volume, from even before WIPP opened,
10. They asserted that the Permittees have not demonstrated that they can reliably operate WIPP and correctly calculate capacity limits,
11. They asserted that the Permittees' explanations for the request are incomplete and inaccurate, and
12. Objections were stated to each new provision proposed in the draft Permit.

On September 21, 2018, SRIC, by letter to the NMED Secretary, objected to the inadequate posting of comments on the draft Permit, because several comments were excluded from the initial posting of comments on the evening of September 20, 2018. SRIC reiterated its objections to the schedule for negotiations and the date and location of the public hearing.

On September 22, 2018, the HWB issued a fact sheet and public hearing notice, stating that the hearing would begin on Tuesday, October 23, 2018 in

Carlsbad and that Notices of Intent to Present Technical Testimony must be submitted by October 9, 2018.

On September 24-25, 2018, negotiations were held in Santa Fe, attended by the Permittees, HWB officials, representatives from SRIC, NWNM, CCNS, and Steve Zappe. The negotiations resulted in agreement on Permit Section 3.3.1.8 and on revisions to the Administrative Record, but there was no agreement on other issues.

On October 9, 2018, the Permittees (2 witnesses), HWB (one witness), SRIC (two witnesses), and Steve Zappe (individual) filed timely notices of intent, including direct testimony and exhibits.

On October 23-25, 2018, public hearings were held in Carlsbad.

On November 2, 2018, the transcript of the public hearing on October 25, 2018 was filed. On November 7, 2018, the transcript of the public hearing on October 23, 2018 was filed. On November 19, 2018, the transcript of the public hearing on October 24, 2018 was filed. On November 20, 2018, corrections to the November 19 transcript were filed.

On November 28, 2018, the parties, including SRIC and NWNM, filed proposed findings of fact, conclusions of law, and final argument.

On December 10, 2018, the Hearing Officer filed his Report.

On December 18, 2018, parties, including SRIC and NWNM, filed comments on the Hearing Officer's Report.

On December 21, 2018, the NMED Secretary issued his Order approving the Draft Permit.

On January 17, 2019, SRIC and NWNM timely filed a Notice of Appeal.

On January 22, 2019, CCNS timely filed a Notice of Appeal in No. A-1-CA-37894.

(b) Factual background: WIPP is a federal government repository for defense-related TRU waste, operated pursuant to EPA certification under LWA § 8(d) and a Permit issued by NMED under the HWA.

WIPP was authorized by Public Law No. 96-164, § 213 (1979) (the "Authorization Act"). Therein, Congress authorized WIPP "to demonstrate the safe disposal of radioactive waste resulting from the defense activities and programs of the United States exempted from regulation by the Nuclear Regulatory Commission." The law specifically designates WIPP as a "pilot plant" and states that its mission is to "demonstrate the safe disposal." AR 180121.08, § 213(a). Thus, Congress did not intend WIPP to be the sole disposal site for all TRU waste.

The 1979 Authorization Act provides further:

> (b)(1) In carrying out such project, the Secretary shall consult and cooperate with the appropriate officials of the State of New Mexico, with respect to the public health and safety concerns of such State in regard to such project and shall, consistent with the purposes of subsection (a), give

> consideration to such concerns and cooperate with such officials in resolving such concerns. The consultation and cooperation required by this paragraph shall be carried out as provided in paragraph (2).
>
> (2) The Secretary shall seek to enter into a written agreement with the appropriate officials of the State of New Mexico, as provided by the laws of the State of New Mexico, not later than September 30, 1980, setting forth the procedures under which the consultation and cooperation required by paragraph (1) shall be carried out.

AR 180121.08, § 213(b).

The congressionally-authorized agreement was not completed by the statutory deadline, but, after the State filed suit (Civil Action No. 81-0363 JB (D.N.M.)), the State Attorney General and U.S. Attorney filed a Joint Motion to Stay All Proceedings, and presented a Stipulated Agreement, which was approved by the court. AR 180706.02, pp. 9-16 of PDF. Further, the Governor and DOE Secretary signed a Consultation and Cooperation ("C&C") Agreement, as Congress had directed. The Stipulated Agreement states:

> This consultation and cooperation agreement shall be a binding and enforceable agreement between the Department of Energy and the State of New Mexico and shall expressly provide that it does not constitute a waiver by the State of any right it may have to judicial review of federal agency actions with respect to the WIPP project.

at 3. The C&C Agreement has since been modified. AR 180706.02, pp. 32-45 and 53-57 of PDF. The First Modification of 1984 incorporates the volume limitation of 250,000 ft^3 (equal to 7,080 m^3) of remote-handled ("RH") TRU waste (AR 180706.02, p. 35 of PDF) (November 30, 1984); the Second Modification of 1987

incorporates the volume limitation of 6.2 million ft^3 for all TRU waste. AR 180706.02, p. 56 of PDF (August 4, 1987).

Legislation was necessary to open WIPP, and, after lengthy debate and negotiations, Congress passed the LWA in October 1992. The capacity of the repository was a major issue in the LWA negotiations. 10/25/18 Tr. 181, ll. 13-17 (Hancock). Congress discussed waste capacity in terms of containers and container volume. 10/25/18 Tr. 181, ll. 16-21 (Hancock). See Senate Report 102-196 on S 1671, by the Senate Energy and Natural Resources Committee, SRIC Ex. 8 at 27, AR 180402.34Z. For example, the House bill (HR 2637) reported by the House Armed Services Committee stated the volume limit both in cubic feet and in drums:

> CAPACITY OF THE WIPP.—The total capacity of the WIPP by volume is 6.2 million cubic feet of transuranic waste. Not more than 850,000 drums (or drum equivalents) of transuranic waste may be emplaced at the WIPP.

SRIC Ex. 9B at 10, AR 180402.34BB, § 9(a)(3). See also: House Report 102-241, Part 1, from the House Interior and Insular Affairs Committee; SRIC Ex. 9A at 16, 18, AR 180402.34AA; House Report 102-241, Part 3, from the House Energy and Commerce Committee; SRIC Ex. 9C at 42, AR 180402.34CC.

The LWA, as enacted, states:

> CAPACITY OF WIPP.—The total capacity of WIPP by volume is 6.2 million cubic feet of transuranic waste.

AR 180706.03, § 7(a)(3). The LWA, as enacted, also contained capacity limits for the Test Phase (which was not conducted and was deleted from the LWA in 1996) and for WIPP as a whole, which were based on the volume of 55-gallon drums (or drum equivalents): 850,000 drums times 7.3 ft^3 (55-gallon drum volume) equals 6,205,000 ft^3. 10/23/18 Tr. 168, ll. 10-20 (Kehrman).

Thus, the LWA placed waste volume limitations on the Test Phase, both as a percentage of the § 7(a)(3) total capacity and in terms of the number of waste drums: Specifically, LWA § 6(b)(2) incorporated the limitations stated in EPA's No-Migration Determination (55 Fed. Reg. 47700 (Nov. 14, 1990)), which stated that, for the Test Phase: "Wastes placed in the repository may not exceed 8,500 drums or 1 percent of the total capacity of the repository, as currently planned." *id.* at 47720. LWA § 6(c) stated: "During the test phase, the Secretary may transport to WIPP—. . . . (B) in no event more than 1/2 of 1 percent of the total capacity of WIPP as described in section 7(a)(3)."

The LWA also confirms the State's authority under the Solid Waste Disposal Act, of which RCRA is a part. LWA §§ 9(a)(1)(C), 14, AR 180706.03.3. In addition, the LWA affirms the C&C Agreement and states that it may only be modified by express language. LWA § 21.

Since at least 1980, TRU waste volume has consistently been measured by the gross internal volume of the waste container. In the 1980 Final Environmental

Impact Statement ("FEIS"), DOE stated that "The data for TRU waste presently in retrievable storage are the container volume." SRIC Ex. 1, AR 180121.04 at E-25. The 1980 FEIS stated that, on that basis, the design capacity was 6.2 million ft^3. SRIC Ex. 1, AR 180706.03 at 2-17. DOE's 1981 Record of Decision, based on the FEIS, carried forward these capacity figures. SRIC Ex. 2 at 9163, c. 1, AR 180121.02. DOE's 1990 Final Supplement Environmental Impact Statement (DOE/EIS-0026-FS, January 1990) (SRIC Ex. 52 at 246) stated that the "design capacity of the WIPP is based upon the total volume of emplaced containers and not their contents." *Ibid.*

In 1994 DOE published a WIPP Transuranic Waste Baseline Inventory Report, which calculated waste volumes in "Final Waste Form," which means the gross internal volume of the container. SRIC Ex. 10 at 1-5; 10/23/18 Tr. 175, ll. 8-14 (Kehrman). DOE's 1997 Disposal Phase Supplemental Environmental Impact Statement (DOE/EIS-0026-S-2, September 1997) again used the volume of the waste containers to measure the volume of waste. AR 180121.03 at 2-9. DOE emphasized the rationale for its measurements of waste volume:

> While the LWA and C&C Agreement include limits on the volume of TRU waste that can be emplaced, there is considerable uncertainty concerning how much of a container's volume is made up of TRU waste and how much is void space. Many of the containers would include a great deal of void space, particularly for RH-TRU waste; the actual volume of waste in a drum or cask, therefore, may be much less than the volume of the drum or cask. For the purposes of analysis in SEIS-II, the volume of the drum or cask is used, as if the drum or cask were full without void space. . .

SRIC Ex. 11 at 3-8; AR 180121.03. See also AR 180121.03 at 2-9, 3-8, A-13, -14.

DOE has consistently reported to Congress the volume of contact-handled ("CH") TRU waste emplaced at WIPP, based on the gross internal volume of the outer container. AR 180402.34H to V. DOE also reports the volume of waste emplaced annually to EPA, stating CH waste volumes based on the outer container volume. SRIC Ex. 55 at 17. DOE calculates the total volume of waste planned for disposal based on the outer container volume. AR 180402.34W at 13. DOE's Annual Transuranic Waste Inventory Report shows "final form" volumes as in earlier Baseline Inventory Reports, and also "outer container volume," which is the gross internal volume of the outer container. AR 180402.34X at 18.

Under the LWA, EPA must certify, pursuant to notice-and-comment rulemaking and judicial review, "whether the WIPP facility will comply with the [40 C.F.R. Part 191, subpart B] final disposal regulations." LWA § 8(c)(2), AR 180706.03. To show compliance with the 6.2 million ft^3 LWA volume limit, DOE submitted waste inventory data based on "final form" container volume. SRIC Ex. 14 at 24-97. EPA accepted the data and found that WIPP was in compliance. SRIC Ex. 14 at 24-98; 63 Fed. Reg. 27354, 27373. Final waste form data were also submitted in 2006, 2010, and 2017 recertifications and accepted by EPA. SRIC Exs. 17, 20, 22; 10/23/18 Tr. 192, ll. 16- 195, l. 19 (Kehrman). *See also* 10/24/18 Tr. 150, ll. 7-11(Maestas).

RCRA requires EPA to establish regulations for hazardous waste permits (42 U.S.C. § 6925), which EPA has done (40 C.F.R. Parts 260-272). These regulations govern, inter alia, permitting of "miscellaneous units," which include WIPP. 40 C.F.R. §§ 264.601-03, Subpart X. The regulations require the permitting authority to analyze a proposed facility, addressing how hazardous wastes might be released, and to issue a permit that protects human health and the environment:

> Protection of human health and the environment includes, but is not limited to: (a) Prevention of any releases that may have adverse effects on human health or the environment due to migration of waste constituents in the ground water or subsurface environment . . .

40 CFR § 264.601. The permitting authority must consider "[t]he volume and physical and chemical characteristics of the waste in the unit" (*Id.*) and must regulate the volume, concentration and characteristics of hazardous wastes to be disposed of. EPA Release, 52 Fed. Reg. 46946, 46956 (Dec. 10, 1987). To that end, a permit application must include:

> (j) A specification of the hazardous wastes listed or designated under 40 CFR part 261 to be treated, stored, or disposed of at the facility, an estimate of the quantity of such wastes to be treated, stored, or disposed annually, and a general description of the processes to be used for such wastes.

40 C.F.R. § 270.13. DOE's Part A application states the total waste capacity of WIPP as 175,600 m^3 (equivalent to 6.2 million ft^3). AR 180402.48G. This figure is based on the gross internal volume of the waste containers, as shown in

numerous DOE documents referred to above. It was incorporated into the original Permit and remains in the current permit. AR 180914.37I, Section 3.3.1. DOE admits that "the WIPP LWA limit and the HWDU [hazardous waste disposal unit] limit were considered to be the same." AR 180121 at 7.

DOE filed a Part B application, describing how the WIPP facility would meet Environmental Performance Standards. AR 180402.48G, ch. D-9. *See* 10/23/18 Tr. 73, ll. 19 – Tr. 74, l. 18 (Kehrman). On October 27, 1999, after 19 days of hearings, NMED issued the HWA permit for WIPP. The Permit imposed capacity limits on each Hazardous Waste Disposal Unit ("HWDU"), based on container volumes, including overpacks. Permit Part III.C.1. The Permit specifies the maximum volume of TRU waste to be disposed of in each of eight panels and requires DOE to keep records of the volume of waste emplaced in each disposal room and to report the volume emplaced in each panel for entry in Permit Table 4.1.1. Permit Part 1.3.1, 6.10.1.

To ensure that WIPP, for the present and the future, does not adversely affect human health and the environment, the Permit specifies the waste types and exact waste volume allowed in each panel. (Table 4.1.1). NMED is legally required to enforce these volume limits. 10/24/18 Tr. 167, ll. 19-25, Tr. 168, ll. 1-13 (Maestas).

The Permit, from its inception, has approved use of overpacks for storage and disposal. 10/25/18 Tr. 104, ll. 11-24 (Zappe); Tr. 189, ll. 24-25 (Hancock). Overpacks may be required in some situations. Attachment A1-1c(1), Attachment A1-1d(2), Attachment A1-1d(4), Attachment A1-1e(1), Attachment A2-2b, Attachment A4-3, Attachment D-4b, Attachment D-4e, and Attachment D-4e(3). Overpacks may also be used in DOE's management judgment. 10/23/18 Tr. 117, ll. 8-23; Tr. 129, ll. 22- 130, l-14; Tr. 130, l.23 - 131, l. 25 (Kehrman). Waste volume emplaced has consistently been measured by the gross internal volume of an overpack. Kehrman prefiled testimony at 2; 10/23/18 Tr. 61, ll. 6-23 (Kehrman); 10/24/18 Tr. 117, ll. 1-6 (Maestas).

NMED, as DOE's regulator at WIPP, has enforced the calculation of capacity based on outer container volume, stating, *e.g.*, that "The corrected RH volume is based on the volume of the RH canisters (264 canisters * 0.89 m^3 per canister = 235 m^3)." SRIC Ex. 33 at 1, AR 180914.32I. From March 26, 1999 to September 29, 2018, less than 54 percent of that 6.2 million ft^3 (175,564 m^3) capacity limit has been emplaced at WIPP. SRIC Ex. 56; 10/25/18 Tr. 192, ll. 1-8 (Hancock).

Issues presented by this appeal:

The Secretary's Order adopts the findings and reasoning of the Hearing Officer. The fundamental question here is whether the Permittees' request for unrestricted authority to declare the quantity TRU waste deemed to be emplaced in WIPP, for measurement against the LWA limit of 6.2 million ft^3, satisfies the intent of Congress.

Many points are undisputed. It is undisputed that the LWA fixes the capacity of WIPP at 6.2 million ft^3. LWA § 7(a)(3). It is undisputed that more than 30 years of consistent interpretation by DOE, and 20 years of interpretation by NMED and by EPA, have measured waste quantity by outer container volume, *i.e.*, "final waste form."

It is also undisputed that WIPP is regulated by RCRA and HWA, that DOE applied for a HWA permit to dispose of 6.2 million ft^3 of TRU waste, that after environmental analyses NMED granted such a permit, and that in applying the volume limit of the permit, DOE and NMED have agreed that waste volume is determined by the outer container volume. NMED must enforce that capacity limit, and DOE is legally bound to comply with it.

It is also undisputed that, as required by LWA § 8(c), DOE applied to EPA for certification of WIPP's compliance with the 40 CFR Part 191, subpart B, disposal regulations. To show compliance with the LWA volume limit of 6.2

million ft^3, DOE submitted waste volume data based upon the outer container volume, and EPA accepted such data as showing compliance.

But now DOE requests permission to keep its own separate account of waste emplaced at WIPP, planning to emplace waste in WIPP *in excess* of the 6.2 million ft^3 limit enforced by NMED and EPA. Thus, DOE requests a Permit amendment to allow it to calculate volume with its "internal" calculation methods, which it will employ without external oversight. This dispute boils down to some closely-related questions:

1. Whether DOE has the legal authority to apply a new and different method of measuring emplaced waste volume? The Hearing Officer addressed the issue several times:

   (a) He stated, without reference, that Congress intended DOE to have the responsibility to define the method used for calculating the LWA capacity limit. (FF 132[2]).

   (b) He stated that radioactive materials are regulated by DOE in accordance with the Atomic Energy Act ("AEA"). (FF 24).

   (c) He stated that DOE has the responsibility and authority to manage radioactive waste under the AEA and the DOE Organization Act, and that NMED does not regulate radioactive waste. (FF 25).

[2] Citations in the form FF132 refer to Findings of Fact in the Hearing Officer's Report.

(d) He stated that LWA does not "reassign the responsibility to track the volume of the TRU waste disposed from the DOE to the EPA." (FF 26).

(e) He stated that "DOE has responsibility to track and report specific waste information controlled by the LWA, including the waste inventory relative to the LWA capacity limit." (FF 27).

(f) He stated that the DOE authorization basis for disposal of TRU waste at WIPP includes the DOE National Security and Military Applications of Nuclear Energy Authorization Act of 1980, the WIPP LWA, and the Permit. (FF 93).

(g) He stated that DOE is "not interpreting the volume limitation in the LWA but simply relying on what is unambiguously stated." (FF 214).

(h) He stated: "Moreover, the Atomic Energy Act (AEA) and the Department of Energy Organization Act (AR180121.01) grant DOE the responsibility and authority to manage certain radioactive materials including radioactive waste, and while neither act specifically grant[] DOE the authority to interpret the volume limitation in LWA", the "Acts would appear to grant DOE authority to make decisions related to carrying out its responsibility of disposing of the defense TRU waste." (FF 214).

(i) He refers to Guidance for DOE Order 435.1, which the Hearing Officer interprets to mean that "the total volumetric capacity of a facility is based on the actual waste volume." (FF146).

The most basic question here is the supposed authority of DOE to regulate waste disposal volume at WIPP. SRIC and NWNM maintain that the statutes cited by the Hearing Officer do not refer to WIPP or confer any authority upon DOE as to the operation of WIPP (except insofar as the Hearing Officer may refer to obligations imposed by the HWA Permit). An interpretation of the LWA that authorizes DOE to apply two or more different meanings to the same term—"6.2 million ft^3"—would make the number blatantly ambiguous, when the Hearing Officer has said "[t]he language of the LWA is unambiguous and must be followed as written." (FF 217). But no reading of the LWA or its history supports interpreting the 6.2 million ft^3 capacity limit as having two different meanings. Under common sense rules of interpretation, the same statutory language cannot have two different meanings. Moreover, the most recent and most specific statute prevails over the prior or more general statute, and under this principle the LWA prevails. The LWA directs that NMED and EPA have regulatory powers over WIPP, and DOE's role is not to regulate but to comply with regulation. The LWA nowhere gives DOE regulatory authority either in general or specifically as to the 6.2 million

ft^3 capacity limit. Instead, DOE is expressly the regulated party. LWA §§ 9(a), 14(a), (b). Since DOE has no regulatory authority, DOE's interpretation is not entitled to deference. Further, DOE has not even offered any alternative interpretation to which a court might defer. Finally, one purpose of the LWA is to remove DOE from the position of regulating its own activities, *i.e.*, self-regulation. AR 180914.37, pp. 7-15.

> *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1627 (2018)("Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provision—it does not, one might say, hide elephants in mouseholes.'").
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> *Gonzales v. Oregon,* 546 U.S. 243, 258 (2006)("*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to that official.").
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> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000)("an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.").
>
> *Whitman v. American Trucking Assn.*, 531 U.S. 451, 468 (2001)(a "textual commitment of authority" . . . "must be a clear one.").
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> *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)("We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)("The court is first required to decide whether the Secretary acted within the scope of his authority.").

Hydro Resources, inc. v. EPA, 608 F.3d 1131, 1146 (10th Cir. 2010)("Courts do not, however, afford the same deference to an agency's interpretation of a statute lying outside the compass of its particular expertise and special charge to administer.").

Ohio v. Ruckleshaus, 776 F.2d 1333, 1339 (6th Cir. 1985)(a court undertakes a "'searching and careful' inquiry into the facts of each case to determine that the agency has acted within the scope of its statutory authority.").

2. In any case, is DOE bound by the meaning of the LWA capacity limit of 6.2 million ft^3? LWA § 7(a)(3). No one questions the number. However, DOE asserts that there is a question whether the 6.2 million ft^3 volume limit refers to volume calculated by summing the volume of the outer waste containers. The Hearing Officer stated that the volume limit is "not ambiguous" (FF 214), and he concluded that there is no occasion to look to the legislative history for its meaning. (FF217). The Hearing Officer stated that the LWA is "silent" on the method for calculating the volume of TRU waste. (FF 20, FF 209). He stated that NMED found no evidence that the LWA volume must be tied to the dimensions of the outer disposal container (FF 134) and concluded that Congress did not express any intent as to how the volume of waste was to be measured. (FF 208). He also stated that Congress intended DOE to have the

responsibility to define the method used for calculating the LWA capacity limit. (FF 132).

SRIC and NWNM's position is that, in seeking the clear meaning of the capacity limit in the LWA, the Court must examine the entire statute, not just the specific words in issue, and that when one examines the entire LWA, including the LWA's incorporation by reference (LWA § 6(b)(2)) of the No-Migration Determination's test phase limitation of "8,500 drums, or 1% of the facility's final capacity" (55 Fed. Reg. at section III, IV.B.2), it is clear that, in the LWA, Congress intended the waste volume to be determined on the basis of the volume of the outer waste container.

> *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)("In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.").
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> *Robinson v. Shell Oil Co.,* 519 U.S. 337, 345-46 (1997)(court should consider the "broader context provided by other sections of the statute.").
>
> *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)(court should interpret a statute "as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout.").
>
> *Brown v. Gardner*, 513 U.S. 115, 118 (1994)("Ambiguity is a creature not of definitional possibilities but of statutory context.").

Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989)("statutory language cannot be construed in a vacuum.").

FTC v. Mandel Brothers, Inc., 359 U.S. 385, 389 (1959)(court's "task is to fit, if possible, all parts into an harmonious whole.").

3. Even if the LWA is considered ambiguous as to the method of volume measurement, whether NMED, at the request of DOE, may impose its own construction on the statute? SRIC and NWNM's position is that the presence of ambiguity in a statute does not give NMED license to impose its interpretation on the statutory terms. (Chevron 2)

   Chevron U.S.A., Inc v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . ").

4. Even if the LWA is considered ambiguous as to the method of volume measurement, whether the meaning is established by legislative history and agency practice and rulemakings by DOE, NMED, and EPA? The Hearing Officer said that there is no ambiguity, and therefore there is no occasion to look to the legislative history, and to do so would be inappropriate. (FF 217). SRIC and NWNM maintain that the language is clear (as stated above), but it is appropriate to seek confirmation from legislative history and agency practice, and that such approach confirms that the outer container volume is the relevant statutory value. Moreover, Congress enacted a volume limit only once, and the identical statutory words referring to a single facility cannot have two different

meanings: one meaning for RCRA regulation and a different meaning for supposedly separate LWA regulation.

> *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1630 (2018)("the canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle.").
>
> *Brown v. Gardner,* 513 U.S. 115, 118(1994)("there is a presumption that a given term is used to mean the same thing throughout a statute.").
>
> *Garcia v. United States,* 469 U.S. 70, 76 (1984)("the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which '[represent] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'").
>
> *Chevron U.S.A. v. NRDC, Inc.*, 467 U.S. 837, 845 (1984)(court's inquiry is "[b]ased on the examination of the legislation and its history.").
>
> *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986)("The normal rule of statutory construction assumes that 'identical words used in different parts of the same act are intended to have the same meaning.'").
>
> *Zuber v. Allen*, 396 U.S. 168, 186 (1969)("A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.").
>
> *Fish v. Kobach*, 840 F.3d 710, 736 (10th Cir. 2016)(court refuses "to contemplate the absurdity of Congress providing a statutory principle in one breath and immediately violating it in the next.").
>
> *Dalzell v. RP Steamboat Springs LLC*, 781 F.3d 1201, 1209 (10th Cir. 2015)(where a statutory term is ambiguous, "we must look to any

relevant agency interpretation or definition and defer to the agency if it has based its definition on a permissible construction".).

Elwell v. Oklahoma ex rel. Bd. of Regents, 693 F.3d 1303, 1310 (10th Cir. 2012)(In statutory construction, "the specific controls the general.").

Seneca-Cayuga Tribe v. NIGC, 327 F.3d 1019, 1040 (10th Cir. 2003)(interpretation contained in regulation adopted through notice and comment rulemaking is entitled to "controlling weight.").

5. Even assuming that DOE has the authority to interpret the WIPP volume limit, whether the Permit modification proposed by DOE, which would render the calculation of waste volume entirely separate from NMED's process of administering the Permit, and make it entirely non-public and internal to DOE, is authorized by the HWA? The Hearing Officer said that Permittees have committed to calculate internal container volume of overpacked containers based on inner containers with a fixed geometry (FF 147) and that DOE has clearly articulated the method it will use to determine the volume of waste in containers. (FF 215). SRIC and NWNM show that DOE has not committed to any particular method of calculating volume, in seeking authority unilaterally to interpret the capacity limit. The Permit language that DOE proposes does not constrain DOE at all in the method used to calculate the amount of waste emplaced. Moreover, it is likely that DOE's method would overlook some of the emplaced waste. For example, HWA-regulated wastes that escape into an overpack would not be included at all in the calculation of waste emplaced.

Non-contained waste might not be included. Most basically, under the PMR DOE could change its methodology at will without asking anyone's permission, least of all NMED's.

6. Even assuming that DOE has power to interpret the WIPP volume limit, whether DOE may make a basic change in its interpretation without explaining how the new interpretation better serves the statutory purpose? The Hearing Officer stated that DOE had offered the justification that, under DOE's interpretation, it could fit more waste into WIPP to achieve "the purpose for which WIPP was authorized by Congress." (FF 218). SRIC and NWNM maintain that the purpose of WIPP, as stated in the Authorization Act and the LWA, is not to dispose of ever-increasing amounts of waste, but to operate and close a facility with a congressionally-defined TRU waste capacity limit. It does not serve that congressional purpose to violate the limit. Moreover, the new policy upsets New Mexico's reliance interests.

> *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)("An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." An "agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate. Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account.").
>
> *Motor Vehicle Manufacturers Assn. v. State Farm*, 463 U.S. 29, 41-42 (1983)(" A "settled course of behavior embodies the agency's

informed judgment that, by pursuing that course, it will carry out the policies _committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." . . . Accordingly, "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

Indigenous Environmental Network v. U.S. Department of State, (D. Mont. Nov. 8, 2018)("The United States Supreme Court established a four part test in *Fox* to determine whether a policy change complies with the APA: (1) the agency displays "awareness that it is changing position;" (2) the agency shows that "the new policy is permissible under the statute;" (3) the agency "believes" the new policy is better; and (4) the agency provides "good reasons" for the new policy.").

7. Whether the C&C Agreement bars DOE from introducing waste into WIPP in excess of the capacity limit in that agreement? The Hearing Officer simply ignored the C&C Agreement, which is separate from the HWA Permit. SRIC and NWNM contend that the C&C Agreement sets out the expectations and commitments of the State and DOE and contains existing legal obligations, including capacity limits, which are not vulnerable to modification or circumvention in a HWA permit.
8. Whether NMED, in considering a PMR, may disregard a facility's history of accidents and mismanagement, despite NMED's statutory obligation to protect public health and the environment? The Hearing Officer stated that these concerns, which include two serious recent incidents and numerous safety violations within the past five years, "while obviously of critical importance

were not developed fully enough in the hearing to be considered in arriving at the recommended disposition of this case." (FF 220). SRIC and NWNM assert that the testimony of George Anastas, a professional engineer experienced in working with the WIPP facility, who reviewed, in his prefiled testimony and as a live witness, the severity of these violations and cited detailed oversight reports by DOE and the Defense Nuclear Facilities Safety Board, amply "developed" the safety and management violations that shadow WIPP's safety record—matters that are, indeed, of "critical importance" and would normally impel a responsible state agency to stop before authorizing expansion of the facility.

4. Judicial review: The Hazardous Waste Act, § 74-4-14(C) NMSA 1978, states the standard of judicial review:

> Upon appeal, the court of appeals shall set aside the action only if it is found to be:
>
> 1. arbitrary, capricious or an abuse of discretion;
> 2. not supported by substantial evidence in the record; or
> 3. otherwise not in accordance with law.

A permit modification request should be denied if the application (a) is incomplete, (b) fails to comply with applicable requirements, or (c) fails to protect human health or the environment. 40 C.F.R. § 270.42(b)(7).

The meaning of a statute is an issue of law that is judicially reviewed de novo. *Southwest Research & Information Center v. State,* 2003-NMCA-012 ¶ 24,

133 N.M. 179, 62 P.3d 270. It is arbitrary and capricious for an agency to follow an erroneous interpretation of the applicable law. *Phelps Dodge Tyrone v. N.M. Water Quality Control Commission,* 2006-NMCA-115 ¶ 33, 140 N.M. 464, 143 P.3d 502.

New Mexico courts apply principles of judicial review similar to those used by federal courts. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Commission,* 2003-NMSC-005 ¶ 11, 133 N.M. 97, 61 P.3d 806; *Atlixco Coalition v. Maggiore,* 1998-NMCA-134 ¶ 16, 125 N.M. 786, 965 P.2d 370.

The Secretary must state reasons for his decision. *Citizen Action v. Sandia Corp.,* 2008-NMCA-031 ¶ 19, 143 N.M. 620, 179 P.3d 1228, *cert. denied,* 2008 NM LEXIS 135, 143 N.M. 666, 180 P.3d 673; *Atlixco Coalition v. Maggiore,* 1998-NMCA-134 ¶ 15,125 N.M. 786, 965 P.2d 370; *Green v. New Mexico Human Services Department,* 1988-NMCA-083 ¶ 13, 107 N.M. 628, 762 P.2d 915.

Agency action must stand or fall on the basis of the agency's reasoning. The reviewing court may not supply a reasoned basis for the agency's action that the agency itself has not given. Thus, the Court may not make agency policy but only review it. *Rio Grande Chapter of the Sierra Club v. N.M. Mining Commission,* 2003-NMSC-005 ¶ 11, 133 N.M. 97, 61 P.3d 806; *Atlixco Coalition v. Maggiore,* 1998-NMCA-134 ¶ 20, 125 N.M. 786, 965 P.2d 370.

An administrative agency may not change its position on a regulatory issue without offering a reasoned explanation of the change. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 57 (1983); *Citizens Awareness Network v. U.S. Nuclear Regulatory Commission,* 59 F.3d 284, 291 (1st Cir. 1995). *See also: Smiley v. Citibank (S.D.), N.A.,* 517 U.S. 735, 742 (1996).

5. Recording of the proceedings: A transcript of the public hearing has been prepared and appears in the Record.

6. Related or prior appeals: Two related appeals have been requested to be consolidated. (A-1-CA-37894 and A-1-CA-37898).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this Docketing Statement was served electronically upon all parties to this proceeding, listed below, in accordance with Rule 12-307.2 of the Rules of Appellate Procedure:

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