IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Southwest Research and Information Center,
Appellant

-against- **No. A-1-CA-38924**

New Mexico Environment Department,
Appellee.

NEW MEXICO ENVIRONMENT DEPARTMENT)
HAZARDOUS WASTE BUREAU)
CLASS 3 PERMIT MODIFICATION REQUEST:)
EXCAVATION OF A NEW SHAFT AND ASSOCIATED)
CONNECTING DRIFTS, WASTE ISOLATION PILOT)
PLANT, NO. NM4890139088-TSDF)

DOCKETING STATEMENT

Southwest Research and Information Center ("SRIC"), by its counsel, makes 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 New Mexico Environment Department's ("NMED") order dated April 24, 2020, approving a Temporary Authorization ("TA") Request for a Class 3 Permit Modification to the Hazardous Waste Act, § 74-4-1 *et seq*. ("HWA"), Permit for the Waste Isolation Pilot Plant

("WIPP"). The Permit Modification Request ("PMR") was submitted on August 15, 2019. The TA Request was submitted on January 16, 2020.

2. Date of the Order on Review: The NMED Order granting a TA was issued on April 24, 2020. A Notice of Appeal was filed by SRIC in this Court on April 27, 2020 (Docket No. A-1-CA-38924). This filing is timely in accordance with § 74-4-14 NMSA and § 12-601 NMRA.

3. Statement of the case: The PMR, submitted by the Permittees U.S. Department of Energy ("DOE") and Nuclear Waste Partnership, LLC ("NWP"), seeks NMED's permission to construct a fifth vertical shaft at WIPP, connecting the surface to the operating level 2150 feet below the surface, and horizontal drifts connecting the station at the bottom of the new shaft with WIPP's existing underground workings. The horizontal drifts would be 1200 feet—nearly a quarter mile—in length.

4. The PMR documents state that the schedule for construction would require 37 months to complete the project. TA Request, Ex. C at 2[1]. The Permit calls for WIPP operations to end in 2024. The PMR does not request a change in this date. Thus, if the shaft and drifts were built as requested, starting now, they would only have a few months' use before closure begins.

[1] Citations to Exhibits refer to exhibits presented on SRIC's Motion for Stay, dated May 4, 2020, and in SRIC's Response and Reply, dated May 22, 2020.

5. On December 22, 2017, the Permittees submitted a PMR to excavate a new shaft and drifts, similar to the PMR here in issue, accompanied by a Request for Class Determination, and proposing that that PMR then be deemed a Class 2 PMR, which has an abbreviated process compared to a Class 3 PMR and entails no public hearing. 40 C.F.R. § 270.42.

6. On August 15, 2019, approximately 20 months after the initial filing, the Permittees submitted the PMR here in issue, withdrawing the previous request for determination of class and agreeing that the PMR be categorized as a Class 3 PMR. A Class 3 PMR, unlike a Class 2 PMR, allows members of the public to request a public hearing.

7. On January 16, 2020, Permittees submitted a Request for Temporary Authorization for the Class 3 PMR, seeking leave to commence construction forthwith. Therein, Permittees emphasized the benefits of the project for WIPP's underground ventilation system:

> The underground ventilation system (UVS) upgrade in the Class 3 PMR provides improved management of hazardous waste, pursuant to 20.4.1.900 NMAC (incorporating 40 CFR Part 270.42(e)(2)(i)(B)) as indicated on page 9 of the MR which states, *"The addition of S#5 and associated connecting drifts represents an upgrade to the UVS, and will provide a new intake and exhaust system capable of restoring full-scale, concurrent, mining, maintenance, and waste emplacement operations."*

Exhibit C at 1 (*italics original*). The Request for a TA stated that the "activity described in this TA request will have no impact on the existing permitted facility." (at 3).

8. SRIC commented on the TA Request, pointing out that the regulation concerning permit modifications, 40 C.F.R. § 270.42 (which is adopted in New Mexico, § 20.4.1.900 NMAC), does not allow a TA for the major construction that is the subject of a Class 3 PMR. SRIC also stated that the TA would severely prejudice the subsequent Class 3 proceedings, because construction of the $ 197 million project would prevent public consideration of the proposal and prejudice any opportunity for NMED to deny the PMR. (Letter, SRIC to NMED, Jan. 27, 2020.) (Exhibit D).

9. On April 24, 2020, NMED approved the TA in a letter that contains no factfindings nor any explanation of NMED's reasoning, except to state the conclusion that "NMED finds the documentation sufficient to support the issuance of a temporary authorization." (Letter, NMED to DOE, NWP, April 24, 2020) (Attached to Notice of Appeal).

10. SRIC then filed a Notice of Appeal in this Court and moved NMED to stay its own ruling, as caselaw and § 74-4-14 require. (SRIC Motion for a Stay of Temporary Authorization before NMED Secretary, April 27, 2020.). NMED refused to entertain the motion:

> As you are aware, there are no motions available to you at this time, as this is not a docketed proceeding. Additionally, it was brought to my attention that you have filed a Notice of Appeal before the Court of Appeals regarding this matter, which means we are in litigation with you on this matter. Therefore, for both of those reasons, NMED will not entertain this motion, and stands by its decision to issue the referenced Temporary Authorization.

Email, Stringer to Lovejoy, April 27, 2020. (Ex. Q). SRIC then filed its Motion for a Stay of Temporary Authorization in this Court. (Motion for a Stay, May 4, 2020.).

11. Factual Background: WIPP is a federal government repository for defense-related transuranic ("TRU") waste, operated pursuant to Environmental Protection Agency ("EPA") certification under the WIPP Land Withdrawal Act, Pub. L. No. 102-579 (1992) ("LWA"), a Permit under the HWA, which is the statute that enacts the New Mexico program under the Resource Conservation and Recovery Act, 42 U.S.C. § 6921 *et seq.* ("RCRA"), and a stipulated Consultation and Cooperation ("C&C") Agreement among DOE and the State of New Mexico.

12. WIPP was initially 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." Thus, Congress did not authorize WIPP to be the sole disposal site for all TRU waste.

13. The 1979 Authorization Act provides further, as to the role of the State of New Mexico:

> (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.

14. In 1981, the State sued DOE in Federal District Court, asserting the State's concerns about the planning and construction of WIPP. Civil Action No. 81-0363 JB (D.N.M.). The case resulted in a Stipulated Agreement, which was approved by the court. Exhibit E. This agreement includes the C&C Agreement and Working Agreement, executed pursuant to the WIPP Authorization Act. The 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 . . . .

Exhibit E at 8. The C&C Agreement has since been modified: The First Modification states the capacity limit of 250,000 ft^3 (equal to 7,080 m^3) of remote-handled transuranic ("RH TRU") waste (November 30, 1984); the Second

Modification states the overall capacity limit of 6.2 million ft^3 (equal to 175,600 m^3) of TRU waste. (August 4, 1987). Exhibit E (Pages 35 and 56 of PDF).

15. Further, the Working Agreement states:

> Where a State or Federal permit is a prerequisite to any action by DOE (*e.g.*, access roads, site development or discharge of pollutants), that action shall not be carried out until the appropriate permit has been obtained.

Exhibit E, Working Agreement, Art. II.F. (Page 60 of PDF). Thus, DOE agreed not to undertake construction of the shaft and drifts requested in the PMR until it obtained a modified Permit, which it has not done.

16. In 1992 Congress enacted the WIPP Land Withdrawal Act, Pub. L. No. 102-579 (1992), which contains the statutory capacity limit:

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

Exhibit F § 7(a)(3).

17. Further, Congress intended that the LWA capacity limit be based on waste container volumes. At the time, congressional committees were especially motivated to impose hard-and-fast waste volume limits on DOE's Test Phase, which was the anticipated next step[2]. The capacity limits for the Test Phase (which

[2] Senate Report 102-196 on S 1671, by the Senate Energy and Natural Resources Committee, specifically states: "According to DOE's current plans, a total of 4,525 55-gallon drums of transuranic waste would be used during the experimental program." Exhibit G. The House bill (HR 2637) reported by the House Armed Services Committee, stated the volume limit both in cubic feet and in drums:

was deleted in 1996) and for the entire WIPP facility were in direct ratio to one another, so that under the LWA the total capacity is also subject to a hard-and-fast limit. Exhibit F, LWA § 6(c)(1)(b) (as enacted). In addition, the LWA incorporates volume limits imposed by EPA, which EPA expressed both in the number of 55-gallon drums and the total waste volume, demonstrating that the statutory limit is based on container volumes. Exhibit F § 6(c)(1)(B), 55 Fed. Reg. 47700, at III, IV.B.2 (Nov. 14, 1990).[3]

> 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.

§ 9(a)(3). Similarly, House Report 102-241, Part 1, from the House Interior and Insular Affairs Committee, included capacity limits of 5.6 million ft^3 of contact-handled ("CH") waste and 95,000 ft^3 of RH waste. § 7(a). Test Phase waste was limited to no more than 4,250 55-gallon drums. Exhibit G. House Report 102-241, Part 3, from the House Energy and Commerce Committee, included a dissent, opposing the capacity limits "of not more than 5.6 million cubic feet of contact-handled transuranic waste and 95,000 cubic feet of remote-handled transuranic radioactive waste in WIPP" (§ 7(a)) and Test Phase limits of 4,250 barrels or 8,500 barrels of waste. Exhibit G.

[3] The limits are based on the volume of 55-gallon drums (or drum equivalents): 850,000 drums times 7.3 cubic feet (55-gallon drum volume) equals 6,205,000 ft^3. In the 2018 WIPP PMR hearing Mr. Kehrman, witness for the Permittees, so testified. Exhibit H.

18. WIPP's 6.2 million ft^3 (175,600 m^3) waste capacity limit is also imposed by the HWA Permit itself. Permit, Attachment B, Part A[4] application. The LWA (Exhibit F) goes to great lengths to ensure the application of RCRA and HWA regulation to WIPP. Thus, it directs that DOE *comply with RCRA, RCRA regulations, and the RCRA permit*,[5] and document its compliance:

> SEC. 9. COMPLIANCE WITH ENVIRONMENTAL LAWS AND REGULATIONS.
>
> (a) In General.—
>
> (1) Applicability. Beginning on the date of the enactment of this Act, the Secretary [of Energy] shall comply with respect to WIPP, with –
>
> * * *
>
> (C) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.);
>
> * * *
>
> (H) all regulations promulgated, and all permit requirements, under the laws described in subparagraphs (B) through (G).[6]

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[4] The Permit is voluminous and is available at: https://wipp.energy.gov/Library/Information_Repository_A/Searchable_Permit_Fenceline_RCRA_EC%20additions_April%202020_1.pdf

[5] References to the Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.*, include RCRA, which is a part of that Act, 42 U.S.C. § 6921 *et seq.*, Subchapter III.

[6] The LWA continues, requiring certification of RCRA compliance:

> (2) Periodic oversight by administrator and state. The Secretary [of Energy] shall, not later than 2 years after the date of the enactment of this Act, and biennially thereafter, submit documentation of continued compliance with the laws, regulations, and permit requirements described in paragraph (1) to the [EPA] Administrator, and, with the law described in paragraph (1)(C), to the State.
>
> (3) Determination by administrator or state. The [EPA] Administrator or the State, as appropriate, shall determine not later than 6 months after receiving a submission under paragraph (2)

In addition, LWA § 9(d) underscores the State's authority under RCRA:

> (d) Savings provision.—The authorities provided to the Administrator and to the State pursuant to this section are in addition to the enforcement authorities available to the State pursuant to State law and to the Administrator, the State, and any other person, pursuant to the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) and the Clean Air Act (40 U.S.C. 7401 et seq.).

Exhibit F. Moreover, the LWA emphasizes that it modifies neither the State's nor EPA's authority to enforce, nor DOE's obligation to comply with, RCRA[7].

> whether the Secretary is in compliance with the laws, regulations, and permit requirements described in paragraph (1) with respect to WIPP.

[7] SEC. 14. SAVINGS PROVISIONS.
(a) CAA and SWDA. No provision of this Act may be construed to supersede or modify the provisions of the Clean Air Act (42 U.S.C. 7401 et seq.) or the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.).
(b) EXISTING AUTHORITY OF EPA AND STATE. No provision of this Act may be construed to limit, or in any manner affect, the Administrator's or the State's authority to enforce, or the Secretary's obligation to comply with --
(1) the Clean Air Act (42 U.S.C. 7401 et seq.);
(2) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), including all terms and conditions of the No-Migration Determination; or
(3) any other applicable clean air or hazardous waste law.

The 1996 WIPP Land Withdrawal Amendments Act, Pub. L. No. 104-201, relieved DOE from compliance with the land disposal provisions of RCRA for waste designated for WIPP. These amendments have no effect on the case at hand. Section 14 of the LWA now reads as follows:

> Section 14. Savings provisions.
> (a) CAA and SWDA.—Except for the exemption from the land disposal restrictions described in Section 9(a)(1), no provision of this Act may be construed to superseded or modify the

19. Pursuant to its delegated RCRA authority, NMED held extensive hearings and issued the Permit, which includes the 6.2 million ft^3 waste capacity limit. Permit, Attachment B. The repository was designed to contain the waste capacity of 6.2 million ft^3 within its original footprint. Exhibit I.

20. NMED stated in the 2018 NMED proceeding about the Volume of Record PMR (now before the Court in No. A-1-CA-37894) that NMED understood that the disposal capacity is to be measured by the volume of the outer waste containers, and that NMED would enforce it as such. (Exhibit J).

21. In addition, the Permit states a 25-year operational period:

> During the Disposal Phase of the facility, which is expected to last 25 years, the total amount of waste received from off-site generators and any derived waste will be limited to 175,600 m^3 of TRU waste of which up to 7,080 m^3 may be remote-handled (RH) TRU mixed waste.

B-13. Again:

> provisions of the Clean Air Act (42 U.S.C. 7401 et seq.) or the Solid Waste Disposal act (42 U.S.C. 6901 et seq.).
>
> (b)EXISTING AUTHORITY OF EPA AND STATE.—No provision of this Act may be construed to limit, or in any manner affect, the Administrator's or the State's authority to enforce, or the Secretary's obligation to comply with—
>
> (1) the Clean Air Act (42 U.S.C. 7401 et seq.);
>
> (2) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), except that the transuranic mixed waste designated by the Secretary for disposal at WIPP is exempt from the land disposal restrictions described in section 9(a)(1); or
>
> (3) any other applicable clean air or hazardous waste law.

> For the purpose of establishing a schedule for closure, an operating and closure period of no more than 35 years (25 years for operations and 10 years for closure) is assumed.

G-5. Yet again:

> The Disposal Phase for the WIPP facility is expected to require a period of 25 years beginning with the first receipt of TRU waste at the WIPP facility and followed by a period ranging from 7 to 10 years for decontamination, decommissioning, and final closure. The Disposal Phase may therefore extend until 2024, and the latest expected year of final closure of the WIPP facility (i.e., date of final closure certification) would be 2034.

G-6. Since WIPP began operations in 1999, the period of operations ends in 2024.

22. Since at least 1980, with DOE's concurrence, TRU waste volume at WIPP has consistently been measured by the gross internal volume of the outermost waste container. Thus, in the 1980 Final Environmental Impact Statement ("FEIS"), DOE stated that "The data for TRU waste presently in retrievable storage are the container volume" and that, the design capacity was 6.2 million ft^3. DOE's 1981 Record of Decision, based on the FEIS, carried forward these capacity figures. 46 Fed. Reg. 9162 (Jan. 28, 1981). DOE's 1990 Final Supplement Environmental Impact Statement (DOE/EIS-0026-FS, January 1990) states that the "design capacity of the WIPP is based upon the total volume of emplaced containers and not their contents." DOE's 1994 WIPP Transuranic Waste Baseline Inventory Report calculated waste volumes in "Final Waste Form," which means the gross internal volume of the container. DOE's 1997 Disposal Phase Supplemental Environmental Impact Statement (DOE/EIS-0026-S-2,

September 1997) again calculated waste volume based on the volume of waste containers. DOE explained:

> While the LWA and C&C Agreement include limits on the volume of TRU 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 waste 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. . .

at 3-8.

23. DOE has consistently reported to Congress and to EPA the volume of contact-handled ("CH") TRU waste emplaced at WIPP, based on the volume of the outer containers. 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.

24. EPA has measured waste volume measurement in the same way. 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). To show DOE's compliance with the 6.2 million ft^3 LWA waste volume limit, DOE submitted waste volume data based on "final form" container volume. EPA accepted the data and found that WIPP was in compliance. 63 Fed. Reg. 27354, 27373 (May 18,

1998). Final waste form data were also submitted in 2006, 2010, and 2017 recertifications and accepted by EPA.

25. EPA's RCRA regulations govern, inter alia, permitting of "miscellaneous units," which include WIPP. 40 C.F.R. §§ 264.601-03, Subpart X. NMED has adopted these regulations as HWA regulations. 20.4.1.500 NMAC. The regulations require the permitting authority to issue a permit that protects human health and the environment, based on the configuration of the unit and "[t]he volume and physical and chemical characteristics of the waste in the unit." *Id.* The permitting authority is required to regulate the volume, concentration and characteristics of hazardous wastes to be disposed of. 40 CFR § 264.601; EPA Release, 52 Fed. Reg. 46946, 46956 (Dec. 10, 1987). DOE's HWA Permit application, Part A, states the total waste capacity of WIPP as 175,600 m^3 (equivalent to 6.2 million ft^3). Based on a detailed Part B application, describing how WIPP would meet Environmental Performance Standards, and 19 days of hearings, on October 27, 1999 NMED issued the HWA Permit for WIPP.

26. The Permit specifies the maximum volume of TRU waste to be disposed of in each of eight panels. It requires DOE to report the volume emplaced in each panel for entry in Permit Table 4.1.1. Permit Parts 1.3.1, 6.10.1. NMED is legally required to enforce these volume limits. NMED has consistently

enforced the calculation of capacity under the Permit based on outer container volume.

27. The August 15, 2019 PMR seeks to modify the Permit to authorize the construction of Shaft #5 and drifts connecting the new shaft to the existing underground facility. The PMR states that the purpose of the modification is to restore "full-scale, concurrent, mining, maintenance, and waste emplacement operations." PMR at 9. (Exhibit A)[8]. In fact, the Permittees have previously stated that other permitted activities already fulfill those requirements. The Permittees' actual purpose is to violate the legal limits on the capacity and the operational period of WIPP. This purpose is not disclosed in the PMR documents, in violation of the requirements of 40 C.F.R. § 270.42.

28. The PMR seeks a major, or "Class 3," modification to the Permit. Under the HWA, 74-4- 4.A.7 NMSA 1978, and the regulations, 40 C.F.R. § 270.42(c), a public process, including a right to request a public hearing, is required for a major permit modification. However, the Permittees also asked NMED for a TA, allowing them to commence the actions included in the PMR—construction of the new shaft and drifts—and to continue construction for up to a

[8] Cited pages excerpted in Exhibit A. The PMR is at: https://wipp.energy.gov/Library/Information_Repository_A/Class_3_PermitModifications/19-0241_Letter_Redacted.pdf

year[9] *before* any public hearing and approval of the PMR. On April 24, 2020, NMED granted the requested TA. Exhibit C; Attachment to Notice of Appeal.

29. SRIC explained the actual purpose of the PMR in a letter to NMED dated October 16, 2019. Exhibit B. The construction of a fifth shaft and connecting drifts is a key element of Permittees' plan to violate the legal limits on WIPP's capacity. The proposed shaft location 1200 feet—almost a quarter mile—from the existing repository provides room to construct additional disposal panels along the connecting drifts. Further, SRIC set forth the legal and regulatory obstacles to issuance of a TA in a letter to NMED January 27, 2020 (Exhibit D), responding to the January 16, 2020 TA request (Exhibit C).

30. DOE has adopted a strategy to violate the legal limits on WIPP, namely, the 6.2 million ft^3 waste capacity limit specified in the C&C Agreement, the LWA, and the Permit and the 25-year period of operations contained in the Permit. DOE's strategy is reflected in the following documents:

31. The 2018 WIPP Volume of Record PMR, issued in December 2018 and now on review in this Court (No. A-1-CA-37894), purports to give DOE unrestricted authority to calculate the volume of waste disposed of in WIPP with reference to the 6.2 million ft^3 limit. DOE's witness in that proceeding stated

[9] The regulation contemplates a duration of 180 days, plus a 180-day extension, for a TA—totaling 360 days or effectively a year. 40 C.F.R. § 270.42(e)(4).

candidly that, after obtaining power to calculate waste volume, DOE would request permit modifications to construct additional underground waste disposal panels to accommodate the additional waste capacity it had gained. Exhibit K.

32. The DOE Carlsbad Field Office ("CBFO") Draft 2019-2024 Strategic Plan declares the objective of operating WIPP through the year 2050 to emplace, not the statutory limit of 6.2 million ft^3, but the entire "existing defense TRU waste inventory." Exhibit L at 1. CBFO contemplates expansion of WIPP beyond the legal limits:

> In addition to ongoing maintenance and recapitalization of existing infrastructure, our focus over the next five years is the construction of a new underground ventilation system consisting of two capital asset projects: 1) the Safety Significant Confinement Ventilation System and 2) the Utility Shaft. The existing underground ventilation system is currently operating in filtration mode at a reduced flowrate, which cannot provide adequate air quality to support concurrent ground control, mining, and waste emplacement activities to dispose TRU waste at the rates expected through 2050. The completion of both capital asset projects will provide the underground ventilation required for simultaneous mining, ground control, and waste emplacement operations at the facility to achieve shipping and waste emplacement rates needed to support the cleanup of defense TRU waste while protecting the health and safety of the public and our workers, as well as the environment from a future radiological release event.

Id. Part of the CBFO Plan is the construction of additional disposal panels:

> State and U.S. Environmental Protection Agency approval for the development and use of additional panels for emplacement beyond Panel 8 are necessary.

Id.

33. DOE's agencywide Environmental Management Strategic Vision 2020-2030 states that "the new Utility Shaft will provide a new air intake shaft to support the SSCVS and facilitate mining additional panels." Exhibit M at 59.

34. A memorandum submitted with DOE's draft renewal HWA Permit estimates that WIPP will receive its last shipments in 2052:

> The recommended final waste receipt and emplacement date is 2052, and the final facility closure date is 2062.

Exhibit N.

35. The Final Supplement Analysis of the Complex Transformation Supplemental Programmatic Environmental Impact Statement, DOE/EIS-0236-S4-SA-02 (Dec. 2019), states that TRU waste from 50 years of production of plutonium pits will be disposed of at WIPP. (Exhibit O at 65). If such production begins in 2030, it would end in 2080, indicating a closure date sometime after 2080.

36. In April 2020 DOE released the Draft Environmental Impact Statement for Plutonium Pit Production at the Savannah River Site in South Carolina, DOE/EIS-0541. The document states that substantial quantities of TRU waste would be produced in the period 2030-2080, and it would all be disposed of at WIPP. Exhibit P at S-24, S-25.

37. DOE's plan to build Shaft #5 under a TA follows DOE's pattern of confronting its regulator with a fait accompli. DOE constructed WIPP itself

before obtaining EPA's determination of compliance with radiation regulations, 40 C.F.R. Part 191, subpart b. EPA compliance determination, 63 Fed. Reg. 27354 (May 18, 1998). When EPA was asked to certify compliance, it experienced severe pressure to authorize use of the already-built billion-dollar facility. DOE began waste shipments in March 1999, before the Permit was issued (on October 27, 1999), thus requiring NMED to include additional provisions in the Permit. See *Southwest Research & Information Center v. State*, 133 N.M. 179, 62 P.3d 270, 2003-NMCA-012. After the February 2014 radiation incident, DOE easily obtained permission to reopen WIPP from NMED and from EPA. Now DOE has secured a TA to start an additional shaft and connecting drifts, enabling DOE to create another fait accompli, for the purpose of compelling NMED to grant the underlying PMR.

38. By the TA, DOE now has permission to build the shaft and drifts before the PMR is even considered in the public process that the rule requires. 40 C.F.R. § 270.42(c). Completion of a year's construction, under authority granted by NMED, will make it impossible for NMED to deny the PMR. The affidavit of Steven Zappe, who worked for NMED and managed NMED's WIPP regulation for 17 years, makes clear that, once begun, a major construction project like Shaft #5 cannot be stopped:

> In granting the TA, NMED has in essence foreordained the outcome of the PMR without the benefit of public comment and hearing. After the

> Permittees spend millions of dollars *beginning* the excavation of a new shaft under the TA granted by NMED, it is unimaginable that NMED would be able to deny the PMR. Likewise, telling the Permittees that they would need to "reverse all construction activities associated with this Request" if the PMR were ultimately denied is technically infeasible.

Zappe Affidavit, sworn to April 27, 2020, at ¶ 15.E. Thus, NMED's issuance of the TA effectively amounts to granting the PMR. Not only does the TA cheat the public of the hearing promised by the rule, 40 C.F.R. § 270.42(c)(6), but it disposes of a critical issue in the administration of the WIPP HWA Permit without any factfindings or explanation.

39. Issues presented by this appeal: Final administrative action: Final administrative action is the predicate for an appeal to this Court. 74-4-14.A NMSA 1978. Here, issuance of a TA constitutes NMED's permission to construct Shaft #5 and the accompanying drifts. It is clear from Mr. Zappe's affidavit and from the practical realities of the situation that NMED has decided, irrevocably so, that the shaft and drifts described in the PMR may be built. As Mr. Zappe points out, after construction commences under the TA, Permittees' investment of a year of work and expense, in reliance on NMED's permission, will render it impossible for NMED to change its mind and order Permittees to shut down the construction and restore the site to its original state. NMED has had its final say in the matter and cannot pretend to be prepared to reconsider the decision.

40. This Court has explained that it holds a practical view of the requirement of final agency action. In *Citizen Action v. New Mexico Environment Department*, 2015-NMCA-058, 350 P.3d 1178, 2015 N.M. App. LEXIS 25, this Court stated that analysis of finality must be pragmatic:

> Section 74-4-14(A) provides that "[a]ny person who is or may be affected by any final administrative action . . . may appeal to the [C]ourt of [A]ppeals for further relief within thirty days after the action." The phrase "final administrative action" is not defined. *See generally* NMSA 1978, § 74-4-3 (2010) (providing definitions of terms used in the Hazardous Waste Act, NMSA 1978, §§ 74-4-1 to -14 (1977, as amended through 2010)). Therefore, we determine finality "based on pragmatic consideration of the matters at issue and analysis of whether the administrative body has in fact finally resolved the issues." *N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm'n*, 1991-NMSC-018, ¶¶ 1, 24, 111 N.M. 622, 808 P.2d 592 (stating the standard used to determine finality in the context of a direct appeal to our Supreme Court from an agency decision). Our "pragmatic consideration" of the administrative agency's action includes considering, among other things, "whether certain issues will be revisited" by the agency and whether the agency will engage in "further fact finding" that "will elicit more evidence illuminating the issues[.]" *Id*. ¶¶ 24,

Citizen Action v. N.M. Env't Dep't, 2015 N.M. App. LEXIS 25, at *12-13. Here, the TA for construction constitutes NMED's permission to invest time, effort, and money that cannot be called back, and the issue will not, in practice, be revisited. This is the pragmatic understanding of finality, and it is the rule followed in this Court.

41. Moreover, if there is to be effective judicial review of such an order, it must happen now, because, after a year's time, work, and money have been expended, this Court cannot be asked to consider objectively the lawfulness of

actions which have resulted in permanent construction. The question presented by the PMR has been decided by NMED. Even if there ultimately is a public hearing, it would be a meaningless formality, because no new result can be reached.

42. Issues presented by this appeal: Legal issues as to the PMR: In addition, under the NMED rules, the agency's order must be supported by a statement of reasons:

> The Secretary . . . shall set forth in the final order the reasons for the action taken.

20.1.4.500.D(2) NMAC. Here, the order issuing a TA sets forth no reasons and contains only a terse conclusion:

> Upon review of the documentation provided by the Permittees in the Request, NMED finds the documentation sufficient to support the issuance of a temporary authorization.

Although SRIC had pointed out in its letter to NMED dated January 27, 2020 (Exhibit D), that preconstruction authority is not allowed under a Class 3 PMR, that the TA would effectively grant the entire PMR without any public process, and that there is no actual urgency to commence construction before the PMR could be heard and decided—the TA addresses none of these issues. There is, in sum, no reasoning to support the TA.

43. On review, agency action must stand or fall on the basis of the agency's reasoning. A 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.

44. A statement of reasons is essential for judicial review:

> Indeed, one of the purposes of requiring a statement of reasons is to allow for meaningful judicial review. *See Green v. New Mexico Human Servs. Dep't*, 107 N.M. 628, 631, 762 P.2d 915, 918 (Ct. App. 1988) (compliance with statute requiring agency to state reasons for its decision is "necessary for meaningful appellate review"); *Akel v. New Mexico Human Servs. Dep't*, 106 N.M. 741, 743, 749 P.2d 1120, 1122 (Ct. App. 1987) (requiring agency's decision to "adequately reflect the basis for [its] determination and the reasoning used in arriving at such determination . . . so that this court may adequately perform its appellate review.").

Atlixco Coalition v. Maggiore, 1998-NMCA-134, ¶¶ 17-18, 125 N.M. 786, 792, 965 P.2d 370, 376. NMED's failure to consider and rule upon the fundamental issues presented by the TA Request requires the TA order to be vacated and remanded. *See also*: *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; *Green v. New Mexico Human Services Department,* 1988-NMCA-083 ¶ 13, 107 N.M. 628, 762 P.2d 915.

45. The NMED action of April 24, 2020 conflicts with the direction of 40 C.F.R. § 270.42(c), which requires as follows:

> After the conclusion of the 60-day comment period, the Director must grant or deny the permit modification request according to the permit modification procedures of 40 CFR part 124.

40 C.F.R. § 270.42(c)(6). The reference provides that permit modifications are subject to the procedures applicable to permit issuance, including the public's right to comment and to request a hearing. 40 C.F.R. §§ 124.5-.15. A hearing is to be provided when there is significant public interest. 40 C.F.R. § 124.12. The action by NMED constitutes NMED's final action authorizing the permit modification in issue, denying any effectiveness to the process of public comment and hearing, which is legally required but, here, denied in any practical sense.

46. The PMR itself is fundamentally defective. The regulation for Class 3 modifications specifies as follows:

> (c) Class 3 modifications.
> (1) For Class 3 modifications listed in appendix I of this section, the permittee must submit a modification request to the Director that:
> (i) Describes the exact change to be made to the permit conditions and supporting documents referenced by the permit;
> (ii) Identifies that the modification is a Class 3 modification;
> (iii) Explains why the modification is needed; and
> (iv) Provides the applicable information required by 40 CFR 270.13 through 270.22, 270.62, 270.63, and 270.66.

40 C.F.R. § 270.42(c). The PMR fails to "[e]xplain[] why the modification is needed." It describes its subject as a new *ventilation* system to restore "full-scale, concurrent, mining, maintenance, and waste emplacement operations." PMR at 9.

(Exhibit A). Thus: "Drifts will be excavated to connect S#5 to the existing WIPP underground facility for access and ventilation purposes." PMR at 3. (Exhibit A).

47. However, those purposes are already achieved by existing provisions of the Permit that were incorporated in the previously approved New Filter Building. Permit at A2-9. SRIC related this fact in its October 16, 2019 comment letter on the PMR. Exhibit B.

48. Moreover, on its face, the PMR begs for an explanation that has not been provided. Permittees propose to excavate a fifth 2150-foot vertical shaft and underground drifts 1200 feet in length (Exhibit A, at C-3) at a cost that is shown in DOE budget requests to amount to nearly $197 million. Exhibit S. Permittees say that the construction program will take 37 months, so that if begun in May 2020, it will continue to June 2023. Exhibit C at 2; Exhibit R at 6, Table 1. The PMR proposes no change in the capacity limit, 6.2 million ft^3, contained in the Permit, nor in the terms stating that operations will end in 2024.

49. But it makes no sense to construct new underground facilities costing $197 million that will only see use for six months and will not affect the facility's capacity. Clearly, DOE's actual plans have been withheld from the PMR. The omitted explanation lies in DOE's plans to excavate additional disposal panels connected to and served by the new shaft and drifts, so that the WIPP waste capacity would be increased beyond the legal limit of 6.2 million ft^3 and the WIPP

operational period would be extended beyond the 25-year limit to accommodate the additional waste.

50. Since the PMR under 40 C.F.R. § 270.42 must "explain[] why the modification is needed," Permittees were required to submit their plan, to disclose the practical and safety implications of the project, to state its impact upon the planned period of operations, and to address the legality of the expansion in light of the legal prohibitions upon waste in excess of 6.2 million ft^3 and operations beyond 25 years. The purpose of the PMR is not simply to improve ventilation, and certainly not just for six months. But the PMR does not present any of the necessary information about DOE's actual purpose that the regulation requires.

51. The actual purposes of the PMR violate legal limitations on WIPP's operations. The C&C Agreement, which is a binding agreement executed by the Secretary of Energy, places a limit on WIPP's disposal capacity of 6.2 million ft^3. The PMR cannot be approved without violating this agreement. The LWA contains the same 6.2 million ft^3 limitation. The PMR cannot be approved without violating this statute. The Permit itself contains the same 6.2 million ft^3 limit, which is not proposed to be changed in the PMR; thus, the effect of the PMR is to contradict the Permit. The effect of the PMR is to contradict the Permit's limitation on operations past the year 2024. All of these legal barriers require the denial of the PMR.

52. SRIC has requested a stay of the TA so that the process adopted by NMED does not create a fait accompli that cannot be reversed—not by NMED and not by this Court—despite its illegality.

53. Issues presented by this appeal: Considerations on motion for a stay. This Court held in *Tenneco Oil Co. v. N.M. Water Quality Control Commission*, 1986-NMCA-033, 105 N.M. 708, 736 P.2d 986, that "[d]uring the pendency of an appeal, a stay can be granted as an incident to this court's power to review final administrative orders or regulations." ¶ 6. Further, "the party seeking the relief should first apply for a stay from the agency involved." ¶ 8.

54. Following this Court's direction in *Tenneco*, which is also reflected in § 74-4-14.D(2), SRIC applied to NMED for a stay of the TA pending appeal. NMED refused even to consider SRIC's stay motion:

> . . . there are no motions available to you at this time, as this is not a docketed proceeding. Additionally, it was brought to my attention that you have filed a Notice of Appeal before the Court of Appeals regarding this matter, which means we are in litigation with you on this matter. Therefore, for both of those reasons, NMED will not entertain this motion . . .

Email, S. Stringer to L. Lovejoy, April 27, 2020, Exhibit Q. Section 74-4-14.D(2) and *Tenneco* have been satisfied, and this Court is authorized to grant a stay.

55. The Court in *Tenneco* outlined the showing required for the grant of a stay:

> These conditions involve consideration of whether there has been a showing of: (1) a likelihood that applicant will prevail on the merits of the appeal; (2)

> a showing of irreparable harm to applicant unless the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest.

56. Likelihood of success on the merits: The TA violates DOE's commitment to the State contained in the 1981 C&C Agreement, which includes the Working Agreement, to obtain a permit before beginning construction:

> Where a State or Federal permit is a prerequisite to any action by DOE (*e.g.*, access roads, site development or discharge of pollutants), that action shall not be carried out until the appropriate permit has been obtained.

Exhibit E, Working Agreement, Art. II.F. By issuing a TA, NMED has advanced DOE's strategy to create a fait accompli by carrying out construction, which thereafter cannot be undone. Article II.F of the Working Agreement is clearly intended to prevent exactly such a result.

57. Further, the governing rule[10], 40 C.F.R. § 270.42, prohibits a TA of construction here. DOE itself classified this PMR as a Class 3 modification. Under this classification, "preconstruction" is expressly *unavailable*. EPA explained when the rule was issued:

> The rule also allows the facility to begin construction of a Class 2 modification 60 days after the modification is requested, although such construction would be at the permittee's own risk if the modification request is ultimately denied. This is known as the "preconstruction" provision. Finally, if the proposed Class 2 modification raises significant public interest or Agency concern about protection of human health or the environment, then the Agency can require that the Class 3 procedures be followed instead.

[10] This rule has been adopted by NMED as a rule issued under the HWA. See 20.4.1.900 NMAC.

> Class 3 modifications are subject to the same initial public notice and meeting requirements as Class 2 modifications. *However, the default and preconstruction provisions of Class 2 do not apply*.

53 Fed. Reg. 37912 (Sept. 28, 1988) (*emphasis supplied*). EPA explained that the permit modification rule recognizes the *unavailability of preconstruction authority* under a Class 3 modification:

> The second aspect of today's preconstruction provision allows the Director to establish a preconstruction date of more than 60 days after application submission. This flexibility is needed for several reasons. . . . Another reason for the permitting Agency to be able to delay construction stems from the new provision in today's rule that would allow the Director to determine that a Class 2 request should instead follow the Class 3 procedures. (See above preamble discussion.) *Since there is no preconstruction allowed with a Class 3 modification*, and since the public has 60 days to comment and request that the permittee's proposal follow the Class 3 procedures, the Director may not know by the 60th day whether there is sufficient merit to require the Class 3 procedures for the modification instead of Class 2. In such cases, the Director needs the ability to inform the permittee, by day 60, that construction should be delayed.

Id. (*emphasis supplied*).

58. EPA did not intend "preconstruction" to be used to allow changes that could not be reversed when ruling on the PMR—*i.e.*, a fait accompli:

> Preconstruction. The proposed rule allowed the facility owner/operator to perform any construction necessary to implement a Class 2 change before the modification request is granted. . . . However, several commenters opposed the idea since they believed that the permitting Agency would be less inclined to deny a modification that had already been constructed.
>
> EPA believes that preconstruction by the permittee, as allowed under the final rule, will not influence the permitting Agency's decision. *Because of the limited nature of Class 2 modifications and the need for flexibility in*

maintaining permits, preconstruction will be allowed for this category of modification.

53 Fed. Reg. 37912 (Sept. 28, 1988) (*emphasis supplied*). In contrast to Class 2 modifications, for the more substantial construction subject to Class 3 proceedings, like this PMR, EPA was emphatic that preconstruction is not available:

[T]here is no preconstruction allowed with a Class 3 modification.

Id. (emphasis supplied).

59. Moreover, 40 C.F.R. § 270.42 makes it clear that a TA may be issued only for specific purposes with a Class 3 PMR, and these purposes do not include construction:

(i) The permittee may request a temporary authorization for:

* * *

(B) Any Class 3 modification that meets the criteria in paragraph (3)(ii)(A) or (B) of this section; or that meets the criteria in paragraphs (3)(ii)(C) through (E) of this section and provides improved management or treatment of a hazardous waste already listed in the facility permit.

* * *

(3) The Director shall approve or deny the temporary authorization as quickly as practical. To issue a temporary authorization, the Director must find:
(i) The authorized activities are in compliance with the standards of 40 CFR part 264.
(ii) The temporary authorization is necessary to achieve one of the following objectives before action is likely to be taken on a modification request:
(A) To facilitate timely implementation of closure or corrective action activities;
(B) To allow treatment or storage in tanks or containers, or in containment buildings in accordance with 40 CFR part 268;
(C) To prevent disruption of ongoing waste management activities;
(D) To enable the permittee to respond to sudden changes in the types or quantities of the wastes managed under the facility permit; or

(E) To facilitate other changes to protect human health and the environment. 40 C.F.R. § 270.42(e)(3). Thus, a Class 3 PMR may be the subject of a TA *only* if it concerns closure or corrective action (40 C.F.R. § 270.42(e)(3)(ii)(A)), treatment or storage of wastes subject to land disposal restrictions (40 C.F.R. § 270.42(e)(3)(ii)(B)), improved management or treatment of wastes listed in the permit which are subject to waste management disruptions (40 C.F.R. § 270.42(e)(2)(i)(B), § 270.42(e)(3)(ii)(C),), improved management or treatment of wastes of wastes listed in the permit which are subject to sudden changes in types and quantities (40 C.F.R. § 270.42(e)(2)(i)(B), § 270.42(e)(3)(ii)(D), or improved management or treatment of wastes of wastes listed in the permit where there are other changes to protect human health and the environment, (40 C.F.R. § 270.42(e)(2)(i)(B), § 270.42(e)(3)(ii)(E)). None of these categories involves construction.[11]

[11] EPA explains as much in the 1988 preamble: "An Agency-issued temporary authorization may be obtained for activities that are necessary to: (i) Facilitate timely implementation of closure or corrective action activities; (ii) allow treatment or storage in tanks or containers of restricted wastes in accordance with Part 268; (iii) avoid disrupting ongoing waste management activities at the permittee's facility; (iv) enable the permittee to respond to changes in the types or quantities of wastes being managed under the facility permit; or (v) carry out other changes to protect human health and the environment. Temporary authorizations can be granted for any Class 2 modification that meets these criteria, or *for a Class 3 modification that is necessary to: (i) Implement corrective action or closure activities; (ii) allow treatment or storage in tanks or containers of restricted waste; or (iii) provide improved management or treatment of a waste already listed in the permit, where necessary to avoid disruption of ongoing waste management, allow*

60. EPA also stated that "[t]he authorized activities must be completed at the end of the authorization." 53 Fed. Reg. 37912. The 37-month schedule for construction of the shaft and drifts far exceeds the 180 days (or 360 days with a renewed authorization) available under a TA. 40 C.F.R. § 270.42(e)(1), (4). Such construction is not a lawful subject of a TA.

61. The PMR also suffers from fundamental illegality, as discussed above, for failure to disclose its illegal purposes and its conflict with DOE's obligations under the C&C Agreement, the LWA, and the Permit.

62. Irreparable injury: If the TA is not stayed, neither the TA nor the PMR can effectively be appealed. An appeal will probably require more than a year to obtain a ruling. For comparison, the Volume of Record PMR was granted by NMED on December 21, 2018, and appeals were filed in January of 2019. They have been pending now for well over a year and have not yet been briefed. Since a TA lasts for 180 days and may be renewed for an additional 180 days, it is highly unlikely that the appeal can be heard and decided until after the TA ends.

63. Moreover, as stated, once the construction of the shaft and drifts has advanced, it cannot be stopped. The unlawful expansion of WIPP's capacity and extension of its operations for more than 50 years will be approved without the

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the permittee to respond to changes in waste quantities, or carry out other changes to protect human health and the environment." 53 Fed. Reg. 37912 (*emphasis supplied*).

required public notice, comment and hearing. SRIC (Exhibit B) and other parties have already requested a hearing on the PMR, but if the TA remains in effect, construction will go forward, and the public comment and hearing will be a futile exercise.

64. Injury to Permittees: But if the TA is stayed pending appeal, the Permittees can nevertheless proceed with their PMR and obtain a ruling by the Class 3 PMR process of a draft permit, public comment, negotiations, public hearing, and final order. For comparison, the volume of record PMR was filed on January 31, 2018 and, following an accelerated schedule, granted on December 21, 2018. There is no reason such a schedule should be viewed as injurious to Permittees.

65. The public interest: If the TA is stayed pending appeal, the public interest will be served in several ways: First, NMED's and this Court's consideration of the PMR will not be prejudiced—indeed, bound—by the Permittees' investment of a year and untold millions in construction.

66. Second, the issues raised by the PMR will be heard publicly, as the rule and the statute require. The U.S. Court of Appeals for the Fourth Circuit emphasized the importance of public proceedings to consider expansion of a hazardous waste facility:

> As discussed above, South Carolina has a carefully crafted process for granting a waste disposal operator additional space. That process includes

> the opportunity for public notice and comment. Safety-Kleen seeks to bypass this procedure by demanding immediate additional capacity. The public has a strong interest in the opportunity for notice and comment. First, the notice and comment procedure allows individual citizens and groups that are affected by an expansion in waste operations to participate in the permitting process. If history is any guide, a number of citizens and interest groups will participate in any process for public notice and comment on whether Pinewood's capacity should be increased. Second, the notice and comment procedure allows for careful and deliberate consideration of whether it is environmentally safe to allow Safety-Kleen to store additional waste. The Pinewood facility is located in an environmentally sensitive area. The facility is a mere 1200 feet from Lake Marion, a popular recreational spot and a source of drinking water for several thousand people. The facility is adjacent to over 8500 acres of forest and wetlands. The public has a strong interest in ensuring that DHEC carefully considers whether additional capacity is warranted. See *Coleman v. Paccar Inc.*, 424 U.S. 1301, 1307, 47 L. Ed. 2d 67, 96 S. Ct. 845 (1976) (vacating stay of enforcement of federal motor vehicle safety standard in part because of public's strong interest in safety); see also *Ark. Peace Ctr. v. Ark. Dep't of Pollution Control*, 992 F.2d 145, 147 (8th Cir. 1993) (staying preliminary injunction in part because of potential environmental harm if an injunction was in force). We agree with the district court that the public interest weighs in favor of denying an injunction against DHEC.

Safety-Kleen, Inc. v. Wyche, 274 F.3d 846, 863-64 (4th Cir. 2001). The PMR here involves the highly consequential issues of expanding the waste capacity of WIPP and extending its operations from 2024 into the 2080's. Surely such questions deserve careful and public discussion. It cannot be regarded as detrimental to afford such process.

67. 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.

68. 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 present PMR is incomplete for failure to disclose the actual plan to expand WIPP, fails to demonstrate protection of human health and the environment, and calls for action that is prohibited by the LWA, the Permit, and the C&C Agreement, and thus fails to comply with the requirements of 40 C.F.R. § 270.42.

69. 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 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.

70. Recording of the proceedings: No transcript or recording has been made.

71. Related or prior appeals: Two appeals related to this one concerning the volume of record PMR have been consolidated with one another. (A-1-CA-37894 and A-1-CA-37898).

Respectfully submitted,

/s/ Lindsay A. Lovejoy, Jr.
Lindsay A. Lovejoy, Jr.
3600 Cerrillos Road, Unit 1001 A
Santa Fe, NM 87507
Telephone (505) 983-1800
Facsimile (505) 983-4508
E-mail: lindsay@lindsaylovejoy.com

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Certificate of Service

I hereby certify that the foregoing Docketing Statement was served electronically through the Court of Appeals electronic service and filing system upon all counsel appearing in this proceeding on May 27, 2020:

/s/ Lindsay A. Lovejoy, Jr.
Lindsay A. Lovejoy, Jr.