



August 11, 2026

The Honorable Scott Mason IV
Regional Administrator
United States Environment Protection Agency Region 6
1201 Elm Street, Suite 500
Dallas, Texas 75270-2102

Re: Response to the U.S. Environmental Protection Agency Comments regarding the Waste Isolation Pilot Plant Hazardous Waste Permit

Dear Regional Administrator Mason:

This letter is in response to the U.S. Environmental Protection Agency's (EPA) June 22, 2026 letter concerning the New Mexico Environment Department's (NMED) Agency-Initiated Modification (AIM) to the U.S. Department of Energy's (DOE) Waste Isolation Pilot Program's (WIPP) state hazardous waste operating permit. This letter follows productive conversations with the U.S. Department of Energy leading up to mediation with stakeholders that took place on July 30, 2026 and that will continue on August 13, 2026.

The EPA raised the following issues with the permit modification:

1. does not provide a sufficient basis to authorize the permit modification or set numeric quotas on Los Alamos National Laboratory (LANL) waste;
2. may unreasonably restrict and impede hazardous waste shipments for treatment, storage, or disposal in violation of 40 CFR § 271.4(a) or stymie clean-up of TRU-waste sites across the United States;
3. does not include information showing that LANL legacy waste can be prepared and shipped in the volumes contemplated;
4. may raise concerns under the Supremacy Clause of the U.S. Constitution;
5. may raise concerns under the Commerce Clause of the U.S. Constitution; and
6. may necessitate a presidential waiver.

Based on these concerns, EPA's letter threatens to withdraw approval of the state's authorized program. NMED offers EPA the following responses:

1. The modification of the permit is authorized pursuant to state and federal hazardous waste regulations, and NMED has provided a detailed basis in the AIM that more than satisfies the requirements of both of those regulations. Numeric quotas are not unprecedented.

20.4.1.900 NMAC, of the New Mexico Hazardous Waste Management Regulations, incorporates 40 CFR § 270.41(a)(2). These regulations allow the NMED to modify the permit, based on new information not

available at the time of the most recent permit renewal (2023), that would have justified the application of different permit conditions.

The DOE agreed to prioritize legacy waste and LANL legacy waste for emplacement at WIPP in the last permit renewal in 2023. Since the permit renewal in 2023, NMED has received new information regarding the amount of legacy waste and LANL legacy waste being shipped to WIPP. In addition, NMED has received new information that Panel 12, which DOE indicated would be dedicated for disposal of legacy waste, will not be ready to accept legacy waste until 2035. The delay in emplacing LANL legacy waste increases risk to human health and the environment from legacy waste currently stored above and below ground at LANL. If NMED had this information in 2023, NMED would have imposed numeric quotas to ensure that DOE prioritizes cleanup and emplacement of legacy waste and reduces the risk to human health and the environment from LANL legacy waste. The use of numeric quotas is not unprecedented; they were used in the DOE-Idaho Settlement Agreement. The numeric quotas are necessary in this case to enforce the prioritization language agreed to in 2023.

As a reminder, following the 2023 permit renewal, the EPA's Office of Air and Radiation formally approved the DOE's request to dispose of transuranic waste in panels 11 and 12 at WIPP pursuant to 40 CFR Part 194 on August 19, 2025 (90 FR 40236). Therefore, both NMED and EPA's Office of Air and Radiation took final agency actions affirming DOE's obligation to prioritize legacy waste emplacement in Panel 12. However, EPA Region 6 is taking a contrary position to both NMED and the EPA Office of Air and Radiation.

2. The permit modification is a reasonable condition on the movement of waste across state borders based on the agreement in the 2023 permit renewal to prioritize legacy waste and LANL legacy waste and the AIM will not meaningfully affect clean-up of other TRU-waste sites.

The permit condition imposing numeric quotas is a reasonable condition to ensure that legacy waste is prioritized for emplacement at WIPP in accordance with the Waste Isolation Pilot Plant Land Withdrawal Act and would not violate 40 CFR 271.4(a) which only prohibits "an aspect of a State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes." The prioritization of LANL legacy waste does not operate as an outright ban and does not impose any numeric limits on waste from other sites. The amount and timeframe for waste shipments to WIPP from various DOE sites are regularly renegotiated. The prioritization would, at most, delay some shipments from other sites, but this would also depend on the operational conditions at WIPP. In fact, by agreeing to host the WIPP facility, New Mexico has done more as a state to advance the cleanup of TRU waste sites across the country than any other state.

Finally, it should be noted that DOE's deferred maintenance at WIPP, as documented by the U.S. Government Accountability Office and the Defense Facilities Nuclear Safety Board, have resulted in deteriorating and obsolescent infrastructure at the site with far greater impacts to standing waste generator site shipments and emplacement.

3. LANL has the capacity to prepare and ship LANL waste in the amounts proposed in the permit modification.

DOE operates LANL and WIPP under two separate hazardous waste permits. NMED's assessment is that DOE has the capacity and resources to prepare and ship legacy waste at LANL in the amounts proposed if called upon to do so. However, DOE and NMED are in the process of negotiating new language that would reduce risk at LANL while mitigating concerns related to this permit condition.

4. The permit modification is not preempted under the Supremacy Clause because: (a) the permit modification is consistent with the authority Congress has delegated to New Mexico to regulate WIPP; (b) the permit modification does not create a conflict with federal law; (c) the permit modification advances federal objectives; and (d) federal law does not exclusively occupy the regulatory field regarding prioritization of eligible waste streams for emplacement at WIPP.

A Supremacy Clause issue arises only if the proposed permit modification conflicts with federal law, obstructs federal objectives, or intrudes into a regulatory field exclusively occupied by federal law.

(a) The permit modification is consistent with the authority Congress has delegated to New Mexico to regulate WIPP.

In the Waste Isolation Pilot Plant Land Withdrawal Act, Congress provided New Mexico with broad authority to enforce the hazardous waste provisions of RCRA. *See* Pub. L. 102-579 § 14(b) (1992). Also, Congress decided to subject DOE, in its management of WIPP, to the regular permitting procedures of RCRA and chose not to impose additional limitations on state authority despite the federal interest in the storage of TRU-waste. Pub. L. 102-579 § 9(a)(1)(C) (1992).

Under RCRA, New Mexico is authorized to carry out the hazardous waste program "in lieu of the Federal program ... and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste." 42 U.S. Code § 6926(b). New Mexico – not EPA – acts as the primary permitting authority for WIPP and "[a]ny action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the [EPA]." 42 U.S.C. § 6926(d).

The EPA regulations regarding RCRA permits provide New Mexico the authority to establish permit "terms and conditions as the ... State Director determines necessary to protect human health and the environment." 40 C.F.R. § 270.32(b)(2).

The permit modification is consistent with the authority Congress has delegated to New Mexico to regulate WIPP.

(b) The permit modification does not create a conflict with federal law.

RCRA does not contain provisions that preclude the prioritization of certain eligible waste streams from being emplaced at WIPP. Federal law governing WIPP has specific requirements for the types of waste eligible for disposal, volume limitations, and safety and environmental requirements. Nothing in the permit conditions would prevent DOE from complying with both the permit conditions and federal law.

The permit conditions establish scheduling or allocation priorities which are not governed by federal law.

(c) The permit modification advances federal objectives.

Congress established WIPP for the safe disposal of radioactive waste materials generated by atomic energy defense activities. *See e.g.* Pub. L. 102-579 § 2(20)(C) (1992). Legacy waste was generated from atomic energy defense activities at LANL. The presence of legacy waste currently stored above and below ground at LANL requires safe disposal to protect human health and the environment in New Mexico. Therefore, the purpose of the permit modifications advances federal (as well as state) objectives.

It is also important to note that unlike the other generator sites that rely on WIPP, New Mexico was the only state that assumed the risk for managing the nation's low-level radioactive waste.

(d) Federal law does not exclusively occupy the regulatory field regarding prioritization of eligible waste streams for emplacement at WIPP.

In an interpretation of state authority under RCRA, the Tenth Circuit found that "states retain primary authority to implement hazardous waste programs" and may "issue and enforce permits for the storage, treatment, or disposal of hazardous waste so long as the state program meets the minimum federal standards." *U.S. v. State of Colo.*, 990 F.2d 1565 (10th Cir. 1993) (internal quotations omitted).

The permit modification does not touch on a regulatory field that is exclusively occupied by federal law because federal law is silent on the particular aspects of hazardous waste permitting related to this action.

5. The dormant commerce clause does not apply to the permit modification or, alternatively, is not violated because: (a) the dormant commerce clause prohibits interference with interstate commerce when the activity has not been authorized by Congress; (b) the permit modification does not seek to protect a New Mexico economic interest; and (c) any burden on interstate commerce is incidental to a permit modification and would pass the balancing test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

The dormant commerce clause prohibits a state from discriminating against or unduly burdening interstate commerce.

(a) The dormant commerce clause prohibits interference with interstate commerce only when the activity has not been authorized by Congress.

Congress may authorize state actions that would otherwise violate the dormant Commerce Clause. *Northeast Bancorp, Inc. v. Bd. of Governors*, 472 U.S. 159, 174 (1985); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 427–35 (1946); *White v. Mass. Council of Constr. Employers*, 460 U.S. 204, 213 (1983). Congress has granted New Mexico broad authority to regulate the WIPP permit (*See* 4(a)).

(b) The permit modification does not seek to protect a New Mexico economic interest.

Transuranic waste (TRU waste) is regulated to protect human health and the environment, not as an item of commerce. The permit modification does not benefit any New Mexico business or local market. LANL, WIPP and the waste streams themselves are owned by the federal government. The purpose of the dormant commerce clause is to combat economic protectionism. The purpose of the permit modification is to protect human health and the environment which courts have recognized as a legitimate local interest.

Although the U.S. Supreme Court has ruled that “all objects of trade merit Commerce Clause protection” even “valueless out-of-state wastes,” the permit modification can be distinguished because it does not create an outright ban. *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *See also Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992).

(c) Any burden on interstate commerce is incidental to a permit modification and would pass the balancing test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

Under the balancing test in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), a facially non-discriminatory regulation only violates the dormant commerce clause if the burden on interstate commerce is clearly excessive in relation to local benefits.

The permit modification would have a minimal burden on interstate commerce. If the permit modification was implemented, WIPP would still be able to accept out-of-state waste. The only effect would be the timing and prioritization of the waste being emplaced at WIPP.

The burden is not clearly excessive in relation to the local benefit of reducing the risk to human health and the environment from exposure to LANL legacy waste. New Mexico would benefit from the prompt cleanup of LANL legacy waste, minimizing additional risk for residents that bear the risk of TRU waste being transported through their state from DOE sites across the country.

6. A presidential waiver would not be appropriate because the AIM does not impact a “paramount interest.”

The permit modification to enforce the prioritization agreed to in the 2023 settlement negotiations does not amount to a paramount interest of the United States because it does not threaten national security interests or other critical interests and therefore a presidential waiver is not appropriate.

While NMED acknowledges the President’s authority under 42 U.S.C. 6961, RCRA 6001, the prioritization of LANL legacy waste for emplacement at WIPP does not prevent out-of-state DOE facilities from disposing of waste at WIPP. Any possible delay in shipping waste to WIPP from out-of-state DOE facilities does not threaten national security interests. Most of this waste has sat at various sites for decades.

NMED strongly rejects the assertion that these proposed permit modifications could jeopardize New Mexico’s RCRA state authorization under 40 C.F.R. § 271.22(a). EPA’s reference to withdrawing program

authorization is an overreach that misunderstands both the purpose of the proposed permit conditions and the legal authority delegated to authorized states.

EPA's citing a potential "repeated issuance of permits which do not conform to requirements" per 40 CFR § 271.22(a)(2)(ii) is legally and factually inaccurate. A single draft permit modification subject to public participation and inter-agency dialogue cannot constitute a "repeated issuance" of non-conforming permits.

EPA's threat to assume direct administration of New Mexico's RCRA program ignores practical administrative realities. First, EPA's Office of the Inspector General noted in a 2019 report on oversight of state RCRA programs that while the agency may have the authority to withdraw authorization from a state not in compliance, EPA staff acknowledged that such a move "would be too extreme." Second, there is no precedent for EPA to withdraw authorization from a state that remains in compliance with the RCRA program.¹ Third, EPA lacks the resources required to directly administer the hazardous waste permitting and enforcement program in New Mexico. Finally, EPA's threat to initiate program withdrawal proceedings over a state's legitimate prioritization of local cleanup risks gravely undermines the spirit of cooperative federalism touted by EPA leadership.

In conclusion, the DOE and NMED are working to resolve issues that mitigate many of the concerns raised in your letter. The parties to this matter are working in good faith towards a better outcome for the people of New Mexico and our environment.

Sincerely,


James C. Kenney
Cabinet Secretary

Cc: Courtney Kerster, Senior Advisor, Office of Governor Michelle Lujan Grisham
Zach Ogaz, General Counsel, New Mexico Environment Department

¹ See https://www.epa.gov/sites/default/files/2018-07/documents/epaig_20180731-18-p-0227.pdf