STATE OF NEW MEXICO

BEFORE THE SECRETARY OF THE ENVIRONMENT

No. HWB _____

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_____)

AFFIDAVIT OF STEVEN ZAPPE

State of New Mexico)
) ss.:
County of Santa Fe)

Steven Zappe, being duly sworn, deposes and says:

1. My name is Steven Zappe, and I am a 27-year resident of New Mexico currently residing at 3 Escopeta Court, Santa Fe, New Mexico, 87506.

2. I was hired by the New Mexico Environment Department ("NMED") in 1994 as a permit writer in the Hazardous and Radioactive Materials Bureau (HRMB), the predecessor to the current Hazardous Waste Bureau (HWB). I served as the sole WIPP permit writer from 1994, through the 1999 WIPP public hearing on the original permit issuance, and on all subsequent permit modifications. After the permit was issued, I served as the NMED WIPP project leader, supervising a staff of three to four environmental scientists from 2002 to 2011. During that time, I oversaw all aspects of implementation of and compliance with the WIPP permit.

3. After the issuance of the initial WIPP permit on October 27, 1999, which became effective 30 days later, Permittees submitted over 100 separate permit modification requests ("PMRs") and several temporary authorization ("TA") requests within the first ten years of the permit. I quickly became intimately familiar with the regulatory requirements contained in 20.4.1.900 NMAC (incorporating 40 CFR §270.42). In order to interpret and apply consistently the permit modification requirements specified in 40 CFR §270.42, "Permit modifications at the request of the permittee," HWB permitting staff generally rely upon two resources:

a) a clear and literal reading of the regulatory language in 20.4.1 NMAC and all regulations incorporated by reference therein, and

b) EPA guidance documents, especially preamble and explanatory language when EPA issues proposed and final rules constituting the regulations.

4. The RCRA regulations, 40 CFR §270.42, identify and distinguish between two classes of PMRs that require public notice and allow public comment prior to a final agency decision:

a. Class 2 permit modifications (40 CFR §270.42(b)) are either explicitly listed and identified as such in Appendix I to §270.42 or "*apply to changes that are necessary to enable a permittee to respond, in a timely manner, to*

"*(A) Common variations in the types and quantities of the wastes managed under the facility permit,*

"*(B) Technological advancements, and*

"(C) Changes necessary to comply with new regulations, where these changes can be implemented without substantially changing design specifications or management practices in the permit."

40 CFR §270.42(d)(ii).

b. Class 3 permit modifications (40 CFR §270.42(c)) are either explicitly listed and identified as such in Appendix I to §270.42 or "*substantially alter the facility or its operation.*"

40 CFR §270.42(d)(iii).

5. Both Class 2 and Class 3 PMRs require a 60-day public comment period. The Class 2 process then has a prescribed timeframe, leading to a final agency decision no later than 90 to 120 after receipt of the PMR. The Class 2 process includes a "default" provision (see 40 CFR §270.42(b)(6)(iii) and (b)(6)(v)), which says that, if the agency fails to make a decision on the PMR within 120 days of its receipt, the permittee is authorized to conduct the activities described in the PMR for up to 180 days. If the agency does not make a final decision before the end of the automatic authorization, the permittee is authorized to conduct the activities described in the PMR for the life of the permit.

6. In contrast, the Class 3 process timeframe becomes indeterminate following the initial public comment period, since it incorporates a draft permit, public comment, and a public hearing; it is referred to as "the more extensive procedures of Class 3." 40 CFR §270.42(b)(6)(i)(C)(2). Class 3 PMRs have no "default" provision.

7. The Class 2 PMR process includes a "preconstruction" provision (40 CFR §270.42(b)(8)), under which the permittee may perform construction associated with a

Class 2 PMR beginning 60 days after the submission of the request, unless the agency establishes a later date for commencing construction. EPA's preamble (*Permit Modifications for Hazardous Waste Management Facilities*, 53 Fed. Reg. 37913 (September 28, 1988)) states, "…such construction would be at the permittee's own risk if the modification request is ultimately denied."

8. EPA then adds, concerning Class 3 PMRs: "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*." *Id.* The preamble discussion of the final rule is clear: "… there is no preconstruction allowed with the Class 3 modification…" 53 Fed. Reg. 37918.

9. Temporary authorizations were incorporated in the 1988 final rule to provide "…the [a]gency with the authority to grant a permittee temporary authorization, without prior public notice and comment, to conduct activities necessary to respond promptly to changing conditions." 40 CFR §270.42(e). EPA expected that temporary authorizations will be useful in the following two situations:

> "(1) To address a one-time or short-term activity at a facility for which the full permit modification process is inappropriate; or
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> "(2) to allow a facility to initiate a necessary activity while its permit modification request is undergoing the Class 2 or 3 review process." 53 Fed. Reg. 37919.

10. The regulatory criteria for issuance of a TA (§270.42(e)(2)(i)) are [§270.42(e)(3)(ii)]:

"(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."

A TA can be granted for a Class 2 modification that meets one or more of the five criteria. However, a TA can only be granted for a Class 3 modification if it meets criteria (A) and (B), or if it meets criteria (C) through (E) and provides improved management or treatment of a hazardous waste already listed in the facility permit.

11. On January 16, 2020, the WIPP Permittees submitted a TA request to NMED related to their August 15, 2019 Class 3 PMR entitled, "Excavation of a New Shaft and Associated Connecting Drifts." In their TA request, they requested authorization to "Excavate a new shaft, Shaft #5 (S#5), approximately 1,200 feet to the west of the existing Air Intake Shaft (AIS)." They explained that this TA "… is needed pursuant to 20.4.1.900 NMAC (incorporating 40 CFR Part 270.42(e)(3)(ii)(E)) 'to facilitate other changes to protect human health and the environment.'" They stated:

> Based on estimated timelines, it will take approximately seventeen months to excavate (sink) the shaft. It will take an additional eight months to mine the connecting drifts from S#5 to the existing repository. The start-up testing will take an additional twelve months to complete. The total estimated time to complete construction and implement the use of the S#5 ventilation system is thirty-seven months. Thus, there is a need on the part of the Permittees to start sinking the

> shaft as soon as possible so that the upgrade, which includes additional unfiltered ventilation, will be available to the Permittees and their workforce at the earliest possible date.

TA, at p. 2.

12. During my 17 years working on the WIPP Permit, I evaluated at least four TA requests from the Permittees and recommended appropriate action by NMED. Under the TA regulations, NMED is not required to give public notice of its final decision, but the Permittees are required to send notice to the facility mailing list within seven days of their submission of the TA. In response, Southwest Research and Information Center ("SRIC") has frequently submitted comments on TA requests.

13. The relevant TA decision documents that I was directly involved in are listed below. The decision letters are attached to this affidavit:

AR/Index Number	Date Issued	Action	Note
000904	09/05/2000	Denial	General inquiry from SRIC, no comment
001213.5	12/13/2000	Approval	SRIC comment sent 12/12, rec'd 12/15
001230	12/22/2000	Rescission of prior approval	Incorporated SRIC 12/12 comments in rescission
010955	09/24/2001	Denial	SRIC comment sent 9/6
040521	05/21/2004	Approval	No comment from SRIC

14. Public comment can be extremely helpful in providing an alternative perspective. It is crucial to informed decisionmaking by NMED.

15. For several clear regulatory reasons, NMED should not have approved the January 16, 2020 TA request to excavate Shaft #5. Any one of the following reasons would be sufficient grounds to deny this TA request. The combination of the following reasons makes an indisputable argument for denial:

A. <u>A TA for preconstruction activities is not allowed under Class 3 PMRs, and thus are inappropriate activities for a Class 3 TA request</u> – Preconstruction

activities are only allowed under Class 2 PMRs. EPA's preamble for the final rule clearly states that the preconstruction provisions available for Class 2 PMRs do not apply to Class 3 PMRs. Based on the regulation alone, approval of the TA is totally indefensible.

B. The proposed activity will not achieve the stated objective within the time limit for a TA – Permittees state that the purpose of the TA is "to facilitate other changes to protect human health and the environment," but the proposed activity is to "Excavate a new shaft…" The new shaft could not be connected to the existing WIPP repository for more than three years. Thus, the TA will have zero impact on human health and the environment within the 180-day or (if reissued for one additional term of up to 180 days) 360-day limit, which is the maximum allowed. Excavating a shaft in downtown Carlsbad (or Santa Fe) would have the same inconsequential effect on human health and the environment. Moreover, a Class 3 TA must "provide[] improved management or treatment of a hazardous waste already listed in the facility permit." This TA has nothing to do with "management or treatment" of waste.

C. The timeframe for the proposed activity does not fit within the TA time limit – Even if excavating a new shaft *did* have a positive impact on protecting human health and the environment, the Permittees estimate "it will take approximately seventeen months to excavate (sink) the shaft" and thirty-seven months in total "to complete construction and implement the use of the S#5 Ventilation system." EPA specifically states that the activities authorized by a TA must be completed at the end of the authorization. 53 Fed. Reg. at 37920. A

TA is limited to 180 to 360 days. 40 CFR § 270.42(e)(1), 270.42(e)(4). At the end of the TA, not even the excavation of the shaft will have been completed. At the same time, the Class 3 PMR will probably not result in a decision within the 360 days, due in part to competition with the permit renewal process currently in preliminary stages.

D. The Permittees have not demonstrated that the proposed activity is necessary – Even if this preconstruction activity were allowable in a Class 3 PMR process, which it is not, the Permittees are confusing "necessary" with "desirable." TAs are intended to authorize activities necessary to respond promptly to changing or temporary conditions (53 Fed. Reg. at 37919), not to circumvent the public process for permit modifications—based only on the supposed urgency of Permittees' self-imposed deadlines. Permittees have not demonstrated that the facility cannot wait until action is taken on the PMR in accordance with the Class 3 process. To construe this provision in any other manner would subvert the public regulatory process for permit modifications under the HWA and RCRA.

E. The nature of the actions authorized by the TA calls for denial of the TA – In granting the TA on April 24, 2020, 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.

16. I have spoken only of the laws and regulations imposed under the Hazardous Waste Act that prohibit issuance of the TA here. It is notable that the Working Agreement executed as part of the State-DOE Consultation and Cooperation Agreement, dated July 1, 1981, states specifically as follows: "Where a state or federal permit is a prerequisite to any action by DOE . . . that action shall not be carried out until the appropriate permit has been obtained." Article II.F. That language, standing alone, prohibits a TA for an activity that requires a permit modification, as the excavation of a new shaft surely does. The TA violates the C&C Agreement.

The above matters are stated under penalty of perjury under the laws of the State of New Mexico.

Steven Zappe

State of New Mexico
County of Santa Fe

Signed and sworn to before me on the 27th day of April, 2020

Official Seal
CESAR LEON
Notary Public
State of New Mexico
My Commission Expires 03/26/23

Notary Public

My commission expires: 03/26/2023