



Michelle Lujan Grisham
Governor

Howie C. Morales
Lt. Governor

**NEW MEXICO
ENVIRONMENT DEPARTMENT**

Harold Runnels Building
1190 Saint Francis Drive, PO Box 5469
Santa Fe, NM 87502-5469
Telephone (505) 827-2855
www.env.nm.gov



James C. Kenney
Cabinet Secretary

Jennifer J. Pruett
Deputy Secretary

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

November 18, 2020

Reinhard Knerr, Manager
Carlsbad Field Office
Department of Energy
P.O. Box 3090
Carlsbad, New Mexico 88221-3090

Sean Dunagan, Project Manager
Nuclear Waste Partnership LLC
P.O. Box 2078
Carlsbad, New Mexico 88221-2078

**RE: DENIAL OF TEMPORARY AUTHORIZATION REISSUANCE
FOR CLASS 3 PERMIT MODIFICATION
WASTE ISOLATION PILOT PLANT
EPA I.D. NUMBER NM4890139088**

Dear: Messrs. Knerr and Dunagan:

On April 24, 2020, the New Mexico Environment Department (“NMED”) approved the January 16, 2020 Request submitted by the Department of Energy (“DOE”) and Nuclear Waste Partnership (“NWP”) (collectively the “Permittees”) for a Temporary Authorization (“Request”) for activities associated with the August 15, 2019 Class 3 Permit Modification Request (“PMR”) to the Waste Isolation Pilot Plant (“WIPP”) Hazardous Waste Facility Permit (“Permit”) entitled “*Excavation of a New Shaft and Associated Connecting Drifts.*” This Temporary Authorization expired on October 24, 2020.

On September 9, 2020, the Permittees submitted a Request for a Reissuance of the Temporary Authorization pursuant to 20.4.1.900 New Mexico Administrative Code (“NMAC”) (incorporating Title 40, Code of Federal Regulations (“CFR”), Part 270.42(e)(4)(ii)). Specifically, the Permittees sought to continue excavating a new shaft, Shaft #5, approximately 1,200 feet to the west of the existing Air Intake Shaft for an additional 180 days while the Class 3 process is on-going. NMED has received weekly updates via conference call on construction activities since the start of the Temporary Authorization term, and the reissuance request did meet the minimum regulatory requirements, however, it did not provide a comprehensive summary on the status of the project and progress to date, nor did it include a revised schedule for completion.

On September 29, 2020, NMED performed an unannounced, in-person inspection of the Temporary Authorization activities at the WIPP site to assure compliance. During this inspection, NMED verbally requested the submittal of a construction schedule and plans for safely halting operations at the end of the Temporary Authorization term. On October 16, 2020, NMED received a response from the Permittees that contained the requested information. The information included a short-term schedule that failed to include the Temporary Authorization term as a key date but did describe different contingency plan scenarios. The Temporary Authorization expired on October 24, 2020.

On November 5, 2020, the Permittees formally notified NMED that on November 3, 2020 it had implemented "Contingency Plan Scenario 1: No Reissuance of the Current Temporary Authorization," ten (10) days after the Temporary Authorization expired. The lack of a readily available contingency plan during the inspection, the exclusion of the Temporary Authorization expiration in the short-term schedule, along with the notification of implementing the contingency plan 10 days after the expiration of the Temporary Authorization gives NMED significant concern that the Permittees are not appropriately planning the execution of shaft construction activities in accordance with a Temporary Authorization or approved Permit Modification in place.

Further, in addition to ensuring compliance with, and pursuant to, all applicable federal and state laws, NMED must also ensure that the approval of a Temporary Authorization does not endanger human health or the environment, as the state is currently under a Public Health Order associated with the COVID-19 pandemic. Given the current high incidence rate at the WIPP facility, including a reported death of an employee, the circumstances of which are currently unknown, it is clear that the Permittees are unable to successfully mitigate COVID-19 risk to protect human health while conducting the activities under the scope of this Request. For example, the DOE news release on November 12, 2020 states:¹

"Between November 4 and November 10, WIPP was notified of 20 positive COVID-19 test results for WIPP employees, including 11 Nuclear Waste Partnership (NWP), 6 NWP subcontractor, 1 Department of Energy Carlsbad Field Office (CBFO) and 2 CBFO contractor employees. The employees were last on site between March 24 and November 8.

In total, through November 10, WIPP has recorded 104 positive cases, with 49 of the individuals recovered in accordance with WIPP protocols.

The Department of Energy and Nuclear Waste Partnership continue to work with all employees to ensure Department of Health and CDC guidelines are followed."

Additionally, NMED has requested that the Permittees provide standard operating procedures and policies associated with COVID-19 mitigation efforts at the WIPP facility, and to date, the Permittees have only been able to produce a check list akin to a fact sheet.

In accordance with 40 C.F.R. § 270.42(e)(4), NMED *may* [emphasis added] approve the reissuance of a Temporary Authorization if "(i) [t]he reissued temporary authorization constitutes the Director's decision on a Class 2 permit modification..." or "(ii)...determines that the reissued temporary

¹ See https://www.wipp.energy.gov/wipp_news_COVID.asp

authorization involving a Class 3 permit modification request is warranted to allow the authorized activities to continue while the modification procedures...are conducted.” Pursuant to the NMED Delegation Order dated September 14, 2020, the Cabinet Secretary has delegated the authority to issue or deny Temporary Authorizations under the Hazardous Waste Act to the Director of the Resource Protection Division. Based upon the aforementioned information, NMED hereby finds that neither 40 C.F.R. § 270.42(e)(4)(i) or (ii) are applicable, and therefore denies the Permittees’ Request for reissuance of the Temporary Authorization. The Permittees must adhere to its “Contingency Plan Scenario 1: No Reissuance of Temporary Authorization” until the Class 3 PMR process has concluded. If NMED ultimately denies the PMR, the Permittees must reverse all construction activities conducted under the original Temporary Authorization at their expense and within timeframes specified by the Department. If any further activities are conducted beyond the scope of “Contingency Plan Scenario 1: No Reissuance of Temporary Authorization”, the Permittees may be subject to enforcement under NMSA 1978, Section 74-4-10.

This denial does not constitute a final agency action on the pending Class 3 PMR, nor does it prejudice or presuppose the outcome of the final action on the PMR.

The Request for a Reissuance and NMED’s denial letter are available and may be found on the NMED WIPP Information Page at <https://www.env.nm.gov/hazardous-waste/wipp/>.

If you have any questions regarding this letter, please contact me at (505) 382-1655.

Sincerely,

Stephanie Stringer
Director
Resource Protection Director

cc: K. Pierard, NMED HWB
R. Maestas, NMED HWB
D. Biswell, NMED HWB
M. McLean, NMED HWB
C. Catechis, NMED DOE-OB
M. Brown, DOE CBFO
R. Chavez, NWP
L. King, EPA Region 6
T. Peake, EPA ORIA
File: WIPP '20