



SOUTHWEST RESEARCH AND INFORMATION CENTER

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January 27, 2020

Stephanie Stringer
New Mexico Environment Department (NMED)
1190 St. Francis Drive, Suite N4050
Santa Fe, NM 87505

Via email: stephanie.stringer@state.nm.us

RE: WIPP Temporary Authorization Request, dated January 16, 2020

Dear Ms. Stringer:

Southwest Research and Information Center (SRIC) provides these comments on the “Request for a Temporary Authorization (TA) for the Referenced Class 3 Permit Modification,” dated January 16, 2020. SRIC previously commented to NMED on the new shaft that is the subject of that Class 3 modification request on February 2, 2018; March 8, 2019; and October 16, 2019. Thus, SRIC’s views that the new shaft should not be permitted are well known to NMED and to the Department of Energy (DOE) and Nuclear Waste Partnership (NWP), the co-permittees.

SRIC strongly opposes the requested TA because there is no legal basis for a TA, as it is specifically precluded by the regulations, historic NMED practices, as well as case law, and it would severely prejudice the required Class 3 process, including public notice and comment, negotiations and hearings. Nor is there any legitimate basis for the permittees to complain about a “delay” from following required class 3 procedures, since the permittees themselves are the reason that the modification request is only now being considered. Thus, NMED must deny the TA and proceed with a draft permit or with a notice of intent to deny the modification request.

1. NMED should deny the TA request, pursuant to 20.4.1.900 NMAC (incorporating 40 CFR 270.42(e)(3)).

Those regulations state:

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.

In the case of a substantial construction project, such as the new shaft, that would be part of the facility for decades, a **TA is not allowed by the regulations**. Instead, Class 3 procedures must be followed.

In developing the regulations that include Temporary Authorizations, the Environmental Protection Agency (EPA) explained:

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.

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. 37913 (September 28, 1988), *emphasis added*.

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. First, situations may arise that warrant design changes in the permittee's proposal, and the Director should be able to postpone all or part of the construction until the final design is approved (although this should be infrequent, given the limited scope of Class 2 modifications). 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. 53 Fed. Reg. 37918, *emphasis added*.

Therefore, it is clear that a TA for a substantial construction project, such as the new shaft, that is the subject of a Class 3 Modification is **not allowed** by the regulations.

In the TA request, the permittees did not discuss that regulatory history, nor show that the request is exempt from the preconstruction prohibition on a TA for such a Class 3 request.

2. NMED's practice regarding Temporary Authorizations for WIPP has also used those EPA explanations.

In 2000 and 2001, NMED acted on previous permittees' requests for Temporary Authorizations. On December 13, 2000, NMED approved a TA for a Class 2 Modification related to Drum Age Criteria. However, after reviewing public comment from SRIC, NMED rescinded that approval on December 22, 2000. In its rescission decision, NMED cited the September 28, 1988 EPA regulations and explanation.

On September 24, 2001, NMED denied permittees' request for a TA for a previously submitted Class 1 request that the permittees asked be considered under Class 2 procedures. In its denial letter, NMED again cited the September 28, 1988 EPA regulations and explanation.

SRIC is unaware that any WIPP TA requests have been approved that established a different basis for such approval. NMED has not adopted regulations providing any different basis than that used by EPA. Thus, NMED must continue to rely on its past practices and use the 1988 EPA explanation, which clearly prohibits a TA for the proposed preconstruction activity.

3. In addition to being specifically precluded, the TA request should be denied because it would severely prejudice the required Class 3 procedures, including public notice and comment, negotiations, and a public hearing.

The permittees Class 3 Permit Modification request was dated August 15, 2019. SRIC filed comments on October 16, 2019, opposing the request, noting that it was technically incomplete, and requesting negotiations and a public hearing. Other organizations and individuals also commented in opposition to the modification request.

On December 6, 2019, NMED issued to the permittees a Technical Incompleteness Determination (TID) on the modification request. On January 21, 2020 (five days after the TA was submitted), the permittees submitted their TID response.

NMED has still not issued a notice of denial or a draft permit for public comment, negotiations and public hearing, which are required for the pending Class 3 request. SRIC and other members of the public would be denied an effective opportunity to participate in the modification request if the TA were approved because construction on the \$75 million project would commence, which clearly prejudices the opportunity for the request to be denied because it would be substantially constructed before the NMED decision is made.

Further, the regulations limit TAs to 180 days. 20.4.1.900 NMAC (incorporating 40 CFR 270.42(e)(1)). That TA authorization can be extended only once, for an additional 180 days. 20.4.1.900 NMAC (incorporating 40 CFR 270.42(e)(4)). Thus, the entire Class 3 modification process would have to be completed in 360 days. At the same time, the WIPP permit renewal application is also in process. There are past examples of WIPP class 3 modifications requiring more than 360 days to complete, especially when there is as much substantial public opposition and technical concerns as is true with the new shaft modification. In SRIC's April 15, 2019 letter to Secretary Kenney, the concern about the time and resources for the permit renewal process and the permit renewal were specifically raised. at 2-3.

The U.S. Fourth Circuit Court of Appeals has recognized the public interest in a full public permitting process before construction of hazardous waste disposal facilities. The permittee (Safety-Kleen) had asked for an injunction, directing the regulator to grant a temporary authorization to construct additional disposal facilities. The court sustained denial of the injunction, based upon the need for a public process:

We now turn to the question of whether the district court erred in concluding that the public interest weighs against the grant of an injunction. We agree with the district court. 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, 863-864, 2001 U.S. App. LEXIS 26910, *28-30, 53 ERC (BNA) 1744, 38 Bankr. Ct. Dec. 261, 32 ELR 20438.

The same arguments in favor of a denial of “temporary” authorization to construct apply here. A number of citizen groups and individuals seek to participate in the Class 3 procedures and the environmental safety of the project is disputed. Moreover, in its October 16, 2019 comments, SRIC specifically raised concerns about the permittees’ likely attempts to begin excavation before the Class 3 procedures were completed. at 9.

4. The permittees’ actions have clearly established that there is no urgency to begin excavation of the new shaft before the required modification public processes are completed.

On July 13, 2017, the permittees submitted a notice of planned change for the new Shaft Number 5 (S#5). The notice stated: “The Permittees anticipate that the excavation of S#5 will start in calendar year 2018.” at 1. Clearly, that excavation of the new shaft did not begin in 2018.

On December 22, 2017, the permittees submitted a Determination of Class for the new shaft. Subsequently, on January 31, 2018, the permittees submitted a Class 2 modification request – Clarification of TRU Mixed Waste Disposal Volume Reporting – that became the Class 3 Volume of Record (VOR) modification request.

Even though the new shaft request had been submitted more than a month earlier, the permittees stated to NMED and the public (including SRIC) that the VOR was a higher priority for action than the new shaft modification request. The permittees knew that priority decision would significantly delay the required modification processes for the new shaft. As a result, NMED proceeded with the VOR as a Class 3 request and issued its decision approving that request on December 21, 2018. (SRIC and other parties have appealed that decision to the New Mexico Court of Appeals, case A-1-CA-37894).

The permittees have not claimed that the VOR is needed to protect human health and the environment at WIPP. Yet they placed the VOR as a higher priority than excavation of the new shaft. Indeed, the Determination of Class request for the new shaft was withdrawn and the Class 3 modification request for the new shaft was not submitted until August 15, 2019. That request could have been submitted months earlier, and it could have been technically complete, so that the required Class 3 processes would be further along. Further, the permittees could have filed the Class 3 request as their December 22, 2017 Class Determination Request, in which the Class 3 procedures could have begun in 2018 and would likely have been concluded before now. Thus, it is the permittees own actions that have delayed the required public processes for the new shaft modification.

As noted in SRIC’s October 16, 2019 comments, the likely “urgency” of starting excavation relates to financial incentives for NWP, which are not the basis for a TA or approval of the modification request. The current FY 2020 Performance Evaluation and Measurement Plan (PEMP) for NWP includes a \$1,200,000 bonus fee for completing three specific activities related to the new shaft. Those activities are to be accomplished by February 20, 2020; March 30, 2020; and July 10, 2020. The fees themselves provide incentives for NWP to advocate for a quick approval of the request, to the detriment of an adequate public participation process. at 9.

5. The permittees’ claim that the TA for the shaft would protect public health and the environment has not been demonstrated.

In the TA request, the permittees assert that it meets the criterion “to facilitate other changes to protect public health and the environment.” at 2. However, SRIC’s October 16, 2019 comments stated that the shaft has not been shown to protect, public health and the environment. at 6-7. The permittees’ basis and need for the shaft should be part of the Class 3 modification process. Moreover, SRIC reiterates that the real purpose of the shaft is to facilitate WIPP expansion – adding new disposal rooms and panels – not to protect public health and the environment. If such rooms and panels were not being planned, there is no need for the new shaft, as WIPP was designed and has operated since 1999 with the four existing shafts.

In summary, there is no legal basis for a TA, as it is specifically precluded by the regulations, as well as case law, and it would severely prejudice the required Class 3 process. Nor is there any legitimate basis for the permittees to complain about any “delay” from NMED following the

required Class 3 procedures, since the permittees themselves are the reason that the modification request is only now being considered.

Thank you very much for your careful consideration of, and your response to, these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Don Hancock". The signature is written in a cursive style with a large, looped initial "D".

Don Hancock

cc: Kevin Pierard
Ricardo Maestas