

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

**IN THE MATTER OF:
HEARING DETERMINATION REQUEST
CLASS 3 “EXCAVATION OF A NEW SHAFT
AND ASSOCIATED CONNECTING DRIFTS”
PERMIT MODIFICATION TO THE WIPP
HAZARDOUS WASTE FACILITY PERMIT**

Docket No. HWB 21-02

**Motion on behalf of Southwest Research and Information Center
to Dismiss for Noncompliance with Rules Governing Permit Modifications**

Preliminary statement

Southwest Research and Information Center (“SRIC”), a party herein, moves to dismiss this Permit Modification Request (“PMR”) and Draft Permit. SRIC requests that the Hearing Officer hear and grant this motion in the interest of regulatory efficiency under the Hearing Officer’s “authority to take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by this Part.”

20.1.4.100.E(2) NMAC.

SRIC has conferred with counsel for the Environment Department (“NMED”), Permittee U.S. Department of Energy (“DOE”), and Permittee Nuclear Waste Partnership, LLC (“NWP”). Such parties oppose this motion. SRIC has also conferred with representatives for Concerned Citizens for Nuclear Safety and

Nuclear Watch New Mexico and with George Anastas, Dave McCoy, Deborah Reade, and Steve Zappe. Such parties concur in this motion.

SRIC is a New Mexico-based citizen organization which has monitored the Waste Isolation Pilot Plant (“WIPP”) project of the DOE for approximately fifty years from headquarters in Albuquerque. Members of SRIC reside near WIPP’s location near Carlsbad and along highways used to transport waste to WIPP and stand to be affected by its operations.

Summary

DOE has a plan to expand WIPP in excess of limits established by the Hazardous Waste Act, 74-4-1 NMSA 1978 (“HWA”), Permit, federal law, and enforceable agreements with the State, which under the regulations, 40 C.F.R. § 270.42, must be considered and approved or denied in a public permit modification process. But DOE has not submitted that plan for consideration in the PMR process. Instead, it has submitted a fragment of that plan, a segment that, standing alone, makes no sense and cannot be effectively considered and reviewed. Thus, DOE has chopped its expansion plan into segments, whose purpose and lawfulness cannot easily be discerned, preventing the public from participating effectively in the review process. But the regulations require that the public be allowed to address the project in its entirety. SRIC seeks dismissal of the present PMR and Draft Permit on the grounds that:

(a) DOE has failed to advise NMED of planned changes, in accordance with the Permit § 1.7.11.1 and 40 C.F.R. § 270.30, so that they may be included in the PMR and the Draft Permit,

(b) the PMR fails to incorporate changes to parts of the Permit that are necessary in light of the changes contained in the PMR and must be included in the PMR pursuant to 40 C.F.R. Appendix I, subsection B, Note, and

(c) the Draft Permit fails to comply with 20.4.1.901.A.1 NMAC, which requires the proposed Permit responding to a PMR to be set forth as a Draft Permit.

To fulfill the regulatory requirements, this PMR and the Draft Permit should be dismissed.

Factual background: DOE's planned changes

The main purpose of the current PMR is to enable DOE to press forward its plan to expand WIPP by excavating additional disposal space. Numerous DOE documents disclose the existence, and parts of, this expansion plan.

(1) The DOE Carlsbad Field Office (“CBFO”) Draft 2019-2024 Strategic Plan (AR 200422 and AR 200503, Ex. L) declares DOE’s objective of operating WIPP through the year 2050 to emplace, not the statutory limit of 6.2 million ft³ under § 7(a)(3) of the Waste Isolation Pilot Plant Land Withdrawal Act, Pub. L. No. 102-579 (1992) (“LWA”), but the entire “existing defense [transuranic] waste

inventory.” WIPP’s underground disposal rooms are laid out in “panels.” DOE-CBFO contemplates the addition of 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., addition of which will expand WIPP beyond its legal limits.

(2) 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 [Safety Significant Confinement Ventilation System] and facilitate mining additional panels.” AR 200422 and AR 200503, Ex. M, at 59.

(3) A memorandum submitted with DOE’s draft renewal HWA Permit estimates that WIPP will receive its last shipments in 2052. AR 200422 and AR 200503, Ex. N:

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

Id. The Permit states that operations shall conclude in 2024; see *infra* at 17.

(4) 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. (at 65). If such production begins in 2030, it would end in 2080, indicating a closure date sometime after 2080.

(5) 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 transuranic (“TRU”) waste would be produced in the period 2030-2080, and it would all be disposed of at WIPP. at S-24, S-25. AR 200422 and AR 200503, Ex. P. The Final EIS, released in September 2020, states that WIPP will accommodate all of the TRU waste from pit production “over the next 50 years,” Exhibit A at S-32, attached.

(6). In April 2020 the National Academies of Sciences, Engineering and Medicine (“NAS”) released a consensus report by 13 scientists, made pursuant to the direction of Congress, evaluating DOE’s plan to dispose of diluted surplus plutonium (“DSP”) at WIPP. *Review of the Department of Energy’s Plans for Disposal of Surplus Plutonium in the Waste Isolation Pilot Plant*, National Academy of Sciences (2020) (“NAS Report”). Exhibit B, attached. The NAS Report is explicit:

Specifically, the National Academies were asked to review DOE-NNSA’s plans to ship, receive, and emplace surplus plutonium in WIPP and to assess DOE-NNSA’s understanding of the impacts of these plans on WIPP and WIPP-bound waste streams.

at 12. The NAS Report states that disposal of DSP in WIPP is the currently planned DOE approach. at 14.

The NAS Committee received its information in briefings by DOE. at 42.

The NAS Report shows that DOE's plan has advanced to the point that "criticality-control" containers have been designed to dispose of the DSP, and a plan has been developed for two additional disposal panels. at 89, 103.

DOE has reviewed the plan to emplace DSP at WIPP and has approved it under its processes, having found that there is a need to dispose of at least 34 metric tons of DSP and that emplacement in an expanded WIPP is the most practical way to do this. at 42. DOE has authorized certain construction to begin. at 44.

The NAS Committee calculated the disposal space needed for a projected 48.2 metric tons of DSP and found that the existing and previously-planned disposal panels 1 through 8 and 10 are not large enough to contain the waste containers for DSP. at 6, 65. Even considering only the volume of inner containers holding DSP within the criticality-control external containers, the projected volume of DSP would cause the total waste volume in WIPP to exceed the statutory volume limit of 6.2 million ft³. at 6, 65. Thus, the disposal of DSP implies the expansion of WIPP in violation of the statutory limit.

Further, the plan to expand WIPP and introduce DSP would cause WIPP's operational life to extend beyond the year 2050, well exceeding the limit of 2024 contained in the existing Permit. at 45, 53, 73, 87.

The NAS Committee cautioned that the DOE plan to dispose of DSP raises safety questions that have not been resolved concerning, *e.g.*, the possible formation of a critical mass of radioactive material, precipitating a chain reaction, as the repository closes around the waste, and concerning the impacts of future accidents or human intrusion in zones of the repository containing concentrations of DSP. at 36, 39. The NAS Committee also noted that several studies of the repository's performance have not been completed and made public. at 94. In addition, DOE has not conducted an examination under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, of the environmental impacts of its plan to emplace DSP in WIPP and alternatives to that plan. at 44, 100-02.

The NAS Committee observed that the plan to enlarge WIPP by adding new disposal panels and rooms constitutes a substantial technical and “social contract” modification for WIPP and the State of New Mexico. at 96. It emphasized that the DOE approach of dividing its expansion plan into segments, which, considered individually as permit modifications, are unclear in purpose and impact, prevents effective public examination and comment on the project as a whole. at 104-05. The NAS Report recommends that the public be allowed, instead, to examine and comment upon the entire plan: “Members of the public and the State of New Mexico should be afforded the opportunity to consider the significance of the dilute and dispose program in its entirety.” at 99.

(7) In November 2020 the Government Accountability Office (“GAO”) released its latest report on DOE’s plans to expand WIPP. *Nuclear Waste Disposal; Better Planning Needed to Avoid Potential Disruptions at Waste Isolation Pilot Plant*, GAO 21-48 (Nov. 2020) (“GAO Report”). Exhibit C, attached. The GAO Report states that, after considering anticipated waste streams, in 2018 DOE planners foresaw the need to construct nine additional disposal panels at WIPP, to add to the existing eight panels:

During their planning, DOE officials calculated that nine additional panels, using panel designs similar to those of the existing panels, should be sufficient to meet DOE’s TRU waste disposal needs as outlined in its 2018 Annual TRU Waste Inventory Report.

at 18. A conceptual plan of the expanded repository based on DOE information was included in the GAO Report. at 19.

The GAO Report stated that DOE has developed an Integrated Master Schedule that incorporates development of additional physical space and the obtaining of regulatory permission, such as by PMR, for the expansion from the several regulators. at 33. Under DOE’s schedule, the first panel of new disposal rooms would be completed by June 2025. at 33.

The GAO Report relates that, to develop the new disposal panels, DOE must first complete the “Utility Shaft,” which is the subject of the present PMR. at 37. DOE has planned the drifts, which are also the subject of the present PMR, with an eye to efficient waste disposal in the new waste panels that will be constructed

along those drifts. at 20. Thus the “shaft and drifts” PMR that is before the NMED Secretary now is an integral element of DOE’s plan to expand WIPP by adding disposal space.

Argument

- a. There is no indication in the Administrative Record that DOE ever communicated to NMED the expansion plan that DOE has briefed in detail to the NAS Committee and the GAO.**

Title 40 C.F.R. § 270.30 states that a permittee must report any planned changes to the regulator:

(l) Reporting requirements.

(1) Planned changes. The permittee shall give notice to the Director as soon as possible of any planned physical alterations or additions to the permitted facility.

40 C.F.R. § 270.30. The Permit contains this requirement also. Permit 1.7.11.1.

Courts recognize the force of the reporting requirement. *Empire Energy Mgmt.*

Sys. v. Roche, 362 F.3d 1343, 1347, 1350 (Fed. Cir. 2004); *In re TVA Ash Spill*

Litig., 2012 U.S. Dist. LEXIS 122231, at *30-31 (E.D. Tenn. 2012). But a review

of the Administrative Record shows that DOE has said nothing to NMED about its

plan to enlarge the repository to accept additional waste. There is nothing about

additional waste panels, with additional waste rooms, connected to the planned

shaft and drifts. There is nothing about “criticality control” waste containers,

nothing about management of waste in such containers, nor about waste

emplacement in light of concerns about criticality, or accident scenarios, or human

intrusion scenarios. There is nothing about an extension of the operating period for several decades nor about closure of the repository with waste emplaced in new rooms and panels.

b. NMED has issued an incomplete and misleading Draft Permit.

As a result of DOE's failure to report planned changes, NMED issued a Draft Permit that fails to mention DOE's expansion plan and shows only the shaft and drifts, which are a small part of that plan, which DOE has chosen to include in its PMR, describing it as solely a ventilation improvement.

Under the applicable regulations a draft permit prepared by the HWB is a key element of the public process of examining a PMR. The permitting rules state:

A. Permit issuance or denial.

(1) Once an application is determined to be administratively and technically complete, the secretary shall prepare and issue either a draft permit or a notice of intent to deny.

20.4.1.901.A NMAC. The requirement applies in the case of a permit modification:

If the secretary decides to modify . . . a permit under 40 CFR section 270.41 or 40 CFR section 270.42(c), . . . a draft permit shall be prepared incorporating the proposed changes.

20.4.1.901.B(5) NMAC. A draft permit shall contain all the conditions, etc., required by 40 C.F.R. Part 270:

(a) A draft permit shall contain all conditions, compliance schedules, monitoring requirements and technical standards for treatment, storage, and/or disposal provided for in 40 CFR Part 270.

20.4.1.901.A(1) NMAC. See also 40 C.F.R. § 124.6(d), which is expressly “applicable to state programs” and requires a draft permit to include “standards for treatment, storage, and/or disposal and other permit conditions under sec. 270.30.”

The regulations place the Draft Permit at the center of the process of public participation:

(3) The secretary shall give public notice that a draft permit or a notice of intent to deny has been prepared, and shall allow 45 days for review and public comment, including requests for public hearing.

(4) If the secretary issues a draft permit, and a timely written notice of opposition to the draft permit and a request for a public hearing is received, the department, acting in conjunction with the applicant, will respond to the request in an attempt to resolve the issues giving rise to the opposition. If such issues are resolved to the satisfaction of the opponent, the opponent may withdraw the request for a public hearing.

20.4.1.901.A(3), (4) NMAC. Further,

A public hearing shall be scheduled if:

* * *

(b) the secretary issues a draft permit, a timely request for public hearing is received from any person opposed to the granting of a permit, and such person does not subsequently withdraw the request pursuant to Paragraph four of this subsection . . .

20.4.1.901.A(5).

Following DOE’s failure to report its expansion plan, NMED prepared a Draft Permit that does not show the planned expansion of WIPP. DOE’s entire expansion plan has been kept from the public process in violation of the regulations and the Permit. Instead, NMED has issued a highly misleading Draft

Permit and asked the public to comment and attend a hearing about that misleading document.

c. The PMR fails to comply with § 270.42(c)(1)(iii), which requires that a modification request “[e]xplain[] why the modification is needed.”

The PMR states at length that the purpose of the request is to improve ventilation in the underground:

The [Permanent Ventilation System] restores the WIPP underground to its pre-2014 condition by providing significantly increased ventilation flow, unfiltered exhaust for the construction activities, and filtered exhaust for the disposal circuit.

PMR at 1. See PMR at 1-10. The PMR discounts the scope of the changes involved:

The proposed modification does not change the fundamental design of the repository, and does not substantially alter the permit conditions or reduce the capacity of the facility to protect human health or the environment. The Permittees are simply proposing to modify the manner in which certain components are used (*i.e.*, a downcast shaft becomes an upcast shaft, fans push air through portions of the facility in addition to pulling air through portions of the facility).

PMR at 10. Nothing is said about the function of the shaft and drifts in enabling the construction of additional disposal panels, nor about the configuration of such panels, nor the duration of their use, nor the methods of waste emplacement. DOE has spoken elsewhere in detail about its plans for expansion and continuing waste emplacement, notably including presentations to the NAS Committee and to the GAO. None of that appears in the PMR, nor the Draft Permit. Evidently, DOE

has not told NMED these facts. The actual purpose of the PMR, “why the modification is needed,” 40 C.F.R. § 270(c)(1)(iii), is plainly to enable the expansion and continued use of the disposal panels. The PMR does not so state nor explain the asserted need; it is misleading and fails to comply with the rules.

d. The Draft Permit, read along with the remainder of the existing Permit not included in the PMR, suffers from major deficiencies.

The Draft Permit issued by the HWB (AR 200606) (June 12, 2020) contains only the following sections of a Permit:

Permit Attachment A, General Facility Description and Process Information, showing only the new shaft, at A-2.

Attachment A2, Geologic Repository, describing air flow in the five-shaft configuration, at A2-2, A2-5, A2-6, A2-8, A2-9, A2-12.

Attachment A4, Traffic Patterns, showing typical waste transport routes, shows only the new shaft and associated excavations, not its use as waste transport route, at A4-18, A4-20.

Attachment B, Application Part A, containing a spatial view and plan view with shaft #5, at B-38, B-40.

Attachment D, Contingency Plan, showing spatial and plan views with shaft #5, at D-41, D-43, D-55.

Attachment G, Closure Plan, revised to add shaft #5 to plan views, at G-29, G-36.

The Draft Permit contains no other sections. It violates § 20.4.1.901.A.1. It omits numerous provisions contained in the existing Permit that set forth

conditions for storage and disposal that would be affected by DOE's expansion plan.

Moreover, the Draft Permit that NMED issued makes no sense. The PMR proposes excavation of a shaft and drifts, costing \$197,000,000. GAO Report at 11. Construction will take 37 months; if begun in June 2020, it would continue to July 2023. AR 200114 at 6. The Draft Permit shows these changes and proposes that, after the shaft and drifts are constructed, the Permit, as modified, would still have a capacity limit of 6.2 million ft³, and the operating period would still end in 2024. But it is not credible that DOE would spend \$197 million on the shaft and drifts and then shut WIPP down in 2024 as soon as the shaft and drifts are finished. It makes no sense to construct new facilities costing \$197 million that will be used for less than six months, if that. But that is what the Draft Permit says. The Draft Permit does *not disclose DOE's actual plan*, which is to excavate additional disposal panels, to increase the waste capacity, and to operate beyond 2024. The Draft Permit is highly misleading. The public should be able to evaluate DOE's actual plan for its safety and legality. The regulations require it.

Changes that are logically related and necessary, in light of the changes sought in a PMR, must be included in a PMR proceeding. EPA's preamble on 40 C.F.R. § 270.42 addresses the inclusion of such necessary modifications:

3. General Facility Standards

In many cases, specific changes at a facility will necessitate changes in general facility standards and plans. For example, the introduction of a new waste at a unit might necessitate a change in the contingency plan, or the addition of a new unit might require a change in the facility's closure or security plan. In such cases, the changes in the plan would be reviewed and approved under the same procedures as are required for the introduction of the new waste or the new unit. . . . This point is clarified in a note added to Section B of Appendix I.

The language appears in Appendix I:

Note: When a permit modification (such as introduction of a new unit) requires a change in facility plans or other general facility standards, that change shall be reviewed under the same procedures as the permit modification.

Logically, if DOE is seeking permission to build a shaft and drifts at a cost of \$197 million, it must intend to continue using WIPP beyond 2024, an intention that, at WIPP, implies the development and use of additional disposal capacity. The DOE expansion plan is required to be included in the PMR as a “require[d] change in facility plans” in light of the shaft and drifts. The public is entitled to see the DOE expansion plan in full as part of this proceeding.

e. DOE’s expansion plan raises significant legal and practical questions that require consideration in a public hearing.

If DOE were to submit a PMR containing its actual expansion plan, there would be significant legal and practical issues requiring consideration. The present PMR and Draft Permit are abbreviated in an apparent attempt to avoid these issues.

In the 1980’s and 1990’s, when New Mexico negotiated with DOE about terms for the construction and operation of the planned WIPP, it was decided that

the waste capacity, the total volume of the repository, and the operating life of WIPP would be fixed in written agreements. The waste capacity was to be 6.2 million ft³. The total volume included the eight panels, of seven rooms each, plus two panels (9 and 10) formed by the main drifts. The operating life was to be 25 years.

The WIPP Authorization Act, Pub. L. No. 96-164, § 213 (1979), calls for consultation and cooperation between DOE and the State concerning planning and operation of WIPP and a formal agreement to structure that process. In 1981 the State and DOE made a Stipulated Agreement, which includes the “C&C Agreement” and Working Agreement. Exhibit D, attached. 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

C&C Agreement at 8 (Page 30 of PDF). The Second Modification to the C&C Agreement states the overall waste capacity limit of 6.2 million ft³. (August 4, 1987) (Page 56 of PDF).

In 1992 Congress enacted the WIPP LWA, which contains a statutory capacity limit:

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

LWA § 7(a)(3). The Permit contains the same 6.2 million ft³ capacity limit.

Permit, Attachment B, Part A application (also showing the currently permitted capacity of 151,135m³ for Panels 1 through 8, at B-10.)

The Permit, issued under the HWA, which applies the Resource Conservation and Recovery Act, 42 U.S.C. § 6921 *et seq.* (“RCRA”), in New Mexico, was issued on the basis of a layout of disposal rooms in ten panels. Attachment A-4. Successive Permit amendments have authorized construction of eight panels as hazardous waste disposal units. Permit Table 4.1.1, Attachment A-4.

The Permit also 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 m³ of TRU waste of which up to 7,080 m³ may be remote-handled (RH) TRU mixed waste.

B-13. Again:

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. As far as concerns the waste capacity, the total repository volume, and the operating life, the limits in these charter documents have never been increased.

DOE's plan for WIPP expansion raises serious questions under these legal constraints. The NAS Report points out that the planned waste inventory would exceed the 6.2 million ft³ statutory limitation. (NAS Report at 6, 65). The NAS and GAO Reports make clear that WIPP operations would extend far beyond the 2024 operating limit stated in the Permit. (NAS Report at 45, 53, 73, 88; GAO Report at 4, 5, 23, 25, 47).

Moreover, the DOE expansion plan raises several issues of repository safety, including the threat of unplanned criticality and the enhanced impacts of accidental releases due to the concentration of high-activity wastes. See NAS Report at 36, 39. The public is entitled to a thorough exploration of such matters in public hearings.

Conclusion

In 2021, DOE has new programs, not envisioned when WIPP was planned and its specifications agreed upon. To expand WIPP, DOE pursues permit modifications piecemeal, so that its expansion plan will only become clear when the final changes are adopted. DOE advances the current "shaft and drifts" PMR in the guise of a ventilation project, even though its actual purpose is to build

access drifts to enable construction of new waste panels, expanding WIPP's volume and capacity.

Thus, DOE deliberately keeps its expansion plan out of the current PMR, to prevent consideration of the capacity expansion or of DOE's plan to operate WIPP far beyond the operating deadlines contained in the Permit and agreed to with the State. DOE's covert strategy conflicts with the regulations governing permit modifications, which demand full disclosure of DOE's plans and purposes.

NMED, for its part, has issued a Draft Permit that disregards the regulatory and practical requirements. The public cannot lawfully be misled as to the purpose of the shaft and drifts that are the ostensible subject of this proceeding, when these additions are simply the initial elements of a major project to expand WIPP, which DOE has been planning for several years and which would necessitate far more extensive changes to the facility and to the terms of the Permit. DOE seems bent on modifying WIPP in ways that depart from the limits agreed upon in the C&C Agreement, imposed by the WIPP Land Withdrawal Act, and incorporated in the HWA Permit. If so, it still must seek leave to do so in a legitimate public proceeding that considers all the interrelated elements of DOE's plan. The present PMR and Draft Permit do not satisfy the regulations and should be dismissed under the Hearing Officer's "authority to take all measures necessary for the maintenance

of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by this part.” 20.1.4.100.E(2) NMAC.

Respectfully submitted,

/s/

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Dated: March 10, 2021

Certificate of Service

I hereby certify that a copy of the Motion to Dismiss was served on the following via electronic transmission on March 10, 2021:

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