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STATE OF NEW MEXICO

BEFORE THE SECRETARY OF THE ENVIRONMENT

No. HWB 18-19(P)

NEW MEXICO ENVIRONMENT DEPARTMENT)
HAZARDOUS WASTE BUREAU)
CLASS 3 PERMIT MODIFICATION REQUEST:)
CLARIFICATION OF TRU MIXED WASTE VOLUME)
REPORTING, PERMIT MODIFICATION TO THE)
WIPP HAZARDOUS WASTE FACILITY PERMIT)
NO. NM4890139088-TSDF)

COMMENTS ON HEARING OFFICER'S REPORT
ON BEHALF OF
SOUTHWEST RESEARCH AND INFORMATION CENTER

The following comments on the Hearing Officer's Report, dated December 10, 2018, are presented on behalf of Southwest Research and Information Center ("SRIC"), a party to this proceeding, pursuant to the Secretary's Order dated December 10, 2018.

1. This permit modification request ("PMR") raises serious legal questions, mainly involving the construction of the WIPP Land Withdrawal Act, Pub. L. No. 102-579 ("LWA"), and the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* ("RCRA"). The Department's decision will fundamentally affect the operation of WIPP for many years into the future.
2. However, this proceeding was conducted on an accelerated schedule, compared with historic practice, including the practice in a less controversial and less complex PMR earlier this year. AR 180914.27.

3. The Hearing Officer, in his Report (the "Report"), has adopted *verbatim,* or nearly so, all 203 of the proposed findings of fact and all six of the conclusions of law proposed by the Hazardous Waste Bureau.[1]

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[1] The following breakdown illustrates the sources of the findings of fact and conclusions of law in the Hearing Officer's Report:

A. THE WASTE ISOLATION PILOT PLANT
Findings 1-13 are HWB Findings 1-13.
B. THE LAND WITHDRAWAL ACT
Findings 14-23 are HWB Findings 14-23.
Findings 24-27 are Permittees Findings 36, 37-38, 39, and 40.
C. RESOURCE CONSERVATION AND RECOVERY ACT
Findings 28-34 are HWB Findings 24-30.
D. THE HAZARDOUS WASTE BUREAU
Findings 35-38 are HWB Findings 31-34.
E. THE WIPP PERMIT
Findings 39-42 are HWB Findings 35-38.
Finding 43 is HWB Finding 39, adding Permittees' Finding 24.
Finding 44 is HWB Finding 40, with the HO's addition of "In practice."
Findings 45-56 are HWB Findings 41-52.
F. PERMIT MODIFICATION REQUEST
Findings 57-114 are HWB Findings 53-110.
G. THE PROCEDURAL HISTORY OF THE PMR
Findings 115-130 are HWB Findings 111-126.
H. THE BUREAU'S RECOMMENDATION AND DRAFT PERMIT
Findings 131-166 are HWB Findings 127-162.
I. PUBLIC NOTICE & PUBLIC COMMENTS RECEIVED
Findings 167-177 are HWB Findings 163-173.
J. NEGOTIATIONS
Findings 178-183 are HWB Findings 174-179.
K PUBLIC HEARING
Findings 184-207 are HWB Findings 180-203.
J. ARGUMENT AND EVIDENCE SUBMITTED IN OPPOSITION TO APPROVING THE DRAFT PERMIT
Finding 208 is partly from HWB Statement about History and Legislative Intent.
Finding 209 is from HWB's Argument at 2 - "Has Authority" section.
Finding 210 is from SRIC Finding 4.
Finding 211 is partly from the PMR, AR 180121 at Page 9.
Finding 212 is the Hearing Officer.
Finding 213 is the Hearing Officer.
Finding 214 is mostly from Permittees' argument at 11.
Finding 215 is the Hearing Officer.
Finding 216 is the Hearing Officer.

4. SRIC presented well-founded objections, challenging the lawfulness of the proposed modification. Most of these points were simply ignored in the Report.
5. The case, therefore, presents a pattern that has recently become too familiar in the Department's proceedings. A proposed permit action has raised significant concern, causing the public to demand a hearing. The Department held a hearing, but it did not demonstrate that it has studied the legal issues and the evidence in any depth. Nevertheless, the Department proposed findings and conclusions to dispose of the public's objections, and the Hearing Officer retained by the Department adopted the Department's findings and conclusions and ignored the public presentations.
6. Therefore, there has been the form of public involvement, but the proceeding in fact was a costly and time-consuming impediment to substantive consideration of the facts and law. For substantive legal review of this complex permit action, involving the nation's only deep geologic repository, the public must go to the courts on appeal.
7. Matters raised by SRIC, but not addressed at all, or addressed only superficially, are as follows:

Finding 217 is mostly from Permittees argument at 11.
Finding 218 is the Hearing Officer.
Finding 219 is Permittees' Findings 29 & 30.
Finding 220 is the Hearing Officer.
Finding 221 is the Hearing Officer.
Finding 222 is the Hearing Officer.
CONCLUSIONS OF LAW
Conclusions 1-6 are HWB Conclusions 1-6.
Conclusion 7 is Permittees' Conclusion 12.

a. The existence of an actual conflict between the way disposal volume is calculated under the RCRA permit and the way DOE proposes to calculate disposal volume. SRIC Br. 22-28.

b. The fact that NMED, the RCRA regulator, has determined the capacity of WIPP that will protect human health and the environment, and NMED is legally bound to enforce that capacity limit, as DOE is legally bound to comply with it. SRIC Br. 29-33.

c. The lack of any legal basis for DOE's claim of authority to apply the volume limitation contained in § 7(a)(3) of the LWA. An agency's assumption of regulatory authority must be based on clear statutory language. SRIC Br. 33-40.

d. The analysis mandated by *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), in determining the validity of an agency's interpretation of LWA § 7(a)(3), including the consideration of (a) the entire WIPP LWA, (b) legislative history, (c) longstanding agency interpretation, and (d) agency action in public rulemakings. SRIC Br. 40-43.

e. WIPP's recent record of fire, radiation release, and numerous other safety violations. SRIC Br. 17-22.

f. The fact that DOE's separate method of calculating waste volume would be outside NMED's oversight and utterly unenforceable by NMED. SRIC Br. 24-26, 34.

g. The fact that DOE's separate method of calculating waste volume would increase WIPP's capacity by an estimated 30% in excess of the capacity limit enacted by Congress and allowed by the RCRA permit. SRIC Br. 26-27.

h. The fact that, under DOE's separate method of calculating waste volume, the 25-year operating life of WIPP would be extended by approximately 20 years. SRIC Br. 27.

i. The absence of any regulatory justification for any change in the interpretation of the capacity limit. SRIC Br. 49-52.

j. The fact that the proposed permit modification violates the C&C Agreement between the State and DOE. SRIC Br. 53-55.

8. The Report contains the following principal errors:
9. The Hearing Officer's Report shows little regard for the RCRA (in New Mexico, the HWA) program, for which NMED has responsibility. The LWA states at several points that RCRA applies to and regulates WIPP. SRIC Br. 8, 14-15, 29-36.
10. Application of RCRA to this miscellaneous unit includes the specification in the RCRA Permit of a waste capacity and the enforcement of such capacity. Here, after passage of the LWA, DOE applied for a RCRA permit for WIPP, stating a capacity limit of 6.2 million ft^3, and NMED, after close study of the environmental impacts, issued a permit in 1999 for a facility with a capacity limit of 6.2 million ft^3. Throughout the permitting process and 19 years of operations, disposal volume has been measured by the outer container volume. SRIC Br. 8-15. The Hearing Officer ignored this process.
11. The Hearing Officer's statement that, in issuing a RCRA permit, regulators establish the maximum capacity of a disposal unit by "calculating the volume based on the outermost disposal containers that would be emplaced" (Finding 142) ignores the environmental performance calculations underlying the waste capacity determination. SRIC Br. 31-32, AR 180914.37T.

12. As for the WIPP LWA, the Hearing Officer appears to have forgotten that his main task is to ascertain and carry out the intent of Congress: "Our 'primary task in interpreting statutes [is] to determine congressional intent.'" *United States v. Collins,* 2017 U.S. App. LEXIS 14032 (10th Cir. 2017).

13. The Report ignores the fundamental fact that DOE has no statutory authority to regulate its own conduct and operations at WIPP, nor to interpret and apply § 7(a)(3) of the LWA. Under the LWA and RCRA, DOE is the regulated entity, and NMED is the regulator, and neither can lawfully change its role. SRIC Br. 29, 33-37. The fact that the "Bureau supports the Permittees' premise in the PMR that Congress intended DOE to have the responsibility to define the method used for calculating the LWA capacity limit" (Finding 132) expresses at most a political position, because as a legal proposition it is indefensible.

14. The Hearing Officer contends that DOE obtains "authority to make decisions related to carrying out its responsibility of disposing of defense TRU waste" (Finding 214), including application of the LWA capacity limit, from the Atomic Energy Act, 42 U.S.C. § 2011 *et seq*., and the Department of Energy Organization Act, Pub. L. No. 95-91 (Aug. 4, 1977). He refers to no statutory language. There is no language about WIPP in the cited statutes, which were passed before WIPP was authorized and before enactment of the LWA. But the existence of regulatory authority must be shown by clear statutory language. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000). The LWA specifically regulates WIPP and specifically subjects DOE to compliance with RCRA, which regulates waste volume, and which NMED administers. LWA § 9(a)(1)(C). The rule is: "Congress's most specific directions are its controlling

directions." *Elwell v. Oklahoma ex rel. Board of Regents*, 693 F.3d 1303, 1310 (10th Cir. 2012)(Gorsuch, J.).

15. The Report states that "The LWA did not reassign the responsibility to track the volume of the TRU waste disposed from the DOE to the EPA." Finding 26. The statement wrongly implies that the "responsibility" to track the volume of waste disposed had somehow previously been "assigned" to DOE. The Hearing Officer cites nothing in support of this implication, which is factually incorrect.

16. One of Congress's principal purposes in enacting the WIPP LWA was to preclude self-regulation by DOE. SRIC Br. 34-35. The Report makes DOE self-regulating in the key respect of compliance with the capacity limit, defeating Congress's purpose.

17. SRIC has shown that the capacity limit is not ambiguous, when read in the context of the entire LWA, as the cases require. Thus, upon consideration of the entire LWA, it is clear that the 6.2 million ft^3 capacity must be calculated from outer container volume, and this method may not be changed by DOE. SRIC Br. 40-49. The Hearing Officer makes no reference to this showing.

18. The Hearing Officer says that the capacity limit in LWA § 7(a)(3) constitutes "unambiguous" language. Finding 214. This leads him in two directions:

19. One direction leads him to conclude that the same language has two different meanings. He argues that DOE can interpret the volume limitation in § 7(a)(3), because the volume limitation is "unambiguous," and DOE is "not interpreting" that limitation. Finding 214. But he also asserts that DOE can interpret the capacity limit to refer to *inner* containers, and NMED can interpret the same language to refer to *outer* containers. Finding 216. The definition of "ambiguous" is "having two or more possible meanings." (Webster's

New World Dictionary). But Congress did not enact a "RCRA waste volume" and a "LWA TRU waste volume." SRIC Br. 22. Congress enacted a single transuranic waste volume limit. LWA § 7(a)(3). If "identical words used in different parts of the same act are intended to have the same meaning," *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986), the *very same* statutory words cannot have two (or more) operative meanings. The Report finds that, after vigorous debate, Congress enacted a capacity limit that it simultaneously made meaningless by authorizing DOE to change it, thus embracing "the absurdity of Congress providing a statutory principle in one breath and immediately violating it in the next." *Fish v. Kobach*, 840 F.3d 710, 736 (10th Cir. 2016).

20. Whether a statute is ambiguous must be determined from a close study of the *entire statute*, not just the contested language. SRIC Br. 37-39. But the Hearing Officer looked at § 7(a)(3) alone. He disregarded LWA language that expressly states that RCRA governs WIPP's operation, so that the waste volume limit specified in the RCRA permit must apply, and that DOE has no power to recalculate disposal volume. This was error.

21. The other direction that the Hearing Officer takes is to disregard any legislative history, any historical practices, and even any public rulemakings on the theory that, when a statute is "unambiguous," one may not determine its meaning from such sources. Finding 217. But the Hearing Officer himself has created ambiguity by refusing to interpret § 7(a)(3) in the context of the entire LWA, as the decisions require, and by concluding that 6.2 million ft^3 capacity may be read to apply either to the *inner* container volume or to the *outer* container volume, or *both*.

22. If the Hearing Officer had found § 7(a)(3) ambiguous, he is instructed (*Chevron*, 467 U.S. at 845) to examine the legislative history, the parties' interpretations, and interpretations adopted in notice-and-comment rulemakings—all of which the Hearing Officer ignored, and all of which show that for 38 years waste volume has consistently been understood as the outer container volume. SRIC Br. 43-49.

23. Instead, the Hearing Officer flatly asserts, without any support, that "Congress' intent was to dispose of a defined volume of TRU waste not to dispose of a fixed number of containers." Finding 212. This claim is refuted by the congressional reports. SRIC Br. 44-46

24. The Hearing Officer admits that "the internal dimension of the outer container has been the method historically used to measure the volume of waste emplaced at WIPP." Finding 208. However, he espouses DOE's proposed measurement, since, he claims, "the LWA is silent as to how the waste is to be measured." *Id.* But when a statute is deemed ambiguous, that does not mean that an agency may adopt any interpretation that it wishes. *Chevron,* 467 U.S. at 843; SRIC Br. 43. Rather, further inquiry is required, to determine the intent of Congress. This is the task that the Hearing Officer refused to undertake.

25. The Hearing Officer's statement that the "Bureau has found no evidence that the LWA volume limit must be tied to the dimensions of the outer disposal container" (Finding 134) omits to note that the Bureau *did not look* for such evidence, and, when such evidence was brought to its attention, the Bureau *ignored* it. SRIC Br. 41, 44-46. Likewise, the statement that the "parties have not presented any direct evidence of Congress' intent on this issue and in fact the record is clear that Congress did not express

any intent as to how the volume of waste was to be measured when it enacted LWA" (Finding 208) is a wholesale factual misstatement. SRIC presented extensive evidence that, in enacting the LWA, Congress referred to capacity in terms of container volume. SRIC Br. 6-8, 40-46.

26. The Hearing Officer claims that the "maximum repository capacity limit currently stated in the Permit was based on the assumption by Permittees that waste containers would be full of TRU mixed waste." Finding 43. But Permittees' witness Kehrman testified that DOE was well aware that disposal containers were not full and established disposal capacity based on container volume. 10/23/18 Tr. 211, ll. 16-17 (Kehrman), SRIC Br. 8-11.
27. The Hearing Officer relies on RCRA regulations on garbage cans. Finding 135. These regulations have nothing to do with WIPP. 10/24/18 Tr. 157, ll. 5-25 (Maestas). The Hearing Officer refers to DOE guidance on Order 435.1. Finding 146. The Order dates from 1999, seven years after passage of the LWA, so Congress was not relying upon it in enacting the LWA.
28. The Hearing Officer asserts that DOE has clearly articulated how waste volume will be determined. Finding 215. He ignores the fact that DOE seeks unregulated authority to select and apply a measurement method without any oversight. The method that DOE has attached to its TID response (and in Exhibit A) is merely a draft, which DOE may change at will. 10/23/18 Tr. 146, ll. 13-24 (Kehrman), SRIC Br. 23-24.
29. The Hearing Officer argues that DOE's use of overpacks, causing inefficient waste emplacement, constitutes a change in circumstances that supports DOE's change in its interpretation of the LWA limit. Finding 218. But DOE's new interpretation conflicts

with the statutory limit in § 7(a)(3), which Congress intended to apply to container volume. SRIC Br. 16-17. More basically, DOE is not a self-regulator at WIPP, has no authority to apply § 7(a)(3), and so cannot change its interpretation for any reason. SRIC Br. 39-40. The rule that an agency may change a previous interpretation when the new interpretation better serves "the policies committed to it by Congress," *Motor Vehicle Manufacturers Assoc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 41-42 (1983), has never authorized a self-regulating agency to reinterpret a statute that governs the agency's own operations. SRIC Br. 37-38. In any case, for 19 years the WIPP disposal strategy has been entirely within DOE's control, and nothing about it can be a surprise. Nor does NMED offer any basis for changing its own interpretation, except that DOE requested the change. 10/24/18, Tr. 121, ll. 8-14 (Maestas), SRIC Br. 49-52.

30. The statement (Finding 216) that there is no conflict between DOE's interpretation of the volume limit and the so-called RCRA volume limit is flatly wrong. Mr. Kehrman stated that the RCRA interpretation, based on the outer container volume, and DOE's interpretation, based on the "inner container," lead to results that differ by 30%. 10/23/18 Tr. 23, ll. 1-5 (Kehrman), SRIC Br. 12-13.

31. The Hearing Officer anticipates that NMED will be governed by DOE's calculation of the volume disposed of and will not enforce the limit contained in the LWA and in the RCRA Permit. Finding 162. Thus, the Draft Permit plainly authorizes a violation of the law. In the future, WIPP could reach the limit specified by the RCRA permit, when it legally must be closed, but DOE will maintain that the disposal volume has not reached 6.2 million ft^3 and will refuse to close WIPP. That will indeed be a critical conflict, brought about by this PMR.

32. Some of the Hearing Officer's contentions are pure speculation. He states:

> There is nothing in the record and no reason to assume that if Congress had proceeded on the assumption that each 55-gallon drum of waste would have only been only half full when shipped that Congress would not have authorized the excavated size of WIPP to have been larger than it currently is so as to accommodate the space necessary to store the 6.2 million ft^3 of waste.

Finding 212. No support is cited. In fact, Congress measured waste volume in terms of waste drums. SRIC Br. 44-46. The Hearing Officer's statement is refuted by the legislative history.

33. There is more. The Hearing Officer states:

> It also is not logical to assume that when Congress determined that it would take 850,000 55-gallon drums to hold the 6.2 million ft^3 of TRU waste and when Congress subsequently discovered after 850,000 drums of waste had been emplaced, that for reasons that were not initially anticipated many of those drums were not fully packed and therefore not all of the 6.2 million ft^3 had been disposed of, that Congress would have intended that the number of drums emplaced and not the actual volume of waste disposed of was to be the critical measurement of completing the mission of WIPP.

Finding 213. Again, no support is cited. In fact, 850,000 drums of waste have never been emplaced in WIPP. The current disposal inventory (as of September 29, 2018) is 173,970 containers of waste. SRIC Ex. 56. Overpacking was anticipated before WIPP even opened and was authorized by the original Permit. 10/25/18 Tr. 104, ll. 11-24 (Zappe); Tr. 189, ll. 24-25 (Hancock); SRIC Br. 14-15. Congress plainly intended the capacity of WIPP to be defined by waste container volume. SRIC Br. 6-8, 40-46.

34. The Hearing Officer also states that many container overpacks have air "which is not waste," citing the Permittees' Exhibit 1. Finding 44. That statement is clearly erroneous. The Permittees and Mr. Zappe testified that such air often contains volatile organic compounds that are wastes regulated by the Permit. 10/23/18 Tr. 131, ll. 1-25 (Kehrman); 10/25/18 Tr. 107, ll. 15-19 (Zappe).

35. Finally, the idea that the demonstrated safety risks of operating WIPP under the management of CBFO and NWP have not been "developed fully enough . . . to be considered" (Finding 220) mocks the expert professional investigations undertaken by the Defense Nuclear Facility Safety Board and DOE itself of the alarming incidents of fire, radiation release, and other risky mismanagement, which were thoroughly recounted by the professional engineer, George Anastas. His professional judgment impelled Mr. Anastas to declare emphatically that he fears to tread underground in the WIPP of the current day. 10/25/18 Tr. 174, ll. 24-25 (Anastas), SRIC Br. 17-22.

Conclusion

NMED should deny the PMR. If a modification is to be approved, the Record in this proceeding amply demonstrates that it should specify only one method to calculate the LWA and RCRA capacity limit, *i.e.,* based on the outer container volume. The only changes in the Permit that are supported in the record are to amend Permit Section 3.3.1.8 Shielded Container as agreed to by all parties (Hazardous Waste Bureau Exhibit 3) and to add to Attachment B, page B-13, l. 21, the following sentence: "Waste volume is reported as the gross internal volume of the outermost container." AR 180402.48 at 14.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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