



SOUTHWEST RESEARCH AND INFORMATION CENTER

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U.S. Department of Energy
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E-mail: David.Levenstein@em.doe.gov

RE: Elemental Mercury Supplemental Environmental Impact Statement (EIS)
(DOE/EIS-0423)

Dear Mr. Levenstein:

Southwest Research and Information Center (SRIC) is a 41-year-old nonprofit organization based in Albuquerque that works to promote the health of people and communities, protect national resources, ensure citizen participation, and secure environmental and social justice now and for future generations. Among many other issues, SRIC has been actively involved with public education, health, technical, regulatory, and legal matters related to the Waste Isolation Pilot Plant (WIPP) for decades.

Thank you for honoring the request to have a scoping meeting in Albuquerque.

These comments are in addition to those made on June 28 at the Albuquerque scoping meeting by Don Hancock of SRIC.

1. The Department of Energy (DOE) should not proceed with a Supplemental EIS for the two proposed New Mexico sites.

DOE has provided no substantive basis for its reconsideration of the range of alternatives to be included in the Mercury Final EIS (FEIS). The Notice of Intent (NOI) of June 5, 2012 provided no basis for the reconsideration. (77 FR 33204). There are no documents on the mercury storage EIS website to justify the selection of the New Mexico sites, despite SRIC's written request on June 21 for such documentation. Various people at the Albuquerque scoping meeting also requested such documentation.

The Council on Environmental Quality (CEQ) stated more than 30 years ago that scoping must make “enough information available on the proposal so that the public and relevant agencies can participate effectively.” 46 *Federal Register* 18030 (March 23, 1981). DOE has not provided enough information for the public to effectively participate in the Supplemental EIS. Thus, the scoping is inadequate and does not meet CEQ requirements.

DOE also has violated its own procedures for the Mercury EIS in proceeding with the New Mexico sites. In March 2009, DOE published a Request for Expressions of Interest in the *Federal Business Opportunities* and *Federal Register* (74 FR 11923). In addition, DOE site offices were requested to determine if they had a facility(ies) that could be used for mercury storage. DOE received responses from ten sites and determined that seven of the ten locations appeared to be within the range of reasonable alternatives for mercury storage. FEIS at 1-6. Subsequently, on July 2, 2009, DOE published its NOI in the *Federal Register* (74 FR 31723). Thus, the public had an opportunity to understand what specific sites were being considered and the basis for the inclusion of the seven sites *prior to* the 52-day scoping period. Similar information is not available about the two New Mexico sites prior to the initiation of the (inadequate) 30-day comment period noticed on June 5, 2012. The posters provided at the New Mexico scoping sessions showed possible approximate locations within the two sections identified in the NOI, but did not specify the basis for identifying those two sites.

In the case of the WIPP site, though it was included in the March 30, 2009 DOE Memo to site offices (FEIS at A-24), the site did not favorably respond to the request and has not subsequently requested mercury storage, according to the Waste Isolation Pilot Plant (WIPP) Site Manager and Deputy Site Manager on a June 20, 2012 conference call with SRIC and representatives of other citizen groups. The second site is not a DOE site and no entity included it in the responses to the Expressions of Interest. Nor has DOE provided any information about who proposed that second site, unlike the information provided about the 10 locations identified in 2009.

The Lowland Environmental Services and Veolia ES Technical Solutions sites, which responded to the Expressions of Interest, were eliminated because they did not meet the basic requirement to propose a specific location for siting such a facility. FEIS at 2-32. Of course, no specific location was proposed at WIPP or the Section 10 site in the NOI. Once again, DOE is not following its own procedures for the Mercury EIS.

The Bureau of Land Management (BLM), which manages the (second) site just north of the WIPP site boundary (Section 10, Township 22 South, Range 31 East), manages millions of acres of land and has undertaken no process, nor has the DOE, to indicate that site is adequate for mercury storage and that it is superior to thousands of other BLM sites in the nation that might be considered reasonable alternatives for mercury long-term management and storage. DOE has provided no basis for choosing Section 10 (or the approximate location within the section), nor provided any basis that Section 10 is superior to dozens of other BLM-managed sections or sites in the vicinity of WIPP. Thus, DOE has no basis to include just that one BLM site, nor can the public effectively participate in analyzing why that site was chosen and the environmental impacts of using the site.

The statement given orally at the June 28 scoping meeting by David Levenstein and sent by email on July 3, 2012 to Joni Arends of Concerned Citizens for Nuclear Safety and Don Hancock of SRIC does not at all satisfy legal requirements to provide the basis for including the two New Mexico sites. First, the statement is not on the Mercury EIS website and is not generally available to the public. Second, the brief explanation was not provided to anyone at the beginning of the scoping process, but rather at the very end so that adequate time has not been provided to discuss the statement. Third, the statement does not provide an actual basis for including the New Mexico sites. The “characteristics” mentioned – “the WIPP site is situated near existing infrastructure; accessible to transportation routes; and has personnel with an outstanding transportation management record, and experience in implementing RCRA and other pertinent environmental requirements, records management, and security” – are not unique to WIPP, but also are characteristics of other DOE sites that are not being considered as alternative locations, including Argonne National Laboratory, Livermore National Laboratory, Nevada Test Site. Those three sites are not listed in Section 2.6 of the FEIS regarding sites considered and eliminated. Of course, the Oak Ridge Reservation also has those same (and additional) “characteristics.” DOE must explain why those other sites do not have those “characteristics” and are not being considered.

Because DOE is not properly scoping the Supplemental EIS, including that it has no basis for the two New Mexico sites, the agency should not proceed with that supplement. Alternatively, it must first provide necessary information and then initiate a new scoping process before issuing a Draft Supplemental EIS.

2. DOE should inform Congress that it has not, and will not, comply with the deadlines established for having one or more facilities for mercury storage. DOE should suggest that Congress reconsider giving DOE the task of long-term management and storage of elemental mercury.

Public Law 110-414, Mercury Export Ban Act of 2008, Section 5(a)(1) – which is not included in the scoping fact sheet or presentation – states in part:

SEC. 5. LONG-TERM STORAGE.

(a) DESIGNATION OF FACILITY.—

(1) IN GENERAL.—**Not later than January 1, 2010, the Secretary of Energy** (referred to in this section as the “Secretary”) **shall designate a facility or facilities** of the Department of Energy, which shall not include the Y-12 National Security Complex or any other portion or facility of the Oak Ridge Reservation of the Department of Energy, **for the purpose of long-term management and storage of elemental mercury generated within the United States. (Emphasis added).**

More than 30 months after that 2010 date, DOE has failed to comply with the provision to designate one or more facilities. DOE also will miss the law’s deadline to have a storage facility (other than at Oak Ridge) operating on January 1, 2013.

Thus, it is clear that DOE is unable to fulfill those provisions of the law. If new mercury storage facilities are to be established, Congress will need to set new deadlines. Congress also should consider whether another agency could better identify and manage such facilities.

DOE should remind Congress that it has many other responsibilities to which it must direct its financial and other agency resources. Those responsibilities, among others, include the National Nuclear Security Administration facilities, non-nuclear laboratories, and storage and cleanup of nuclear weapons wastes in several states. In New Mexico, among DOE's responsibilities are:

- Operation of the WIPP which is planned to continue for another 15 or more years. Focus needs to be on safety and addressing WIPP's failure to accomplish its mission related to remote-handled (RH) waste. Because of the mismanagement of the underground storage space at WIPP and the inability of some DOE sites to characterize and package RH waste, less than 0.6 percent of the volume of waste currently emplaced at WIPP is RH waste. Further, the remaining underground space is much less than needed to accommodate all RH waste in the current WIPP inventory, using existing emplacement practices and procedures.
- Operation of and cleanup at LANL, which is years behind schedule and will cost billions of dollars.
- Operation of and cleanup of Sandia; and
- Nine current Office of Legacy Management (LM) sites:
Acid/Pueblo Canyon Site, Ambrosia Lake Site, Bayo Canyon Site, Bluewater Site, Chupadera Mesa Site, Gasbuggy Site, Gnome-Coach Site, L-Bar Site, Shiprock Site.

In addition, the Northeast Churchrock and Homestake/Barrick uranium sites are to become LM sites in the future.

Those important tasks require more than the resources that DOE has, so additional responsibilities are not appropriate. DOE should so state to Congress and focus the agency's attention on those long-standing core responsibilities.

3. DOE is not complying with the WIPP Land Withdrawal Act (LWA, PL 102-579).

Section 3(a)(1) of the LWA states that the site is "reserved for the use of the Secretary for the construction, experimentation, operation, repair and maintenance, disposal, shutdown, monitoring, decommissioning and other authorized activities associated with the purposes of WIPP as set forth in section 213" of Public Law 96-164 and this act. Mercury storage is not a purpose authorized under either law. Thus, both laws would have to be amended to allow mercury storage at WIPP. At the June 28 scoping meeting, David Levenstein agreed that the LWA would have to be amended by Congress for mercury storage to occur at WIPP.

Further, Greater-Than-Class C (GTCC) waste is explicitly prohibited by the LWA, as is all other commercial waste. As SRIC and dozens of other New Mexicans said last year, WIPP is not a reasonable alternative for GTCC waste. SRIC is attaching its June 27, 2011 comments on the GTCC Draft EIS. Those comments must be addressed in any GTCC EIS and in the Mercury storage Draft Supplement EIS, if it is issued.

Several other provisions of the WIPP LWA are not compatible with mercury management and storage. For example, Section 9(c) of the LWA requires the Environmental Protection Agency (EPA) Administrator to require a remedial plan to address non-compliance with any law, regulation or permit requirement. Since if DOE continues with considering WIPP for mercury storage, it would not comply with several laws, the remedial plan could be required at any time. Section 16 of the LWA includes various transportation safety measures, including training, equipment, and emergency preparedness requirements that would have to be revised to address mercury transportation. Thus, in addition to amending the LWA to allow mercury storage, many other provisions, policies, and practices would have to be changed, which would take years and be financially costly. Rather than adequately analyzing such impacts in a Draft Supplemental EIS, the WIPP site should not be considered a reasonable alternative for mercury storage.

4. DOE is not complying with the Federal Land Policy and Management Act (FLPMA).

The WIPP LWA Section 4(a) requires the DOE Secretary to comply with FLPMA as to the WIPP site. Mercury storage at WIPP also would violate FLPMA, including as to grazing, hunting and trapping activities.

As noted in #1 above, Section 10, Township 22 South, Range 31 East is federal land managed by the BLM. Thus, BLM also must comply with FLPMA, 43 U.S.C. §§ 1701-1785, regarding that site. Among many other things, that land shall be managed under principles of multiple use and sustained yield. 42 U.S.C. § 1732(a). Long-term mercury management and storage is incompatible with other uses, including grazing, hunting and trapping, hiking, and mineral extraction. That site would have to be withdrawn, pursuant to FLPMA, which has not occurred and for which the various requirements have not discussed, let alone been completed.

The Mercury FEIS does not even include FLPMA in Table 5-1 of relevant environmental laws. FEIS at 5-2 to 5-4. Thus, that statute has not been considered for any of the other sites, while it has direct applicability to both New Mexico sites. Rather than adequately analyzing the environmental impacts in a Draft Supplemental EIS, the two New Mexico sites should not be considered as reasonable alternatives for mercury storage. If those sites are to be considered, BLM must be a cooperating agency and the requirements of FLPMA must be discussed and analyzed in detail in the Draft Supplemental EIS.

5. DOE is not complying with the National Environmental Policy Act (NEPA).

Only Congress could change laws to allow WIPP or the nearby site to be used for mercury management and storage. NEPA allows consideration of alternatives not covered by existing law because an “EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA’s goals and policies.” 46 *Federal Register* 18027 (March 23, 1981). However, DOE has provided no basis for considering the two New Mexico sites that are not allowed by existing laws but not considering another alternative site – the DOE’s Oak Ridge Reservation – precluded by another law. The FEIS states that Oak Ridge is not considered because the Mercury Export Ban Act excludes that site in the Section 5(a)(1). FEIS at 2-32.

In fact, the Y-12 Facility at Oak Ridge has stored large amounts of elemental mercury and will continue to do so after January 1, 2013, since there will not be an alternative elemental mercury

DOE storage site operating on that date. Oak Ridge Reservation is clearly a reasonable site(s), not only for the no action alternative, but for storage of other mercury, in addition to the seven other sites included in the Mercury FEIS.

NEPA requires DOE to consider “all reasonable alternatives.” The discussion of alternatives is the legally required heart of any EIS. 40 CFR § 1502.14. The legally adequate EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” 40 CFR § 1502.14(a). SRIC does not believe that the New Mexico sites are reasonable alternatives. But if DOE does consider New Mexico sites as reasonable alternatives, it must also consider one or more sites at the Oak Ridge Reservation as reasonable alternatives in any legally adequate supplemental FEIS.

Because use of part or all of Section 10, Township 22 South, Range 31 East for long-term mercury management and storage would be a major federal action, BLM also would have to comply with NEPA. BLM is not a cooperating agency in the Mercury EIS, nor has it provided any environmental analysis of the subject site or surrounding BLM lands or whether other BLM lands are appropriate for long-term mercury management and storage. Thus, going forward with that BLM site would be a further violation of NEPA.

In none of the three EIS’s done for WIPP (DOE/EIS-0026, DOE/EIS-0026-FS, DOE/EIS-0026-S-2) was the possibility of long-term mercury management and storage discussed or analyzed. SRIC believes that another supplemental WIPP EIS also is required if WIPP is to be considered for mercury storage. The Mercury EIS would not be a proper supplement to the WIPP EIS, and would be another violation of NEPA.

Thus, DOE is not complying with multiple aspects of NEPA if it proceeds with considering the two New Mexico sites as reasonable alternatives for mercury storage. Those two sites should be excluded from any Supplemental EIS. If DOE intends to proceed with a Supplemental EIS that includes those two sites, it must substantially revise its scoping, including issuing a new NOI, providing more information about sites to be considered, and provide for additional public comment and scoping meetings.

6. If DOE goes forward with a Supplemental EIS including the New Mexico site(s) as reasonable alternatives, it must consider that mercury storage could result in terminating WIPP’s operations before it completes its planned disposal operations.

In addition to being incompatible with WIPP’s mission, mercury storage could result in the early closing of WIPP’s disposal operations. Any transportation accident, accident at the mercury facility, or leak at the mercury facility could result in interruption of WIPP’s operations. Mercury is highly toxic and shipments of mercury on the same highways bringing radioactive waste to WIPP will increase the risks of radioactive and hazardous waste contamination from transportation accidents. Such risks are increased by the proximity of the proposed mercury storage sites to the WIPP site and to WIPP transportation routes as compared with the other seven alternative sites. The FEIS did not consider the risks of accidents or leaks in proximity to WIPP or the impacts of a mercury storage facility on WIPP’s operations.

The WIPP LWA Section 9 also provides the DOE must comply with the State of New Mexico's Hazardous Waste Act (HWA) permit for WIPP. That renewed permit was issued by the New Mexico Environment Department on November 30, 2010. That permit covers the entire WIPP land withdrawal area, including Section 20 that is proposed for mercury storage. Permit Section 1.5.3. Thus, to permit mercury storage would require (among many other things) a class 3 modification to the WIPP permit. Such a modification could take years to be approved, might not be issued, or the permit for mercury storage could require compliance with the closure provisions of the permit as to WIPP's operations, among other possible outcomes.

If there is a Supplemental EIS, it must consider, for the above reasons and others, that WIPP's operations could be terminated before completion of the planned disposal phase. Such an analysis must consider the effects of WIPP's operations ceasing prematurely on other DOE sites that store and generate transuranic (TRU) waste and DOE's overall cleanup plans for TRU waste.

7. If DOE goes forward with a Supplemental EIS, it must consider that mercury storage could be limited to the disposal phase operations at WIPP and could be for less than 20 years.

The WIPP HWA permit requires that when disposal operations cease, closure operations must commence. Final closure required by the permit includes decontamination and removal of all surface facilities and equipment. Such closure operations could affect the mercury storage operations, including because much heavy equipment and traffic would be at the WIPP site. Closure also could require removal of all mercury storage facilities, along with WIPP facilities and equipment. Since the end of disposal phase operations could be in as few as 12 years and is currently planned in less than 20 years, the mercury storage could be limited to that time period, which is much less than the 40 years of operations used in the FEIS.

The EPA certification of WIPP, required by the LWA and EPA regulations, which does not include mercury storage, also requires that when disposal operations end that decommissioning will occur. Mercury storage would be contrary to the certification and, at a minimum, would require a public process to revise the certification and would take time and additional resources that would not apply to the seven alternative sites.

If there is a Draft Supplemental EIS including WIPP, it must discuss and fully analyze the impacts on mercury storage if there is a more limited timeframe for the operation of that facility.

8. If DOE goes forward with a Supplemental EIS, it must analyze the other alternatives sites regarding their financial costs and re-analyze the alternative sites for new information.

If there is a Draft Supplemental EIS that includes the New Mexico site(s), it must analyze those sites for all of the environmental impacts discussed in the Mercury FEIS. But the Supplemental EIS also must contain additional analyses.

During the original Mercury EIS scoping process, commentors stated that the costs of the facilities should be considered. However, costs were not included in the Draft EIS. Draft EIS at

1-16. Commentors on the Draft EIS also identified the lack of cost analysis as a deficiency, but costs were not included in the FEIS. FEIS, Vol. 2 at 2-16.

Costs and fees are included in PL 110-414, and they are a major impact that should be considered in any adequate NEPA analysis. Thus, it is a serious inadequacy in the Mercury FEIS that costs are not included.

The basic rationale for not including costs was that “Section 5 of the Mercury Export Ban Act of 2008 authorizes DOE to assess and collect a fee at the time of delivery of mercury to the DOE storage facility(ies) to cover certain costs of long-term management and storage.” FEIS, Vol. 2 at 2-16. That rationale is deficient. First, the generators of mercury and the public should know the range of costs that DOE intends to assess. Such information could help policymakers and the public determine whether long-term mercury management and storage is cost-effective. That information might also lead to generators, the public, and Congress determining that DOE should not be in charge of long-term mercury management and storage. Second under that law, not all costs can be assessed on generators of mercury. Those additional costs should be quantified for each site, as they certainly are a relevant comparison of impacts among the alternatives, and they could be a determining factor in whether any site(s) are selected for mercury storage. Given the well-established constraints on the federal budget, such costs also are relevant to consideration of the budget impacts of long-term mercury management and storage. Third, commercial generators of mercury would not be assessed costs for the DOE mercury at the Oak Ridge Reservation. The public and policymakers should know what the costs are of ongoing management and storage at Y-12 and what the costs would be of transporting, managing, and storing that mercury at each of the alternative sites. Those costs are relevant to the overall federal budget impacts of mercury storage. The costs could also contribute to a decision as to whether to proceed with the “no action” alternative for the mercury already under DOE authority or whether that mercury should go to an alternative site(s).

It is 18 months since the release of the Mercury FEIS and much of the data used in the FEIS is much older. At a minimum, any Supplemental EIS must examine changed conditions or new circumstances or information about each of the sites. A Draft Supplement that does not include such an analysis would be grossly inadequate.

9. Using the New Mexico sites would take more time and be more financially costly than alternative sites.

As noted in #1 above, DOE has provided no documented basis for its reconsideration of alternatives to include the two New Mexico sites. However, David Huizenga, the top official of DOE Environmental Management, stated at the Forrestal Building on March 20, 2012 to representatives of SRIC and other organizations that the “lower cost” of WIPP compared with the other sites was a primary consideration.

As noted in #8 above, DOE has provided no cost analysis for any site, so it has no basis for saying that the costs of using either New Mexico site is less than the alternatives. Certainly, either of the New Mexico sites have costs that would likely not occur at other sites. For example, because of the substantial opposition by SRIC and New Mexicans, there would be costs

for, among other things, HWA permit modifications; additional EISs; other permits; and transportation, emergency response, and other procedures; and numerous litigation expenses. That opposition would also result in years of delays beyond 2013 to operate either site for mercury storage. Such delays would continue storage costs at Y-12 and on the generators. Insofar as there are environmental risks from not having mercury storage consolidated, the delays in using the New Mexico sites would increase those risks.

10. Using WIPP for mercury storage, GTCC wastes, or other proposals to expand WIPP's mission is a serious breach of trust.

In addition to mercury storage and GTCC waste disposal at WIPP being contrary to federal laws, it is also a serious breach of trust. During the 20 years of discussion and debate about WIPP's mission before the passage of the LWA, many promises were made that WIPP was only for defense transuranic waste and that the site would not be used for other types of wastes. Those promises, some enacted as explicit requirements and prohibitions into the LWA, were important in obtaining support from federal and state officials and the public that allowed WIPP to open and operate.

That support also has been deemed essential by the Blue Ribbon Commission on America's Nuclear Future. In its January 2012 report, the Commission stated that "most notably the siting of a disposal facility for transuranic radioactive waste, the Waste Isolation Pilot Plant (WIPP) in New Mexico" provides a strong basis to "sustain the public trust and confidence needed to see controversial facilities through to completion." Report at ix. Breaching that trust regarding WIPP would affect many New Mexicans. But such expansions also would seriously undermine the ability to convince the public and government officials in other states that promises and even federal laws provide an adequate basis and assurances for states and communities to consent to radioactive waste or other controversial facilities.

This issue of breach of trust is a major impact that would have to be considered in any adequate Draft Supplement EIS. But DOE should not be proposing to breach that trust. DOE should not proceed with considering WIPP a reasonable alternative for mercury storage, GTCC waste disposal, or other expansions in WIPP's mission.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Don Hancock". The signature is written in a cursive, flowing style.

Don Hancock

Attachment: SRIC GTCC Comments of June 27, 2011