



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

21 2018

NEW MEXICO ENVIRONMENT
DEPARTMENT, HAZARDOUS WASTE
BUREAU CLASS 3 CLARIFICATION
OF TRU MIXED WASTE DISPOSAL
VOLUME REPORTING PERMIT
MODIFICATION TO THE WIPP HAZARDOUS
WASTE FACILITY PERMIT

NO. HWB 18-19 (P)

**COMMENTS ON THE HEARING OFFICER'S REPORT OF
NUCLEAR WATCH NEW MEXICO**

Pursuant to the Post-Hearing Scheduling and Procedural Order and 20.1.4.500.B NMAC, Nuclear Watch New Mexico submits the following comments on the Hearing Officer's Report.

1. The Findings of Fact and Conclusions of Law submitted to the Hazardous Waste Bureau ("HWB") by Nuclear Watch New Mexico ("Nuke Watch") were ignored in the Hearing Officer's Report.
2. The findings of fact and conclusions of law submitted to HWB by Nuclear Watch New Mexico were delivered in a timely manner on November 28, 2018.
3. The findings of fact and conclusions of law submitted to HWB by Nuclear Watch New Mexico received a date stamp.
4. The lack of any response on the part of the Hearing Officer of the findings of fact and conclusions of law of Law submitted to HWB by Nuclear Watch New Mexico makes it impossible to comment on the Hearing Officer's response to Nuclear Watch New Mexico.
5. A public hearing was held on October 23 through 25, 2018 in Carlsbad, New Mexico. Nuclear Watch New Mexico was a Party to those proceedings, providing public statements and



cross examinations.

6. A vast majority of the Hearing Officer's findings of fact in the Report were directly based on HWB Findings. Most of the remaining findings of fact (after those based on HWB Findings) were based on Permittee Findings. Very few findings were based on Members of the Public Findings.

7. It is unclear upon what some of the Hearing Officer's findings are based. In particular, many of the last 15 findings (208-222) are findings with unknown origins.

8. Hearing Officer finding 208 *states*, "But those 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." This statement ignores the Committee reports. See SRIC Finding #10 regarding the Test Phase.

9. Hearing Officer Finding 211 *states*, "The parties opposing approval of the Draft Permit are obviously confusing engineering design considerations with Congressional intent. This is more of a conclusion and is not in the record.

10. Hearing Officer Finding 212 *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 to accommodate the space necessary to store the 6.2 million ft³ of TRU waste. Congress' intent was to dispose of a defined volume of TRU waste not to dispose of a fixed number of containers." This appears to be Hearing Officer speculation with no citations to the record. The record shows that DOE always knew containers would not be full. See SRIC Findings 16 and 24.

11. Hearing Officer Finding 213 *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 ft³ 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 ft³ of waste 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. The historical record thus is not a basis upon which the Draft Permit should not be approved.” This is a Hearing Officer conclusion with no citations to the record. There aren’t 850,000 drums at WIPP. The record shows that, as of September 29, 2018, there are 173,970 containers with waste at WIPP. See SRIC Ex. 56.

12. Hearing Officer Finding 214 states, “Here the language of the LWA is not ambiguous and thus conclusively establishes that the volume limit of WIPP is 6.2 million ft³. DOE is, therefore, not interpreting the volume limitation in LWA but simply relying on what is unambiguously stated. This is not a Finding, rather it is a Conclusion of Law. DOE has unambiguously counted the volume of the outermost container since WIPP opened.

13. Hearing Officer Finding 215 states, “Doe [sic] has clearly articulated the method that be will utilized to determine the volume of waste in containers emplaced in WIPP.” This ignores the record to the contrary. See SRIC Finding 43.

14. Hearing Officer Finding 216 states “However, I find that this “conflict” is one SRIC has created. If the PMR is granted there will simply be two methods of measuring the volume of TRU waste emplaced in WIPP for two different purposes.” There is nothing simple here. The LWA does not allow that there be two measurements of 6.2 million cubic feet.

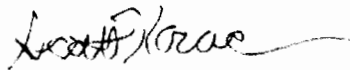
15. Hearing Officer Finding 217 states that the Statute is not ambiguous. This is not a

Finding, rather it is a Conclusion of Law. If this is not ambiguous, why is the PMR called a “Clarification”? DOE has unambiguously counted the volume of the outermost container since WIPP opened.

16. Hearing Officer Finding 218 states, “The DOE has explained in the PMR that the assumptions upon which the original method of measuring waste emplaced in WIPP have with experience proven to be wrong and without the changes embodied in the PMR the DOE will not be able to complete the purpose for which WIPP was authorized by Congress.” This ignores the record that DOE continues to use the “original method” for annual reports to Congress (SRIC Finding 19); for EPA (SRIC Finding 20); for its Annual Inventory reports (SRIC Finding 21); for its contracts (SRIC Finding 22). Further, overpacks allow more waste, not less (SRIC Finding 25).

Nuclear Watch New Mexico does not support the concluding recommendation of the Hearing Officer’s Report issued on December 10, 2018. And Nuclear Watch New Mexico respectfully requests that the Secretary of the Environment not approve the Draft Permit issued by the Hazardous Waste Bureau for public comment on August 6, 2018. AR-180804.

Respectfully submitted,



Scott Kovac
Nuclear Watch New Mexico

CERTIFICATE OF SERVICE

I hereby certify that the original of these Proposed Findings of Fact and Conclusions of

Law was filed and served via the stated methods below on November 21, 2018:

Via email:

Pam Castañeda
Administrator to Boards and Commissions
P.O. Box 5469
Santa Fe, NM 87502
(505) 827-2425
pam.castaneda@state.nm.us

Jennifer L. Hower
General Counsel
New Mexico Environment Department
121 Tijeras Ave. NE, Suite 1000
Albuquerque, NM 87102
Office: (505) 222-9550
Cell: (505) 500-7628
Fax: (505) 383-2064
E-mail: jennifer.hower@state.nm.us

Michael L. Woodward
HANCE SCARBOROUGH, LLP
400 W. 15th Street, Ste. 950
Austin, Texas 78701
Telephone: (512) 479-8888
Facsimile: (512) 482-6891
mwoodward@hslawmail.com

Myles Hall, Legal Counsel
U.S. Department of Energy
4021 National Parks Highway
Carlsbad, NM 88220
Myles.hall@cbfo.doe.gov

Dennis Cook, Legal Counsel
Nuclear Waste Partnership LLC
P.O. Box 2078, GSA-202
Carlsbad, NM 88221-2078
dennis.cook@wipp.ws
Steve Zappe
60 La Pradera
Santa Fe, NM 87508

steve_zappe@mac.com

Don Hancock
Southwest Research and Information Center
PO Box 4524
Albuquerque, NM 87196-4524
sricdon@earthlink.net

Lindsay A. Lovejoy, Jr.
3600 Cerrillos Rd.
Unit 1001 A
Santa Fe, NM 87507
lindsay@lindsaylovejoy.com

Joni Arends
Concerned Citizens for Nuclear Safety
P. O. Box 31147
Santa Fe, NM 87594-1147
jarends@nuclearactive.org

J.D. Head
Fritz Byrne, Head & Gilstrap, PLLC
221 W. 6th St., Suite 960
Austin, TX 78701
jhead@fbhg.law

Robert A. Stranahan, IV
Law Office of Robert A. Stranahan, IV
29 A Rancho Mañana
Santa Fe, NM 87506
Rstranahan1@me.com



Scott Kovac