



MAY 28 2018

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

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

HWB 18-19 (P)

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW 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 proposed findings of fact and conclusions of law.

PROPOSED FINDINGS OF FACT

Historical Background

1. WIPP was authorized in 1979 in Public Law 96-164, § 213. Therein, Congress authorized WIPP “to demonstrate the safe disposal of radioactive waste resulting from the defense activities and programs of the United States exempted from regulation by the Nuclear Regulatory Commission.” The law specifically designates WIPP as a “pilot plant,” and states that its mission is to “demonstrate the safe disposal.” AR 180121.08, § 213(a). Thus, WIPP was not the sole disposal site for all TRU waste. 10/25/18 Tr. 181, ll. 1-2 (Hancock).

2. In its first 19.5 years of operations – March 26, 1999 to September 29, 2018 – less than 54 percent of that 6.2 million cubic feet (175,564 cubic meters) volume capacity limit has been emplaced at WIPP. Ref. 6. For CH waste, 173,242 containers emplaced have 93,929 cubic meters of waste, and 728 containers of RH waste have 642 cubic meters of waste. That total of

181125



94,571 cubic meters is less than 54 percent of the capacity limit. The request and the Draft Permit do not specifically discuss that fact, nor addresses why any change in the capacity limit nor a "Volume of Record" is needed now, since the existing gross internal container volume limits are adequate for years or even decades into the future.

3. In Mr. Kovac's cross examination of Mr. Kehrman, Mr. Kehrman stated,

A. "In the past, using the gross internal volume of the outermost container has been used to report both TRU mixed waste and to detract against the Land Withdrawal Act, and that is because the time [tie] between those two -- between those two items in the permit.

The reason for the modification is to break that time [tie] because we -- the Department and permittees had realized that by tracking that way we count a great deal of void space as TRU mixed waste." (Hazardous Waste Bureau Class 3 Clarification of TRU Mixed Waste Disposal Volume Hearing Transcript For October 24, 2018, Page 13, Starting at Line 13)

To avoid counting void spaces that were traditionally counted and accounted for is not a reason to modify the permit.

PROPOSED CONCLUSIONS OF LAW

1. NMED is authorized to issue hazardous waste permits subject to any terms and conditions necessary to achieve compliance with the Resource Conservation and Recovery Act ("RCRA"), the New Mexico Hazardous Waste Act ("HWA"), or the hazardous waste

regulations. 40 CFR § 270.32(b)(1), incorporated by 20.4.1.900 NMAC.

2. The proposed permit is not protective of public health and the environment, pursuant to RCRA and the HWA and must be denied. 40 CFR § 270.42(c)(6), incorporated by 20.4.1.900 NMAC.

3. The modification request and Draft Permit are not needed. NMED has articulated no reason or rationale to expand WIPP's capacity and to depart from the way that compliance with the capacity limit has historically been calculated, based on gross internal volume of the outer container. It is not enough for DOE to urge that it did not anticipate the extent of the required use of overpacks or that DOE now has more waste than the available disposal space. What is in issue is a capacity limit, which is a number that is intended to remain fixed and binding, regardless of future events. This limit that has always been understood to apply to the volume of the outer disposal containers. DOE cannot contest that history and that understanding. A limit is not to be exceeded. To assert that a legal limit now presents problems is not a rationale for refusing to honor it, which is the essence of DOE's request here.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

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