

MAY 23 2019

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

_____)	
NEW MEXICO ENVIRONMENT)	
DEPARTMENT, HAZARDOUS WASTE)	
BUREAU CLASS 3 CLARIFICATION)	
OF TRU MIXED WASTE DISPOSAL)	HWB 18-19 (P)
VOLUME REPORTING PERMIT)	
MODIFICATION TO THE WIPP HAZARDOUS)	
WASTE FACILITY PERMIT)	
_____)	

STEVE ZAPPE COMMENT ON
HEARING OFFICER'S REPORT

Pursuant to 20.1.4.500.C(2) NMAC, Steve Zappe submits the following comment on the hearing officer's report (**Report**) in this proceeding:

On December 10, 2018, the hearing officer in this matter submitted his Report to the New Mexico Environment Department (**Department**) Secretary summarizing his findings of fact and conclusions of law after reviewing the original permit modification request (**PMR**), the evidence presented at the public hearing held in Carlsbad, New Mexico on October 23-25, 2018, and the applicable law. The Report recommended that the Secretary approve the August 6, 2018 draft permit, AR 180804.

Disputed Facts

The Report relies primarily upon statements submitted as findings of fact by both the Permittees and the Department, and included in the report as factual, some of which are demonstrably false and unsupported by the record. Specifically, the Report finds in both Finding 43 and 77 that *the maximum repository capacity limit currently stated in the Permit was based on the original assumption by the Permittees that waste containers would be full of TRU mixed waste.* The Department bears responsibility for perpetuating this assumption as a fact in their Finding 73, incorporated verbatim in the Report as Finding 77. The Department appears to have accepted the Permittees' statement of assumption at face value without independently confirming the veracity of this statement.

Zappe Findings 1 through 15 effectively refute that this assumption was ever articulated or considered in the Permittees' submittal of the original permit application in 1996. Zappe Conclusion 6 summarizes these findings:

"... there is no evidence whatsoever in the record to support the assertion that containers were ever assumed to be full in the original permit application."

Zappe comments (AR 180402.48, pp. 2-5; AR 180914.37, pp. 16-17), written testimony (Zappe Exhibit 1, pp. 20-21, 29-30), oral testimony (Tr. Oct 25, pp. 54-73), and



cross-examination (Tr. Oct 25, pp. 74-125) are all consistent in refuting this “fundamental assumption” that waste containers “would be totally full.” (AR 180121, p. 8-9) This is crucial, because the assumption of full containers is foundational to the Permittees’ argument that the PMR is necessary. Zappe Findings 41 through 62 summarize how the Permittees have historically considered the manner in which waste volume would be determined and reported, and it has never been based upon how full the containers would be. Zappe Conclusions 24 and 25 state this succinctly:

24. *Based upon findings of fact 41 through 62, the record is unequivocal regarding how waste volumes are to be reported:*
 - *Overpacks are considered the waste container for disposal, and any overpacked containers are considered part of the waste.*
 - *Waste volume is reported as the amount of space occupied by the waste and its container (i.e., gross internal volume of outermost container).*
25. *Based upon findings of fact 1 through 62, although the presumed “assumption” by the Permittees regarding “full containers” ultimately yields the same volume as using the amount of space occupied by the waste and its container, this false assumption leads to the unfounded conclusions presented by the Permittees in their testimony regarding the need for a new definition of “LWA TRU Waste Volume.” **If the initial assumption regarding volume of waste is instead as it is listed in conclusion 24, there is no basis for proposing an alternate definition, and the entire premise undergirding the PMR and draft permit disappears.***

However, what I find most troubling in the Report is the series of Findings 208 through 219, which appear to dance around the issue of whether Congress either intended or didn’t intend to specify how the volume of waste would be determined. These findings never address one critical, fundamental fact: DOE made that determination shortly after enactment of the WIPP Land Withdrawal Act (**LWA**), when it began reporting waste inventory under the Federal Facility Compliance Act – both laws enacted in October 1992. Rather than question what Congress intended in declaring that the capacity limit of WIPP was “6.2 million cubic feet of transuranic waste,” DOE took decisive action and declared its method for determining waste volume to be as I’ve stated above in Zappe Conclusion 24. DOE has been reporting waste volume in this manner for almost 20 years now.

The real question, totally ignored in the Report, is this: did Congress intend to give DOE a second opportunity to decide how waste volume is determined under the LWA? If the answer to that question is “yes,” as appears to be the conclusion of the Report, does that then lead to the subsequent conclusion that Congress intended to give DOE multiple opportunities to create new methods for determining waste volume? By recommending in the Report that the Secretary approve the draft permit, predicated on the false pretense that DOE originally assumed all waste containers would be full and by removing the Department’s regulatory authority over the method of calculating waste volume under the LWA, DOE will be given free rein to redefine LWA waste volume in the future using any pretense and any method yet to be imagined.

I also dispute Report Finding 221 being presented as a fact and not as a conclusion. The hearing officer is entitled to his own opinion about whether my arguments and

proposed findings are persuasive, but the facts as I have presented them are clearly based upon the record and have not been disputed by either the Permittees or the Department. The Secretary alone must determine the relevancy and persuasiveness of my submittals.

Conclusion

I continue to oppose issuance of the draft permit for these reasons, and recommend that Secretary deny it.

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

Steve Zappe

CERTIFICATE OF SERVICE

I hereby certify that a copy of my Comment on the Hearing Officer's Report was sent via the stated methods below on November 28, 2018:

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