



**Department of Energy**

Carlsbad Area Office  
P. O. Box 3090  
Carlsbad, New Mexico 88221

**NOV 21 1995**

*Steve T  
Please prepare  
response for my  
signature sent*

Mr. Benito J. Garcia  
Bureau Chief  
New Mexico Environmental Department  
P. O. Box 26110  
Santa Fe, NM 87505

Dear Mr. Garcia:

Enclosed for your review is the draft policy statement on a definition of *defense waste*. The policy was developed in an effort to improve the consistency in categorizing waste among the generator sites. The policy statement clarifies the definition by eliminating potential differences in how sites categorize their waste.

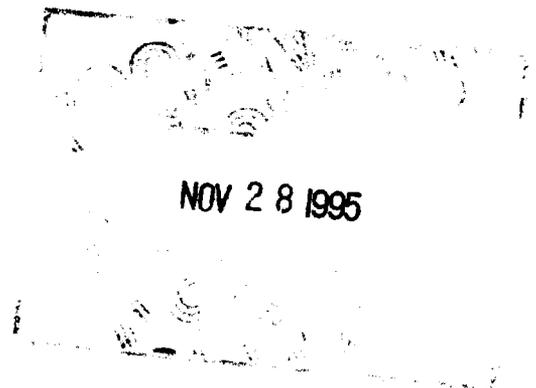
I would appreciate any comments you have by December 15, 1995. If you have any questions please contact Mike Brown of my staff at 505-234-7476

Sincerely,

*George E. Dials*  
George E. Dials  
Manager

Enclosure

cc w/enclosure:  
Cooper Wayman, CAO  
Mike McFadden, CAO  
Dennis Hurtt, CAO  
C & C File



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# Proposed Policy Statement

- Pursuant to the Atomic Energy Act of 1954, Public Law 96-164, the Land Withdrawal Act, the Consultation and Cooperation Agreement, the Nuclear Waste Policy Act of 1982, and Public Law 101-189, the National Transuranic (TRU) Executive Committee endorsed the following policy statement:
  - *It is the Department of Energy's policy that all TRU waste under the control of the United States Government is generated by atomic energy defense activities, not limited to those listed in the Nuclear Waste Policy Act, and may be emplaced at the Waste Isolation Pilot Plant (WIPP) pursuant to all other WIPP regulatory and legal constraints, including, but not limited to, the Land Withdrawal Act, the Consultation & Cooperation Agreement, and the WIPP Waste Acceptance Criteria (WAC). The only exception is TRU waste, if any, generated by the commercial nuclear power industry.*

## **DEFENSE TRU WASTE POLICY** **EXECUTIVE SUMMARY**

### **Introduction**

There are two public laws that specifically address the purposes of WIPP. Public Law 96-164 (Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1980), Title II, Section 213(a) provides that:

...the Waste Isolation Pilot Plant is authorized as a defense activity of the Department of Energy. . .for the express purpose of providing research and development facilities to demonstrate the safe disposal of **radioactive wastes resulting from the defense activities and programs of the United States exempted from regulation by the Nuclear Regulatory Commission.** (Emphasis added).

Section 2(21) of the the Waste Isolation Pilot Plant (WIPP) Land Withdrawal Act (LWA), Public Law 102-579 of October 30, 1992, characterizes WIPP's purpose:

The term "WIPP" means the Waste Isolation Pilot Plant project authorized under section 213 of [Public Law 96-164] to demonstrate the safe disposal of **radioactive waste materials generated by atomic energy defense activities.** (Emphasis added.)

In the LWA Congress equated **radioactive wastes resulting from the defense activities and programs of the United States exempted from regulation by the Nuclear Regulatory Commission with radioactive waste materials generated by atomic energy defense activities.** As the more recent and more WIPP-specific law, the LWA is used here as the best indicator of Congress' intent for WIPP.

Not all radioactive waste materials can be emplaced at WIPP. Section 12 of the LWA prohibits the transportation to and disposal of high-level radioactive waste (HLW) or spent nuclear fuel (SNF) at the WIPP. Section 2(5) of the LWA allows only transuranic (TRU) waste to be disposed of at WIPP. Section 2(20) of the LWA defines transuranic radioactive waste (TRU waste) as radioactive wastes containing more than 100 nanocuries per gram of alpha-emitting transuranic (atomic number greater than 92) isotopes per gram of waste, and which have half lives greater than 20 years. Consequently, only radioactive waste satisfying these radiological criteria and generated by atomic energy defense activities can be emplaced at WIPP. Unfortunately, the term "atomic energy defense activities" is not defined in the LWA. Consequently, we must look to other sources to understand which TRU wastes may be emplaced at WIPP.

The following laws provide information that can be used to clarify the intent of Congress as to the definition of "atomic energy defense activities"

### **Nuclear Waste Policy Act (NWPA)**

Section 10101(3) of the Nuclear Waste Policy Act of 1982 defines atomic energy defense activity:

The term “atomic energy defense activity” means any activity of the Secretary [of the Department of Energy] performed in whole or in part in carrying out any of the following functions:

- (A) naval reactors development;
- (B) weapons activities including defense inertial confinement fusion;
- (C) verification and control technology;
- (D) defense nuclear materials production;
- (E) defense nuclear waste and materials by-products management;
- (F) defense nuclear materials security and safeguards and security investigations; and
- (G) defense research and development.

### **Defense Waste Cleanup Act**

Public Law 101-189, passed November 29, 1989 and codified at 42 U.S.C. §7274(a), authorized the Defense Waste Cleanup Technology Program. In this legislation, defense waste is defined as:

waste, including radioactive waste, resulting **primarily** from atomic energy defense activities of the Department of Energy. (Emphasis added.)

The plain meaning of this definition is that there is defense nuclear waste that is generated by activities other than the seven listed in the NWPA.

### **The Atomic Energy Act of 1954 (AEA)**

Congress stated its intent and policy as to the development, utilization, and control of atomic energy in the Atomic Energy Act of 1954, as amended, and as codified at 42 U.S.C. §§2011 et seq.

42 U.S.C. §2011(a) contains Congress’ declaration that:

. . .the development, use, and control of atomic energy shall be directed so as to make the maximum contribution to the general welfare, subject at all times to the paramount objective of making the maximum contribution to the common **defense** and security... (Emphasis added.)

42 U.S.C. §2012 provides that:

The Congress of the United States hereby makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military **and for all other purposes** are vital to the common defense and security. (Emphasis added.)

The AEA provides that any atomic energy defense activity is an atomic energy defense activity.

### **Conclusions**

Defense TRU waste can be generated by other than the atomic energy defense activities listed in the NWPA. The NWPA indicates that there is radioactive waste generated by civilian nuclear activity which, according to the LWA, would not be eligible for WIPP emplacement, even if it satisfied the radiological criteria of the LWA. On the other hand, the AEA indicates that any atomic energy activity is an atomic energy defense activity.

Consequently, TRU waste generated by any atomic energy activity, subject to other criteria such as the WIPP WAC, may be emplaced at WIPP. There is some TRU waste that is WIPP eligible pursuant to the AEA, but not pursuant to the NWPA.

The general rule that any atomic energy activity is an atomic energy defense activity should be followed because Congress' intent and policy, unlike the LWA, is clearly stated in the AEA, and this policy involves all of atomic energy and nuclear materials, not just high level waste as in the case of the NWPA. Therefore, all TRU waste is eligible for WIPP emplacement. However, even if the general rule is followed, some TRU waste is prohibited from emplacement at WIPP.

### **Limitations**

Article VI(B) of the Agreement for Consultation and Cooperation Between the Department of Energy and the State of New Mexico on the Waste Isolation Pilot Plant, Updated April 18, 1988, (C&C Agreement) states WIPP's mission:

WIPP is intended to include receipt, handling and permanent disposal of defense transuranic waste and temporary storage for experimental purposes of a limited amount of high level defense waste.

Article II(E) of the C&C Agreement defines **defense waste** as:

radioactive wastes resulting from the defense activities and programs of the United States exempted from regulation by the Nuclear Regulatory Commission. **The term excludes any radioactive waste generated by the commercial nuclear power industry.** (Emphasis added.)

The C&C Agreement restricts radioactive waste which may be disposed of at WIPP by excluding commercial nuclear power industry waste.

### **Proposed Policy Statement**

Pursuant to the Atomic Energy Act of 1954, Public Law 96-164, the LWA, the C&C Agreement, the Nuclear Waste Policy Act of 1982, and Public Law 101-189, the National TRU Executive Committee endorsed the following policy statement:

**It is the DOE's policy that all TRU waste under the control of the United States Government is generated by atomic energy defense activities, not limited to those listed in the NWPA, and may be emplaced at WIPP pursuant to all other WIPP regulatory and legal constraints, including, but not limited to, the LWA, the C&C Agreement, and the WIPP WAC. The only exception is TRU waste, if any, generated by the commercial nuclear power industry.**