Comments on NMED Proposed WIPP Permit

02/02/2023

The following comments are offered by me as Chairman of the Mayor's Nuclear Task Force. These are point by point comments at the new permit conditions. I feel strongly that these new conditions are unnecessary and not germane to the renewal process.

Comment RN1 on Part 4, Section 4.2.1.4:

NMED has introduced a new requirement that *"On an annual basis, the volume of stored TRU mixed waste emplaced in a HWDU from the LANL must exceed the volume of stored TRU mixed waste from all other individual generator sites"*. This provision is purely political in nature, with NMED attempting to obsequiously placate NMED's own oversight organization within the State Legislature, the Radioactive and Hazardous Materials Committee. This requirement should be removed.

Comment RN2 on Part 4, Section 4.2.1.4:

NMED has introduced a new requirement that *"On an annual basis, the volume of stored TRU mixed waste emplaced in a HWDU from the LANL must exceed the volume of stored TRU mixed waste from all other individual generator sites"*. This provision threatens WIPP premature closure from events completely out of control by the permittees. For example, if TRU mixed waste packaging at LANL were curtailed (e.g., regional forest fires, accidents at LANL suspending operations for lengthy periods, etc.), the provision would require WIPP to suspend shipments from other generator sites until LANL shipments resumed. This is tantamount to trading lessened hypothetical risk to New Mexico stakeholders for greater risk to other states where TRU mixed waste is being stored and packaged for disposal in WIPP. This is opposite the intent of RCRA. This requirement should be removed.

Comment RN3 on Part 4, Section 4.2.1.4:

NMED has introduced a new requirement that *"On an annual basis, the volume of stored TRU mixed waste emplaced in a HWDU from the LANL must exceed the volume of stored TRU mixed waste from all other individual generator sites"*. In a twist of irony, this provision gives NMED undue prospect of introducing far greater risk to the WIPP work force, than reducing risk to northern New Mexicans near LANL. Remember, the risk of exposure to the hazardous materials in TRU mixed waste is much less than the risk of exposure to the radioactive components (i.e., estimated at ~1000 times lower). Consider the scenario where NMED issues a compliance order to LANL under its permit provisions, which curtails or stops shipment to WIPP. This has happened. With limited or no shipments from LANL, the permittees would be forced to curtail or stop shipments from all other generator sites, thereby increasing their risk of storing their inventory. In addition, with no waste emplacement at WIPP until LANL resumed shipping, the underground conditions at WIPP would deteriorate, adding to risk for WIPP workers. This requirement should be removed.

Comment RN4 on Part 4, Section 4.2.1.4:

NMED has introduced a new requirement that *"On an annual basis, the volume of stored TRU mixed waste emplaced in a HWDU from the LANL must exceed the volume of stored TRU mixed waste from all other individual generator sites"*. This requirement seems to violate any number of interstate commerce laws. If WIPP were disposing commercial mixed waste (instead of strictly defense waste), then this provision would limit waste acceptance from out-of-state mixed waste generators based on the amount of waste from New Mexico in-state generators. Should the provision not be removed, NMED faces obvious legal challenges from the permittees based on interstate commerce laws, and would be embarrassed by the obvious outcome.

Comment RN5 on Part 4, Section 4.2.1.4:

NMED has introduced a new requirement that *"…within 15 days of publishing the Annual Transuranic Waste Inventory Report (ATWIR), the Permittees shall certify to the NMED that there is sufficient disposal capacity to dispose of the New Mexico generator/storage site waste detailed in this report".* This provision requires the permittees to create and certify some sort of crystal ball to see far into the future of DOE's efforts to fulfill Congressional intent that ALL defense TRU waste shall be disposed of in WIPP. The permittees Annual Transuranic Waste Inventory Report is NOT an absolute "certification" of all future TRU mixed waste. It is at best an effort to estimate and project the future inventory. Other RCRA permits across the nation do not include any provision for the total quantity of future permitted capacity. Yes, each Hazardous Waste Disposal Unit (HWDU) within a disposal facility may be permitted to limit total waste quantity for a specific HWDU, but no other State RCRA permit requires certification of the overall "total" facility capacity as a condition for continued operation. As long as any permittee continues to demonstrate protection of human health and the environment in each HWDU, capacity limits on the overall facility is not required. NMED does have the authority to limit the capacity of each future HWDU, but does not have the authority to limit future capacity of the overall WIPP disposal facility. This requirement should be removed.

Comment RN6 on Part 1 Section 1.3.1:

NMED is adding a new Permit condition that triggers "*permit revocation within 30 calendar days if the Land Withdrawal Act (Pub. L. 102-579, as amended) volumetric disposal limit for TRU waste of 6.2 million cubic feet at the WIPP facility is increased or otherwise changed by the U.S. Congress*". Public Law 102-579, SECTION 9, "COMPLIANCE WITH ENVIRONMENTAL LAWS AND REGULATIONS" clearly sets NMED authority over WIPP in SEC. 9(a)(1)(C) for compliance with the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.). By adding this new permit condition, NMED appears to usurp the Federal authority granted by the US Congress. NMED's regulatory responsibility is limited to ensuring Permittees compliance with RCRA, which provides no provision of revoking any permit based on Congressional action. Any challenge, whether legal or within the RCRA framework, by the WIPP permittees would be swift and embarrassing to NMED. This requirement should be removed.

Comment RN7 on Attachment C, Section C-1d:

NMED has introduced a new Section C-1d in Attachment C of the permit. This new section appears to be a sort of "chest thumping" on NMED's part. One could even construe NMED feels a need to "brow beat" the permittees to placate an external audience. The entire Section C-1d is based on reiterating NMED's authority which is already clearly set forth in the regulations. Why does NMED feel it necessary to restate within the permit itself that "*NMED retains the right…to take action…*" or the "*The secretary reserves the right to…*"? The regulations themselves give NMED this authority. Section C-1d makes it appear that NMED is insecure in its authority, and should be removed.

Comment RN8 on Attachment C, Section C-1d:

NMED has introduced a new Section C-1d in Attachment C of the permit. It contains a single provision that is not codified in the RCRA regulations. That language is quoted here: "*The Secretary reserves the right to prohibit…TRU mixed wastes at the WIPP facility for, but not limited to, the following reasons: (1) …(2)…(3)… or (4) based on **any** allegation of noncompliance."* Reasons (1)-(3) are already set forth in the RCRA regulation, and repetition is not needed. Reason (4) is neither a regulatory requirement, nor a reasonable requirement. The use of the word "***any***" is especially problematic. WIPP critics have routinely alleged non-compliance (unsubstantiated) since the day the permit was issued over 20 years ago. Is NMED now prepared to revoke the permit based on mere allegation? Over the lifetime of the permit, there have been several minor violations of the permit, none of which posed any harm or threat to human health or the environment. All of them have been self-reported by the permittees. "Allegations" are not "proof" of non-compliance. This sort of subjectivity has no place in a regulatory instrument, with very real enforcement consequences. Section C-1d should be removed.

Comment RN9 on Attachment A1 Section A1-1d(2):

NMED is introducing Attachment A1 Section A1-1d(2) requiring permittees to complete a tedious root cause analysis "*In the event that extensive area contamination is discovered within a CH Package during unloading…"*. This language is both subjective and very likely beyond NMED authority under RCRA. First, take the phrase "*extensive area contamination*". What is meant by "*extensive*"? Is it an area the size of a typical surface radiation survey instrument (100 cm^2)? Or is it the entire area of a payload container? For reasons of worker exposure minimization, permittees do not disassemble multiple containers from a payload assembly, so the entire surface area of individual payload containers is not accessible. And what is meant by "*area contamination*"? Remember, the risk of exposure to the hazardous materials in TRU mixed waste is much less than the risk of exposure to the radioactive components (i.e., estimated at ~1000 times lower). NMED authority is for risk from hazardous materials inside the container, and not for radioactive material that has escaped the container. NMED has no authority to regulate the permittees with respect to radioactivity. If NMED intends to include similar root cause analysis requirements, it must frame them in the context of contamination by hazardous constituents. Permittees already make real time measurements of airborne concentrations of Volatile Organic Compounds in the area during the unloading process. There have been multiple events wherein permittees have self-identified radiological contamination on payload containers. In these instances,

permittees have taken the same steps NMED has written into Attachment A1 Section A1-1d(2). The very nature of chemically hazardous material "contamination" is fundamentally different than that of radioactive material "contamination". Attachment A1 Section A1-1d(2) should be removed.

Comment RN10 on Part 1 Section 1.15.2

From WIPP's opening under NMED RCRA authority, permittees voluntarily, and in good faith, agreed to pre-submittal meetings as well as post-submittal meetings for Class 2 and Class 3 permit modification requests. However, under RCRA regulations, only post-submittal public meetings are required when permit modifications are requested. Only post-submittal meetings to inform and provide a venue for public comment are required under RCRA, and the WIPP permittees have been thoroughly compliant. It must be argued that WIPP permittees have even gone the extra mile in entertaining public input, way beyond the basic RCRA requirements. However, NMED is now requiring pre-submittal public meetings in addition to the post-submittal meetings, even though there is no RCRA regulatory requirement, as a condition of compliance with the permit. An arduous review of all 10 current Hazardous Waste Facility Permits (HWFP) NMED issued to Federal facilities in New Mexico (including WIPP), and all 11 HWFPs issued to commercial facilities reveals the requirement for pre-submittal public meetings is only being applied to WIPP. A rhetorical question may be whether NMED intends to revise the other 20 HWFPs it administers to incorporate similar requirements. In addition, NMED is adding the requirement that "*Permittees shall conduct WIPP Community Forum and Open House quarterly public meetings…*". Again, none of the other 20 NMED permittees face a similar requirement in their respective Community Relations Plan or Public Involvement Plan. NMED should remove these extraneous requirements that go far outside their authority under RCRA. Voluntarily, and in good faith, DOE should continue to conduct pre-submittal meetings for Class 2 and 3 modification requests. One further note is that NMED ironically did not seek public input from the Carlsbad community in drafting these changed provisions in the new permit, in obvious contrast to RCRA intent. What is good for the goose is good for the gander.

Comment RN11 on Part 2 Section 2.14.3

NMED is adding a new section to require that the "*Department of Energy (DOE) submit an annual report summarizing its progress toward siting another geologic repository for transuranic waste in a state other than New Mexico"*. This provision demonstrates how NMED has embraced the anti-WIPP culture in northern New Mexico, cultivated for over 50 years. NMED's role in regulating WIPP under RCRA provisions must be impartial, and fair to all parties. NMED has no authority under RCRA to require any hazardous waste disposal facility to seek an alternate disposal site for the waste that the facility has been already been authorized and permitted to operate. NMED exposes its naiveté by requiring this annual report to "*summarize the steps the DOE has taken …to include documentation…on budget appropriation requests; land acquisition(s); state and public engagement activities; feasibility studies; and design, construction, and operation plans"*. NMED must know that DOE cannot make budget requests or take any steps toward a new disposal facility without appropriate authorization and appropriation from Congress. To include this new requirement would be an embarrassment for NMED, when legal challenges will inevitably be brought. Part 2 Section 2.14.3 should be removed.

Comment RN12 on Part 1 Section 1.7.7.1

NMED has introduced a new provision in Part 1 Section 1.7.7.1: "*It is a violation of this Permit if the DOE or the DOE contractor fail to safely transport TRU mixed waste to the WIPP facility. The NMED is requiring compliance with applicable requirements of the WIPP Transportation Plan Implementation Guide and any transportation plans under the authority of the Western Interstate Energy Board's High-Level Radioactive Waste Committee."* This new provision is fraught with problems. First, NMED has no authority to regulate transportation to or from a hazardous waste facility under RCRA. That regulatory authority lies within the jurisdiction of the Federal Department of Transportation (DOT). Second, the WIEB has no "authority". WEIB is an ad hoc organization representing western states to advocate common principles across its members, and champion western states interests over pressure from energy interests in eastern states. Third, the WIPP Transportation "*Plan Implementation Guide"*, affectionately known as the "PIG", was negotiated over 25 years ago with representatives of the western Governors Association, well before WIPP opened. Ongoing annual DOE interaction with the transportation committee of the western Governors Association continues to keep the "PIG" as the primary framework for WIPP transportation guidance, completely independent from WEIB involvement. Finally, the language of this newly introduce provision by NMED is extremely subjective. What does "*fail to safely transport*" mean? Would the permittees be in violation if a shipment experienced a flat tire in transit? What about a scenario where severe weather forced a shipment to return to the shipping site? And what does "*safely*" mean? What about a traffic accident with a TRU shipment enroute to WIPP, where there are injuries to other vehicles involved, but no damage or insult to the TRU waste shipping package. Subjectivity has no place in an enforceable regulatory permit! Part 1, Section 1.7.7.1 should be removed.

Comment RN13 on Attachment A2 Section A2-5b(2)(a)

NMED has introduced a new provision in Attachment A2, Section A2-5b(2)(a): "*In the annual Geotechnical Analysis Report, the Permittees shall provide a summary of the results of the monthly surveillance of oil and gas production and salt water disposal wells within a one-mile perimeter outside the Land Withdrawal Act boundary"*. This requirement is completely outside of NMED's regulatory authority. The permittees compile an annual Geotechnical Analysis Report (GAR) to demonstrate that the long-term repository geological characteristics continue to agree with original assumptions DOE relied upon in its compliance demonstration to EPA. The GAR is focused on ensuring that the long term performance requirements for WIPP (10,000 years) remain valid. As good neighbors, permittees do maintain frequent interactions with nearby oil and gas exploration and production entities. EPA regulations (40CFR Part 194) require DOE to monitor nearby drilling activities, but this is not a subject that the GAR is intended to report. The GAR is focused on the geotechnical performance of the repository, especially on creep closure rates and conditions in the underground repository. Oil and gas exploration one mile outside the WIPP boundary has absolutely nothing to do with protecting human health and the environment, over which NMED has any authority. Attachment A2, Section A2-5b(2)(a) should be removed.

In closing I believe that the renewal should be granted without new conditions.

Sincerely,

Jack Volpato,

Chairman, Carlsbad Mayor's Nuclear Task Force.