

April 18, 2023

Mr. Ricardo Maestas  
New Mexico Environment Department  
2905 Rodeo Park Drive East, Building 1  
Santa Fe, N.M. 87505

By electronic mail  
(Ricardo.Maestas@env.nm.gov)

Re: New Mexico Hazardous Waste Act permit renewal for the Waste Isolation Pilot Plant

Dear Mr. Maestas:

I write for Conservation Voters New Mexico to address the New Mexico Environment Department's proposed renewal of the New Mexico Hazardous Waste Act permit for the Waste Isolation Pilot Plant.

I would appreciate it if you would acknowledge that you have received these comments.

### Introduction

By way of introduction, Conservation Voters New Mexico ("CVNM") is a statewide non-profit non-partisan organization that values responsible stewardship of New Mexico's water, land, and other natural resources. CVNM believes that ecological health and social equity among New Mexico's diverse and culturally rich communities protect our state's quality of life.

CVNM is dedicated to ensuring democratic accountability and access for all New Mexicans in decision making at all levels of government. CVNM supports policies that promote long-term ecological and economic sustainability. This is CVNM's responsibility to future generations.

CVNM is concerned about the renewal of the New Mexico Hazardous Waste Act permit for WIPP for several reasons, including but not necessarily limited to the following:

- First, the transport of radioactive waste to WIPP involves transport of that waste through New Mexico communities.
- Second, the existence and operation of WIPP pose risks to the New Mexico communities that surround WIPP.
- Third, WIPP is used, among other purposes, for removal of radioactive waste from Los Alamos National Laboratory (“LANL”), which is located adjacent to several communities in northern New Mexico, including Pueblo Nations.
- Fourth, decisions that are made about the final permit for WIPP are both technical and political decisions that should reflect concerns of New Mexico communities and concerns of New Mexico residents about those communities.
- Finally, because of WIPP’s importance to the residents of New Mexico, the Hazardous Waste Act permit must require that those residents be given timely and effective notice of events at WIPP.

### Request for hearing

On the basis of the following comments, CVNM requests that the NMED conduct a public hearing to determine what action to take on the draft renewal permit.

### Comments

CVNM’s comments on the New Mexico Environment Department’s (“NMED’s”) proposed renewal of the New Mexico Hazardous Waste Act (“Hazardous Waste Act”) permit (“the Draft Renewal Permit”) for the Waste Isolation Pilot Plant (“WIPP”) are based on the CVNM values outlined above. CVNM’s comments refer to the Draft Renewal Permit issued by NMED on December 20, 2020. These comments are timely because they are filed with the NMED by the deadline of 5:00 p.m. MT on April 19, 2023 established in your email message dated February 13, 2023.

These comments are divided into two sections. The first section explains three provisions of the Draft Renewal Permit that CVNM supports and that NMED should incorporate into the final renewal of the Hazardous Waste Act permit for WIPP (“the Final Permit”). The second section explains

several provisions in the Draft Renewal Permit that should be changed, and the manner in which they should be changed.

- I. The Draft Renewal Permit contains three provisions that NMED should incorporate into the Final Permit.
  - A. The Draft Renewal Permit appropriately requires that the U.S. Department of Energy and its contractors report on the U.S. government's efforts to establish a permanent geologic repository.

The documents that provided for the creation and operation of WIPP indicate that the facility is a pilot facility that is to be operated only for a limited period of time. The Draft Renewal Permit honors the intent of these documents by proposing that the U.S. Department of Energy (DOE) and Salado Isolation Mining Contractors (SIMCO), which is comprised of Bechtel and Los Alamos Technical Associates (referred to jointly as “the Permittees”), report to the NMED each year on the progress made by the federal government for establishment of a permanent geologic repository for transuranic waste in a state other than New Mexico. This provision follows through on the representations made to the residents of New Mexico that led to the State of New Mexico’s agreement to allow WIPP to be constructed and to operate. These representations were made in the following documents.

1. The Land Withdrawal Act

First, the federal Land Withdrawal Act, which authorized WIPP initially, provided for decommissioning of WIPP. It stated:

**Decommissioning of WIPP**

The Secretary shall develop a plan for the management and use of the Withdrawal following the decommissioning of WIPP or the termination of the land withdrawal. The Secretary shall consult with the Secretary of the Interior and the State in the preparation of such plan and shall submit such plan to the Congress.

Waste Isolation Pilot Plant Land Withdrawal Act (Public Law 102-579), section 13.

2. The Consultation and Cooperation Agreement

Second, the Consultation and Cooperation Agreement between the State of New Mexico and the U.S. Department of Energy also clearly contemplated that WIPP would cease operations at some point in the future. Article VII of the Agreement lists 17 Key Events, and the 17<sup>th</sup> Key Event is the Decontamination and Decommissioning of WIPP.

3. The initial permit issued for WIPP

Finally, the permit for WIPP issued by the New Mexico Environment Department pursuant to the federal Resource Conservation and Recovery Act as implemented by the New Mexico Hazardous Waste Act indicates that the operation and closure of WIPP shall take a total of 35 years. Section I-1d of that permit states:

I-1d Schedule for Closure

For the purpose of establishing a schedule for closure, an operating and closure period of no more than thirty-five (35) years (twenty-five (25) years for disposal operations and ten (10) years for closure) is assumed. This operating period may be extended or shortened depending on a number of factors, including the rate of waste approved for shipment to the WIPP facility and the schedules of TRU mixed waste generator sites, and future decommissioning activities.

WIPP Hazardous Waste Facility Permit, section I-1d.

4. The Draft Renewal Permit appropriately requires an annual report on efforts to establish a permanent geologic repository for transuranic waste.

Thus the assumption that was a basis for the State of New Mexico's issuance of a permit for WIPP was that it would be a pilot plant that would operate for a limited amount of time. Specifically, WIPP was supposed to operate for 25 years and closure of the facility

was supposed to take 10 years. Because WIPP opened in 1999, the schedule called for it to operate until 2024 when the closure of the facility would begin.

The underlying assumption was that by the time WIPP closed, the federal government would have established a permanent geologic repository for disposal of transuranic waste, but that has not happened. It therefore is appropriate for the Draft Renewal Permit to require that the Permittees report each year on the federal government's progress toward establishment of such a repository. It also is appropriate for the Draft Renewal Permit to mandate that the report indicate progress toward establishment of such a repository in a state other than New Mexico so that New Mexico does not become the *de facto* permanent dumping ground for all of the nation's transuranic waste.

CVNM therefore urges NMED to maintain its position that the Permittees must provide such a report on an annual basis.

- B. The Final Permit must include the condition that WIPP will be closed if the Land Withdrawal Act is amended.

The Draft Renewal Permit contains another provision related to WIPP's status as a pilot project that is critically important for New Mexicans and the State of New Mexico. Section 7(a)(3) of the Land Withdrawal Act limits to 6.2 million cubic feet the volume of transuranic waste that can be disposed of in WIPP. That limit is one of the indications that WIPP is a pilot project that is not intended to serve indefinitely as the geologic repository for all of the nation's transuranic waste. As was explained above, that is important to New Mexicans and to the State of New Mexico.

The Draft Renewal Permit reflects the importance of this volumetric limit – and therefore WIPP's status as a pilot project – by providing that the Final Permit will be revoked within 30 days if the Land Withdrawal Act's volumetric limit of 6.2 million cubic feet is increased or otherwise changed by Congress.

That is appropriate, but the provision should be modified because 30 days is not adequate time for completion of required closure activities. Section 74-4-2.H NMSA 1978 of the New Mexico Hazardous Waste Act

provides that there must be an opportunity for a public hearing when revocation of a permit issued under the Act is proposed. Thirty days is not an adequate amount of time for the NMED to conduct a public hearing and make a decision based on the record of that hearing. For that reason, the provision in the Draft Renewal Permit should be changed to indicate that the process for revocation of the Final Permit will be started within 30 days.

If that change is made in this Permit condition, CVNM urges that the NMED retain it in the Final Permit.

- C. The Draft Renewal Permit appropriately requires that the Permittees prioritize use of WIPP for disposal of waste from Los Alamos National Laboratory.

Finally, the use of WIPP for disposal of transuranic waste from LANL is important to the residents of New Mexico. The atomic age began in New Mexico, and LANL is where the first atomic bombs were built. The disposal of radioactive waste at LANL has caused radioactive pollution in canyons that surround LANL, in surface waters that are downstream from LANL, including the Rio Grande River, and in ground water that is down gradient from LANL. Moreover, those surface waters and that ground water are among the sources of drinking water for communities near LANL, including Pueblo Nations, and for downstream communities such as Santa Fe, Cochiti Lake, and Albuquerque.

The importance of WIPP for disposal of transuranic waste from LANL was also recognized by the Land Withdrawal Act, which authorized WIPP initially. Section 16(e) of that Act specifically addresses transportation of transuranic waste from LANL to WIPP, and it prohibits shipments of such waste to WIPP from LANL until the Santa Fe bypass route is completed or one of two other conditions pertaining to transportation of waste from LANL to WIPP is met.

The Draft Renewal Permit recognizes the importance of disposal at WIPP of transuranic waste from LANL in section 4.2.1.4. It provides that:

While this permit remains in effect, the Permittees shall prioritize the emplacement of stored TRU [transuranic] mixed waste at

WIPP from the clean-up activities at the Los Alamos National Laboratory (LANL). On an annual basis, the volume of stored TRU mixed waste emplaced in a HWDU [hazardous waste disposal unit] from the LANL must exceed the volume of stored TRU mixed waste from all other individual generator sites.

This provision is quite important for New Mexicans and the State of New Mexico, and the NMED should resist any efforts to have this provision removed from the Final Permit.

II. The Draft Renewal Permit must be changed to provide actual notice of events at WIPP to New Mexicans.

There are several ways in which the Draft Renewal Permit must be changed to provide adequate protection for New Mexicans and their environment. These include but are not necessarily limited to the following.

A. The Draft Renewal Permit must include specific requirements for giving notice to members of the public.

The Draft Renewal Permit includes only inadequate provisions for giving notice to members of the public about actions required by the permit. The primary example of these inadequate provisions is the Draft Renewal Permit's section 1.11 on page 18 of the first part of the Draft Renewal Permit. It indicates that the Permittees "shall develop and maintain an e-mail list to notify members of the public concerning actions identified in this Permit requiring e-mail notification." That section also provides that the Permittees "shall provide a link on the WIPP Home Page <http://www.wipp.energy.gov> whereby members of the public may review the actions requiring e-mail notification and submit a request to be placed on this list." Interested persons also may receive notice in the U.S. mail by being on the Facility Mailing List, according to section 1.14.4.1 of the Draft Renewal Permit. These provisions ignore two important points about giving notice to members of the public in New Mexico.

The first point is the limited access of residents of New Mexico to the internet. According to the U.S. Census estimates, during 2015 to 2019 only 74.6% of households in New Mexico had broadband access. That means that

notices given to members of the public only by electronic means will not reach 25.4% of New Mexico's households.

The second point is that like most government entities, the Permittees habitually give notices to members of the public in written English, but many residents of New Mexico do not communicate in written English. Some New Mexico residents communicate primarily in other written languages, such as Spanish and Vietnamese, and other residents of New Mexico communicate primarily in languages that are not written. The latter is particularly true in Native American Nations such as the Pueblos that surround LANL, where many shipments of waste to WIPP originate.

There are quite a few examples of the Draft Renewal Permit's inadequate provisions for giving notice to members of the public. *See, for example*, the following sections of the Draft Permit Renewal:

- section 1.11 (PUBLIC E-MAIL NOTIFICATION LIST);
- section 1.14 (INFORMATION REPOSITORY);
- section 1.14.4 (Notification to Public of Information Repository);
- adequate notice
- section 2.3.1.7 (WIPP Waste Information System (**WWIS**) Database);
- section 4.1.1.2 (Disposal Locations and Quantities);
- section 4.5.2.2 (Notification Requirements);
- section 4.6.2.3 (Notification Requirements);
- section 4.6.3.2 (Notification Requirements);
- section 6.4 (NOTIFICATION OF CLOSURE);
- section 6.10.1 (Panel Closure); and
- section 8.10.7 (Statement of Basis).

Moreover, there is nothing in the Draft Renewal Permit to ensure that people who do not have internet access or who communicate by means other than written English will actually receive notice of events that occur at or are proposed to occur at WIPP. In all of the sections of the Draft Renewal Permit where notice to members of the public is required, the Draft Renewal Permit should mandate that notice be given by means such as advertisements on radio and television, advertisements in newspapers, and announcements in locations that are likely to reach residents such as Chapter Houses, churches, and community centers. These provisions of the Draft Renewal Permit should also

require that notices be given in the languages that are used by the individuals in the communities where notice is given.

Finally, the failure of the NMED to require that the Permittees provide adequate notice to members of the public, and the failure of the Permittees to provide that notice, violate New Mexico and federal Executive Orders that apply to the NMED and to the Permittees. The NMED is subject to and governed by the New Mexico Environmental Justice Executive Order signed by then Governor Bill Richardson in 2005. That Executive Order provides in part:

All cabinet level departments and boards and commissions that are involved in decisions that may affect environmental quality and public health shall provide meaningful opportunities for involvement to all people regardless of race, color, ethnicity, religion, income, or education level.

....

All cabinet level departments and boards and commissions shall recognize the need to communicate in writing and orally significant public health and environmental information in languages other than English by ensuring that all publicly disseminated information, including websites, is available in Spanish and English, at a minimum, and in tribal languages and dialects as appropriate for areas of the state where those languages are spoken.

State of New Mexico Executive Order 2005-056, THEREFORE paragraphs 1-2.

Similarly, the Permittees are subject to and governed by federal Executive Order 12898, which was promulgated by then President Bill Clinton in 1994. It provides that:

Each Federal agency shall work to ensure that public documents, notices, and hearings relating to human health or the environment are concise, understandable, and readily accessible to the public.

U.S. Executive Order 12898, paragraph 5-5(c).

Thus both the NMED and the Permittees are required to provide the kind of notice outlined above that will actually reach residents of New Mexico.

B. The Draft Renewal Permit fails to require that the Community Relations Plan include realistic notice to members of the public.

The Draft Renewal Permit requires the Permittees to establish and implement a Community Relations Plan for the purpose of keeping members of the public informed about Permit-related activities, including waste management, closure, post-closure, and corrective action. CVNM supports this provision of the Draft Renewal Permit, particularly the parts of this provision set forth in section 1.15.2.3 – which requires pre-submittal meetings for Class 2 and 3 permit modification requests – and section 1.15.2.7 – which requires WIPP Community Forums and Open House quarterly meetings with stakeholders, communities, and members of the public.

However, the Draft Renewal Permit fails to address whether members of the public shall be involved in the preparation of the Community Relations Plan and, if they are to be involved, what means of communication will be used to facilitate their involvement. The Draft Renewal Permit also fails to specify the means that will be used in the Community Relations Plan to give notice to members of the public of developments at WIPP that are covered by the Community Relations Plan. Section 1.15.1 of the Draft Renewal Permit, which provides the only specific information relating to involvement of members of the public concerning the Community Relations Plan indicates only that the Permittees shall post the Community Relations Plan on the WIPP Home Page within 180 days of the effective date of the Final Permit.

As was explained above, however, approximately 25% of New Mexico households do not have internet access, so the posting of the Community Relations Plan will not reach those households. In addition, unless the Community Relations Plan is posted in written languages other than English, it will not reach residents of New Mexico who communicate primarily in written languages such as Spanish and Vietnamese. Finally, posting the Community Relations Plan in various written languages will not reach New Mexicans

whose primary means of communication are in languages that are not written. This is a particular issue for members of the Pueblo Nations that surround LANL, since shipments of transuranic waste from LANL to WIPP will pass near those Nations.

- C. The Draft Renewal Permit fails to require that appropriate notice be given to members of the public about three aspects of WIPP that are of concern to members of the public.

In addition to the problems with the Draft Renewal Permit's public notice provisions outlined above, there are three sections of the Draft Renewal Permit for which appropriate public notice is not required despite those sections' clear importance to the members of the public. The first section is Part 5, which governs ground water detection monitoring; the second section is Part 7, which governs post-closure care at the WIPP facility; and the third section is Part 8, which governs corrective action for solid waste management units and areas of concern.

Part 5 – GROUNDWATER DETECTION MONITORING is a major concern to anyone who lives near or down gradient from WIPP because any ground water contamination at WIPP may pollute the ground water of any wells that are near or down gradient from WIPP. In addition, the shortages of water throughout New Mexico make contamination of ground water anywhere in the state a matter of concern for all New Mexico residents.

For those reasons, members of the public should receive notice of and reports from all of the ground water monitoring and other activities that are required by Part 5 of the Draft Renewal Permit. Moreover, that notice must be given using means designed to ensure that members of the public will actually receive the notice intended for them.

Second, members of the public also must receive notice of and reports about the post closure care at WIPP, which is the subject of Part 7 of the Draft Renewal Permit. Part 7 defines what is to happen at the WIPP site after WIPP is closed, which is a matter of concern not only to members of the public who live near WIPP but also to members of the public throughout New Mexico.

Despite that, there is nothing in the Draft Renewal Permit to indicate that residents of New Mexico will receive notice of developments that occur during the post-closure period for WIPP and that do not require a permit modification.

Third, in Part 8 – CORRECTIVE ACTION FOR SWMUS AND AOCS, the Draft Renewal Permit only requires public involvement when the NMED Secretary has made a decision about a remedy for corrective measures to be used to address contamination, including contamination beyond the WIPP facility borders. Involvement of members of the public at this stage of corrective action is appropriate, and CVNM supports the provision in this section that provides opportunities for public comment and for a public hearing on the NMED Secretary’s decision concerning a remedy.

However, this is inadequate. Members of the public have an interest in and a right to know about contamination beyond the WIPP facility boundaries as soon as that contamination is discovered, and the Draft Renewal Permit must be changed to provide meaningful notice of such contamination to members of the public.

D. The Final Permit must address all of these notice issues.

The Final Permit must address all of these issues pertaining to notice and involvement of members of the public. The NMED is obligated to provide appropriate notice and opportunities for public involvement pursuant to Governor Richardson’s Executive Order cited earlier, and the federal Department of Energy has similar obligations under Executive Order 12898.

Finally, both NMED and the Permittees owe appropriate notice and opportunities for public involvement to the residents of New Mexico because of their sacrifices for the United States’ involvement in the atomic age.

Conclusion

The NMED should retain in the Final Permit three provisions set forth in the Draft Renewal Permit:

- the requirement that the Permittees submit a report each year to NMED on the federal government's progress for establishment of a permanent geologic repository outside of New Mexico;
- the condition that NMED will initiate proceedings to withdraw the State Hazardous Waste Act permit for WIPP if the Land Withdrawal Act is amended to allow disposal of more than 6.2 million cubic feet of waste in WIPP; and
- the condition that the Permittees must prioritize use of WIPP for disposal of waste from LANL.

In addition, the Final Permit should mandate that the Permittees be required to provide timely and appropriate notice of events at the WIPP facility to the residents of New Mexico.

Thank you for your attention to CVNM's concerns.

/s/ Douglas Meiklejohn

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