

Elizabeth Forinash

To Whom It May Concern:

I am writing in opposition to the NMED WIPP Agency-Initiated Modification (AIM) draft Permit, issued April 23, 2026. The proposed AIM does not meet the regulatory standard for Agency-Initiated Modifications and is in conflict with the requirements of an authorized state RCRA program by effectively operating as a ban on the free movement of hazardous wastes across State borders.

DOE negotiated the renewed permit in good faith less than three years ago, voluntarily agreeing to permit conditions—conditions that were outside the requirements of RCRA or state regulations—to address the State's and stakeholders' interests in prioritizing New Mexico transuranic (TRU) waste, including Los Alamos legacy waste, in particular. The means of defining and documenting legacy waste, and of demonstrating prioritization of New Mexico waste, were captured in Permit Sections 4.2.1.4 and 4.2.1.5. NMED consented to the conditions in a stipulated agreement and touted the negotiations as successful, stating, "Communities in New Mexico and around the U.S. benefit from the clean-up of legacy waste and its disposal at WIPP." See [2023-06-27-COMMS-NMED-negotiates-settlement-agreement-for-Waste-Isolation-Pilot-Plant-renew](#)

Now the State is back-tracking on the fully informed agreements it made and proposes to unilaterally remake the permit in favor of New Mexico waste at the expense of communities around the U.S. The proposed permit modification would not only require that LANL legacy waste comprise over half the waste volume at WIPP emplaced over a certain duration but would prohibit waste being sent from other sites if that threshold is not met, effectively banning interstate transport and disposal of hazardous wastes in contradiction to RCRA and settled case law. Given available volumes of LANL legacy TRU waste excavated, characterized, package and certified for shipment and disposal at WIPP, and the complex and time-consuming efforts to safely and compliantly retrieve buried legacy TRU waste, the AIM will significantly limit out-of-state waste shipments for many years. This would jeopardize ongoing national defense missions and significantly hamper the pace and progress of legacy clean-up at other DOE sites across the nation, increasing human health and environmental risks and decreasing the possibilities for reindustrialization and reuse of land for community benefit.

DOE has fully met the defined conditions in the permit today, and NMED does not contend otherwise. Instead, NMED declared that the agreement—which NMED freely made in facilitated negotiations under its own agency process—"is not meeting the objectives" they intended.

RCRA regulations provide no basis for NMED to dictate the source and sequencing of waste disposed at WIPP, only the authority to verify that the waste received meets regulatory and statutory requirements and restrictions to assure the safety of WIPP operations and disposal. The proposed changes effectively ban free movement of hazardous waste across state boundaries and prohibit the treatment, storage or disposal of hazardous waste in the State, which is inconsistent with the express limitations on authorized state RCRA programs in 40 CFR 271.4.

Examination of the administrative record (NMED's original proposed permit; public comments,

including those from DOE and stakeholders party to negotiations; the stipulated agreement; and the final permit) provides important insights into areas of discussion and shows clearly which points were in contention and where various parties made concessions.

The state claims that substantial new information is available that was not at the time of the negotiations. The record shows that these supposed gaps in knowledge were fully known or recognized at the time the permit was issued. NMED did not identify any increased risk to human health or environmental protection at the WIPP as the basis for this AIM, as required by RCRA. Instead, NMED cited environmental risks at LANL associated with TRU waste. The appropriate regulatory mechanism to address those risks is the RCRA and clean-up framework at LANL; to use the WIPP permit as the vehicle is capricious and unlawful.

To address these deficiencies, NMED must withdraw the AIM immediately. In the event NMED intends to move forward with the AIM in conflict with RCRA regulations and settled case law, NMED must issue an expanded justification that explicitly describes:

- the WIPP-based public health and environmental protection risks, and the RCRA requirements, that justify changes to the WIPP permit
- the regulatory basis for using the WIPP permit to enforce risk objectives for clean-up and waste handling/storage at LANL, an entirely separate site with its own RCRA permits and regulatory agreements
- how its proposed actions meet the regulatory requirements and boundaries specified in 40 CFR 271.4 for authorized state RCRA programs.

An extended comment period of at least 120 days should be provided for the public to fully understand and provide comments on the expanded justification. A hearing must be held on the proposed permit changes, justification, and regulatory basis.

Detailed comments on these points are provided in the attachment.

Sincerely,
Elizabeth (Betsy) Forinash

DOE has met the letter and intent of the permit conditions for prioritization of New Mexico and legacy waste.

- The conditions reflecting the State’s interests in prioritization of New Mexico waste, and legacy waste at LANL in particular, were negotiated and agreed at permit renewal in 2023.
- These conditions do not trace directly to a regulatory requirement in RCRA but were voluntarily agreed by DOE to address NM’s interests during the permit renewal process.
 - No provisions in RCRA provide an enforceable basis for the state to impose conditions on prioritization of waste from a given site, to address a second repository, or to distinguish categories of eligible TRU mixed waste (e.g., legacy waste) based on factors other than physical or chemical characteristics that may affect its compliance with the WIPP Waste Acceptance Criteria.
 - Commitments DOE made on these issues are unique to the WIPP permit and go beyond the information required to verify compliance with hazardous waste regulations.
- The subject conditions and the full permit were established through a stipulated agreement negotiated and signed by the State.
- NMED negotiated with DOE to establish the processes and deliverables to address the State’s interest. Specifically:
 - DOE issued a one-time Legacy TRU Waste Disposal Plan (including definitions of legacy waste), following public information and comment period, and committed that “To the extent practicable, as articulated in the final Plan, Panel 12 will be reserved for the disposal of legacy TRU mixed waste.” (Permit Section 4.2.1.5)
 - Prioritization and Risk Reduction of New Mexico Waste is demonstrated by an annual certification by DOE “that there is sufficient TRU Mixed Waste Volume capacity in permitted HWDUs to dispose of the New Mexico generator/storage site waste detailed in [the ATWIR].” (Permit Section 4.2.1.4)

DOE has met the requirement to issue a Legacy TRU Waste Disposal Plan in Permit Section 4.2.1.5.

- DOE has fully abided by the negotiated, agreed upon, and duly issued permit condition to conduct public consultation and issue the Legacy Waste Disposal Plan.
- The Plan, including the definition of legacy waste that was required to be addressed in the plan, is not subject to NMED approval.
- As recently as April 07, 2026—just over a month before the AIM was proposed—NMED accepted without comment a Class 1 Permit Modification from Permittees to simplify

the original language in recognition of the fact that DOE had satisfied the requirement to develop the Legacy Waste Plan.

DOE has met the requirement to demonstrate Prioritization and Risk Reduction of New Mexico Waste in Permit Section 4.2.1.4.

- The NMED says “the Permittees have not met their obligation to prioritize and accommodate legacy waste, and LANL legacy waste in particular, during the current permit term, as required.”
- The means of prioritizing New Mexico waste, including LANL legacy waste, was articulated in the renewed permit. A provision was included in the permit approved by NMED that exactly defined the conditions by which to judge and assure the prioritization of New Mexico Waste:
 - Permit Part 4, Section 4.2.1.4, *Prioritization and Risk Reduction of New Mexico Waste*: Under this permit section, the Permittees are required to certify that sufficient capacity exists in permitted Hazardous Waste Disposal Units to dispose of New Mexico generator/storage site waste. LANL legacy waste must be prioritized while the WIPP permit remains in effect.
- DOE has submitted this certification annually, and NMED does not dispute this fact.
- NMED stated, “The process of providing these certifications is not accomplishing this objective [to prioritize LANL waste disposal].”
 - However, the state cites no basis for coming to this conclusion.
 - Contrary to NMED’s claims, WIPP continues to support the timely certification, scheduling and shipping of TRU waste to WIPP, prioritizing LANL certified waste shipment and disposal over other sites as soon as they are available, as evidenced by the lack of backlog of certified waste located at LANL.
 - It appears that NMED intends to leverage the WIPP permit to accelerate buried TRU waste retrieval at LANL, which is not within the scope of the WIPP RCRA permit nor compliant with RCRA regulations.
 - NMED was fully aware of these limitations during the permit negotiation process and was fully equipped at the time of permit renewal to negotiate different terms.

There is no permit requirement for DOE to dispose of waste in Panel 12 during the current permit term.

- NMED describes the existing permit condition on the Legacy TRU Waste Disposal Plan as requiring DOE to “prioritize legacy waste during the current permit term in Panel 12.” This is factually incorrect and misleading to the public.
- There is a requirement to prioritize disposal of legacy waste in Panel 12.

- Permit Section 4.2.1.4 states: “To the extent practicable, as articulated in the final Plan, Panel 12 will be reserved for the disposal of legacy TRU mixed waste.”
- There is no timeframe in the permit tied to disposal of any waste in Panel 12, and no requirement to accommodate legacy waste, including LANL legacy waste in particular, in Panel 12 *during the current permit term*.
 - During negotiations with NMED and subsequent public information sessions, DOE provided estimated timeframes for the operation of Panel 12, which were openly acknowledged to have uncertainties, and were not commitments regarding deadlines for excavating or filling any specific disposal panels.
 - The negotiated permit conditions demonstrably account for such uncertainty. For example, while the previous permit contained an estimated date for closure of the WIPP, the renewed permit removed all references to estimated timeframes, including for waste panels and closure of WIPP, and instead tied requirements to permit actions and renewal cycles.
 - NMED implies that the closure date from the earlier permit still stands in the permit, and links its justification to that claim: “Panel 12 will not be available for disposal until 2035, which is two years after the current permit expires and three years after the anticipated closure end date articulated in the permit.”
 - There are no dates articulated in the current permit for either Panel 12 operations or WIPP closure.
- The AIM will further delay the timing of waste emplacement in Panel 12 and undermine the ability to prioritize it for legacy waste, including legacy LANL TRU waste.
 - Currently, TRU waste is being emplaced in Panel 8, which will be followed by Panel 11. Panel 12 has not been mined yet. Given the time required to mine the various panels and the need to pace panel mining with emplacement operations to ensure panel viability and operational safety, the timing for waste emplacement in Panel 12 is fully dependent on the amount of waste received and emplaced in Panels 8 and 11.
 - NMED’s limitation on out of state shipments will delay the mining of Panel 12, essentially guaranteeing that Panel 12 emplacement operations fall well outside of the existing permit term and undermining the ability to dedicate it to prioritized legacy waste—with implications for all DOE cleanup sites, and in direct conflict with the implemented permit conditions and NMED’s stated objectives in negotiating those conditions.
 - Further, it appears as if NMED is trying to prioritize LANL legacy TRU waste for emplacement in Panels 8 and 11, contrary to what it had negotiated in the permit.

The NMED does not contend that DOE has failed to satisfy the plain language of the permit conditions in 4.2.1.4 and 4.2.1.5 regarding legacy waste or prioritization of New Mexico waste.

- NMED nearly ignores the approved permit conditions, as written, in its notice and justification. Instead, it describes its interpretations and motivations for the approved permit conditions, refers to obsolete conditions and dates from prior permits, and states that the fully-informed agreements it made are “not working as intended.”
- The State agreed to certain terms for DOE to demonstrate a commitment to prioritize New Mexico waste—an entirely voluntary commitment on the part of DOE. NMED does not provide a regulatory justification, nor does it have authority, to unilaterally impose different definitions and criteria.

The proposed permit modifications have insufficient justification, trace to no RCRA or state implementing regulation, and are inconsistent with the boundaries of an authorized state RCRA program.

The NMED’s proposed requirements for specific thresholds and timeframes for shipment of LANL legacy waste have no regulatory basis.

- RCRA entitles the NMED to establish conditions and verify that receipt and emplacement of mixed TRU waste at WIPP are accomplished safely and compliantly.
- DOE must abide by the statutory restrictions on waste eligible for disposal at WIPP: namely, transuranic waste from atomic energy defense activities, and the cap on the total volume of waste for disposal.
- RCRA does not provide authority for the state to dictate—at WIPP or any other permitted facility—from where, or when, waste is shipped, so long as it complies with the RCRA requirements and Waste Acceptance Criteria.
- There is no restriction on DOE voluntarily agreeing to prioritize NM waste, in recognition of the state’s service as a host state for the WIPP facility and the state’s environmental objectives—which is exactly what Permittees did in the language and conditions negotiated for the stipulated agreement on permit renewal.
- However, this in no way confers authority for NMED to impose requirements—definitions, prioritization, or restrictions (explicitly or *in effect*)—on accepting compliant waste from other states, sites, or sources.

The NMED cites no new substantive information that is now available and was not at the time of negotiation. The examples of alleged new information cited by NMED are:

- “Information in the Legacy Waste Plan”: this was a known unknown at the time of the negotiations, given that the creation of the Legacy Waste Plan was itself a new requirement.
 - The role of the ATWIR, the definition of legacy waste, and the prioritization of waste were all the subject of significant public comment. Decisions on if/how to

- define them were explicit facets of negotiation, not the result of lack of information. To negotiate and consent to DOE defining legacy waste in the report and then claim that the definition is information “unknown at the time” is disingenuous and inconsistent with good faith negotiations.
- The agreed-upon language does not subject the legacy waste plan to approval by NMED or stakeholders—because the DOE was willing to provide information but reluctant to confer oversight to NMED to dictate the definition, source and sequence of waste disposed at WIPP, all of which would be outside the state’s jurisdiction under RCRA.
 - The negotiated permit condition in 4.2.1.5 did not obligate DOE to respond to comments on the plan, only to “submit received comments to the Secretary.” As such, DOE has done beyond what was required in the permit by providing responses to public comment.
 - NMED has demonstrated that it understands NMED does not have approval authority over the Legacy Waste Report. In its correspondence with Permittees on the development and issuance of the legacy waste plan, titled “Request for Improvements,” the Agency’s comments are clearly couched as “expectations” and “recommendations for improvement.” See <https://hwbdocs.env.nm.gov/Waste%20Isolation%20Pilot%20Plant/250514.pdf>. Nowhere does NMED identify regulatory language that requires DOE to abide by the opinions or comments conveyed by NMED or the public.
 - NMED agreed to DOE defining legacy waste and now proposes to unilaterally impose a legacy waste definition and dictate the sequence/source of waste, effectively subjecting the report to regulatory approval. This is directly contrary to the original negotiations and stipulated agreement. Furthermore, under RCRA and state regulations, there is no “legacy waste” classification of definition and, therefore, no regulatory basis to impose such a definition.
- That the timeframe for use of Panel 12 has changed, an eventuality that was recognized at the time the permit was established.
 - While DOE provided a good faith estimate at the time, the fact that it could change was easily anticipated and the possibility openly acknowledged by DOE. Historical information shows that changes in estimated timeframes for panels are not uncommon, and that use typically shifts to later timeframes.
 - In fact, in contrast to earlier permits, the negotiated permit excluded any reference to specific timeframes for disposal panels or overall WIPP operation, as a reflection of this recognized trend.
 - NMED misrepresents the explicit language of the permit condition to imply a requirement that does not exist— i.e., that waste must be disposed in Panel 12 during this permit tenure. There is no timeframe in the permit tied to disposal of any waste in Panel 12.

The NMED provides no basis regarding “human health or environmental protection” at WIPP in its justification.

- NMED claims an interest to “reduce the risk from LANL stored legacy waste,” and refers to “New Mexico citizen and NMED concerns about . . . the risk associated with waste buried and in surface storage at LANL.”
- The basis for these concerns is not provided. The NMED provides no supporting data on the degree or nature of risk; it ignores the risks from effectively disallowing the disposal of approved, shipment-ready waste from other sites, imposing a distributed risk that outweighs that of waste at LANL; and it fails to relate any of these risks to aspects legitimately covered by the application of RCRA regulations to WIPP.
- Further, NMED fails to consider the risks associated with overly aggressive schedules for the high-hazard and complex work of retrieving and packaging legacy waste at LANL. The past instance of NMED requiring expedited legacy waste removal from the LANL site, for the 3,706 Cubic Meter TRU Waste Campaign, led to LANL TRU legacy waste being stranded for a dozen years (and counting) at a facility not designed for that purpose, with shipping limitations and no clear treatment path—a significant geographic expansion and drastic increase in the human health and environmental risk.
- From a regulatory perspective, the concerns about LANL do not justify changes to the WIPP permit. They relate to risks of storage at entirely separate sites and facilities subject to their own RCRA permits and regulatory agreements, which are the appropriate and legally justified means to address risks at those sites and facilities.
- In effect, NMED is using permit conditions at one regulated facility (the WIPP) to drive actions that it desires at another site (LANL)—where it has authority to separately enforce RCRA requirements and negotiate cleanup agreements, priorities and milestones. As such, NMED’s actions are outside the regulatory framework of RCRA and its delegated authorities from the U.S. EPA.

The proposed changes effectively operate as a ban on the free movement of hazardous waste across state boundaries, which is inconsistent with the express limitations on authorized state RCRA programs in 40 CFR 271.4.

- While state requirements can “be more stringent” than federal requirements, they cannot do so in a way that restricts interstate shipment of hazardous waste in a discriminatory way—i.e., they cannot favor in-state waste over out-of-state waste.
- RCRA expressly sets boundaries on authorized state programs:
 - 40 CFR § 271.4(a) — Consistency “Any aspect of the State program which unreasonably restricts, impedes, or operates as a ban on the free movement across the State border of hazardous wastes from or to other States for treatment, storage, or disposal at facilities authorized to operate under the Federal or an approved State program shall be deemed inconsistent.”
 - 40 CFR § 271.4(b) “Any aspect of State law or of the State program which has no basis in human health or environmental protection and which acts as a

prohibition on the treatment, storage or disposal of hazardous waste in the State may be deemed inconsistent.”

- Note it does not need to be an express prohibition. The standard is that it “operates as a ban” or “acts as a prohibition” on the free movement of hazardous waste from other States.
 - This principle has been enforced by EPA and upheld in multiple court settings: “Under the so-called “dormant commerce clause” of the United States Constitution, state and local governments cannot lawfully discriminate against interstate commerce. The Supreme Court has consistently ruled that waste is a “commodity” subject to the commerce clause. Thus, with some exceptions dealing with publicly owned waste facilities, the Court has consistently invalidated state and local laws that discriminate against out of state wastes.” [The Right Side of the Tracks: EPA Stands Up for Interstate... - Verrill](#)
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NMED must withdraw the AIM immediately. In the event NMED intends to move forward with the AIM in conflict with RCRA regulations and settled case law, NMED must issue an expanded justification, extend the comment period, and hold a hearing on the AIM.

- An expanded justification for the AIM should be issued by NMED to address:
 - the WIPP-based public health and environmental protection risks that justify changes to the WIPP permit,
 - the regulatory basis for using the WIPP permit to dictate risk reduction and priorities for cleanup and waste handling/storage at LANL, and
 - how its proposed actions meet the regulatory requirements and boundaries specified in 40 CFR 271.4 for authorized state RCRA programs.
- An extended comment period of at least 120 days should be provided for the public to fully understand and provide comments on the expanded justification.
- A hearing must be held on the proposed permit changes, justification, and regulatory basis.