

U.S. EPA Region 6 (Eunice Varughese)

On behalf of the U.S. Environmental Protection Agency, Region 6, please find attached the comment letter from Regional Administrator Scott Mason regarding the New Mexico Environment Department's proposed permit modification of the State RCRA permit for the Waste Isolation Pilot Plant (WIPP) in Carlsbad, New Mexico.



REGION 6 ADMINISTRATOR

DALLAS, TX 75270

June 22, 2026

Dear Secretary Kenney:

The purpose of this letter is to provide comments on the New Mexico Environment Department-initiated modifications to the Waste Isolation Pilot Plant (WIPP) hazardous waste permit (EPA I.D. Number NM4890139088). EPA's Office of Land and Emergency Management participated in the preparation of these comments along with EPA regions impacted by the proposed permit modifications.

NMED's proposed modifications to WIPP's hazardous waste permit raises significant concerns. If finalized in its current form, EPA is concerned that the permit: (1) does not provide a sufficient basis for the proposed changes pursuant to 20.4.1.900 NMAC (incorporating 40 C.F.R. 124.8); (2) may unreasonably restrict and impede hazardous waste shipments for treatment, storage, or disposal in violation of 40 C.F.R. 271.4(a); (3) could stymie clean-up of TRU-waste sites across the United States; (4) may raise concerns under the Supremacy Clause and Commerce Clause of the U.S. Constitution; and (5) may necessitate a presidential waiver.

Proposed Modifications

Among other permit modifications, New Mexico Environment Department (NMED) proposes changes to section 4.2.1.4 "Prioritization and Risk Reduction of New Mexico Waste." The new provisions concern certifications and other requirements associated with "legacy waste" from the Los Alamos National Laboratory (LANL). They are as follows:

- i. From January 1, 2027, through December 31, 2031, the Permittees shall emplace legacy waste from Los Alamos National Laboratory (LANL) such that LANL emplaced legacy waste is at least 55% of the total volume of waste emplaced from all generator/storage sites as calculated on a rolling monthly average based on the prior 12 consecutive months.*
- ii. Beginning January 1, 2032, and until all LANL legacy waste has been emplaced at WIPP, the Permittees shall emplace legacy waste from LANL such that LANL emplaced legacy waste is at least 75% of the total volume of waste emplaced from all generator/storage sites as calculated on a rolling monthly average based on the prior 12 consecutive months.*

iii. Within 15 days of the last day of each month, the Permittees shall provide a written report and certification documenting all waste emplaced at WIPP on a LWA volume basis. The report shall distinguish between legacy and non-legacy waste and include the percent of waste emplaced from each generator/storage site during the previous month.

iv. Legacy waste stored above-ground at LANL Material Disposal Area-G shall be shipped and emplaced by July 1, 2028.

v. The Permittees shall submit an annual report by April 30 of each year. For each generator/storage site and for both legacy and non-legacy waste, the report shall detail, at a minimum, waste shipments, volumes of waste emplaced, volumes of waste remaining in retrievable storage, as well as any other information needed to demonstrate prioritization of LANL legacy waste and compliance with the requirements of this Permit section. The information shall be provided for the prior calendar year. Volumes shall be reported in LWA TRU Waste and TRU Mixed Waste volumes. Volumes shall be trackable in WWIS.

vi. If at any point any of the conditions required in this section are not met, all generator/storage site shipments (with the exception of LANL) must cease until all under deliveries are cured.

The following section, 4.2.1.5 “Legacy TRU Waste Disposal Plan,” contains proposed modifications including that legacy waste,

...as defined in Part 1, Section 1.5.24, will be prioritized in all currently permitted HWDUs; the portion of all waste emplaced shall be at least 55% legacy waste, as demonstrated by reporting requirements in Permit Section 4.2.1.4. Beginning January 1, 2032, and until all legacy waste has been emplaced at WIPP, the Permittees shall emplace legacy waste such that emplaced legacy waste is at least 75% of the total volume of waste emplaced, as demonstrated by reporting requirements in Permit Section 4.2.1.4.

Proposed modifications to Section 1.5.24 establish,

“Legacy Waste” means waste placed in retrievable storage that is part of a TRU or TRU mixed waste stream without a projected waste component. This definition applies to all generator/storage sites except those with state agency adopted site specific ‘legacy waste’ definitions, in which case the respective state agency adopted definition applies.

Impacts to Transuranic Waste-Generating Sites

EPA's initial analysis indicates that the proposed permit modifications will interfere with the Department of Energy's progress in processing and removing transuranic waste (TRU) from DOE facilities across the United States, including those on the Superfund National Priorities List, and may severely hamper at least four of those. The proposed modification states that upon WIPP's failure to meet the requirements of permit section 4.2.1.4, “all generator/storage site shipments (with the

exception of LANL) must cease.” Based on publicly available information, EPA understands that when calculated on the rolling monthly basis described in the proposed permit modifications, LANL waste typically comprises only a minority of the waste received and disposed at WIPP.¹ Moreover, DOE has not indicated, nor has NMED established, that LANL legacy waste can be prepared and shipped in the volumes contemplated by the proposed permit modification that would allow the continued shipment from other sites at historic or anticipated volumes. Also, EPA understands that in most cases, there are no alternative disposal facilities. Because of these circumstances, it appears to EPA that the proposed permit modification would effectively require WIPP to significantly reduce the amount of waste it accepts from other generators in the future. As a result, affected generators, including DOE facilities on the Superfund National Priorities list, would not be able to transport waste to WIPP at historic or projected levels. With no disposal options, efforts to treat, repackage, and transport TRU waste for permanent isolation would slow to a halt.

To date, EPA has identified the following potentially impacted sites:

The Hanford Site in Washington (EPA Region 10)
Idaho National Laboratory in Idaho (EPA Region 10)
The Savannah River Site in South Carolina (EPA Region 4)
Oak Ridge Reservation in Tennessee (EPA Region 4)

Other sites in Illinois (EPA Region 5), California (EPA Region 9), and Washington (EPA Region 10) generate TRU waste for disposal at WIPP and may be impacted by the proposed permit conditions.

EPA Review of State RCRA Permits

In accordance with 40 C.F.R. 271.19 and the Memorandum of Agreement signed by the NMED and U.S. EPA Region 6 in 2010, EPA submits comment on the sufficiency of the basis provided to support the proposed changes in the permit fact sheet. Although the proposed permit fact sheet discusses the regulatory basis for a modification to the existing RCRA permit, it does not indicate what authority NMED is relying on to require a condition that sets a numeric quota on LANL waste. To address this comment, NMED must address both the authority to require the permit modification and the authority for the particular conditions it seeks to impose in the modification, 20.4.1.901(B) NMAC incorporating 40 C.F.R. § 124.8. To the extent NMED asserts reliance on the authority provided in 20.4.1.900 NMAC (incorporating by reference 40 C.F.R. § 270.32(b)(3)), information must be added to justify that such a condition is necessary in addition to those required under the state’s authorized program “to ensure protection of human health and the environment.” Additionally, NMED should indicate whether such a condition has been included in a permit for any other treatment, storage, or disposal facility located in New Mexico. And NMED should justify why such a condition is appropriate here.

¹ See WIPP’s Annual Transuranic Waste Inventory Report. https://wipp.energy.gov/Library/TRUwaste/ATWIR_2025_DOE-TRU-2025-34250_Final.pdf.

State Authorization

The proposed permit modifications appear to be inconsistent with the Federal RCRA program. EPA's regulations at 40 C.F.R. 271.4(a) provide, "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" with the Federal RCRA program. The proposed permit modifications would likely prohibit WIPP from accepting certain TRU waste from generators other than LANL. As a result, the proposed modifications would appear to unreasonably "restrict" and "impede" waste shipments for disposal of hazardous waste at WIPP, inconsistent with both the Federal program and the New Mexico state program as authorized by EPA.²

If NMED believes these modifications would not unreasonably restrict or impede the free movement of hazardous waste from other states for treatment, storage, or disposal at WIPP, it should supplement the proposed modification fact sheet to provide this information. Specifically, EPA requests NMED explain how the modifications would impact the flow of waste received from non-LANL facilities located in other states, including the sites listed above. This information should include the amount of waste currently coming from these sites and how the proposed modifications would impact these volumes and timelines for disposal at WIPP. This should include any other information needed for NMED to show that these modifications do not run afoul of 40 C.F.R. 271.4(a).

Constitutional Concerns

The proposed revisions and their associated impacts also raise concerns for EPA under the Supremacy Clause and Commerce Clause of the United States Constitution. While EPA acknowledges that waste management is primarily the province of state and local regulation, Congress has long provided that "the problems of waste disposal" represent "a matter national in scope and in concern," necessitating federal action. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901(a)(4). EPA also exercises federal authority under RCRA and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq., to ensure the protection of human health and the environment through response to contaminated sites.

As identified above, EPA is concerned that the NMED-initiated proposed permit modification, if finalized, may impede the ability to process and dispose of TRU waste at DOE facilities across the United States. In addition to possible increased risks to human health and the environment, impacts may include substantially increased costs and lengthy delays to remediation. These impediments to management of TRU waste may raise concerns under the Supremacy Clause, which establishes that state actions are preempted when they are an obstacle to executing Congress's purpose and objectives. EPA is concerned that, if finalized, the proposed modifications would function to subvert federal laws concerning the safe treatment and disposal of TRU waste at WIPP. *See, e.g., Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs*, 27 F.3d 1499, 1504 (10th Cir. 1994).

² 40 CFR 271.22(a) provides that the Administrator may withdraw approval of a state's authorized program when the program no longer meets the requirements for final authorization. 40 CFR 271.22(a)(2)(ii) establishes that "repeated issuance of permits which do not conform to requirements of [part 271] constitute a state's failure to comply with the criteria for final authorization.

The NMED-initiated permit modifications also raise concerns under the U.S. Constitution's Commerce Clause, which prohibits state action that discriminates against or unreasonably burdens interstate commerce. Any interference with the movement of hazardous waste material into or through another state raises concerns under the Commerce Clause. U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause limits the power of states to discriminate against interstate commerce, including by curtailing the movement of articles in commerce such as the interstate movement of hazardous waste. *See, e.g., Fort Gratiot Landfill v. Michigan Department of Natural Resources*, 504 U.S. 353, 360 (1992); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 628 (1978). Though the proposed permit modifications do not explicitly bar interstate waste or impose burdens on the basis that the wastes are generated outside of New Mexico, the proposed "Prioritization and Risk Reduction of New Mexico Waste" proposed modifications clearly favor the in-state LANL waste over waste from out-of-state generators. Any such overt discrimination would impermissibly impede interstate commerce.

Presidential Waiver Authority

EPA notes that under 42 U.S.C. 6961, RCRA 6001, "The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with [a state solid or hazardous waste] requirement if he determines it to be in the paramount interest of the United States to do so." As discussed elsewhere in this letter, EPA is very concerned that the prioritization of legacy waste at LANL over more recently generated waste may adversely impact DOE's national nuclear security mission. Accordingly, should New Mexico proceed to finalize the proposed conditions, EPA may recommend that DOE seek, and for the President to authorize, a waiver from any such final conditions.

Conclusion

To remedy the significant issues discussed above, NMED should reconsider the proposed modification. Any permit modification must ensure consistency with all regulatory requirements in the federal RCRA program and New Mexico's approved state program. Should NMED continue to seek a modification, NMED must ensure that a sufficient regulatory and factual basis for any proposed modification is provided in the permit fact sheet. Finally, any such modification must not violate the Supremacy Clause and Commerce Clause of the United States Constitution.

EPA understands and respects NMED's desire to address contaminated sites within New Mexico's borders. We remain available to meet with you to discuss your objectives and to assist you in a manner that comports with our laws and policies. Should you have any further questions, please contact Eunice Varughese, EPA Region 6 Director of the Land, Chemicals, and Redevelopment Division, at varughese.eunice@epa.gov or at 513-203-4299.

Sincerely,



Scott Mason IV
U.S. Environmental Protection Agency
Region 6 Administrator