

DOE, NNSA, Sandia Field Office, NA-SN (Dori Richards)

Good morning- Attached please find comments from the National Nuclear Security Administration, Sandia Field Office (NNSA/SFO) regarding the WIPP Administrative Initiated Modification by NMED.

NNSA/SFO respectfully requests a hearing on the proposed AIM.

Sandia Field Office Comments Related to the Agency-Initiated Modification of the WIPP RCRA Permit

Operational Impact

While Sandia National Laboratories is a small quantity generator of TRU and mixed TRU (MTRU) waste, the Agency-Initiated Modification of WIPP's RCRA permit may impact TRU/MTRU waste management, dependent upon the amount of waste that is shipped overall to WIPP, the 55% percent mandatory receipt from LANL, and wastes shipped from other sites or federal entities. Shipments of waste to WIPP occur on an as-needed schedule and may include legacy TRU/NTRU waste. Shipments of undetermined quantities are anticipated every one (1) to three (3) years, dependent upon testing needs, storage, characterization, containerization and transportation requirements.

Definition of Legacy and Projected Wastes

SNL/NM TRU and MTRU wastes include both legacy waste and projected waste under the proposed definitions (WIPP Permit, Part 1, Sections 1.5.23 and 1.5.24). SNL/NM also has TRU and MTRU wastes that do not fit in either category as defined (e.g., packaged or unpackaged wastes from ongoing activities and programs). The proposed definitions do not clearly address existing waste from ongoing programs or decontamination and demolition (D&D) activities; this is a significant gap impacting risk assessment and future emplacement requirements.

Effect of Prioritization of LANL Legacy Waste Shipment and Emplacement

The proposed change in WIPP priorities (Part 4, Section 4.2.1.4) to focus on LANL legacy waste would cause delays in shipment of TRU and MTRU wastes from SNL. SNL/NM currently has sufficient storage capacity for TRU and MTRU wastes (legacy, ongoing, and projected) considering the current WIPP schedule. Future SNL/NM activities (including D&D of aging buildings) will generate projected waste amounts that may exceed current SNL/NM storage capacity. The focus on LANL legacy waste will likely delay SNL/NM shipments of TRU and MTRU wastes to WIPP, which will likely result in a delay of SNL/NM projects.

In addition, NNSA may change the way SNL/NM would keep materials post testing from LANL and LLNL (and potentially SRS), store, characterize, container and direct transport to WIPP. This change would serve to reduce transportation costs and multi-location transportation risk associated with these wastes. This risk and cost reduction option is jeopardized by NMED's AIM of the WIPP permit that includes mandatory shipping quantities solely from LANL.

If unable to timely and efficiently ship TRU/MTRU waste to WIPP, storage needs would increase or projects that create such wastes would necessarily require reduction. Given that SNL/NM is near New Mexico's largest metropolitan area, additional safety concerns may be raised due to extended storage of TRU/MTRU wastes at SNL/NM.

Effect of Prioritization of Legacy Waste Shipment and Emplacement

It is understood that the proposed change in WIPP priorities (Part 4, Section 4.2.1.5) to focus on legacy waste would also require SNL/NM to reprioritize shipment of legacy wastes over shipment of projected wastes from ongoing and future projects and D&D activities. This would have several impacts:

- The SNL/NM inventory of legacy TRU and MTRU wastes is not large, but the imposed requirement for extended storage (due to focus on shipment and emplacement of LANL wastes) will reduce future storage capacity and will likely cause delays in activities as described in the previous item.
- TRU and MTRU wastes from ongoing activities would have a much lower priority for disposal at WIPP, regardless of waste volume. Ongoing and projected wastes would be stored at SNL/NM for extended periods, and future activities (including activities important to verifying the reliability of the nation's nuclear weapons) would likely be delayed due to lack of waste storage capacity.
- Expanded mission requirements or capabilities would become tied the waste criteria, instead of to congressional mandates, identified need, or research and development – hamstringing future programs.

Effect of Extended TRU/MTRU Waste Storage at SNL/NM

It is not possible to quantify the additional storage capacity needed at SNL/NM, as it would depend on the duration of the time that WIPP is unable to accommodate shipments of waste from small quantity generators such as SNL/NM.

Legal Consideration for the WIPP AIM

NMED is unlikely to Meet the Regulatory standard of 40 C.F.R. 270.41 for Unilateral Modification

NMED has taken action to unilaterally modify the existing WIPP permit, specifically to establish an intrastate, site specific priority (from Los Alamos National Laboratories, “LANL”), for the transport and receipt of certain wastes, stating the “basis for the development of this agency-initiated modification [] clarifies the **priority to emplace legacy waste** and reduces the risk of Los Alamos National Laboratory legacy waste during the current permit term” (emphasis added).

NMED asserts that it satisfies the federal/state regulation allowing for such unilateral Permit modification¹ based on “the receipt of information not available at the time of permit issuance” and such “information would have justified the application of different permit conditions.” (See Letter from NMED to CBFO, April 22, 2026, [Waste Isolation Pilot Plant](#)). NMED has reduced its reasoning to a published April 23, 2026, Fact Sheet. See [260421.pdf](#) Finally, the NMED determination letter relies (for its underlying factual basis to support the regulatory standard), on

¹ 20.4.1.900 NMAC incorporating 40 CFR §270.41.

the “background and administrative history presented by NMED in the associated April 23, 2026 Fact Sheet

40 C.F.R. § 270.41(a) allows for modification of an existing Hazardous Waste Bureau Permit, only in limited circumstances. Here, the NMED relies on section 270.41(a)(2) “Information” which states:

Permits may be modified during their terms for this cause **only if** the information was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance.

Id. (emphasis added). Review of the Fact Sheet supporting the Agency-Initiated Modification (AIM) and NMED April 22, 2026, Determination Letter, demonstrates that NMED does not satisfy the new information requirement. The Fact Sheet indicates reliance on the information contained in the AR that supported the 2023 Permit issuance, as supplemented by yearly required certifications that (1) “certify annually that sufficient capacity exists in permitted Hazardous Waste Disposal Units to dispose of New Mexico generator/storage site waste”; and (2) “LANL legacy waste must be prioritized while the WIPP permit remains in effect.”

The LANL waste that NMED seeks to prioritize by its unilateral modification specifying required amounts of emplacement, consists of “legacy waste.” *i.e.* waste that has existed for decades that the LANL site is working to properly dispose of by storage at WIPP. This is not new waste, nor is it new information. NMED essentially acknowledges that its AIM is not based on new information that was not available at the time of permit issuance, but rather, is based on NMED’s “objectives” related to the certification requirement, not being met. (See Fact sheet p. 8. “The process of providing these certifications is not accomplishing [the prioritization] objective.” Yet, nothing in the Permit sections cited by NMED to support the AIM (Fact Sheet p. 8), requires a specified amount of TRU waste from LANL be emplaced, nor that such emplacement be to the detriment of other NNSA mission site emplacement needs. Nor do the cited Permit provisions *require* that Pad 12 be immediately available for emplacement. Instead, section 4.2.1.5 simply states that Pad 12 (whenever available for emplacement) will prioritize LANL legacy waste:

4.2.1.4 Prioritization and Risk Reduction of New Mexico Waste

Pursuant to 20.4.1.900 NMAC (incorporating 40 CFR 270.10.k), within 15 days of publishing the Annual Transuranic Waste Inventory Report (ATWIR), the Permittees shall certify to the NMED that there is sufficient TRU Mixed Waste Volume capacity in permitted HWDUs to dispose of the New Mexico generator/storage site waste detailed in this report. The certification shall contain the underlying calculations and data used to validate the certification. While this permit remains in effect, the Permittees shall prioritize by so certifying the emplacement at WIPP of stored (including buried) TRU mixed waste from the clean-up activities at the Los Alamos National Laboratory (LANL).

4.2.1.5 Legacy TRU Waste Disposal Plan

The Legacy TRU Waste Disposal Plan previously developed by the Permittees shall be publicly posted on the WIPP website. To the extent practicable as articulated in the final Plan, Panel 12 will be reserved for the disposal of legacy TRU mixed waste.

WIPP Permit. While NMED claims that its “objectives” are not being met in the implementation of the Permit, those “objectives” are not requirements of the Permit, nor do they constitute “information that was not available at the time” the Permit was issued.

NMED Exceeds the State Implementation Plan as to the Added Permit Requirements and is Inconsistent with 40 C.F.R. § 271.4

The RCRA allows for the implementation of state-implemented hazardous waste programs. 42 U.S.C. 6926(b). USEPA authorized the State of New Mexico to operate a hazardous waste management program in lieu of USEPA in 1985. *See* 40 C.F.R. 272.1601gg. New Mexico’s hazardous waste program largely adopts or incorporates the federal RCRA regulations. Thus, the State’s authority to implement a hazardous waste program is derivative of the federal law, and such implementation includes limitations and restrictions. *See* 40 C.F.R. 272.1601(c)(2) “the following provisions provide the legal basis for the State’s implementation of the hazardous waste management program, but they are not being incorporated by reference and do not replace Federal Authorities.” While a state may include “more stringent” standards in its implementation, or in some instances greater scope, those expansions do not become part of the federal RCRA program nor are they enforceable federally:

Except as provided in § 271.4, nothing in this subpart precludes a State from:

- (1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this subpart;
- (2) Operating a program with a greater scope of coverage than that required under this subpart. Where an approved State program has a greater scope of coverage than required by Federal law, the additional coverage is not part of the Federally approved program.

40 C.F.R. § 271.1(i). A State program will also not be approved if it is inconsistent with the Federal program or inconsistent with other approved state programs:

To obtain approval, a State program must be consistent with the Federal program and State programs applicable in other States and in particular must comply with the provisions below. For purposes of this section the phrase “State programs applicable in other States” refers only to those State hazardous waste programs which have received final authorization under this part.

- (a) 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.

(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.

40 CFR 271.4. Thus, a state program would not be authorized if its implementation includes restrictions or impacts on the free movement of hazardous wastes or the treatment and storage of hazardous wastes from other states. If a state adds a provision to a permit under its hazardous waste management program that prevents or impedes free movement across state borders of hazardous wastes, that provision would violate the consistency requirement of 40 C.F.R. § 271.4 and could jeopardize the state's authorization. The Fourth Circuit in *Environmental Technology Council v. Sierra Club* confirmed that EPA's consistency standard under § 271.4 prohibits state discrimination against interstate hazardous waste shipments, noting that Congress did not authorize states to burden interstate commerce through their RCRA programs. *Environmental Technology Council v. Sierra Club*, 98 F.3d 774 (1996).

The Commerce Clause's "dormant" aspect prevents states from discriminating against or imposing substantial burdens on interstate commerce (*Oregon Waste Sys. v. Department of Env'tl Quality*, 511 U.S. 93, 98 (1994)), and waste is considered an object of commerce for which state law restrictions invoke dormant commerce clause protections (*See Philadelphia v. New Jersey*, 437 U.S. 617, 622-23 (1978)).

Regarding enforceability against federal agencies, the WIPP Permit provision may not be enforceable. RCRA contains a waiver of federal sovereign immunity in Section 6961(a), which requires federal agencies to comply with all substantive and procedural requirements of authorized state hazardous waste programs:

The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge).

42 U.S.C. 6961(a); *U.S. v. State of N.M.*, 32 F.3d 494 (1994).

Essentially, while the federal entity – here WIPP – must comply with the requirements of an EPA-authorized program, acquire a hazardous waste management permit for covered activities, and comply with specific permit conditions (*See U.S. v. State of N.M.*, 32 F.3d at 498-99) a permit that includes a prohibited standard would not likely be enforceable. It would make little sense for EPA to not authorize state programs that violate the consistency standard, and then allow a permit requirement to do just that. A permit provision restricting interstate commerce would violate § 271.4's consistency requirement, is likely to be deemed inconsistent with the authorized state program, and therefore potentially unenforceable as part of the federally authorized program due to federal preemption per the Commerce Clause.

Atomic Energy Act Federal Preemption Considerations

RCRA's waiver of sovereign immunity does not insulate state regulators from federal preemption. And, even "more stringent" State hazardous waste regulations may be preempted if

they frustrate federal law objectives. See *Colorado Dept. of Public Health and Env. v. U.S.*, 693 F.3d 1214 (2012). Similarly subject to a preemption challenge are state provisions that frustrate the objectives of NNSA's TRU/MTRU waste management activities. New Mexico's AIM *de facto* requires LANL to characterize, package and ship at least 55% of the legacy TRU waste that can be received by WIPP each year, and absent that shipping - results in decreased amounts that WIPP can receive from other DOE sites. The AIM requirements impact all NNSA sites that manage and ship TRU waste to WIPP.

The Supremacy Clause shields federal activities from state regulation absent unambiguous congressional consent. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988). "[W]here Congress does not affirmatively declare its instrumentalities or property subject to regulation, the federal function must be left free of regulation." *Hancock v. Train*, 426 U.S. 167, 179 (1976); See *United States v. Manning*, 434 F. Supp. 2d 988, 997 (E.D. Wash. 2006), aff'd, 527 F.3d 828 (9th Cir. 2008)

To the extent that New Mexico seeks to regulate the management of TRU/MTRU waste - whether it be the amounts of mandated legacy TRU/MTRU waste shipped from LANL each year, amounts of NNSA's obligation of funds to various sites for TRU/MTRU waste management/transport or decisions regarding the percentages of AEA-covered waste transported from other (non-LANL) NNSA sites to WIPP, the state overreaches into federal functions. Such overreach includes intruding into the field that is preempted by the Atomic Energy Act (AEA), 42 U.S.C. 2011 *et seq.*;² and intrudes into the exclusive management of mandated mission responsibilities of NNSA and apportionment federal funds that reflect Administration priorities and urgencies.

With regard to AEA preemption, New Mexico does not limit the transport and emplacement of waste from LANL to WIPP to RCRA-covered waste. Instead, the new AIM requirements are specific to "legacy waste," newly defined as "waste placed in retrievable storage that is part of a TRU or TRU mixed waste stream without a projected waste component" (AIM permit, Part 1, Section 1.5.24), thus "crossing the line and impermissibly regulat[ing] the AEA" waste (See *United States v. Manning*, 434 F. Supp. 2d 988, 1004 (E.D. Wash. 2006), *aff'd*, 527 F.3d 828 (9th Cir. 2008)). Here, there is no real effort to disguise that New Mexico seeks to govern the management, storage and transportation of AEA waste by DOE and NNSA as it specifically mandates disposition of TRU/MTRU wastes.

The Court in *Manning* found a state law was field preempted because it had a "direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." Similar to the state law at issue in *Manning*, the New Mexico AIM would: (1) require NNSA to meet cleanup/storage levels established by the State AEA covered materials/waste; (2) reduce or prevent WIPP from receiving such wastes from other NNSA (and potentially Department of War) sites until LANL has fully removed legacy AEA-covered TRU/MTRU waste, therefore trumping NNSA/DOE's decision under the AEA that

² "nothing ... shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." 42 U.S.C. § 2021(k)

WIPP is an appropriate site for the disposal waste from a variety of its locations and thus forcing the Agency to find alternative pathways for disposal; (3) disrupting NNSA and DOE's nationwide cleanup program for AEA materials; and (4) interfering with mission-driven funding allocations to its sites. *See Manning* at 1007-1008 for similar discussion.

New Mexico's efforts in adding permit restrictions seeking to govern transport and emplacement of AEA covered wastes from LANL to the WIPP, appears as an effort to avoid legislation that would be preempted by including such requirement in the WIPP permit itself.