



SOUTHWEST RESEARCH AND INFORMATION CENTER

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January 21, 2025

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Via email: Mark.Bollinger@CBFO.DOE.gov ken.harrawood@wipp.ws

RE: Noncompliant 2024 Repository Siting Annual Report

Dear Mr. Bollinger and Mr. Harrawood:

Southwest Research and Information Center (SRIC) was actively involved in the WIPP Renewal Permit and the negotiations that resulted in the current Permit. As you know, SRIC specifically advocated for some of the new provisions in the Permit.¹ SRIC commented extensively on Draft Permit Section 2.14.3 and suggested some of the specific agreed to language. SRIC is very concerned that the first annual report submitted on December 23, 2024 (“2024 Report”) does not fully comply with the provision and does not meet even minimal acceptability standards.

In this letter SRIC details major inadequacies in the 2024 Report. SRIC also suggests what process and changes are required in the second Annual Report to be submitted in 2025.

1.0 Noncompliant authority

On April 8, 2022, Governor Michelle Lujan Grisham wrote to DOE Secretary Granholm in response to a petition that she had received from more than 1,100 New Mexicans from around the entire state. Among the issues in the petition was the specific request that “DOE develop a new disposal site in a state other than New Mexico.”²

The June 24, 2022 DOE National Nuclear Security Administration (NNSA) and Environmental Management (EM) response did not even mention the additional repository.³

Permit Section 2.14.3 was another direct result of the petition and DOE’s lack of action. The WIPP Permit indicates the State’s support for another repository and the need for the Secretary of Energy to appropriately respond.

¹ NMED Administrative Record (AR) 230425.245.

² AR 220403.

³ AR 220625.5

As you are well aware, virtually every provision of the WIPP Permit relates to the Permittees. Uniquely, Permit Section 2.14.3 is a specific requirement for DOE, which is “the United States Department of Energy (DOE).”⁴ Both the 1979 original WIPP authorization⁵ and the WIPP Land Withdrawal Act (LWA)⁶ place DOE’s authority for WIPP in the Secretary of Energy.

While the Secretary of Energy may delegate certain matters to other DOE officials, the 2024 Report includes no such delegation. Even more importantly, two key entities of DOE apparently had no role in the 2024 Report. The NNSA is the agency driving the stated need for WIPP expansion for waste to be generated for the next 60 years. See Section 3.4 below. The chief legal officer for DOE is the General Counsel and the Office of General Counsel (OGC) must participate in a compliant report, especially to provide a basis for the legal authorities for actions or inactions related to siting an additional repository in another state. See Section 2 below.

The lack of participation of those DOE entities results in gross errors in the report, which should not have occurred had the DOE Secretary been responsible for the 2024 Report. The lack of direction from the DOE Secretary also shows a lack of responsiveness to the Governor’s requests.

2.0 Legal authority for repository siting

The 2024 Report states:

“any efforts to site a future repository will require prior Congressional authorization and funding.” at 5;

“it is important to note that Congressional authorization and funding is required before any siting process for a second TRU waste repository can be initiated.” at 11.

“As mentioned above, Congressional authorization and funding would be required to initiate a siting process.” *Id.*

“Congressional authorization and appropriations would be required prior to initiating the siting process for a second repository.” at 20.

There is no legal basis provided for any of those assertions. In fact, the assertions are contrary to DOE’s historic practice, its legal authorities, and case law.

2.1 Historic Practice with WIPP.

The 2024 Report states that a site was selected in 1973. at 7. The 2024 Report also states that WIPP was not authorized until years later “following a several decades-long site selection and site characterization process.” at 8.

The compliant report would discuss under what legal authority the WIPP site selection process was done. A complaint report would discuss whether DOE can initiate a siting process for another repository under the same legal authorities as used for the WIPP site selection.

⁴ Permit Section 1.2.

⁵ Public Law 96-164 §213(a).

⁶ Public Law 102-579, as amended by Public Law 104-201, §3(a)(3).

2.2 Legal Authority.

The Atomic Energy Act (AEA) provides General Authority to “make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission [now DOE Secretary] may deem necessary or proper to assist it in exercising any authority provided....” AEA, §161(c).

The AEA explicitly authorizes DOE to “provide for safe storage, processing, transportation, and disposal of hazardous waste (including radioactive waste) resulting from nuclear materials production, weapons production and surveillance programs, and naval nuclear propulsion programs.” AEA, §91(a)(3).

Those legal provisions remain in effect. A compliant report would specifically discuss those and any other relevant legal provisions that allow or prohibit initiating a siting process for another repository.

2.3 Case law.

Since 1968, the courts have supported the AEC’s broad authorities: “Congress ... enact[ed] a regulatory scheme which is virtually unique in the degree to which broad responsibility is reposed in the administering agency, free of close prescription in its charter as to how it shall proceed in achieving its statutory objectives.” *Siegel v. Atomic Energy Commission*, 400 F.2d 778, 783 (D.C. Cir. 1968).

What case law does DOE cite that overrides that and related decisions? A compliant report would specifically discuss those and any other relevant case law that allows or prohibits initiating a siting process for another repository.

2.4 Presidential Direction for a Defense High-Level Waste Only Repository

In October 2014, DOE issued its *Assessment of Disposal Options for DOE-Managed High-Level Radioactive Waste and Spent Nuclear Fuel*.⁷ That report “recommends that the DOE begin implementation of a phased, adaptive, and consent-based strategy with development of a separate mined repository for some DOE-managed HLW and cooler DOE-managed SNF, potentially including some portion of the inventory of naval SNF.” at 28.

The report also stated: “Available information indicates that a repository limited to DOE-managed HLW and SNF not of commercial origin could be more likely to gain public acceptance than a repository that includes commercial waste,” at 25. The report also stated that: “In the case of WIPP, the restriction of the facility to transuranic waste of defense origin was an essential condition to the public and state acceptance of the repository (Downey 1985; Stewart and Stewart 2011).” *Id.*

In March 2015, DOE issued its *Report on Separate Disposal of Defense High-Level Radioactive Waste* which concluded “that a strong basis exists to find that a Defense HLW Repository is required” under Section 8 of the Nuclear Waste Policy Act. at iv.

⁷ <https://www.energy.gov/ne/articles/assessment-disposal-options-doe-managed-high-level-radioactive-waste-and-spent-nuclear>

On March 24, 2015, President Barack Obama agreed with DOE and issued a Presidential Memorandum⁸ that stated: “In accordance with the Act, I find the development of a repository for the disposal of high-level radioactive waste resulting from atomic energy defense activities only is required.”

While that DOE analysis and Presidential Memorandum relate to defense high-level waste, not transuranic (TRU) waste, much of the analysis, including that related to public acceptance, seems relevant to an additional TRU waste repository. Further, that DOE analysis is arguably much more relevant to siting another defense repository than is the extensive discussion in the 2024 Report of the DOE Office of Nuclear Energy process of siting a storage (not disposal) site for commercial (not defense) waste. Additionally, as SRIC and many others have stated, an adequate consent-based storage process does not seem possible without disposal site(s). In the case of New Mexico, the lack of a commercial spent fuel disposal site was a factor in the 2023 Legislature passing Senate Bill 53,⁹ which requires, in addition to state consent, that “a repository, as defined in 42 U.S.C. Section 10101(18), is in operation.” Section 3(b)(2). At a minimum, a compliant report would discuss the 2014 and 2015 reports and presidential determination and its relevance for another TRU waste repository.

3.0 Inadequate documentation related to specific documentation requirements.

Permit Section 2.14.3 has specific documentation requirements. The 2024 Report devotes less than four of its 25 pages to those requirements, and does so very inadequately.

3.1 Regarding disposal regulations, the 2024 Report acknowledges that 40 CFR 191 would apply. at 19. The next sentence then states: “However, a future repository could be subject to different standards.” A compliant report would state whether the DOE Secretary would use the existing regulations or what changes in standards are preferred to apply to an additional repository.

3.2 Regarding consent-based or other siting process, the 2024 Report states: “a consent-based process is the most current and relevant template for an approach to identify a site to host any future TRU waste repository.” at 20. The 2024 Report, however, does not discuss that such a consent-based process is not required under the Nuclear Waste Policy Act or the WIPP LWA. A compliant report would include a discussion of whether DOE would use a consent-based process (and further define such a process) and whether a statutory change is needed.

3.3 Regarding timelines and milestones, the 2024 Report only mentions the Blue Ribbon Commission estimates of 15 to 20 years for site identification and licensing of a repository. at 20. In the case of WIPP, siting started in 1972 and WIPP began operations in 1999, which is 27 years. A compliant report would state what range of timeframes the DOE Secretary considers reasonable to have an additional repository in operation, what are the major milestones to achieve the timeline, and when such a siting process would be initiated.

⁸ <https://obamawhitehouse.archives.gov/realitycheck/the-press-office/2015/03/24/presidential-memorandum-disposal-defense-high-level-radioactive-waste-se>

⁹ <https://www.nmlegis.gov/Sessions/23%20Regular/final/SB0053.pdf>

3.4 Regarding the National Environmental Policy Act (NEPA), the glaring lack of NNSA and OGC involvement is readily apparent. Not mentioned in the 2024 Report is discussion about WIPP in existing DOE NEPA documents.

Over the past more than 25 years, NNSA has issued various Environmental Impact Statements (EISs) on Complex Transformation (DOE/EIS-0236) and Surplus Plutonium Disposition (DOE/EIS-0283 and DOE/EIS-0549), which have included alternatives for plutonium pit production and plutonium disposition, some of which have specifically included WIPP.

In January 2024, NNSA issued the Final Environmental Impact Statement (EIS) for the Surplus Plutonium Disposition Program (SPDP) (SPDP EIS) (DOE/EIS-0549).¹⁰ WIPP was one of the five major facilities included in the EIS and the only potential disposal site. A compliant report would summarize those and other relevant EISs and how they relate to WIPP's current and long-term activities and waste volumes.

Importantly, on September 30, 2024, the Federal District Court in South Carolina ruled that NNSA had violated NEPA related to producing plutonium pits at LANL and SRS.¹¹ On January 16, 2025, DOE and the parties filed a Settlement Agreement¹² which includes that NNSA will issue a new Programmatic Environmental Impact Statement (PEIS) and Record of Decision within 2.5 years. SRIC believes that the alternative of an additional repository in another state must be one of the alternatives considered in that new PEIS. A compliant report will describe that new PEIS and how WIPP and an additional repository are being included.

WIPP's NEPA date for WIPP's closure remains 2033. The 1998 WIPP Record of Decision (ROD) states: "The Department needs to safely dispose of the TRU waste that has accumulated at DOE sites and to provide for the disposal of additional TRU waste to be generated over approximately the next 35 years (through approximately 2033) in a manner that protects public health and the environment."¹³ A compliant report would include that existing ROD and any plans for future WIPP NEPA analysis.

Those NEPA documents and other DOE documents demonstrate how NNSA also must be involved in the annual repository reports because its new plutonium pit production waste and surplus plutonium is the key driver in expanding WIPP's lifetime and volumes and amount of radioactivity beyond Cold War legacy waste. More information about the importance of plutonium pit production and surplus plutonium is contained in the March 2024 Planned Change Request (PCR) submitted to the Environmental Protection Agency (EPA).¹⁴ The PCR estimates that about 25% of the total volume is from proposed plutonium pit production at SRS (20.33%-Waste Stream SR-CH-PP) and at LANL (4.41%-Waste Stream LA-MHD01-Pits).¹⁵ The PCR

¹⁰ <https://www.energy.gov/nepa/articles/doeeis-0549-final-environmental-impact-statement>

¹¹ <https://srswatch.org/wp-content/uploads/2024/10/SRS-Final-Order-Sept-30-2024.pdf>

¹² <https://nukewatch.org/wp-content/uploads/2025/01/Settlement-Agreement-and-Exhibits.pdf>

¹³ 63 Federal Register 3625 (January 23, 1998).

¹⁴ <https://www.epa.gov/system/files/documents/2024-03/24-0168-wipp-pcr-panels-letter-enclosures.pdf>

¹⁵ PCR Enclosure 2, Table 4-2.

also estimates that SRS pits (Waste Stream SR-CH-PP) would constitute 21.51% of radioactivity in 2083, and LANL pits (Waste Stream LA-MHD01-Pits) is 2.99% of radioactivity in 2083.¹⁶ Regarding surplus plutonium, the PCR states that SRS surplus plutonium (Waste Stream SR-KAC-PuOx) is 41.36% of total radioactivity in 2083.¹⁷ Thus, this NNSA plutonium pit and surplus plutonium waste is the major driver to keep WIPP operating until 2083 or later. The proposed volume and radioactivity amounts would also significantly expand and change WIPP and its mission. A compliant report will include NNSA and discuss how its inventory is the key driver in WIPP expansion and how its waste could be disposed in an additional repository.

3.5 Regarding Congressional authorizations and appropriations, the 2024 Report includes one of the assertions discussed in 2.0-2.4 above. at 20. If, contrary to historic practice, AEA authorization, and case law, DOE now believes that new authorizations and appropriations are necessary, a compliant report would provide a legal basis for that action and state when DOE will request such authorization and appropriations.

3.6 Regarding communications with EPA, other federal agencies, and Congress, the 2024 Report states that no such communications have taken place. at 21. Since New Mexicans and others have had such communications with EPA and Congress, this lack of action again is an apparent disregard for the citizens of New Mexico and the Governor. A compliant report will discuss the communications that should occur during 2025 and the results of such communications.

3.7 Regarding land acquisitions, the 2024 Report states: “No action can be taken...unless and until the siting process is complete and a site for a second repository is identified.” at 21. Among the actions that clearly could be taken is an assessment of the storage capabilities at sites that have waste that would not be emplaced at WIPP by the end of the current Permit term in 2033. An assessment of existing DOE sites in other states as locations for an additional repository can and should be done. A compliant report will describe those storage and disposal assessments, especially related to whether or not any might be suitable for a repository.

3.8 Regarding state and public engagement activities, the 2024 Report states that no such activities have been initiated. at 21. While DOE has not initiated such activities, it should have recognized that, in addition to New Mexicans, on May 22, 2024, the Hanford Advisory Board requested that “US DOE-EM pursue a transparent and equitable process to identify additional repository locations for transuranic and mixed transuranic waste.”¹⁸ A compliant report will describe DOE engagement activities and its responses to state or public engagement activities.

3.9 Regarding feasibility studies, the 2024 Report states that none have occurred. at 21. As noted in 3.7 above, DOE should be conducting feasibility studies, at least on its existing DOE sites. A compliant report will describe what feasibility studies have been done and the plans for others.

¹⁶ PCR Enclosure 2, Table 4-3.

¹⁷ *Id.*

¹⁸ https://www.hanford.gov/files.cfm/HAB_Advice_316_-_Planning_for_Disposition_of_TRU_-_Final_Signed.pdf at 4

3.10 Regarding plans and timelines for independent technical expert reviews, the 2024 Report refers to Section 6.0, which does not mention independent technical reviews. at 21-22. Nor does the 2024 Report mention the Environmental Evaluation Group, which was created by the State of New Mexico and funded by DOE,¹⁹ even before the original WIPP authorization. A compliant report will describe DOE's historic practice of funding some independent technical reviews, including those without specific congressional authorization and appropriations, and how such independent reviews could be a part of a second repository siting process.

4.0 Other issues

4.1 Incorrect Mission Statement

A fundamental problem with the 2024 Report and many WIPP documents is the incorrect description of WIPP's mission. SRIC has frequently discussed this issue, most recently in the comments on the WIPP Legacy Waste Disposal Plan.²⁰ A step forward in addressing the need for and initiating a repository siting program would be for DOE to correctly state its Mission as:

The WIPP project is authorized under the WIPP Land Withdrawal Act [LWA; (Public Law 102-579)] to dispose of up to 6.2 million cubic feet (175,564 m³) of defense-related TRU waste generated from atomic energy defense activities.

4.2 Compliance with agreed upon key provisions of the WIPP Renewal Permit

On June 23, 2023, the Permittees agreed to the provisions of the Renewal Permit and signed the Settlement Agreement.²¹ In addition to Section 2.14.3, two other key provisions are 4.2.1.4 (Prioritization of New Mexico Waste) and 4.2.1.5 (Legacy TRU Waste Disposal Plan). The Permittees have so far failed to comply with those provisions – see SRIC comments on the first Certification²² and on the Legacy Waste Plan.²³ SRIC has repeatedly encouraged the Permittees to discuss these requirements prior to submitting the reports. SRIC continues to be willing to further discuss how these provisions can be addressed. While SRIC is seriously attempting to be helpful with the Permittees' compliance, there should be no reason to remind the Permittees that NMED can take enforcement actions related to non-compliance.

5.0 Actions needed for a compliant 2025 Annual Report

Throughout these comments are suggestions to make the 2025 report compliant. They include:

- * The DOE Secretary takes responsibility for the report and requires that all relevant DOE entities to participate, including NNSA, EM, OGC, NE, and others. Outside entities could provide assistance and a draft should be shared with NMED and interested stakeholders before the final report is submitted.
- * Historic practices, legal authorities, and case law should be detailed as they relate to initiating a repository siting process.
- * The enumerated documentation requirements should be fully addressed.

¹⁹ www.sric.org/nuclear/eeg.php;

www.sandia.gov/app/uploads/sites/194/2022/01/MoraWIPP991482.pdf at 49.

²⁰ https://wipp.energy.gov/Library/documents/2024/LTWDP_Public_Comments_011225.pdf

²¹ AR 230611.

²² AR240404.

²³ See footnote 18.

* The three key provisions of the Permit (Sections 2.14.3, 4.2.1.4, and 4.2.1.5) should be considered in a comprehensive way so that DOE is consistently inventorying wastes that could come to WIPP, with priority for LANL waste and legacy waste from Hanford, Idaho National Lab, Oak Ridge, and Savannah River, and initiating a process for an additional repository, particularly for non-legacy waste and from new pit production over the next several decades.

* The Permittees should use an accurate Mission Statement that recognizes that WIPP is for up to 6.2 million cubic feet of waste, that waste disposal operations can end prior to reaching that capacity limit, and that an additional repository is needed.

Once again, SRIC reiterates that it is willing to discuss these matters with the Permittees and other interested parties.

Thank you for your serious consideration of these comments and suggestions.

A handwritten signature in black ink, appearing to read "Don Hancock". The signature is cursive and somewhat stylized.

Don Hancock

cc: Michael Gerle, CBFO
James Kenney, NMED
JD Nance, NMED
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