

July 29, 2022

Deputy Secretary Rebecca Roose  
New Mexico Environment Department  
1190 St. Francis Dr. Suite N4050  
Santa Fe, NM 87505 via email

Re: WIPP permit renewal proceeding issues

Dear Deputy Secretary Roose:

We write to address the issues to be considered during the New Mexico Environment Department's current proceeding concerning renewal of the State Hazardous Waste Act permit for the Waste Isolation Pilot Plant (WIPP).

#### Introduction

By way of introduction, this letter is submitted on behalf of three non-profit organizations: Southwest Research and Information Center, Concerned Citizens for Nuclear Safety, and Nuclear Watch New Mexico. Each of these organizations has been involved in issues relating to WIPP extensively in the past, and each of them has a significant interest in the proposed renewal of the New Mexico Hazardous Waste Act permit for WIPP.

#### Southwest Research and Information Center

Southwest Research and Information Center is a multi-cultural organization working to promote the health of people and communities, protect natural resources, ensure citizen participation, and secure environmental and social justice now and for future generations. Southwest Research and Information Center was involved extensively in the Environment Department's proceeding that resulted in the granting of a Hazardous Waste Act permit for WIPP in 1999, and Southwest Research and Information Center has also been involved in every Department proceeding concerning WIPP since then.

#### Concerned Citizens for Nuclear Safety

The mission of Concerned Citizens for Nuclear Safety is to protect all living beings and the environment from the effects of radioactive and other

hazardous materials now and in the future. Concerned Citizens for Nuclear Safety formed in 1988 to address community concerns about the proposed transportation of transuranic waste from Los Alamos National Laboratory (LANL), through Santa Fe on St. Francis Drive, to the then proposed WIPP. Its interests expanded to other issues relating to WIPP, and Concerned Citizens for Nuclear Safety has been involved in almost every subsequent proceeding conducted by the New Mexico Environment Department concerning WIPP.

### Nuclear Watch New Mexico

Nuclear Watch New Mexico was founded in December 1999 by veteran New Mexican anti-nuclear activists. Since then, the organization has engaged in many successful efforts to address nuclear weapons issues across the spectrum of disarmament, non-proliferation, open government and environmental concerns. Nuclear Watch New Mexico seeks to promote safety and environmental protection at nuclear facilities through diversification away from nuclear weapons programs, greater accountability and cleanup in the nation-wide nuclear weapons complex, and national leadership toward a world free of nuclear weapons. Nuclear Watch New Mexico has been involved in issues relating to WIPP since its founding.

### Argument

- I. The U.S. Department of Energy and the Nuclear Waste Partnership, LLC have asserted that eight issues should not be considered in the WIPP permit renewal proceeding.

On May 13, 2022 Rick Shean of the Environment Department's Hazardous Waste Bureau sent a Technical Incompleteness Determination ("TID") letter concerning the application for renewal of the Hazardous Waste Act permit to Reinhard Knerr of the U.S. Department of Energy and Sean Dunagan of the Nuclear Waste Partnership, LLC. In their July 12, 2022 response to that letter, the Department of Energy ("DOE") and the Nuclear Waste Partnership ("the Renewal Applicants") asserted that no evidence should be considered during the Department's WIPP permit renewal proceeding concerning eight issues (which are listed with their numbers in the TID letter):

- (3) a schematic of the conceptual plan for the anticipated final [WIPP] facility footprint;

- (4) the most current anticipated physical capacity (Final TRU Mixed Waste Volume) needed for underground hazardous waste units, above and beyond Panels 11 and 12, both over the next ten years and at final [WIPP] facility closure;
- (6) a plan and budget for WIPP transportation routes through the operating period closure date of WIPP;
- (7) how the proposed end date of the operating period for the WIPP facility will impact the public along WIPP transportation routes;
- (9) documentation of DOE's engagement with other states regarding the construction and operation of another geologic repository for transuranic waste;
- (10) documentation of feasibility studies conducted by DOE relating to the construction and operation of another geologic repository for transuranic waste;
- (16) DOE documents that govern the prioritization of generator site waste cleanup and generator site waste shipments to WIPP; and
- (19) a chronology of public engagement and tribal consultation meetings conducted to date, as well as a list of associated public materials (*i.e.*, presentations, factsheets, etc.), regarding the "dilute and dispose" program for surplus plutonium waste streams from the Savannah River Site (SRS) in South Carolina.

In their response to the TID, the Renewal Applicants objected to providing the information called for by the Environment Department in each of these eight items and asserted that no evidence should be admitted to the record concerning any of them. The Renewal Applicants asserted that six of these eight items are not relevant to the Environment Department's proceeding and that the Renewal Applicants are prevented from providing information about two of them by the National Environmental Policy Act regulations. However, none of those objections has any merit.

- II. Each of the eight items objected to by the Renewal Applicants should be considered during the WIPP permit renewal proceeding because they are all relevant to that proceeding.
  - A. The Environment Department's rules provide that all relevant evidence must be admitted.

The Environment Department's Permit Procedures, codified at 20.1.4 NMAC, address proceedings concerning the issuance or renewal of a permit by the Department. *See* 20.1.4.2 NMAC. More specifically, the Permit Procedures mandate that the Hearing Officer conducting each hearing:

*shall admit all relevant evidence that is not unduly or prejudicial or repetitious or otherwise unreliable or of little probative value.*

20.1.4.400.B(1) NMAC (emphasis added).

B. The Environment Department has determined that all of the eight items listed above are relevant to the WIPP permit renewal proceeding.

The relevance of each of these eight items was indicated clearly by the language used by the Environment Department in the TID. The Department stated:

*In its technical review of the consolidated Renewal Application, per 20.4.1.900 and 20.4.1.901A.1 NMAC (incorporating 40 CFR §270.30), NMED [the Department] has determined that additional information is needed in order to proceed.*

TID, page 1, paragraph 4 (emphasis added).

Thus the Environment Department has determined that it must have each of these eight items in order to evaluate the application for renewal of the WIPP permit. For that reason, they are relevant, and the Hearing Officer must receive evidence concerning them in the permit proceeding.

III. The administrative record of the permit renewal proceeding must include evidence concerning each of these eight items.

A. The Environment Department's regulations call for material concerning these eight items to be included in the administrative record of the permit renewal proceeding.

The Environment Department's Permit Procedures indicate that all of the

material presented concerning a proposed permit renewal shall be included in the administrative record of the permit renewal proceeding. Section 20.1.4.7 of the Permit Procedures defines the “Administrative Record” to mean:

all public records used by the Division [in this matter the Hazardous Waste Bureau] in evaluating the application or petition, including the application or petition and all supporting data furnished by the applicant or petitioner, all materials cited in the application or petition, *public comments, correspondence*, and, as applicable, the draft permit and statement of basis or fact sheet, and any other material used by the Division to evaluate the application or petition.

20.1.4.7.A.(2) NMAC, emphasis added.

B. The eight items listed above should be included in the record of the permit renewal proceeding.

There are two reasons why this definition confirms that the eight items to which the Renewal Applicants have objected should be included in the record of the permit renewal proceeding. The first reason is that, as was explained above, the Department has indicated in the TID that the Department needs these eight items in order to proceed with its evaluation of the permit renewal application.

The second reason is that all of these eight items will be addressed in comments and correspondence by one or all of the organizations submitting this letter (Southwest Research and Information Center, Nuclear Watch New Mexico, and Concerned Citizens for Nuclear Safety), or by one or more of other parties during the Environment Department’s permit renewal proceeding. Because those comments and correspondence will be part of the administrative record, the information at which they are directed also should be part of that record.

IV. There is no merit to the Renewal Applicants’ assertion that provision of information relating to items #3 and #4 is precluded by the National Environmental Policy Act and its implementing regulations.

Finally, the Renewal Applicants have asserted in their July 12, 2022

response to the TID that they are prevented from providing the information called for by the TID items #3 and #4 by the National Environmental Policy Act and its implementing regulations. This assertion demonstrates a fundamental misunderstanding of the National Environmental Policy Act and its regulations.

The National Environmental Policy Act governs federal agencies' decision making processes for projects that affect the environment. Section 102 of the Act (42 U.S.C. §4332) states:

The Congress authorizes and directs that, to the fullest extent possible: (1) *the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act*, and (2) *all agencies of the Federal Government shall ....*

42 U.S.C. 4332 (emphasis added)

Thus the Act is limited in its application to actions of the federal government and its agencies. Moreover, contrary to the Renewal Applicants' assertions, the regulations codified at 10 CFR 1021.210 apply only to situations in which the DOE is making decisions. They do not apply to situations such as this one in which the DOE makes proposals to other agencies that have the authority to make decisions.

In this matter, the only agency with the authority to make a decision is the New Mexico Environment Department. It is the Department, and only the Department, that will decide whether to renew the permit for WIPP and, if the permit is renewed, what conditions will apply to the renewed permit. Neither the DOE nor any other agency of the Federal Government has the authority to make either of those decisions. For that reason, neither the National Environmental Policy Act nor any of its implementing regulations has any application to this matter.

### Conclusion

There is no merit to any of the Renewal Applicants' objections to providing the information requested by the Environment Department in its May 13, 2022 Technical Incompleteness Determination. The Renewal Applicants therefore should be required to provide all of that information before a

Completeness or Hearing Determination is issued, and all of it should be included in the administrative record of this proceeding.

Thank you for your attention to these issues.

Sincerely,

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