Department of Energy
Carlsbad Field Office
P. O. Box 3090
Carlsbad, New Mexico 88221

April 18, 2023

Mr. Ricardo Maestas, WIPP Group Staff Manager
Hazardous Waste Bureau
New Mexico Environment Department
2905 Rodeo Park Drive East, Building 1
Santa Fe, NM 87508-6303

Subject: Permittees' Comments on the Waste Isolation Pilot Plant 10-Year Renewal Draft, Hazardous Waste Facility Permit

Dear Ms. Maestas:

The purpose of this letter is to transmit the Permittees' Department of Energy (DOE), Carlsbad Field Office (CBFO), and its Management and Operating Contractor (M&O), Salado Isolation Mining Contractor's (SIMCO) comments on the December 20, 2022 Waste Isolation Pilot Plant (WIPP) 10-Year Renewal Draft, Hazardous Waste Facility Permit (HWFP) Renewal.

As the nation's only repository for the disposal of transuranic (TRU) waste generated by atomic energy defense activities, WIPP is a crucial national resource. The Permittees remain fully committed to ensuring WIPP's operations protect human health and the environment. Routine and meaningful engagement with state and federal regulators, local communities, Tribal nations, and other stakeholders is critical to the continued success of WIPP. The Permittees will continue to embrace opportunities such as this Renewal Permit process to engage in a constructive dialogue to advance WIPP's critical role to completing DOE's cleanup mission in a safe and effective manner.

Permittees' Specific Comments

Enclosed, please find the Permittees' "Technical Comments and Associated Proposed Changes" (Permittees' Comments) submitted in response to the December 20, 2022, Renewal Draft Permit Public Notice, and 20.4.1.901.A.3, New Mexico Administrative Code (NMAC). Part one (1) of the Permittees' Comments sets forth concerns regarding, and opposition to, certain portions of the draft permit. In the interest of working collaboratively with the New Mexico Environment Department (NMED), Part one (1) also includes the Permittees' proposed modified language, shown in redline strikeout, which proposes solutions to address concerns identified by the Permittees. Part two (2) of the Permittees' comments provides a general comment, and part three (3) of the Permittees' comments sets forth the Permittees' editorial comments consisting of typographical errors and other minor corrections.

Permittees' Request for a Hearing

Given the importance of the Permittees' issues of concern described in the enclosed comments, the importance of the Permit Renewal to WIPP's continued operation and DOE's broader mission, the Permittees respectfully request a public hearing pursuant to 20.4.1.901.A.3 NMAC. In light of the possibility that these issues of concern may not be resolved before or through the public hearing, the Permittees reserve the right, as expressly stated and incorporated in the Permittees' Comments, to utilize appropriate appeal procedures and to seek available legal remedies in the event doing so, if it proves necessary.

The Permittees appreciate that in the past the NMED, stakeholders, and the Permittees have successfully resolved issues of concern by agreeing on appropriate permit language consistent with the NMED delegated authority under the Resource Conservation and Recovery Act (RCRA) and the New Mexico Hazardous Waste Act (HWA). The Permittees remain committed to this cooperative approach.

We certify under penalty of law that this document and all attachments were prepared under our direction or supervision according to a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on our inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of our knowledge and belief, true, accurate, and complete. We are aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If you have any questions, please contact Mr. Michael Gerle at (575) 988-5372.

Sincerely,

Signatures on File

Mark Bollinger
Acting Manager
Carlsbad Field Office

Ken Harrawood
Program Manager
Salado Isolation Mining Contractors

Enclosure

cc: w/enclosure
D. Biswell, NMED * ED
A. Donahue, NMED ED
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*ED denotes electronic distribution

CBFO:ERCD:MG:JV:23-0298

Permittees' Comments on the December 20, 2022, Waste Isolation Pilot Plant 10-Year Renewal Draft Hazardous Waste Facility Permit

23 pages

Permittees' Comments on the December 20, 2022, Waste Isolation Pilot Plant 10-Year Renewal Draft Hazardous Waste Facility Permit

The Department of Energy Carlsbad Field Office (CBFO) and its Management and Operating Contractor (collectively, the Permittees) are providing the New Mexico Environment Department (NMED) with the following comments and proposed changes to the December 20, 2022, Draft Waste Isolation Pilot Plant (WIPP) Hazardous Waste Facility Permit (Draft Permit).

Part 1 – Technical Comments and Associated Proposed Changes

1. Revise Draft Permit Part 1, Section 1.3.1., *Permit Modification, Suspension, and Revocation*.

Draft Permit Text

This permit shall be revoked within 30 calendar days if the Land Withdrawal Act (Pub. L. 102-579, as amended) volumetric disposal limit for TRU waste of 6.2 million cubic feet at the WIPP facility is increased or otherwise changed by the U.S. Congress.

Permittees' Proposed Changes

~~This permit shall be revoked~~ The Permittees shall notify the NMED within 30 calendar days ~~if~~ after the effective date of any amendment to the Land Withdrawal Act (Pub. L. 102-579, as amended) which increases the volumetric disposal limit for TRU waste of 6.2 million cubic feet at the WIPP facility ~~is increased or otherwise changed by the U.S. Congress~~. Should the change require a modification to the Permit, the Permittees will submit a Permit modification request to revise the Permit.

Permittees' Technical Comment: The Permittees acknowledge the interest of NMED and the state of New Mexico in early notification and engagement regarding any increase contemplated to the WIPP volumetric disposal limit. It is the Permittees' intent to inform and engage the NMED in the event of any changes to increase the volumetric disposal limit for transuranic (TRU) waste provided under the Land Withdrawal Act (LWA). The Permittees propose that the NMED be notified if the LWA volumetric disposal limits are changed as shown in the alternate language provided above. The Permittees also propose removing "is increased or otherwise changed by the U.S. Congress" as shown above because the language is ambiguous and not specific to the volumetric disposal limits for TRU waste. The Permittees would be open to discussing an alternate mechanism outside of the Permit to allow for the NMED's participation and consultation in the event of changes to the LWA volumetric disposal limit.

The LWA statutory limit of 6.2 million cubic feet of TRU waste has also been incorporated in regulatory requirements that are themselves binding on the Permittees, including the Permit, and the current National Environmental Policy Act (NEPA) records of decision. In the event any changes to the LWA volumetric disposal limit were made in the future, a modification to the Permit, including associated regulatory consultation and public engagement, would be needed to increase the allowed volume of TRU mixed waste disposed under the Permit.

DOE has the long-standing authority and responsibility under the Atomic Energy Act of 1954, as amended (AEA), to ensure that all radioactive waste from the United States' defense program, including TRU waste, is managed and disposed of in a safe manner. Accordingly, the continued operation of WIPP within appropriate regulatory parameters to ensure the protection of human health and the environment is essential to both DOE's cleanup mission and national security. Mandating revocation of the Permit based on a

lawful act of Congress would impede DOE's ability under the AEA to safely and effectively progress the cleanup of sites across the DOE complex while fulfilling the plain language and intent of the LWA. This condition is also inconsistent with the New Mexico Hazardous Waste Act (HWA) and Resource Conservation and Recovery Act (RCRA) (see, for example, New Mexico Statutes Annotated (NMSA) 74-4-4.2), and inconsistent with due process rights provided under the constitutions of New Mexico and the United States.

2. Revise Draft Permit Part 1, Section 1.7.7.1., *Safe Transport of TRU Mixed Waste*.

Draft Permit Text

It is a violation of this Permit if the DOE or the DOE contractor fail to safely transport TRU mixed waste to the WIPP facility. The NMED is requiring compliance with applicable requirements of the WIPP Transportation Plan Implementation Guide and any transportation plans under the authority of the Western Interstate Energy Board's High-Level Radioactive Waste Committee.

Permittees' Proposed Changes

~~It is a violation of this Permit if the DOE or the DOE contractor fail to safely transport TRU mixed waste to the WIPP facility. The NMED is requiring compliance with applicable requirements of the WIPP Transportation Plan Implementation Guide and any transportation plans under the authority of the Western Interstate Energy Board's High-Level Radioactive Waste Committee.~~ The Permittees shall comply with the manifest requirements of 20.4.1.500 NMAC (incorporating 40 CFR §§264.71 and 264.72) as described in Permit Part 2, Section 2.13. Non-compliances with Department of Transportation criteria will be reported through the Occurrence Reporting and Processing System (**ORPS**).

Permittees' Technical Comment: The Permittees are dedicated to ensuring the safe transport of TRU waste. This has been demonstrated by over 16 million miles of loaded shipments to the WIPP facility without a significant safety incident. The WIPP transportation program is heavily regulated and subject to substantial oversight (e.g., Nuclear Regulatory Commission and Department of Transportation), which is described more fully below. Regardless of whether transportation requirements are added to the Permit, the Permittees must comply with the applicable transportation regulations. Adding transportation conditions to the permit is redundant to the existing regulatory framework.

The specific transport requirements applicable to RCRA are the hazardous waste manifest requirements set forth in 20.4.1.500 NMAC (incorporating 40 CFR §§264.71 and 264.72). These requirements are implemented through the WIPP Permit Part 2, Section 2.13., Permit Attachment A1, Sections A1-1d, A1-1d(2), A1-1d(3), A1-1d(4), A1-1e(2), Permit Attachment C, Sections C-5b, and C-5b(1), Permit Attachment C6, Table C6-1, *Waste Analysis Plan (WAP) General Checklist for use at DOE's Generator/Storage Sites*. The regulations that govern the transportation of TRU waste are found in 49 CFR Part 173, Subpart I and 20.4.1.400 NMAC (incorporating 40 CFR 263). The NMED has previously acknowledged that transportation requirements (with the exception of manifesting requirements) applicable to the transport of TRU mixed waste from waste generator/storage sites to the WIPP facility fall outside the purview of the Permit. See October 17, 2006, Response to Comments on the Class 3 PMR which states, "With the exception of RCRA manifesting requirements, the NMED has no regulatory authority over the transportation of mixed transuranic wastes from the waste generators to WIPP." The NMED made this same response to seven separate comments in the October 17, 2006, Response to Comments on the Class 3 PMR.

Furthermore, this condition purports to regulate activities being performed in jurisdictions outside of New Mexico, and which are the proper jurisdiction of other federal and state regulatory authorities.

The Permittees propose the alternate language in order to ensure the NMED is informed through the proper (and existing) reporting method for significant transportation related nonconformances, as described above. The proposed language increases the NMED's and the public's access to information related to transportation-related non-compliances and ensures such issues are not siloed. Moreover, the Permittees' proposed language avoids conflict between the Permit and existing regulatory and legal authorities governing the transport of TRU mixed waste from waste generator/storage sites to the WIPP facility, such as the Hazardous Materials Transportation Act, 49 U.S.C. §5125(a),(b), and the Atomic Energy Act, 42 U.S.C. §2021(k).

3. Revise Draft Permit Part 1, Section 1.15.2., *Contents of Community Relations Plan*.

Draft Permit Text

3. Keep communities and interested members of the public informed of permit actions of interest (e.g., implementation of the Contingency Plan, Permit modification requests, Permit compliance issues), to include pre-submittal meetings for Class 2 and 3 permit modification requests;

7. The Permittees shall conduct WIPP Community Forum and Open House quarterly public meetings with interested stakeholders, communities, and members of the public. Specifically, the Permittees must invite the members of the New Mexico Radioactive Waste Consultation Task Force to each quarterly meeting. The Permittees shall provide evidence of at least 30 days' public notice prior to the quarterly meeting taking place.

Permittees' Proposed Changes

3. Keep communities and interested members of the public informed of permit actions of interest (e.g., implementation of the Contingency Plan, Permit modification requests, Permit compliance issues), to include virtual townhall ~~pre-submittal~~ public meetings ~~for~~ to provide information to the public regarding Class 2 and 3 permit modification requests;

7. The Permittees shall conduct WIPP Community Forum meetings on a ~~and Open House quarterly public meetings~~ semi-annual basis ~~with interested stakeholders, communities, and members of the public~~. Specifically, the Permittees must invite the ~~members of the New Mexico Radioactive Waste Consultation Task Force to each quarterly meeting.~~ The Permittees shall provide ~~evidence of~~ at least 30 days' public notice prior to the ~~quarterly meeting taking place~~ WIPP Community Forums and other public meetings.

Permittees' Technical Comment: The Permittees have implemented an ISO 14001, Environmental Management System, which includes stakeholder engagement and communication, which may include additional non-regulatory required virtual townhall meetings for Class 2 and 3 Permit Modification Requests (PMRs). In fact, providing virtual townhall public meetings has been the recent practice implemented by the Permittees. The advantage of virtual townhall meetings versus in-person community-based meetings (e.g., in Carlsbad and Santa Fe) is that they are accessible to a larger public audience. Although these meetings are not required by RCRA or HWA regulations/procedures, the Permittees

are not opposed to providing virtual townhall public meetings. The Permittees are therefore proposing the change shown above.

Although periodic public information meetings are not required by RCRA or the HWA, the Permittees are not opposed to providing public information meetings periodically. The Permittees propose these meetings be open to all participants, including the general public, rendering it unnecessary to extend invitations to specific organizations. In lieu of quarterly public meetings, the Permittees propose to hold WIPP Community Forum public meetings on a semi-annual basis. This frequency is based on past experience at WIPP, which previously held WIPP Quarterly Meetings for several years. Because the meetings were so frequent, there was insufficient new information to have meaningful discussions on a routine, quarterly basis. However, if there is a substantial change (e.g., a capital project is completed), the Permittees remain willing to hold additional public meetings.

Finally, the Permittees also note that mandatory meetings are currently performed in accordance with the regulations for Permit modifications and renewals, and there is currently ample opportunity and mechanisms for members of the public to make inquiries and comments regarding WIPP facility activities.

4. Revise Draft Permit Part 2, Section 2.3.2.2., *Observation of Audit*.

Draft Permit Text

The Secretary may observe such audits as necessary to validate the implementation of and compliance with applicable WAP requirements at each generator/storage site. The NMED will be invited to the daily audit team caucus as observers. The NMED will be invited to observe biennial Generator Site Technical Reviews (**GSTRs**). DOE shall provide the Secretary with a current audit schedule on a monthly basis and notify the Secretary no later than 30 calendar days prior to each audit and GSTR.

Permittees' Proposed Changes

The Secretary may observe such audits as necessary to validate the implementation of and compliance with applicable WAP requirements at each generator/storage site. The NMED will be invited to the daily audit team caucus as observers. The NMED will be invited to observe ~~biennial~~ Generator Site Technical Reviews (**GSTRs**). DOE shall provide the Secretary with a current audit schedule on a monthly basis and notify the Secretary no later than 30 calendar days prior to each audit and GSTR.

Permittees' Technical Comment: The Permittees propose to remove "biennial" to be consistent with the changes being proposed in Draft Permit Attachment C6, Section C6-4, *Audit Conduct*.

The Permittees are not opposed to inviting the NMED to observe Generator Site Technical Reviews (GSTRs) or to notifying the NMED in advance of GSTRs. In fact, this has been the practice since the Permittees began performing GSTRs at applicable generator/storage sites. However, the specific frequency of GSTRs should not be included in the Permit for the following reasons:

- The frequency of GSTRs is established by the Permittees. The Permittees consider several things when determining the frequency for performing GSTRs at generator/storage sites including the following:
    - replacement of the contracting organization performing the TRU waste management,

- new waste processing activities (e.g., additional remediation capabilities or treatment methods),
- site organizational changes,
- unexpected issues and events,
- changes in waste types or forms, and
- input received from the NMED.

To ensure the responsible allocation of funds and resources, it is appropriate for the CBFO to establish the timing and frequency of GSTRs on an as-needed basis as described above.

Finally, the Permittees note GSTRs are not required by the HWA or RCRA. The GSTRs are primarily a function of Department of Energy (DOE) self-regulated requirements which include, but are not limited to, the following: DOE Order (O) 435.1, Radioactive Waste Management; DOE O 422.1, Conduct of Operations; and DOE O 226.1B, Implementation of Department of Energy Oversight Policy.

5. Revise Draft Permit Part 2, Section 2.14.3., *Repository Siting Annual Report*.

Draft Permit Text

The Department of Energy (**DOE**) shall submit an annual report summarizing its progress toward siting another geologic repository for transuranic waste in a state other than New Mexico. The annual report shall summarize the steps the DOE has taken toward siting such a geologic repository in another state and the report shall include documentation supporting the summary. Such documentation may include: budget appropriation requests; land acquisition(s); state and public engagement activities; feasibility studies; and design, construction, and operation plans.

Permittees' Proposed Changes

~~The Department of Energy (**DOE**) shall submit an annual report summarizing its progress toward siting another geologic repository for transuranic waste in a state other than New Mexico. The annual report shall summarize the steps the DOE has taken toward siting such a geologic repository in another state and the report shall include documentation supporting the summary. Such documentation may include: budget appropriation requests; land acquisition(s); state and public engagement activities; feasibility studies; and design, construction, and operation plans.~~

Permittees' Technical Comment: The Permittees understand the stakeholders' and the NMED's interest in ensuring that other viable disposition pathways be pursued to accommodate future volmes of TRU waste beyond the LWA limits. However, the Permittees note there are no requirements in RCRA or the HWA that provide the basis to require such a report on alternative repository siting as a Permit condition. The Permittees instead propose to voluntarily provide an annual update to New Mexico officials outside of the Permit, regarding progress towards siting another geologic repository for transuranic waste.

6. Revise Draft Permit Part 4, Section 4.2.1.4., *Prioritization and Risk Reduction of New Mexico Waste*.

Draft Permit Text

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 disposal capacity to dispose of the New

Mexico generator/storage site waste detailed in this report. The report shall contain the underlying calculations and data to validate the certification. While this permit remains in effect, the Permittees shall prioritize the emplacement of stored TRU mixed waste at WIPP from the clean-up activities at the Los Alamos National Laboratory (**LANL**). On an annual basis, the volume of stored TRU mixed waste emplaced in a HWDU from the LANL must exceed the volume of stored TRU mixed waste from all other individual generator sites.

Permittees' Proposed Changes

~~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 disposal capacity to dispose of the New Mexico generator/storage site waste detailed in this report. The report shall contain the underlying calculations and data to validate the certification. While this permit remains in effect, the Permittees shall prioritize the emplacement of stored TRU mixed waste at WIPP from the clean-up activities at the Los Alamos National Laboratory (LANL). On an annual basis, the volume of stored TRU mixed waste emplaced in a HWDU from the LANL must exceed the volume of stored TRU mixed waste from all other individual generator sites.~~ The emplacement of stored TRU mixed waste at WIPP from the clean-up activities at the Los Alamos National Laboratory (LANL) is a priority for the Permittees. The Permittees shall maintain adequate disposal space in existing panels available for waste disposal and resources needed to dispose of the stored TRU mixed waste that LANL plans to ship. The Permittees shall certify annually that there is sufficient disposal capacity in existing panels available for waste disposal to dispose of waste planned to be shipped by LANL in the coming year. In the event that no existing panels are available for waste disposal, the requirements of this section shall be suspended.

Permittees' Technical Comment: The Permittees propose to add text to the Permit to maintain adequate disposal space and the resources needed to dispose of the stored TRU mixed waste from the clean-up activities at the Los Alamos National Laboratory (LANL). The DOE agrees that emplacement of waste from LANL clean-up is a priority. It is the responsibility of LANL, and outside the control of the Permittees, to plan and prepare waste for shipment from LANL to the WIPP facility. Within the RCRA regulatory framework and Permit, the Permittees can support this prioritization by ensuring that disposal capacity and supporting resources are available to accept and emplace any LANL clean-up waste. The Permittees plan to implement this by obtaining a shipment plan from LANL annually prior to the beginning of each federal fiscal year. This shipment plan will serve as an indication of how much disposal space LANL will need for the upcoming year.

The Permittees cannot implement the following text and therefore propose deleting it: "On an annual basis, the volume of stored TRU mixed waste emplaced in a HWDU from the LANL must exceed the volume of stored TRU mixed waste from all other individual generator sites." Delaying shipments from other generator/storage sites to wait on LANL waste shipments is unnecessary and would create significant operational disruption for the following reasons:

- There is ample disposal capacity for LANL waste. The volume of currently stored TRU waste at the LANL is small compared to the remaining WIPP LWA TRU waste volume capacity. The WIPP LWA total capacity limit for TRU waste is 175,564 m^3. The total LWA volume of waste that has been disposed as of April 8, 2023, is 73,172

m^3. The remaining LWA TRU waste capacity is 102,392 m^3. The inventory of stored CH-TRU waste at LANL is approximately 3,780 m^3. The remaining inventory of stored TRU waste at LANL represents approximately four percent of the remaining WIPP TRU waste capacity.

- The volume of CH-TRU stored waste at LANL is small compared to other generator/storage sites. For example, the Idaho National Laboratory has approximately 11,000 m^3 and Hanford has approximately 11,200 m^3 of stored waste. Delaying shipments from these generator/storage sites in order to wait on small quantities from LANL would be infeasible and inefficient.
- Delaying shipments would extend the closure date for the WIPP facility.
- This would adversely impact resources, cost and safety considerations at the WIPP facility. For example, the life of disposal rooms would have to be extended in order to wait for LANL waste, thereby requiring additional ground control and shipping and waste handling personnel would be idle while waiting for LANL waste shipments.

This condition would impede DOE's ability under the AEA to protect human health and the environment by safely and effectively progressing the cleanup of sites across the DOE complex while fulfilling the plain language and intent of the LWA.

Finally, the Permittees note there are no requirements in RCRA or the HWA that provide the basis to place a condition in a Permit to prioritize shipments from any specific generator/storage sites.

7. Revise Draft Permit Part 6, Section 6.5.2., *Final Facility Closure*.

Draft Permit Text

When the Permit term has expired or ~~After~~ the HWDUs have received the final volume of waste as specified in Permit Part 4, Table 4.1.1, the Permittees shall remove from the facility all non-mixed hazardous waste, dispose in the Underground HWDUs all TRU-mixed hazardous waste and derived waste, and complete closure activities as specified in Permit Attachment G and as required by 20.4.1.500 NMAC (incorporating 40 CFR §264.113).

Permittees' Proposed Changes

~~When the Permit term has expired or After the HWDUs have received the final volume of waste as specified in Permit Part 4, Table 4.1.1.~~When the final facility closure begins, the Permittees shall remove from the facility all non-mixed hazardous waste, dispose in the Underground HWDUs all TRU-mixed hazardous waste and derived waste, and complete closure activities as specified in Permit Attachment G and as required by 20.4.1.500 NMAC (incorporating 40 CFR §264.113).

Permittees' Technical Comment: There are other sections of the Permit that explain when final facility closure begins. See, for example, Permit Attachment G, *Introduction*, and Permit Attachment G, Section G-1d. The point of the text in this Part (Permit Part 6, Section 6.5.2.) is simply to provide the planned approach to initiate final closure activities and not to define when final facility closure begins. In order to remove redundancy and to remove the potential for conflicting text within the Permit, the Permittees recommend deleting the explanation of when final facility closure begins as shown above, since it is redundant with other text, and add the terminology "When the final facility closure begins." Unchanged, this condition exceeds NMED's authority under RCRA and the HWA and impedes DOE's ability

under the AEA to protect human health and the environment by safely and effectively progressing the cleanup of sites across the DOE complex while fulfilling the plain language and intent of the LWA.

8. Revise Draft Permit Part 8, Section 8.13.1, *Ground Water Cleanup Levels,* and Section 8.15, *REFERENCES*

Draft Permit Text

If a cleanup level under Item 1 above does not exist for a carcinogenic hazardous waste or hazardous constituent, then the Permittees shall use the lower of levels listed in most recent version of the EPA *Regional Screening Levels for Chemical Contaminants at Superfund Sites* (**RSLs**) and NMED's *Risk Assessment Guidance for Site Investigation and Remediation* (as updated) for tap water and a target excess cancer risk level of 10-5 to develop a proposed cleanup level for NMED approval. The Permittees may use other scientific or regulatory information currently available to the public to develop and propose a cleanup level for NMED approval provided that the level is lower (or otherwise more protective) than the RSL.

Permittees' Proposed Changes

If a cleanup level under Item 1 above does not exist for a carcinogenic hazardous waste or hazardous constituent, then the Permittees shall use the lower of levels listed in most recent version of the EPA *Regional Screening Levels for Chemical Contaminants at Superfund Sites* (**RSLs**) and NMED's *Risk Assessment Guidance for Site Investigation and Remediation* ~~(as updated)~~ for tap water and a target excess cancer risk level of 10-5 to develop a proposed cleanup level for NMED approval. The Permittees may use other scientific or regulatory information currently available to the public to develop and propose a cleanup level for NMED approval provided that the level is lower (or otherwise more protective) than the RSL. The Permittees shall review EPA Regional Screening Levels for Chemical Contaminants at Superfund Sites and NMED's Risk Assessment Guidance for Site Investigation and Remediation annually and will submit the appropriate permit modification to update the respective references in Permit Part 8, Section 8.15 as needed.

Permittees' Technical Comment: The Permittees propose deleting "(as updated)" from the NMED's revised text as shown above and from the respective references in Permit Part 8, Section 8.15, *REFERENCES*. The addition of NMED's Risk Assessment Guidance creates a new Permit requirement and "as updated" has the potential for the Permittees to implement cleanup levels that have not been reviewed and appropriately added to the Permit. This would create a problem in planning and if the requirements change during an ongoing cleanup. The proposed change limits the Permit to the current version of the NMED's guidance and avoids potential changes to requirements that do not go through the Permit modification process. The Permittees have a similar situation with regard to volatile organic compound (VOC) risk factors in Permit Part 4, Section 4.6.2.3. Should the EPA change the inhalation risk factors for any of the target VOCs, the Permittees are to submit the appropriate Permit modification to update the Permit to the new information. A similar provision would be useful here. Therefore, the Permittees propose updating the respective references with a Permit modification.

9. Revise Draft Permit Attachment A1, Section A1-1c(1), *Waste Handling Building Container Storage Unit (WHB Unit).*

Draft Permit Text
Concrete barriers provide added protection from equipment being utilized in adjacent rooms and buildings to the west of the CH-Bay wall in the WHB.

Permittees' Proposed Changes
~~Concrete barriers~~Barriers provide added protection from equipment being utilized in adjacent rooms and buildings to the west of the CH-Bay wall in the WHB.

Permittees' Technical Comment: There may be barriers other than concrete barriers (e.g., water or sand filled plastic barriers, or steel pillars, or administrative/procedural) that provide appropriate protection from equipment. "Concrete" is therefore proposed for deletion from the text above to allow the Permittees to identify the appropriate barrier type/material for protection from equipment.

10. Revise Draft Permit Attachment A1, Section A1-1c(2), *Parking Area Container Storage Unit.*

Draft Permit Text
Concrete barriers provide protection from vehicles and equipment for the interior of the south side of the WHB.

Permittees' Proposed Changes
~~Concrete barriers~~Barriers provide protection from vehicles and equipment for the interior of the south side of the WHB.

Permittees' Technical Comment: There may be barriers other than concrete barriers (e.g., water or sand filled plastic barriers, or steel pillars, or administrative/procedural) that provide appropriate protection from equipment. "Concrete" is therefore proposed for deletion from the text above to allow the Permittees to identify the appropriate barrier type/material for protection from equipment.

11. Revise Draft Permit Attachment A1, Section A1-1d(2), *CH TRU Mixed Waste Handling.*

Draft Permit Text
The Permittees must perform a root cause analysis on generation, transport, or disposal activities for the following reasons: (1) contamination may have occurred within the shipping container; (2) a shipping container may be compromised; or (3) at any time when directed by the NMED. Once a root cause analysis is required on a specific shipment or waste stream, the shipment or waste stream may not be disposed of at the WIPP facility until the root cause analysis is completed and corrective measures are implemented to prevent such concerns in the future. Prior to submitting the root cause analysis and corrective measures to the NMED for review and approval, the Permittees shall provide a copy of the root cause analysis and corrective measures to all generator/storage sites that ship waste to the WIPP facility. When submitting the root cause analysis and corrective measures to the NMED for review and approval, the Permittees shall provide a certification signed by responsible officials from each organization that the root cause analysis and corrective measures were received by a responsible official at the generator/storage sites.

Permittees' Proposed Changes

If an incident occurs involving the release of contamination within a shipping container or which compromises the integrity of the shipping container associated with TRU mixed waste shipped to the WIPP facility and the incident is reported under DOE Order 232.2A, then the ~~The~~ Permittees will provide the Secretary with a report prepared to evaluate the incident and the results of any follow-up actions required to prevent the recurrence of the incident. ~~perform a root cause analysis generation, transport, or disposal activities for the following reasons: (1) contamination may have occurred within the shipping container; (2) a shipping container may be compromised; or (3) at any time when directed by the NMED. Once a root cause analysis is required on a specific shipment or waste stream, the shipment or waste stream may not be disposed of at the WIPP facility until the root cause analysis is completed and corrective measures are implemented to prevent such concerns in the future. Prior to submitting the root cause analysis and corrective measures to the NMED for review and approval, the Permittees shall provide a copy of the root cause analysis and corrective measures to all generator/storage sites that ship waste to the WIPP facility. When submitting the root cause analysis and corrective measures to the NMED for review and approval, the Permittees shall provide a certification signed by responsible officials from each organization that the root cause analysis and corrective measures were received by a responsible official at the generator/storage sites.~~

Permittees' Technical Comment: The DOE already has a robust system for identifying and classifying incidents that occur at DOE sites or during transportation. Not all incidents rise to the level of requiring a root cause[1] analysis and the term "root cause analysis" can have specialized meaning within certain regulatory and quality assurance contexts not generally applicable here. The NMED's proposed language may result in the Permittees, the shipping site, and/or the transporter performing inconsistent analyses and event evaluation due to the differences between the Permit and applicable DOE Orders or contractual requirements, and in doing so may create an inconsistency with applicable DOE internal policies. Therefore, the Permittees propose the new condition simply require the submittal of the report generated under the applicable DOE Order. DOE O 232.2A, *Occurrence Reporting and Processing of Operations Information*, serves as an appropriate threshold because it would provide NMED notification and reports aligned with internal DOE requirements for notification about events that could adversely affect the health and safety of the public or the workers, the environment, DOE missions, or the credibility of the Department. This order establishes the criteria for categorizing reporting and includes the criteria for reporting packaging and transportation related events and conditions. This Order is implemented at each site under their own implementing standard operating procedures. The proposed language provides the flexibility for the Permittees, generator/storage site, or the transporter to perform their work in accordance with applicable procedures.

The Permittees note this condition is not required by RCRA or the HWA.

[1] Root Cause – the causal factor(s) that, if corrected, would prevent recurrence of the occurrence. It is the most basic cause that explains why the event happened, that can reasonably be identified, that senior management has the control to fix, and for which effective recommendations for corrective actions to remedy the problem, prevent specific recurrence of the problem, and preclude occurrence of similar problems can be generated, if necessary. This is typically one level further in analysis beyond the Apparent Cause(s) (i.e., one level beyond the Level C node of the CAT).
https://www.standards.doe.gov/standards-documents/1100/1197-astd-2011/@@images/file

12. Revise Draft Permit Attachment A2, Section A2-5b(2)(a), *Description of the Geomechanical Monitoring System.*

Draft Permit Text
In the annual Geotechnical Analysis Report, the Permittees shall provide a summary of the results of the monthly surveillance of oil and gas production and salt water disposal wells within a one-mile perimeter outside the Land Withdrawal Act boundary.

Permittees' Proposed Changes
~~In the annual Geotechnical Analysis Report,~~ Using data available on the New Mexico Oil Conservation Division (**OCD**) website, the Permittees shall provide a list ~~summary of the results of the monthly surveillance~~ of oil and gas production and salt water disposal wells within a one-mile perimeter outside the Land Withdrawal Act boundary that were listed as active by the OCD during the previous calendar year. This report will be provided annually in October.

Permittees' Technical Comment: The Permittees are proposing alternate language for Permit Attachment A2, Section A2-5b(2)(a), to clarify what information the Permittees will use to generate the annual list of active oil and gas production and salt water disposal wells requested by the NMED. The New Mexico Oil Conservation Division (OCD) maintains the official database for oil and gas activity for New Mexico. The OCD data, rather than the monthly surveillances referenced in the Permittees' July 12, 2022, response to the NMED's Technical Incompleteness Determination (TID) Item 31, is the appropriate source of information needed to address this condition. This is because the OCD data are reliable; readily accessible to the Permittees, the NMED and general public; and are maintained current by the OCD. The referenced information is publicly available and is used by the DOE for compliance with 40 CFR Parts 191 and 194 and the Land Withdrawal Act.

For example, in the TID response, the Permittees provided the following summary:

> *…As of June 1, 2022, there are 165 active oil and gas production wells and 6 active salt water disposal wells within a one-mile perimeter outside of the WIPP LWA boundary…*

The Permittees are proposing to provide the same summary information and respective list of wells within the one-mile perimeter on an annual basis.

13. Revise Draft Permit Attachment C, Section C-1d, *Control of Waste Acceptance*.

Draft Permit Text
The NMED retains the right, under the New Mexico Hazardous Waste Act at 74-4-13, which is cited in Permit Part 1, Section 1.1, to take action, such as issuing orders, to address evidence an imminent and substantial endangerment to human health or the environment, including orders to suspend TRU mixed waste shipments and emplacement at the WIPP facility for cause. The Secretary reserves the right to prohibit shipment and emplacement of TRU mixed wastes at the WIPP facility for, but not limited to, the following reasons: (1) the Permittees have not satisfied any conditions of this Permit; (2) a TRU mixed waste stream or shipment may pose a threat to human health or the environment; (3) the Permittees are in violation of a Permit condition; or (4) based on any allegation of noncompliance. This attachment also requires that all waste shipped to the WIPP facility is compliant with the WAP contained herein and all shipments arriving at the WIPP facility go through a screening and verification process per Section

C-5 before emplacement in a HWDU. NMED retains the right to suspend any and all waste shipments to the WIPP facility associated for not complying with the WAP.

Permittees' Proposed Changes
The NMED retains the right, under the New Mexico Hazardous Waste Act at 74-4-13, which is cited in Permit Part 1, Section 1.1, to take action, such as issuing orders, to address evidence an imminent and substantial endangerment to human health or the environment, including orders to suspend TRU mixed waste shipments and emplacement at the WIPP facility for cause. The Secretary reserves the right to prohibit shipment and emplacement of TRU mixed wastes at the WIPP facility ~~for, but not limited to, the following reasons: (1) the Permittees have not satisfied any conditions of this Permit; (2)~~ if there is clear and convincing evidence that a TRU mixed waste stream or shipment ~~may pose~~ poses an imminent and substantial endangerment ~~a threat~~ to human health or the environment~~; (3) the Permittees are in violation of a Permit condition; or (4) based on any allegation of noncompliance~~. ~~This attachment also requires that~~The Permittees must ensure all waste shipped to the WIPP facility is compliant with the WAP contained herein and all TRU mixed waste shipments arriving at the WIPP facility go through a screening and verification process per Section C-5 before emplacement in a HWDU. NMED retains the right to suspend any and all waste shipments to the WIPP facility ~~associated for~~ where there is clear and convincing evidence of WAP noncompliance(s) that poses an imminent and substantial endangerment to human health of the environment.~~not complying with the WAP.~~

Permittees' Technical Comment: In the Permittees' July 12, 2022, response to a request by the NMED in the TID to "*Please suggest new Permit language to clearly define NMED's ability to suspend waste shipments to WIPP for good cause if human health or the environment is at risk,"* the Permittees indicated that *"The NMED already has the statutory authority to suspend receipt of waste shipments at the WIPP facility if there is evidence of an imminent hazard to human health or the environment,"* citing the same Permit Part 1, Section 1.1. in the NMED's proposed language. The authority comes from the New Mexico Hazardous Waste Act as follows:

74-4-13. Imminent hazards; authority of director; penalties.

A. Notwithstanding any other provision of the Hazardous Waste Act [74-4-1 NMSA 1978], whenever the secretary is in receipt of evidence that the past or current handling, storage, treatment, transportation or disposal of solid waste or hazardous waste or the condition or maintenance of a storage tank may present an imminent and substantial endangerment to health or the environment, he may bring suit in the appropriate district court to immediately restrain any person, including any past or present generator, past or present transporter or past or present owner or operator of a treatment, storage or disposal facility, who has contributed or is contributing to such activity, to take such other action as may be necessary or both. A transporter shall not be deemed to have contributed or to be contributing to such handling, storage, treatment or disposal taking place after such solid waste or hazardous waste has left the possession or control of such transporter if the transportation of such waste was under a sole contractual arrangement arising from a published tariff and acceptance for carriage by common carrier by rail and such transporter has exercised due care in the past or present handling, storage, treatment, transportation and disposal of such waste. The secretary may also take other action, including but not limited to issuing such orders as may be necessary to protect health and the environment.

Therefore, the Permittees propose language that aligns with the statutory authorization. Specifically, NMSA 74-4-4.2 *Permits; issuance; denial; modification; suspension; revocation*, Section D (see the Permittees comment on Draft Permit Part 1, Section 1.3.1., *Permit Modification, Suspension, and Revocation*).

The Permittees recommend suggested revisions for the following reasons:

- Removes the term "allegations" from the proposed language since allegations are not a basis for taking action to restrain an activity pursuant to the *Hazardous Waste Act [74-4-1 NMSA 1978]*. Furthermore, such allegations can come from any source at any time creating significant administrative burden on both the NMED and the Permittees.
- Removes language related to "not satisfying any condition of this Permit" and language related to "violation of Permit conditions." These changes are necessary since a failure to comply with a condition in the Permit does not necessarily create an endangerment to human health or the environment, which is the statutory threshold for triggering action under 74-4-13.
- Adds language that assures evidence for triggering this action on the part of the NMED is credible, related to WAP compliance, and consistent with the *Hazardous Waste Act [74-4-1 NMSA 1978]*.
- Removes language that impinges on the Permittees' right of due process under federal and state law.
- Removes language that exceeds the State's authority under RCRA and the HWA and that would impede DOE's ability under the AEA to protect human health and the environment by safely and effectively progressing the cleanup of sites across the DOE complex while fulfilling the plain language and intent of the LWA.

14. Revise Draft Permit Attachment C3, Section C3-4b, *Project Level.*

Draft Permit Text

The Site Project Manager shall ensure that a repeat of the data generation level review, validation, and verification is performed on the data for a minimum of one randomly chosen waste container quarterly (every three months). This exercise will document that the data generation level review, validation, and verification is being performed according to implementing procedures.

Permittees' Proposed Changes

~~The Site Project Manager shall ensure that a repeat of the data generation level review, validation, and verification is performed on the data for a minimum of one randomly chosen waste container quarterly (every three months). This exercise will document that the data generation level review, validation, and verification is being performed according to implementing procedures.~~

Permittees' Technical Comment: In the Renewal Application the Permittees requested deletion of the paragraph above in Permit Attachment C3, Section C3-4b and the similar text in Permit Attachment C6, Table C6-1, Item 42 pertaining to the quarterly repeat of data generation level review. The Permittees request that the NMED incorporate these deletions for the reasons listed below.

First, multiple reviews of waste characterization data are required by the Permit in order to ensure waste is adequately characterized. These reviews are specified in Permit Attachment C3, Section C3-4, and include Data Generation Level (DGL) reviews, independent technical reviews (ITRs), project level reviews performed by the Site Project Manager (SPM), and Permittee level reviews. The quarterly repeat of the DGL review is intended to verify that data validation and verification is performed in accordance with procedures. This is also the intent of annual generator/storage site audits performed pursuant to Permit Attachment C6, *Audit and Surveillance Program*. Deletion is therefore needed to remove this redundant review requirement that does not impact the adequacy of the waste characterization process and adds unnecessary regulatory burdens. Second, Permit Attachment C3, Section C3-4b(1) already includes the requirement for SPM review, validation, and verification of waste characterization data prior to certification of waste for shipment. This is the point in time where such reviews impact the waste characterization process by ensuring that nonconformances are identified and addressed before shipment. The quarterly repeat review described in Permit Attachment C3, Section C3-4b, is redundant to the SPM review required by Permit Attachment C3, Section C3-4b(1). Third, due to the quarterly nature of this requirement, the review cannot enhance the waste characterization process. This is because this review is conducted after waste characterization is complete and, typically, after waste has been shipped and emplaced, therefore providing no benefit to the characterization process.

In addition to the reviews identified herein, the generator/storage site is required, in accordance with Permit Attachment C, Section C-2, to develop internal procedures to ensure the quality of waste characterization data including "Identify the oversight procedures and frequency of actions to verify compliance with waste characterization and certification procedures." This requirement encompasses the data reviews listed above. Furthermore, Permit Attachment C6, *Audit and Surveillance Program*, is used for ensuring that procedures are properly implemented, including procedures for DGL review, validation, and verification. Audits conducted in accordance with Permit Attachment C6 occur initially at the outset of the characterization program and subsequently as prescribed by the Permit.

Therefore, Permit-required controls other than the quarterly repeat review serve as more frequent and timely indicators of whether DGL reviews, verification, and validation are being performed in accordance with implementing procedures.

Performing this review is an unjustified expenditure of effort and resources.

15. Revise Draft Permit Attachment C4, Section C4-3g, *Audits of Acceptable Knowledge*.

Draft Permit Text

After the audit is complete, the DOE will provide the site with preliminary results at a close-out meeting. The DOE will prepare a final audit report that includes the~~all~~ observations and findings identified during the audit. Sites shall respond to ~~all~~ the audit findings and identify corrective actions. Audit results will be included in the final audit report (Permit Attachment C6). If ~~acceptable knowledge~~AK procedures do not exist, the required information is not available, or corrective actions (i.e., Corrective Action Reports (**CARs**)) are ~~identified~~ associated with deficiencies in the ~~acceptable knowledge~~AK compilation process (i.e., the minimum required information in Section C4-2 has not been collected and organized to present the required information on the subject waste stream(s)), and/or EPA hazardous waste number assignment is not accurate~~characterization~~, the Permittees will not manage, store, or dispose TRU mixed

waste for the subject waste stream(s) ~~summary category~~. Permit Attachment C3, Section C3-7, *Nonconformances*, requires the responsible organization(s) to review CARs and evaluate the extent of condition. If, during the corrective action process, the extent of condition is determined to be applicable to other waste streams, the Permittees will not manage, store, or dispose of TRU mixed waste from those affected waste streams. Management, storage, or disposal of the ~~affected waste streams~~subject waste summary category at the WIPP facility will not resume until the DOE ~~agrees~~find that ~~all~~ the corrective actions have been implemented and the site complies with ~~all~~the applicable requirements of the WAP.

Permittees' Proposed Changes

After the audit is complete, the DOE will provide the site with preliminary results at a close-out meeting. The DOE will prepare a final audit report that includes the~~all~~ observations and findings identified during the audit. Sites shall respond to ~~all~~ the audit findings and identify corrective actions. Audit results will be included in the final audit report (Permit Attachment C6). If ~~acceptable knowledge~~AK procedures do not exist, the required information is not available, or corrective actions (i.e., Corrective Action Reports (**CARs**)) are ~~identified~~ associated with deficiencies in the ~~acceptable knowledge~~AK compilation process (i.e., the minimum required information in Section C4-2 has not been collected and organized to present the required information on the subject waste stream(s)), and/or EPA hazardous waste number assignment is not accurate~~characterization~~, the Permittees will not manage, store, or dispose TRU mixed waste for the subject waste stream(s) ~~summary category~~. Permit Attachment C3, Section C3-7, *Nonconformances*, requires the responsible organization(s) to review CARs and evaluate the extent of condition. If, during the corrective action process, the extent of condition is determined to be applicable to other waste streams, the Permittees will not manage, store, or dispose of TRU mixed waste from those affected waste streams. Management, storage, or disposal of the affected waste streams~~subject waste summary category~~ at the WIPP facility will not resume until the DOE ~~agrees~~finds that ~~all~~ the corrective actions have been implemented and the site complies with ~~all~~the applicable requirements of the WAP.

Permittees' Technical Comment: The Permittees propose the NMED change "subject waste summary category" to "affected waste streams" and "find" to "finds" so that the sentence reads as shown above.

Permit Attachment C, Section C-0a, *Waste Characterization*, states "Characterization requirements for individual containers of TRU mixed waste are specified on a waste stream basis." Permit Attachment C-1, Section C-1a, *Waste Stream Identification*, states "TRU mixed waste destined for disposal at WIPP will be characterized on a waste stream basis. Generator/storage sites will delineate waste streams using acceptable knowledge." Summary category groups are simply meant to describe the final waste form of the waste (i.e., debris, soil and gravel, or sludge). Because waste or containers of waste are characterized on a waste stream basis and acceptable knowledge (AK) is compiled on a waste stream basis, any corrective actions pertaining to waste stream delineation or AK compilation are on a waste stream basis or on a container basis. Therefore, it is inappropriate to suspend shipments based on summary category groups. At one time summary category groups were important in the WAP for determining the type of sampling required for characterization. For example, debris waste underwent headspace gas sampling. When routine chemical sampling was removed from the Permit the language

pertaining to suspending shipments of summary category groups in Permit Attachment C4, Section C4-3g became moot. It is an artifact in the Permit that should be removed.

It appears that the change made by the NMED creates an inconsistency in the text. In the fifth and sixth sentences of this paragraph the Permittees proposed language to clarify when, in relation to audit findings and resulting corrective actions, the WIPP facility would not manage, store, and dispose of a particular waste stream. In all of the language proposed the Permittees made reference to TRU mixed waste on a waste stream basis. The change in the last sentence of this paragraph was reversed but the language in the previous two sentences was accepted by the NMED. This creates an internal conflict between what was clarified regarding nonconformances and corrective action reports, and when the facility can resume management, storage, or disposal of the affected waste streams based on implementation of corrective actions. The remaining "subject summary category" language creates an inconsistency in this section of the Permit.

16. Revise Draft Permit Attachment C6, Section C6-4, *Audit Conduct.*

Draft Permit Text

As required by Permit Part 2, Section 2.3.2.3, Generator Site Technical Reviews (**GSTRs**) must be completed on a biennial basis at each generator/storage site currently shipping waste to WIPP. Issues identified must be entered into a site's tracking system, resolved, and tracked to closure. A section specific to GSTRs must be included in the final audit report for the site, stating whether a GSTR has been conducted since the previous audit and the status of issues identified. Each GSTR must produce a final report providing evidence that all issues have been closed out. In order to obtain NMED approval of the final audit report, the most recent GSTR final report must be included with the submittal.

Permittees' Proposed Changes

~~As required by Permit Part 2, Section 2.3.2.3, Generator Site Technical Reviews (GSTRs) must be completed on a biennial basis at each generator/storage site currently shipping waste to WIPP. Issues identified must be entered into a site's tracking system, resolved, and tracked to closure.~~ Generator Site Technical Reviews shall be completed at each generator storage site shipping waste to WIPP on a schedule based on WIPP Standard Operating Procedures. The Permittees will provide a GSTR schedule to the NMED annually, in October. The Permittees will consider the following for developing the annual schedule and for determining which generator storage site(s) require GSTR:

- replacement of the contracting organization performing the TRU waste management,
- new waste processing activities (e.g., additional remediation capabilities or treatment methods),
- site organizational changes,
- changes in waste types or forms,
- unexpected issues and events, and
- input received from the NMED.

A section specific to Generator Site Technical Reviews (GSTRs) shall be included in the final audit report for the site, stating whether a GSTR has been conducted since the

previous audit and the status of any WAP-related issues addressed in the GSTR. ~~Each GSTR must produce a final report providing evidence that all issues have been closed out. In order to obtain NMED approval of the final audit report, the most recent GSTR final report must be included with the submittal.~~

Permittees' Technical Comment: The Permittees are not opposed to providing a short summary section specific to GSTRs in final audit reports to address whether recent GSTRs have been conducted at a respective generator/storage site and to include the status of any WAP-related issues addressed in the GSTR. The Permittees have committed to this previously (October 4, 2022, letter from the Permittees to the R. Shean, Chief Hazardous Waste Bureau, NMED: Response to the June 14, 2022, Letter Regarding the NMED Review of the Idaho National Laboratory/Central Characterization Program (INL/CCP) Final Audit Report A-22-07, Waste Isolation Pilot Plant, EPA I.D. Number NM4890139088). The Permittees stated the following in that letter:

> *1. Future (re)certification audits will include a section reflecting the review, follow-up, and confirmation of closure of any issues and recommendations from the most recent GSTR at the generator site to the extent such issues and recommendations are relevant to WAP compliance and to the extent they have not been previously reported.*

The final audit report including the summary and status of WAP-related GSTR issues in the final audit report should be sufficient information to support the NMED's review of final audit reports. In addition, it may be useful to provide a summary of recent GSTRs and the status of any applicable WAP-related issues addressed in GSTRs in final audit reports. Therefore, the Permittees are proposing to remove the requirement to provide GSTR final reports and propose the changes shown in the alternate language provided above.

The Permittees also propose to remove the requirement to perform GSTRs at a specific frequency. The rationale for removing the specific frequency for performing GSTRs is provided in the Permittees comment above on Draft Permit Part 2, Section 2.3.2.2., *Observation of Audit*. Although the Permittees are not opposed to performing GSTRs and including the requirement to perform GSTRs in the Permit, it is more appropriate to improve WAP related text and the certification audit program, which is intended to comply with 20.4.1.500 NMAC (incorporating 40 CFR §264.13) than to include DOE specific GSTR requirements that fall outside RCRA/HWA jurisdiction and delegated authority. The Permittees propose a colaborative effort with the NMED to improve the WAP certification audit program. These improvements can then be added to the Permit via a future Class 2 Permit Modification request with the overarching goal of replacing the GSTR program.

17. Revise Draft Permit Attachment G, Section G-1d, *Schedule for Closure.*

Draft Permit Text

For the purpose of establishing a schedule for closure, the final waste disposal will mark the end of the Disposal Phase and will occur when the Permit term expires or the permitted HWDUs are filled or have achieved their maximum capacities as outlined in Permit Part 4, Table 4.1.1, ~~or when the WIPP facility achieves its~~ within the capacity limit of 6.2 million cubic feet (ft^3) (175,564 cubic meters (m^3)) of LWA TRU waste volume. The Permittees also assume closure will take 10 years ~~an operating and closure period of no more than 35 years (25 years for disposal operations and 10 years for closure) is assumed~~. ~~This operating period~~ The Disposal Phase may be extended or shortened, within the authorized capacities and Permit term, depending on a number of factors,

including the rate of waste approved for shipment to the WIPP facility and the schedules of TRU mixed waste generator sites, and future decommissioning activities.

Permittees' Proposed Changes
For the purpose of establishing a schedule for final facility closure, the final waste disposal will mark the end of the Disposal Phase and will occur within the Permit term when ~~the Permit term expires or~~ the permitted HWDUs are filled or have achieved their maximum capacities as outlined in Permit Part 4, Table 4.1.1, or when the WIPP facility achieves its ~~within the~~ capacity limit of 6.2 million cubic feet (ft^3) (175,564 cubic meters (m^3)) of LWA TRU waste volume. The Permittees also assume closure will take 10 years ~~an operating and closure period of no more than 35 years (25 years for disposal operations and 10 years for closure) is assumed~~. ~~This operating period~~ The Disposal Phase may be extended or shortened, within the authorized capacities and Permit term, depending on a number of factors, including the rate of waste approved for shipment to the WIPP facility and the schedules of TRU mixed waste generator sites, and future decommissioning activities.

Permittees' Technical Comment: The Permittees appreciate that final waste disposal is not readily tied to a specific end date, and instead reflects achievement of waste disposal up to authorized HWDU or LWA TRU waste volumes, which in turn depend on numerous factors at WIPP and TRU mixed waste generator sites. Ongoing engagement with the NMED and refinement of closure schedules will occur over time through regular permit renewals. The Permittees note that the draft permit language "the Permit term expires" creates incongruities in the permit because closure and post-closure phases are themselves permitted activities that will take place under a Permit. To resolve this confusion, the Permittees recommend replacing the phrase "when the Permit term expires or" with the phrase "within the Permit term when".

The Permittees recommend retaining the phrase "or when the WIPP facility achieves its capacity. . ." This phrase accommodates initiating final facility closure, which must occur when the LWA limit is met, if the Permittees implement contingency closure (as defined elsewhere in Permit Attachment G). It also recognizes that the LWA TRU waste volume will mark the point of final waste disposal even if, for example, it is reached within the larger volume of a permitted HWDU. Retaining this reference to the LWA TRU waste volume also ensures consistency with the defined terms of the Permit (i.e., the term of the Permit is defined in Permit Part 1, Section 1.7.2., and continuation is explained in Permit Part 1, Section 1.7.4.) Unchanged, this condition exceeds NMED's authority under RCRA and the HWA and impedes DOE's ability under the AEA to protect human health and the environment by safely and effectively progressing the cleanup of sites across the DOE complex while fullfilling the plain language and intent of the LWA.

To ensure consistency, corresponding changes are recommended to similar language in Permit Attachment G, *Introduction*, and Permit Attachment H1, *Introduction*, Background.

18. Revise Draft Permit Attachment N, Section N-5e, *Performance and System Audits*.

Permittees' Technical Comment: The Permittees requested deleting text pertaining to the Laboratory Performance Evaluation Plan (LPEP). However, the NMED chose not to delete this text in the Draft Permit. Instead, the NMED included language acknowledging that the Permittees have implemented the proficiency testing plan previously submitted by the Permittees.

The Permittees request that the NMED include the originally requested change for the reasons listed below.

The language deleted by the Permittees is obsolete language, placed in the Permit to address a concern regarding the sensitivity of the volatile organic compound (VOC) monitoring analytical process. The Permittees met the condition of implementing the LPEP and have demonstrated the adequacy of the analytical system. The language calling for developing a process that is already in place and approved is unnecessary and provides no useful information for the Permittees.

This proposed deletion is one of the changes in the Renewal Application that deals with obsolete language.

Part 2 – General Comment

The DOE mission for the WIPP Project is to provide safe characterization, transportation, and disposal of defense TRU waste in a manner that is protective of the workforce, the public, and the environment. To this end Congress authorized disposal of 6.2 million cubic feet (175,564 cubic meters) of TRU waste at the WIPP facility. Land Withdrawal Act, (Pub. L. 102-579, Section 7(a)(3)). DOE is responsible under the Atomic Energy Act and the Federal Facilities Compliance Act, to dispose of its TRU and TRU mixed waste in a manner that is protective of human health and the environment. The WIPP facility is the only authorized repository for this waste. DOE's current authorized option for disposal of this waste is the WIPP facility. As of April 8, 2023, 73,172 cubic meters (2,584,045 cubic feet) of TRU waste has been safely disposed at the WIPP facility, which is approximately 42 percent of the total 6.2 million cubic feet authorized under the LWA. Current and future estimated inventory of TRU waste in the DOE complex indicates the mission of the WIPP Project will extend well past the 10-year term of the renewed Permit (i.e., beyond 2034). Accordingly, the Permittees are requesting the term of the renewed Permit be ten years, the maximum term allowed by the regulations at 20.4.1.900 NMAC (incorporating 40 CFR 270.50(a)).

Part 3 – Editorial Comments

1. Draft Permit Part 2, Section 2.10.1.1., *Internal Communications* (pg. 18)

   The Permittees shall have an internal communications or alarm system capable of providing immediate emergency instruction (voice or signal) to facility personnel, as required by 20.4.1.500 NMAC (incorporating 40 CFR §264.32(a)). The internal communication systems shall include two-way communication by the public address (**PA**) system and its intercom phones, mobile phones, mine phones, ~~plant-based radios~~ facility radio base stations, and portable two-way radios. The alarm system shall include local and facility-wide alarm systems.

2. Draft Permit Part 7, Section 7.2., *Unit Identification* (pg. 3)

   The Permittees shall provide post-closure care for the closed Underground HWDUs (~~eight~~panels and ~~two~~ panel access drifts), and for the facility after final closure, as specified in Permit Attachment H (Post-Closure Plan) and as required by 20.4.1.500 NMAC (incorporating 40 CFR §264.110(b)).

3. Draft Permit Attachment A, Section A-4, *Facility Type* (pg. 4, line 35)

The text “requirements of 20.4.1.500 NMAC (incorporating 40 CFR §§264.170 to 264.178.” is missing the right parenthesis.

4. Draft Permit Attachment A2, Section A2-2a(3), *Subsurface Structures*, *Underground Ventilation Modes of Operation* (pg. 15, lines 11-12)

   These lines show a fragmented sentence.

5. Draft Permit Attachment A2, Section A2-2b, *Geologic Repository Process Description*, *CH TRU Mixed Waste Emplacement* (pg. 20, line 12)

   “The waste will be emplaced room by room in Panels 1 through 8,” should be modified as, “The waste will be emplaced room by room in Panels 1 through 8 and Panels 11 and 12.”

6. Draft Permit Attachment C, Section C-4a(3), *Data Generation* (pg. 18, line 22)

   (~~BDRs~~Batch data reports (**BDRs**)

7. Draft Permit Attachment C2, *Reserved*

   Blank page after cover page.

8. Draft Permit Attachment C3, Section C3-4a, *Data Generation Level* (pg. 8, lines 6-7)

   :original data must be ~~so as not to be unreadable~~readable.

9. Draft Permit Attachment C4, Section C4-3g, *Audits of Acceptable Knowledge* (pg. 12, line 31)

   until the DOE ~~agrees~~finds that ~~all~~ the corrective actions have been implemented and the site

10. Draft Permit Attachment D, Section D-6, *Emergency Equipment* (pg. 23, line 19)

    “The fire-water distribution system map is show in Figure D-5”, should be modified as, “The fire-water distribution system map is shown in Figure D-4/Figure D-4-NFB.”

11. Draft Permit Attachment E, Section E-1a(3), *Monitoring Systems* (pg. 7, line 33), should be modified as shown below.

    ~~assure no~~identify the development of unsafe conditions ~~before they are allowed to develop~~.

12. Draft Permit Attachment E, Table E-1a, *RH TRU Mixed Waste Inspection Schedule/Procedures*, *Facility Cask Transfer Car* (pg. 24)

    Remove “PM014486 (Quarterly)” and “PM041195 (Annual)” from the “Procedure Number” column.

13. Draft Permit Attachment E, Table E-1a (Continued), *RH TRU Mixed Waste Inspection Schedule/Procedures*, footnote c (pg. 27)

[c] "Pre-evolution" signifies that inspections are required prior to equipment use in the waste handling process. ~~(~~An evolution is considered to be the process that begins with~~from~~ the receipt of a cask into the RH Bay through canister emplacement in the underground.~~)~~ ~~For an area, preoperational inspection includes: area is clean and free of obstructions (for emergency equipment); adequate aisle space; emergency and communications equipment is readily available, properly located and sign posted, visible, and operational. For equipment, this includes: checking fluid levels, pressures, valve and switch positions, battery charge levels, pressures, general cleanliness, and that functional components and emergency equipment are present and operational. When the equipment is not in use, no inspections are required.~~

14. Draft Permit Attachment E, Table E-1a (Continued), *RH TRU Mixed Waste Inspection Schedule/Procedures*, footnote d (pg. 27)

    [d] When equipment needs to be inspected while handling waste (i.e., during waste unloading or transfer operations), general cleanliness and functional components ~~will be~~are inspected to detect any problem that may harm human health or the environment. The inspection ~~will verify~~verifies that emergency equipment is present.

15. Draft Permit Figures

    Some figures have changed with the submittal of recent Permit modifications. For example:

    - Figures G-1 and G-6 do not represent the figures in the current Permit. These figures were updated in the Class 1 Permit Modification Notification (PMN) submitted on October 5, 2022.
    - Figures D-3 and D-7 do not represent the figures in the current Permit. These figures were updated in the Class 1 PMN submitted on October 5, 2022.

    Please update the figures as needed prior to issuance of the final Permit.

16. Draft Permit Attachment G3, Section G3-3b, *Nature of the TRU Mixed Waste* (pg. 5, line 7)

    "…Acceptance Criteria (**TSDF-WAC**) ~~in Permit Part 2~~ places limits on…"

17. Draft Permit Attachment I, *Compliance Schedule*

    Delete blank page after cover page.

18. Draft Permit Attachment N, Section N-1b, *Objectives of the Volatile Organic Compound Monitoring Plan* (page 7, lines 24-29)

    - The VOCs released from waste containers in disposal rooms will be monitored to that the concentration of VOCs in the air of closed and active rooms in active panels do not exceed the VOC disposal room limits identified in Permit Part 4, Table 4.4.1 ~~or Table 4.4.2, as appropriate~~. Remedial action, as specified in Permit Part 4, Section 4.6.3.3, will be taken if the original sample results are greater than or equal to the action levels in Permit Part 4, Table 4.6.3.2~~ or Table 4.6.3.3, as appropriate~~.

19. Draft Permit Parts 1-8

Please consider removing the periods after the last number in the Part sections (e.g., Part 1, Section 1.3.2.). This becomes awkward and confusing when referring to Permit Parts/Sections in Permit related documents and correspondence.

RESERVATION OF RIGHTS

Permittees are providing these comments and alternative language for permit conditions in the spirit of cooperation and to facilitate good-faith, productive pre-hearing collaborative issue resolution efforts regarding the proposed permit conditions. Permittees intend to work in conjunction with NMED and the other participants, pursuant to 20.4.1.901.A (4) NMAC, in an attempt to resolve these issues and avoid the need for a public hearing on the draft permit. Permittees have requested a public hearing on the draft permit to present factual and technical testimony and legal arguments with respect to the objectionable permit conditions, recognizing that it is the intention of all of the participants to fully resolve all issues through pre-hearing collaborative efforts.

Nonetheless, becausea public hearing on, and a future appeal of, the draft permit may prove necessary, Permittees reserve the right to contest any and all conditions in the draft Permit. For reasons that include, but are not limited to, those set forth in Part 1, and as Permittees are prepared to explain in further detail through the public hearing process, Permittees reserve the right to raise the following legal issues: the conditions discussed in Part 1 comments 1, 2, 3, 4, 5, 6, 7, 11, 13, 16, and 17 fall outside and/or exceed the scope of NMED's regulatory authority under RCRA and HWA; the conditions discussed in Part 1 comments 1 and 13 do not provide procedural safeguards and due process guaranteed by federal and state law; the conditions discussed in Part 1 comments 1, 3, 4, 5, 6, 11, 13, and 16 are more stringent than federal RCRA requirements without complying with procedural requirements under NM Stat. § 74-4-5, and without making the requisite finding that the more stringent requirements are "necessary to protect public health and the environment…." Id. § 74-4-4(A); the conditions discussed in Part 1 comments 1, 3, 4, 5, 6, 11, 13, and 16 are more stringent than those imposed on other persons, or discriminate against the U.S., in a manner inconsistent with RCRA's limited waiver of sovereign immunity and/or the doctrine of intergovernmental immunity; the conditions discussed in Part 1 comments 1, 2, 3, 4, 5, 6, 7, 11, 13, 14, 15, 16, and 17 are arbitrary, capricious, an abuse of discretion, not supported by substantial evidence, or otherwise not in accordance with law; the conditions discussed in Part 1 comments 1, 2, 6, 7, 11, 13, and 17 are inconsistent with (see 42 USC § 6905(a)) and/or preempted by the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 et seq.; the conditions discussed in Part 1 comments 1, 7, and 18 are inconsistent with and/or preempted by the WIPP Land Withdrawal Act, as amended, Pub. L. 102-579, 106 Stat. 4777 (1992); the condition discussed in Part 1 comment 2 is inconsistent with and/or preempted by the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 et seq.; and the conditions discussed in Part 1 comments 2, 6, and 11 purport to regulate activities being performed in jurisdictions outside of New Mexico, and which are the proper jurisdiction of other federal and state regulatory authorities.

Additional issues may arise during the hearing as a result of changes to permit conditions that may be proposed by NMED, issues raised by other parties, or otherwise, and Permittees reserve the right to present additional or different legal arguments as changes and new issues arise during the hearing. Permittees reserve the right to present evidence and legal arguments on all of these issues during the public hearing and post-hearing procedures, to further seek to resolve these issues during and following the hearing, and to make a full administrative record for any appeals that might follow the public hearing. Permittees further reserve the right to take

appeals as provided by law and to seek any other available legal remedies in the event differences cannot be resolved.

CONCLUSION

The Permittees appreciate the opportunity to submit the above comments and look forward to cooperatively discussing the same with NMED personnel at the NMED's earliest convenience. The Permittees request the opportunity to resolve any disagreements regarding the contents of the Draft Permit and to address any ongoing concerns the NMED may have by including non-RCRA requirements in the appropriate agreement, plan or other document. Because the ongoing operation of the WIPP facility within appropriate regulatory parameters and controls is vital to DOE's mission and to the national security, the Permittees have requested a public hearing on the draft permit.