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Part IV

Environmental Protection Agency

40 CFR Parts 191 and 194

**Intent To Evaluate Whether the Waste
Isolation Pilot Plant Continues To
Comply With the Disposal Regulations
and Compliance Criteria; Proposed Rule**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 191 and 194

[FRL -7666-9]

Intent To Evaluate Whether the Waste Isolation Pilot Plant Continues To Comply With the Disposal Regulations and Compliance Criteria

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability; opening of public comment period.

SUMMARY: The Environmental Protection Agency (EPA) intends to evaluate and recertify whether or not the Waste Isolation Pilot Plant (WIPP) continues to comply with EPA's environmental radiation protection standards for the disposal of radioactive waste. Pursuant to the 1992 WIPP Land Withdrawal Act (LWA), as amended, the U.S. Department of Energy ("DOE" or "Department") must submit to EPA documentation of continued compliance with EPA's standards for disposal and other statutory requirements no later than 5 years after the initial receipt of transuranic waste at the WIPP. EPA initially certified that the WIPP met applicable regulatory requirements on May 18, 1998 (63 FR 27354), and the first shipment of waste was received at the WIPP on March 26, 1999.

EPA will determine whether the WIPP will continue to comply with EPA's standards for disposal based on the Compliance Recertification Application (CRA) submitted by the Secretary of Energy. DOE's application was received by the EPA on March 26, 2004, and a copy may be found on EPA's WIPP Web site and in the public dockets (see the **SUPPLEMENTARY INFORMATION & FOR FURTHER INFORMATION CONTACT** sections). The Administrator will make a determination as to the completeness of the application in the near future (approximately 4–6 months) and will notify the Secretary, in writing, when the Agency deems the application "complete." EPA will evaluate the "complete" application in determining whether the WIPP continues to comply with the radiation protection standards for disposal. The Agency requests public comment on all aspects of the DOE's application.

DATES: Comments in response to today's document and on DOE's compliance application must be received by the end of the comment period. The comment period will extend, at a minimum, beyond the time when EPA notifies DOE that the recertification application is complete. The ending date of the public

comment period will be specified in a subsequent **Federal Register** document. Announcements will be published in the **Federal Register** to provide information on the Agency's completeness determination and final recertification decision.

ADDRESSES: Comments may be submitted by mail to: EPA Docket Center (EPA/DC), Air and Radiation Docket, Environmental Protection Agency, EPA West, Mail Code 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Attention Docket ID No. OAR-2004-0025.

Comments may also be submitted electronically, by facsimile, or through hand delivery/courier. Follow the detailed instructions as provided in Unit I.B of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Sharon White, Office of Radiation and Indoor Air, (202) 343-9457. Also, visit our Web site at <http://www.epa.gov/radiation/wipp> or call EPA's toll-free WIPP Information Line, 1-800-331-WIPP.

SUPPLEMENTARY INFORMATION:

I. General Information

A. How Can I Get Copies of This Document and Other Related Information?

1. *Docket.* EPA has established an official public docket for this action under Docket ID No. OAR-2004-0025. The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the Air and Radiation Docket in the EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW, Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Air and Radiation Docket is (202) 566-1742. These documents are also available for review in paper form at the official EPA Air Docket in Washington, DC, Docket No. A-98-49, Category II-B4, and at the following three EPA WIPP informational docket locations in New Mexico: in Carlsbad at the Municipal Library,

hours: Monday–Thursday, 10 a.m.–9 p.m., Friday–Saturday, 10 a.m.–6 p.m., and Sunday, 1 p.m.–5 p.m.; in Albuquerque at the Government Publications Department, Zimmerman Library, University of New Mexico, hours: vary by semester; and in Santa Fe at the New Mexico State Library, hours: Monday–Friday, 9 a.m.–5 p.m. As provided in EPA's regulations at 40 CFR part 2, and in accordance with normal EPA docket procedures, if copies of any docket materials are requested, a reasonable fee may be charged for photocopying.

2. *Electronic Access.* You may access this **Federal Register** document electronically through the EPA Internet under the "Federal Register" listings at <http://www.epa.gov/fedrgstr/>.

An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may use EPA Dockets at <http://www.epa.gov/edocket/> to submit or view public comments, access the index listing of the contents of the official public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through docket facilities identified in Unit I.B. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and

without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

For additional information about EPA's electronic public docket visit EPA Dockets online or see 67 FR 38102, May 31, 2002.

B. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, by facsimile, or through hand delivery/courier. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked "late." Late comments may be considered if time permits.

1. *Electronically.* If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD ROM you submit, and in any cover letter accompanying the disk or CD ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your

comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

i. *EPA Dockets.* Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at <http://www.epa.gov/edocket>, and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, select "Information Sources," "Dockets," and "EPA Dockets." Once in the system, select "search," and then key in Docket ID No. OAR-2004-0025. The system is an "anonymous access" system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

ii. *E-mail.* Comments may be sent by electronic mail (e-mail) to *a-and-r-docket@epa.gov*, Attention Docket ID No. OAR-2004-0025. In contrast to EPA's electronic public docket, EPA's e-mail system is not an "anonymous access" system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

2. *By Mail.* Send your comments to: EPA Docket Center (EPA/DC), Air and Radiation Docket, Environmental Protection Agency, EPA West, Mail Code 6102T, 1200 Pennsylvania Avenue, NW., Washington, DC 20460. Attention Docket ID No. OAR-2004-0025.

3. *By Hand Delivery or Courier.* Deliver your comments to: Air and Radiation Docket, EPA Docket Center, (EPA/DC) EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC, Attention Docket ID No. OAR-2004-0025. Such deliveries are only accepted during the Docket's normal hours of operation as identified in Unit I.A.1.

4. *By Facsimile.* Fax your comments to: (202) 566-1741, Attention Docket ID No. OAR-2004-0025.

C. What Should I Consider as I Prepare My Comments for EPA?

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.

2. Describe any assumptions that you used.

3. Provide any technical information and/or data you used that support your views.

4. If you estimate potential burden or costs, explain how you arrived at your estimate.

5. Provide specific examples to illustrate your concerns.

6. Offer alternatives.

7. Make sure to submit your comments by the comment period deadline identified.

8. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

II. Background

The Waste Isolation Pilot Plant (WIPP) was authorized in 1980, under section 213 of the DOE National Security and Military Applications of Nuclear Energy Authorization Act of 1980 (Pub L. 96-164, 93 Stat. 1259, 1265), "for the express purpose of providing a research and development facility to demonstrate the safe disposal of radioactive wastes resulting from the defense activities and programs of the United States." The WIPP is a disposal system for transuranic (TRU) radioactive waste. Developed by DOE, the WIPP is located near Carlsbad in southeastern New Mexico. TRU waste is emplaced 2,150 feet underground in an ancient layer of salt that will eventually "creep" and encapsulate the waste containers. The WIPP has a total capacity of 6.2 million cubic feet of TRU waste.

The 1992 WIPP Land Withdrawal Act (LWA; Public Law 102-579)¹ limits radioactive waste disposal in the WIPP to TRU radioactive wastes generated by defense-related activities. TRU waste is defined as waste containing more than 100 nano-curies per gram of alpha-emitting radioactive isotopes, with half-lives greater than twenty years and atomic numbers greater than 92. The Act further stipulates that radioactive waste shall not be TRU waste if such waste also meets the definition of high-level radioactive waste, has been specifically exempted from regulation with the concurrence of the Administrator, or has been approved for an alternate method of disposal by the Nuclear Regulatory Commission. The TRU radioactive waste proposed for

¹ The 1992 WIPP Land Withdrawal Act was amended by the "Waste Isolation Pilot Plant Land Withdrawal Act Amendments," which were part of the National Defense Authorization Act for Fiscal Year 1997.

disposal in the WIPP consists of materials such as rags, equipment, tools, protective gear, and sludges that have become contaminated during atomic energy defense activities. The radioactive component of TRU waste consists of man-made elements created during the process of nuclear fission, chiefly isotopes of plutonium. Some TRU waste is contaminated with hazardous wastes regulated under the Resource Conservation and Recovery Act (RCRA; 42 U.S.C. 6901–6992k). The waste proposed for disposal at WIPP derives from Federal facilities across the United States, including locations in Colorado, Idaho, New Mexico, Nevada, Ohio, South Carolina, Tennessee, and Washington.

The WIPP must meet EPA's generic disposal standards at 40 CFR part 191, subparts B and C, for high-level and TRU radioactive waste. These standards limit releases of radioactive materials from disposal systems for radioactive waste, and require implementation of measures to provide confidence for compliance with the radiation release limits. Additionally, the regulations limit radiation doses to members of the public, and protect ground water resources by establishing maximum concentrations for radionuclides in ground water. To determine whether the WIPP performs well enough to meet these disposal standards, EPA issued the WIPP Compliance Criteria (40 CFR part 194) in 1997. The Compliance Criteria interpret and implement the disposal standards specifically for the WIPP site. They describe what information DOE must provide and how EPA evaluates the WIPP's performance and provides ongoing independent oversight. Thus, EPA implemented its environmental radiation protection standards, 40 CFR part 191, by applying the WIPP Compliance Criteria, 40 CFR part 194, to the disposal of TRU radioactive waste at the WIPP. For more information about 40 CFR part 191, refer to **Federal Register** notices published in 1985 (50 FR 38066–38089, September 19, 1985) and 1993 (58 FR 66398–66416, December 20, 1993). For more information about 40 CFR part 194, refer to **Federal Register** notices published in 1996 (61 FR 5224–5245, February 9, 1996) and 1995 (60 FR 5766–5791, January 30, 1995).

Using the process outlined in the WIPP Compliance Criteria, EPA determined on May 18, 1998 (63 FR 27354), that DOE had demonstrated that the WIPP complied with EPA's radioactive waste disposal regulations at subparts B and C of 40 CFR part 191. EPA's certification determination permitted the WIPP to begin accepting

transuranic waste for disposal, provided that other applicable conditions and environmental regulations were met.

Since the 1998 certification decision, EPA has conducted ongoing independent technical review and inspections of all WIPP activities related to compliance with the EPA's disposal regulations. The initial certification decision identified the starting (baseline) conditions for the WIPP site and established the waste and facility characteristics necessary to ensure proper disposal in accordance with the regulations. At that time, EPA and DOE understood that future information and knowledge gained from the actual operations of the WIPP would result in changes to the best practices and procedures for the facility.

In recognition of this, section 8(f) of the amended WIPP LWA requires EPA to evaluate all changes in conditions or activities at WIPP every five years to determine if WIPP continues to comply with EPA's disposal regulations for the facility. This determination is not subject to standard rulemaking procedures or judicial review, as stated in the aforementioned section of the WIPP LWA. The first recertification process beginning now will include a review of all of the changes made at the WIPP facility since the original 1998 EPA certification.

Recertification is not a reconsideration of the decision to open WIPP, but a process to reaffirm that the WIPP meets all requirements of the disposal regulations. The recertification process will not be used to approve any new significant changes proposed by DOE; any such proposals will be addressed separately by EPA. Recertification will ensure that the WIPP is operated using the most accurate and up-to-date information available and provides documentation requiring DOE to operate to these standards.

EPA received DOE's Compliance Recertification Application (CRA) on March 26, 2004. The Agency will review DOE's recertification application to ensure that the WIPP will continue to safely contain TRU radioactive waste. If EPA approves the application, it will set the parameters for how WIPP will be operated by DOE over the following five years. This approved application will then serve as the baseline for the next recertification in 2009.

With today's notice, the Agency solicits public comment period on DOE's documentation of whether the WIPP facility continues to comply with the disposal regulations. A copy of the application is available for inspection on EPA's WIPP Web site ([http://](http://www.epa.gov/radiation/wipp)

www.epa.gov/radiation/wipp) and in the public dockets described in the **SUPPLEMENTARY INFORMATION** section.

Other background information documents related to the Agency's recertification activities also available in our public dockets. EPA will evaluate the complete application in determining whether the WIPP continues to comply with the radiation protection standards for disposal. In addition, EPA will consider public comment and other information relevant to WIPP's compliance. The Agency is most interested in public comment on any issues where changes have occurred that may potentially impact the WIPP's ability to remain in compliance with the requirements outlined in EPA's disposal regulations, as well as any areas where the public believes that changes have occurred and have not been identified by DOE.

The first step in the recertification process is a "completeness" determination. EPA will make this completeness determination in the near future as a preliminary step in its more extensive technical review of the application. This determination will be made using a number of the Agency's WIPP-specific guidances; most notably, the "Compliance Application Guidance" (CAG; EPA Pub. 402-R-95-014) and "Guidance to the U.S. Department of Energy on Preparation for Recertification of the Waste Isolation Pilot Plant with 40 CFR parts 191 and 194" (Docket A-98-49, Item II-B3-14; December 12, 2000). Both guidance documents include guidelines regarding: (1) Content of certification/recertification applications; (2) documentation and format requirements; (3) time frame and evaluation process; and (4) change reporting and modification. The Agency developed these guidance documents to assist DOE with the preparation of any compliance application for the WIPP. They are also intended to assist in EPA's review of any application for completeness and to enhance the readability and accessibility of the application for EPA and public scrutiny. It is EPA's intent that these guidance documents will give DOE and the public a general understanding of the information that is expected to be included in a complete application of compliance. The EPA may request additional information as necessary from DOE to ensure the completeness of the CRA.

Once the recertification application is deemed complete, EPA will provide DOE with written notification of its completeness determination and publish a **Federal Register** notice

announcing this determination as well. All correspondence between EPA and DOE regarding the completeness of the CRA will be placed in the public docket.

EPA will make a final decision recertifying whether the WIPP facility continues to meet the disposal

regulations after each of the aforementioned steps (technical analysis of the application, issuing a notice of the CRA's completeness in the **Federal Register**, and analyzing public comment) have been completed. As required by the WIPP LWA, EPA will make a final recertification decision

within six months of issuing its completeness determination.

Dated: May 19, 2004.

Michael O. Leavitt,
Administrator.

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