

**A New Concept: Use of Negotiations in the Hazardous Waste
Facility Permitting Process in New Mexico**

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ABSTRACT

This paper describes a unique negotiation process leading to authorization of the U.S. Department of Energy (DOE) to manage and dispose remote-handled (RH) transuranic (TRU) mixed wastes at the Waste Isolation Pilot Plant (WIPP). The negotiation process involved multiple entities and individuals brought together under authority of the New Mexico Environment Department (NMED) to discuss and resolve technical and facility operational issues flowing from an NMED-issued hazardous waste facility Draft Permit. The novel negotiation process resulted in numerous substantive changes to the Draft Permit, which were ultimately memorialized in a “Draft Permit as Changed.” This paper discusses various aspects of the negotiation process, including events leading to the negotiations, regulatory basis for the negotiations, negotiation participants, and benefits of the process.

INTRODUCTION

The WIPP facility, located near Carlsbad, New Mexico, is the nation’s first underground repository for the disposal of nuclear wastes. The facility is owned by the U.S. Department of Energy (DOE) and is co-operated by Washington TRU Solutions, LLC (WTS). Both entities are “Permittees” under the WIPP hazardous waste facility permit. The waste received at the WIPP is classified as “mixed” because it contains both radioactive material, which is not subject to regulation by the NMED, and hazardous waste, which is subject to NMED’s jurisdiction, as authorized through the Resource Conservation and Recovery Act (RCRA) [1] and the New Mexico Hazardous Waste Act. [2] WIPP is required by federal law [1, 3] to maintain a hazardous waste facility permit. The WIPP hazardous waste facility permit is issued by the state of New Mexico and governs the management, storage and disposal of mixed TRU wastes.

The state first issued the WIPP hazardous waste facility permit in October 1999. The permit authorized the DOE to dispose of contact-handled (CH) TRU mixed waste, which, although radioactive, can be safely managed through direct contact. The initial permit contained a provision prohibiting the disposal of RH TRU mixed wastes at WIPP, pending NMED’s approval of DOE’s RH TRU mixed waste characterization scheme. RH TRU waste, as opposed to CH TRU waste, requires enhanced shielding and implementation of robotic handling procedures because of its radioactive content. The WIPP permit has been modified numerous times since it was issued in 1999, with the RH modification being the most significant.

In 2002, DOE and WTS began the process to modify the WIPP permit to allow disposal of RH TRU mixed waste and to change the amount of pre-disposal testing, i.e. waste characterization, required for TRU mixed waste disposed at the facility. NMED issued a Draft Permit in November 2005. A number of individuals and groups opposed the changes in the Draft Permit. In an effort to resolve the issues, NMED convened negotiations in March 2006. The negotiations concluded in May 2006. Negotiations resulted in numerous clarifications and changes to the Draft Permit, which were subject to NMED's review and approval. Revisions to the Draft Permit accommodate stakeholder concerns and set forth modified or new conditions to address changes desired by the Permittees. The result of the negotiations was a "Draft Permit as Changed," which contained the changes agreed upon during the negotiation process.

After the successful negotiations, public hearings convened on May 31, 2006 and concluded on June 9, 2006. The public hearings were conducted by a Hearing Officer, who issued his report on September 13, 2006. The report recommended that the NMED Secretary issue the negotiated "Draft Permit as Changed." On October 16, 2006, the NMED Secretary approved the modified permit. The permit modification became effective on November 17, 2006. On November 13, 2006, a Notice of Appeal was filed by one entity that participated in the negotiations. The fact that a single entity appealed, although unfortunate, is encouraging, considering that numerous other entities could have joined in the appeal had their issues not been successfully negotiated during the proceedings discussed herein.

THE NMED PERMITTING & NEGOTIATION PROCEDURES

The New Mexico Hazardous Waste Management Regulations [4] establish procedures for obtaining a hazardous waste facility permit and subsequent modifications. The regulations mirror the EPA hazardous waste regulations, which, for the most part, have been adopted by the state of New Mexico. Permit procedures specific to New Mexico are set forth at 20 NMAC 4.1.901. Key elements of the permit procedures include: (1) permit application submittal; (2) notice to the public of the application; (3) NMED's review of the application and requests to the permittees for clarifications or additional information, i.e., the Notice of Deficiency (NOD) process; (4) NMED's issuance of a draft permit that contains NMED's proposed conditions; (5) public comment on the draft permit by the applicant and the public; (6) a public hearing with the applicant presenting testimony supporting the draft permit with changes proposed by the applicant; (7) cross examination of the applicant; (8) presentation of technical witnesses by interested parties; (9) cross examination of witnesses; (10) NMED's presentation of its position with cross examination by interested individuals; and (11) closing statements by all parties.

As part of the permit process, NMED is required to hold a hearing if a request is made. The rules also allow NMED to determine, on its own, that certain permits have such "substantial public interest" that NMED will order a hearing. Depending on the nature of the permit application, interested parties can involve hundreds of concerned citizens and numerous interest groups. The hearing process usually narrows the interested parties substantially to the most active parties who provide technical testimony through their own witnesses, and to parties who actively participate in cross examination, with or without their own technical witnesses. Generally, the hearing officer provides most consideration to the technical testimony provided by witnesses during the hearing. Public comments are considered but do not carry as much weight as technical comments, and they are sometimes used to cross-examine or challenge the position of the applicant, NMED or an interested party.

At the completion of the hearing, a hearing officer issues a recommended decision and the NMED Secretary issues the final permit, which typically follows, to a large extent, the recommendations of the hearing officer.

Resolution of Issues giving Rise to Hearing Requests

The New Mexico Hazardous Waste Management Regulations have long contained a provision that allows for resolution of issues that prompted requests for hearings. The regulation contemplates that attempts to resolve the issues giving rise to opposition to the draft permit will occur after a draft permit is issued but before a hearing is conducted. The procedural regulation states:

If the Secretary issues a Draft Permit, and a timely written notice of opposition to the Draft Permit and a request for public hearing is received, the Department, acting in conjunction with the applicant, will respond to the request in an attempt to resolve the issues giving rise to the opposition. If such issues are resolved to the satisfaction of the opponent, the opponent may withdraw the request for a public hearing. 20 NMAC 4.1.901.A(4).

The above regulatory provision is mandatory in requiring that NMED and the applicant, in a coordinated manner, attempt to resolve issues raised by the party requesting a hearing. However, the provisions of 20.4.1.901.A(4) do not mandate that “negotiations” be initiated in response to a hearing request. In fact, the language is broad enough that it could be interpreted to mean that NMED and the applicant may address the opponent’s issues through a variety of means, including informal verbal discussions, written correspondence, or responses to comments. It is likely that, typically, NMED and permit applicants viewed the provision as requiring less formal attempts to resolve issues, rather than negotiation sessions. Implementation of the provision through formal negotiations is a rather unique interpretation but very appropriate given the language of the provision and the extensive benefits of the process.

The first negotiation under this provision was held in early 2005. The negotiations involved a hazardous waste permit required for the clean up of the Fort Wingate Army Depot, including the storage and disposal of military explosives. In the Fort Wingate matter, all parties had reached a negotiated agreement and no hearing was held. Early in the negotiation process for the WIPP permit, the NMED expressed its opinion that a public hearing would probably take place regardless of the amount of progress made in the negotiations. Thus, from the beginning, it appeared the WIPP negotiation process would be different and would be breaking new ground.

In view of its historical use, NMED has not established formal protocols or guidance for implementing a negotiation process under the provisions of 20.4.1.901.A(4). The processes employed in the WIPP negotiation proceedings, which are discussed below, will prove useful to NMED in establishing protocols and guidance for formal implementation of 20.4.1.901.A(4).

REGULATORY HISTORY AND ISSUANCE OF THE DRAFT PERMIT

The regulatory history leading to issuance of the RH permit modification is lengthy, with key events occurring from the time of initial permit issuance in October 1999 through issuance of the final permit modification in October 2006. The NMED permitting process allows for varying levels of input and participation by individuals and entities other than the Permittees and NMED. On a general level, individuals and entities who are interested in WIPP and the WIPP permit are referred to as “stakeholders.” The term “stakeholders” is often used to refer collectively to individuals and entities opposing the permit and permit modifications. Stakeholders and other members of the public are given the opportunity to submit comments on permit modification requests and on draft permits. In the context of the WIPP permit negotiations and hearing, the term “parties” was used to refer both to individuals and entities who participated in the negotiations and to those who formally participated in the public hearing. For purposes of public comment and the negotiations, “parties” refers to “participants.” In the context of the hearing, “parties” refers to individuals and entities who submitted

Notices of Intent to Present Technical Testimony or who otherwise satisfied applicable requirements to gain "party" status during the public hearing.

Until the time negotiations were well underway, many key stakeholders unrelentingly argued against issuance of the RH permit modification, raising numerous questions and concerns. Also, prior to NMED's issuance of the Draft Permit in November 2005, it too had questioned and resisted many methods proposed by the Permittees for characterizing RH TRU waste. As a result, NMED issued various Notices of Deficiency (NODs), questioning major aspects of the Permittees' proposals to modify the permit to allow disposal of RH TRU mixed waste at WIPP. Table I below lists key dates and events in the history of the RH permit modification process.

Table I. Major Events in the History of Permitting the WIPP Facility to Manage and Dispose RH TRU Mixed Waste

Date	Event
October 27, 1999	NMED issues first Permit, authorizing management, storage and disposal of CH TRU mixed waste; specifically prohibiting RH TRU mixed waste.
June 28, 2002	RH Permit Modification Request (PMR) submitted.
March 5, 2003	NMED issues a Notice of Deficiency (NOD).
July 24, 2003	NMED responds to the Permittees' questions.
December 1, 2003	Congress passes statute [Section 311/310 (later amended & renumbered)] directing DOE to file a permit modification proposing changes to waste analysis and repository monitoring.
January 9, 2004	Permittees submit a PMR pursuant to Section 311.
December 30, 2004	NMED issues NOD for the Section 311 PMR.
February 28, 2005	NMED grants Permittees' request for an extension of time to respond to the NOD.
March 29, 2005	NMED issues a second NOD for the RH PMR; requesting a consolidated PMR.
April 29, 2005	Permittees submit Consolidated RH/311 PMR.
September 1, 2005	NMED issues a NOD on the consolidated PMR.
September 22, 2005	Permittees respond with additional proposed changes to the consolidated PMR.
November 23, 2005	NMED issues Draft Permit, proposing to authorize DOE to dispose of RH TRU mixed wastes at WIPP.

In March 29, 2005, NMED directed the Permittees to develop an approach that "addresses both CH and RH waste characterization in a unified manner, through a consolidated response and a revised PMR." NMED also stated that the Permittees could propose other changes not previously identified in the prior Section 311 and RH modification requests, including a request for additional storage capacity in certain permitted areas of the facility. In April 2005, the Permittees submitted the revised permit modification request. In the Draft Permit, issued on November 23, 2005, NMED proposed to authorize DOE and WTS to manage and dispose RH TRU mixed wastes at WIPP and proposed to increase storage and

disposal capacity. NMED also proposed to implement TRU waste analysis and WIPP repository monitoring changes mandated by Congress* [5].

Beginning with the NOD issued by NMED in March 2003, NMED raised concerns about the adequacy of Acceptable Knowledge (AK), i.e., information about facility processes that generated the waste or other documentation detailing waste characteristics, the Permittees intended to use for characterization of RH TRU mixed waste. Questions continued through the last NOD issued by NMED on September 1, 2005. By November 23, 2005, the Permittees had satisfactorily addressed NMED's concerns and NMED was now ready to issue a Draft Permit. The Permittees were generally well-pleased with the proposed Draft Permit and had few significant comments.

NMED's issuance of the Draft Permit triggered a public comment process, and, at the end of this period, thirteen parties had requested a hearing. A number of the parties filed detailed comments objecting to, or requesting additional information on, specific parts of the Draft Permit. Some of the parties requesting a hearing only filed short statements of opposition. In addition to the parties requesting a hearing, several hundred other comments were filed. Most of these were short statements of opposition, set forth primarily in the same postcard format. Two organizations requested negotiations, citing 20.4.1.901.A(4) as the basis for their requests.

NMED issued a formal invitation to all parties who had requested a hearing and provided a timely written notice of opposition to the Draft Permit, inviting them to participate in negotiations. The thirteen parties who received the invitation included several individuals located around the country, several interest groups with various levels of sophistication and historical participation, and individuals located throughout New Mexico.

In addition to NMED and the Permittees, other entities that participated in the negotiations were: Southwest Research and Information Center (SRIC); Concerned Citizens for Nuclear Safety (CCNS); Citizens for Alternatives to Radioactive Dumping (CARD); and the New Mexico Attorney General's Office. Individuals also participated by telephone – some throughout the entire proceedings and others only sporadically.

By the time the negotiation sessions began, stakeholders had raised a variety of comments and concerns, which were all open to discussion during the negotiations. Comments varied – from general opposition to the proposed permit modification to specific technical and operational concerns. Major comments are listed below in Table II.

Table II. Major Comments on the Draft Permit issued by NMED on November 23, 2005

GENERAL COMMENT TOPICS	SPECIFIC COMMENTS
Removal of the RH TRU Waste Prohibition	Removal of the RH TRU waste prohibition; adequacy of facility readiness, proposed waste characterization provisions, accident prevention; contingency planning, safety analysis reports for RH TRU waste; and questions about environmental justice.
Waste Characterization	Adequacy of generator sites' acceptable knowledge (AK) data; and adequacy of NMED's resources to support AK Sufficiency Determination (AKSD) review processes.
Waste Confirmation Activities at WIPP	Waste confirmation should only occur at the DOE generator sites and not at the WIPP site; unless the Permittees demonstrate their ability to return prohibited waste items to the generator sites, if found.
Waste Confirmation Processes	Legality of proposed changes (1) from 100% headspace gas analysis of waste containers to visual examination (VE) or radiography to confirm waste; and (2) to confirm 7 percent of each waste shipment.
Storage Capacity Increases	Adequacy of (1) justifications for requested increases in storage capacities and (2) worker safety in areas where storage capacity increases would occur.
Disposal Capacity Increases	The correlation between projected waste shipments and the proposed increases in disposal capacity.
VOC Monitoring Program	Robustness of the proposed VOC monitoring program.
Dispute Resolution Provisions	NMED's reasons for the proposed process; possible audit report changes without public oversight or review; and the adequacy of NMED resources.
Public Access to the WIPP Waste Information System (WWIS)	Public "read-only" access to the WIPP WWIS database.

The comments in Table II were the major discussion areas during the negotiation. The issues raised by the stakeholders fell into seven broad topic areas: (1) waste characterization; (2) RH TRU waste prohibition; (3) waste confirmation activities at WIPP; (4) storage capacity increases; (5) disposal capacity increases; (6) VOC Monitoring; and (7) Dispute Resolution. The goal was to seek resolution of these issues and minimize contested issues during a public hearing; and to encourage those who had requested a hearing to retract their requests, thus streamlining any hearing that might occur. Because the WIPP facility is a first-of-a kind facility that would be permitted to receive a category of waste requiring specialized handling, and many general comments had been filed objecting to the proposed permit, most of the participants realized that a hearing was probably inevitable. Thus, rather than a goal to completely avoid a hearing, the focus became narrowing of issues and gaining consensus on proposed permit changes.

TIMING AND LOCATION OF NEGOTIATION SESSIONS AND PARTICIPANTS

Negotiation sessions convened on March 9 and continued during various periods, up to five days per session, through May 3, 2006. The negotiations took a total of 18 days, including numerous evening sessions. The negotiations culminated in a stipulated Draft Permit, i.e., the "Draft Permit as Changed," with specified exceptions noted by some signatories.

The negotiations took place at the NMED Hazardous Waste Bureau offices in Santa Fe, New Mexico. The team utilized a roundtable with adequate seating for all participants. The meeting room was on the ground floor, with windows that opened and a door for participants to exit for fresh air when needed.

Discussions periodically became quite intense, so many opportunities for fresh air were needed - and routinely taken. Although the proceedings were sometimes grueling, the participants refused to give up on the process and continued until an agreement, resolving almost all concerns, had been reached. Overall, the participants wanted a streamlined hearing process with as few contested issues as possible. Many participants no doubt recalled the initial permit proceeding, which lasted approximately five weeks, having begun in February and ending in late March 1999, including evening public comment periods. Then, at the conclusion of the initial permit hearing, numerous contested issues remained, such that the DOE initiated legal action in an effort to secure relief. The legal action was eventually resolved, with NMED and the DOE agreeing to settle the case, only to end up with another legal challenge by an environmental group that had not been part of the negotiations to settle the case and who believed that NMED had overstepped its regulatory bounds. No one wanted to relive proceedings such as occurred in 1999.

Negotiation team participants included technical experts, legal counsel, regulatory experts, and lay persons. In house counsel participated on behalf of both Permittees. Outside counsel with extensive experience in permitting in the state of New Mexico served as lead negotiator on behalf of the Permittees. Various other experts, including facility engineers and regulatory specialists, were present at the negotiation table. Other regulatory and subject matter experts were on-call at the facility to provide additional information, on an as-needed basis. Representatives of NMED included the Bureau Chief who served as the facilitator, permit writers, and a representative from the NMED Office of General Counsel. Executive directors of three environmental groups personally participated; two of which were represented by joint counsel. Also, at least five other parties actively participated in the first several sessions by telephone. Representative of the New Mexico Attorney General's Office also participated, initially in person and later via conference telephone. Ultimate decision-makers regarding major negotiated changes were the Permittees' senior managers, who were available via telephone throughout the negotiations to approve changes as needed.

In its invitation to the negotiations, NMED made clear that the parties could attend in person or could dial in to a speakerphone at the live negotiation location.

GROUND RULES

When the negotiations convened on March 9, 2006, the first order of business was to confirm that each participant would negotiate in good faith with an eye toward resolving and narrowing issues. If participants could not be relied upon to articulate their concerns in good faith and be trusted to seek consensus, attempts to negotiate would prove futile. Fortunately, the participants confirmed, either directly or indirectly, their willingness to negotiate in good faith. At this juncture, the participants opposing removal of the RH prohibition could not guarantee that they would ultimately be able to move from a posture of generally opposing RH TRU waste disposal at WIPP. However, their apparent willingness to be open-minded was enough to proceed.

At the start of the negotiation sessions, NMED established a series of ground rules with the understanding that, depending on the success of the initial stages of the process, adjustments might have to be made. In particular, NMED indicated in the initial session that the negotiations would not be confidential, but that statements made during the negotiations could not be used against the parties at the hearing or during an appeal. This is similar to a Rule of Evidence for court proceedings that does not allow statements in settlement negotiations to be used in court. This arrangement allowed parties that represented environmental interest groups to have the ability to communicate to their members and allow all parties to provide information to the press, particularly for trade publications.

The NMED Hazardous Waste Bureau Chief acted as the leader and manager of the negotiations. NMED indicated that it was prepared to and would provide its opinion and proposed testimony on

issues as they arose. NMED stated that it would identify issues it believed were beyond the jurisdiction of the hearing, but would facilitate discussions and efforts to address such issues through side negotiations or other arrangements. In fact, as the negotiations progressed, it became apparent that many participants were concerned about transportation of RH TRU waste on the highways of New Mexico. In an attempt to take this issue off the table so specific permit issues could be addressed, some parties agreed to execute a side agreement** on transportation-related issues. In this agreement, the interested parties and the Permittees agreed to meet after the negotiations concluded to seek good faith resolution of the concerns. There was no guarantee, though, that the Permittees would be able to grant any of the concessions requested by the proponents – but the Permittees did agree to consider the requests, in good-faith. The parties agreed to a series of meetings or conference calls to discuss the transportation-related issues. The Permittees also agreed to make their general managers available to render final decisions concerning any proposed actions.

MANAGEMENT OF ISSUES

Comments on the Draft Permit reflected that some parties were not interested in particular areas, while other parties had substantial interest in these areas. In addition, it became clear, at the first session, that the effort involved in negotiating conceptual agreements and then agreeing on exact permit language could take substantial amounts of time, particularly considering the need to develop flow diagrams, definitions and descriptions of engineering processes, and further detail on proposed changes.

In order to revise permit text and permit diagrams, the parties projected permit language on a screen visible to all parties and jointly drafted acceptable language. Suggestions from all participants were given respectful consideration. Revised language was compiled for incorporation into a final agreement the parties expected to execute.

The NMED Bureau Chief proposed to break negotiations into agreed upon issues, such as waste characterization, waste confirmation, VOC monitoring, storage capacity increases and disposal capacity increases. His goal was to reach *general conceptual agreements* on issues or sub-issues within those areas, which would be characterized as “a” (*lower level*) agreements. Upon reaching general conceptual agreements, he would then try to transform these into “A” (*higher level*) agreements, in which the parties *agree on specific language* that addresses issues and/or sub-issues – resulting in final decisions by the parties.

General issue categories included: (1) waste characterization; (2) RH waste prohibition; (3) waste confirmation activities at WIPP; (4) storage capacity increases; (5) disposal capacity increases; (6) VOC Monitoring; and (7) Dispute Resolution. The parties first sought to reach conceptual agreement on these general areas. Then, in order to develop an approach to identify and work on specific issues, the parties agreed to use the detailed written comments that had been filed by parties during the comment period following issuance of the Draft Permit. These written comments expressed opposition towards certain parts of the permit and provided some reasons for the positions taken. The parties agreed to use these as a starting point to begin a comprehensive process of identifying and addressing specific issues. The most controversial issues, such as those specifically related to RH TRU mixed waste, were deferred. Other issues, including testing required for continued waste shipments, were identified early as areas for potential agreement. In identifying issues for early resolution, as opposed to RH-related issues, the number of interested parties who expressed substantial interest in this part of the negotiations was reduced to a handful.

At the end of the second day of negotiations, a written agreement was reached indicating a consensus by several of the interested parties, the applicant and NMED on conceptual ideas and a few associated language changes. Regarding procedural aspects of the Draft Permit, the parties had reached agreement that: (1) issues resolved would be binding on signatories during the comment period, at hearing, and in

any appeals; (2) parties reserved their rights to object, oppose, or propose Draft Permit language on issues not agreed upon; (3) the previously scheduled hearing would be postponed, pending approval by the hearing officer; and (4) the parties would issue a joint stipulation confirming agreement on waste characterization and waste confirmation. With regard to substantive changes, the Permittees had agreed to withdraw their comments requesting authorization to perform confirmation activities at the WIPP facility, which was a major concession demonstrating good faith on the part of the Permittees and showing a willingness to compromise and resolve issues. Also, the parties reached an agreement on the approach to RH TRU waste characterization and confirmation. This too proved to be a major concession on the part of the parties, some of whom had objected outright to the proposed characterization schemes. Although, by the end of the second day, the parties had agreed to major changes, many specific Draft Permit terms and conditions had to be crafted and agreed to by all parties. This first preliminary agreement stated that “The parties recognize that additional discussion on language changes, attachments, and figures on the waste characterization and waste confirmation language is anticipated.”

In the following sessions, the parties engaged in an approach of questioning by interested parties and responses by the applicants, and, at times, NMED. This process provided an open dialogue on issues of concern, provided the applicants and NMED the opportunity to research issues, and provide responses within short turnaround times. As a result, interested parties were afforded opportunities to review the Permittees' or NMED's responses and provide follow up requests for information, detail, explanation or similar questions. This process of identifying concerns, researching and providing information addressing the concerns, then engaging in dialogue, was useful to the parties in addressing issues involving pre-disposal testing requirements. In addition, it provided a flexibility that would not have been provided during the hearing process, which involves formal cross examination and response, along with objections that certain information is either outside the scope of the hearing, unavailable, or is not within the witnesses' expertise.

It appeared the parties realized the information exchange method provided more flexibility by allowing for investigation and response, allowing for the information to be provided in a broader context than the hearing might provide and allowing for follow up not typically available in the hearing process. In order to engage in this process, the applicant produced the persons who were most knowledgeable about the processes that were the subject of the negotiations. These persons had experience under the effective WIPP permit and were able to indicate precisely how proposed changes would likely be implemented. Based on these back and forth discussions, the parties were able to identify concerns, address them in ways that recognized and accomplished the applicants' goals, address the concerns of interested parties, and fell within the range of acceptable resolutions NMED believed it could permit and enforce under its regulatory regime.

Resolution of Waste Characterization Issues

At the end of approximately ten days of negotiations, the key parties had made substantial progress on pre-disposal testing provisions. The agreed upon changes were documented in a preliminary written agreement that referenced actual Draft Permit text that had been subject to detailed consideration and review by the parties. Because many of the thirteen parties did not actively participate in the discussions on waste characterization and waste testing, they did not sign-off on the preliminary agreement. Nonetheless, the negotiations between the major interested parties concluded with what constituted a resolution of the waste testing issues.

In view of the success in resolving waste testing issues, the parties agreed to continue the negotiations to attempt to make additional progress on other issues, including the RH TRU waste issue. All parties that opposed the Draft Permit and requested a hearing also opposed the handling of RH TRU waste at WIPP.

Several of them provided detailed reasoning, and others provided requests for more information. Several others provided statements of blanket opposition without any support for their positions.

Negotiations on RH TRU Mixed Waste

Given the wide range of positions on RH TRU waste, the structure of the negotiations, although building upon the method used for the waste testing issues, was much more difficult to maintain. More parties were involved in the RH TRU waste discussions and raised many issues outside NMED's jurisdiction. The same general process was used - asking parties to state the basis for their opposition, allowing the applicant and NMED to provide responses, and allowing for research and additional information. In addition, NMED attempted to have the parties review and address Draft Permit language regarding the RH TRU waste, even though there was no broad agreement that if all the changes were accepted, the general opposition to RH TRU waste would be resolved. This process resulted in days of negotiations over detailed engineering issues, and specific issues regarding emergency response, employee training, and contingency planning. It also involved discussion and education on NMED's position on RH TRU waste, including its position on the extent of its jurisdiction over the processes involving RH TRU wastes.

Because of the wide range of interest, many questions and responses involved broad policy issues, raised issues of radioactive waste handling, risk, and philosophy. However, within this context, the Bureau Chief attempted to have the parties look at specific language and sections of the Draft Permit that might possibly be relevant to issues the parties were addressing. As an example, when the parties discussed concerns regarding transportation, the Bureau Chief indicated that the permit did not govern transportation issues. However, the Bureau Chief and the applicant attempted to provide information on how transportation did occur, points of contact, and other sources of information on transportation issues. In addition, issues that were related to transportation that are governed by the permit, such as on-site storage, parking, and other issues, were brought into the discussion and language on those issues was reviewed and modified, as appropriate.

Also, in an attempt to resolve issues, several negotiation participants requested a tour of surface waste handling areas at the WIPP facility – with an intent to gain a first-hand view of equipment, storage areas, and other aspects of the facility. The tour involved at least three (3) negotiation parties. The tour lasted a full day. Participants asked numerous questions and observed various pieces of equipment and proposed processes for handling RH TRU waste. After the tour, the participants left with a greater understanding of WIPP procedures, processes, and proposed actions.

At the conclusion of extensive discussions on RH TRU waste, numerous changes to the permit language were addressed and agreed to by the parties. In addition, one of the main interested parties agreed to eliminate its opposition to the Permittees' request to dispose of RH TRU waste at WIPP. Two other major parties did not agree to remove the RH prohibition. One environmental group raised questions about “environmental justice” as related to RH TRU waste. The Permittees responded that there were no environmental justice impacts based upon WIPP operations; and there were no such impacts flowing from planned RH TRU waste disposal operations. The Permittees shared several reports and studies supporting their position. However, environmental group representatives were not convinced and they continued their arguments up to and through the hearing.

Resolution of Other Issues

Many other issues were resolved through the negotiations process. After lengthy discussions and exchange of information, the participants agreed to specified increases in storage and disposal capacities, with explicit controls imposed to address stakeholder concerns. In reaching consensus on storage and disposal capacity changes, it was essential that the parties understood the concerns and

needs of the various participants. The Permittees explained in great detail their need for flexibility at the facility, to respond to emergency situations and to have sufficient space for equipment maneuverability. On the other hand, other entities expressed concern that the requested capacity increases appeared to constitute greater increases than needed to accommodate existing and projected waste inventories. Specifically, they were concerned that the Permittees would have more waste at the facility than could be handled, thus creating safety issues. After needs and concerns had been adequately identified, the parties could then craft appropriate agreements. For example, the parties agreed to implement “surge” storage capacities to address emergency storage needs, with a commitment to notify the public when such storage is activated.

Other issues resolved by the parties included public access to the WIPP Waste Information System (WWIS) and issues surrounding the dispute resolution process.

IMPACT OF THE NEGOTIATIONS ON THE PUBLIC HEARING

Prior to the hearing, a stipulation agreement and proposed “Draft Permit as Changed” were filed with the hearing officer, setting forth the specific issues and revised language on which the parties had reached agreement. Since the agreement did not involve all the parties requesting a hearing on all issues, the stipulation provided the public and all participants in the hearing notification as to what permit language the applicant, the NMED and specific parties were prepared to support at the hearing. It allowed opportunities for the parties to comment on the Draft Permit as Changed. The negotiation process resulted in a substantially shorter hearing than was originally anticipated, with fewer and more focused issues being raised.

The environmental group that raised questions during the negotiations about environmental justice raised these same questions during the hearing. This issue consumed an extensive amount of time during the hearing. Although the Permittees provided a substantial amount of information on this issue, resolution was not possible.

CONCLUSION

The NMED hearing procedures support a new tool - negotiation sessions - which NMED can use to narrow the focus and eliminate issues for hearings.

A negotiation process similar to the one used in the WIPP Permit proceedings provides a benefit that is not readily present in a hearing by allowing for an exchange of questions, information, and revisions that address stakeholder concerns. Although the parties considered the possibility of using a third party facilitator, everyone recognized the usefulness of having NMED present and participating in the sessions in order to set forth its position on various issues. As the agency reviewing the proposed permit modification and providing testimony to the hearing officer, knowing the agency’s position is critical to all parties’ ability to evaluate their particular positions. Given the limited history of these negotiations and the lack of a formal process, the method in which the Bureau Chief controlled and directed the negotiations was beneficial because it placed a person in control who had the ability to convene the parties, to manage information flow, and work to obtain precise agreement on permit language, which is an extremely complex and difficult process to do in a hearing.

It appears the interested parties received benefits from these negotiations in that the exchange of information was more flexible, with the ability to gather information, produce technical experts, and work together on joint language. Many times the parties learned that they had reached conceptual agreement on certain issues but permit language did not appear to reflect the conceptual understanding of all the parties. Thus, the ability to jointly discuss permit language, after having first identified conceptual agreement, provided a benefit that is unavailable in an adversarial hearing process.

One of the difficulties in the historical permit hearing process in New Mexico is the ability to translate conceptual and technical concerns into permit language within the constraints of a hearing. Addressing issues during a hearing often results in a lack of dialogue and an inability of parties to adjust their positions. Thus, historically, hearings have become more of a win or lose situation, rather than a situation where interested parties provide concrete objections and/or questions and the parties agree on language that will address those concerns. A process to resolve concerns before a hearing begins is more amenable to negotiations than a public hearing process.

The use of the negotiation process is likely to continue in NMED permitting. Negotiation provides the potential for parties to work together to narrow issues. They can also reach conceptual agreement and then jointly participate in drafting permit language, such that all parties have the same understanding and interpretation of the language. The process provides substantial benefit. It is likely, and probably necessary, that NMED establish more detailed protocol that will govern these types of negotiations. Having such a protocol in place would allow the parties to have a better understanding of the negotiation procedures, milestones, scheduling, and how the negotiated agreements will be implemented in the hearing.

Primary benefits of the negotiations process included the following: (1) participants were able to express their concerns and exchange information in an informal, yet structured setting, facilitating open dialogue and ultimate understanding of issues and concerns; (2) issues that would otherwise have been debated during a public hearing were substantially eliminated, reducing the length and complexity of the hearing; (3) the likelihood the final permit decision would be appealed, or appealed by several parties, was significantly diminished; (4) participants gathered a greater understanding of the interests and needs of others, which will facilitate future dialogue; and (5) permit conditions were clarified, thereby eliminating potential ambiguities or misinterpretations during permit implementation or enforcement.

REFERENCES

1. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*
2. New Mexico Hazardous Waste Act, N.M. Stat. Ann. § 74-4-1 *et seq.* 1978.
3. WIPP Land Withdrawal Act (LWA), Pub. L. No. 102-579, 106 Stat. 4777-4796 (1992), as amended by Pub. L. No. 104-201, §§ 3181-3191, 110 Stat. 2851-2854 (1996).
4. New Mexico Hazardous Waste Management Regulations, 20 NMAC 4.1 *et seq.*
5. Section 311 of the Energy and Water Development Appropriations Act for Fiscal Year 2004, Pub L. 108-137, § 311 (2004). Congress subsequently passed Section 310 of the Consolidated Appropriations Act, 2005, Pub. L. 108-447, § 310, 117 Stat. 2959 (2004), which is the same as Section 311 except for minor non-substantive word changes. (Both statutory provisions are referred to herein as "Section 311).

FOOTNOTES

* TRU waste analysis and WIPP repository monitoring changes were mandated by Congress in 2004. Section 311 of the Energy and Water Development Appropriations Act, 2004 stated:

(a) The Secretary of Energy is directed to file a permit modification to the Waste Analysis Plan (WAP) and associated provisions contained in the Hazardous Waste Facility Permit for the

Waste Isolation Pilot Plant (WIPP). For purposes of determining compliance of the modifications to the WAP with the hazardous waste analysis requirements of the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), or other applicable laws waste confirmation for all waste received for storage and disposal shall be limited to: (1) confirmation that the waste contains no ignitable, corrosive, or reactive waste through the use of either radiography or visual examination of a statistically representative subpopulation of the waste; and (2) review of the Waste Stream Profile Form to verify that the waste contains no ignitable, corrosive, or reactive waste and that assigned Environmental Protection Agency hazardous waste numbers are allowed for storage and disposal by the WIPP Hazardous Waste Facility Permit. (b) Compliance with the disposal room performance standards of the WAP hereafter shall be demonstrated exclusively by monitoring airborne volatile organic compounds in underground disposal rooms in which waste has been emplaced until panel closure.

In addition to the above, the Congress subsequently passed the Energy and Water Development Appropriations Act, Pub. L. No. 108-447, § 310, 117 Stat. 2959 (2004). This statutory provision contained minor wording changes but reiterated the language of Section 311.

** Key parties to the side agreement were Concerned Citizens for Nuclear safety (CCNS) and the Permittees. Meetings to address concerns were held on two separate occasions. CCNS generated a list of items it wanted the Permittees to consider and discussions continued for months after the hearing.