

Problems with the Shaft Modification Public Process

End-run around public participation

There are quite a few problems with different aspects of the public process for this draft permit modification. The most critical problem is the end-run around the entire public process that is taking place by allowing shaft construction to begin before all public comments have been received and the public process is complete. In fact, construction began before the draft permit modification was even published and is continuing during the comment period.

Even worse, the approximately \$200 million shaft and drift (corridor) construction that is going on right now, is really only needed if WIPP is authorized to expand. Yet the decision on whether such an expansion should go ahead or not won't take place for months. Yet again, construction is continuing even before the draft permit for that decision—the 10-year permit renewal—has been issued.

It makes a mockery of public participation to construct the shaft before all public comments are in and the process (including opportunity for a public hearing) is complete. It indicates that nothing the public could say could be worth changing course. Yet public comment can present information that supports conditions in permits to make those permits better and safer. It provides multiple points of view that can lead to new solutions. Without public comment, how can the needs and concerns of potentially impacted communities be known and addressed?

Lack of exposure information

There is some question on whether or not DOE can seal the very large New Shaft during WIPP Closure. If the shaft cannot be sealed, radionuclides and hazardous gases could seep into the environment from the emplaced waste after closure. Yet, as of May, DOE had not provided an analysis showing how the large shaft (30 feet in diameter) would affect post-closure performance or what DOE would do to ensure that radioactive or toxic materials couldn't reach the environment.

In addition, DOE did not provide information on human and environmental exposure pathways or the potential magnitude and nature of such exposures in the modification request. This information may be required at 40 C.F.R. §270.23(c) and NMED has also agreed that it would make sure that all hazardous waste permit applications include such information. Yet the information is missing in the modification request and is only provided in the permit renewal application, Addendum N1, which is not part of the Record in this New Shaft modification. Combined with the uncertainties on the shaft seals, this leaves the vulnerable populations around WIPP at risk. Even if the information were not required, shouldn't NMED know what effects their permitting activities are having on affected communities? This is exactly the kind of situation in which public comments could be very helpful, even if only to point out that required information is missing. Allowing DOE to sidestep the public process has also allowed these critical studies and analyses to be avoided.

Specific comments about the public documents

Introduction

Federal and state hazardous waste laws, regulations governing WIPP, and NMED Policies require notices and documents be provided to the public. They are the Public Involvement Plan (PIP), the Public Notice (PN), and the Fact Sheet. The Administration Record is also mentioned, which is a listing of all of the documents supporting the permit modification and the draft permit. Critical problems with those documents are below.

The Public Involvement Plan (PIP)

Because of past discrimination, in January of 2017 NMED signed a Resolution Agreement ("Agreement") with EPA. In the WIPP Shaft PIP, DOE says the PIP was created to satisfy public participation requirements of the Resource Conservation and Recovery Act (RCRA), the New Mexico Hazardous Waste Act and the Administrative Code. This statement is incorrect. In reality, the PIPs were first created as part of the Public Participation Policy implementing the Resolution Agreement. In the Agreement NMED said they would address affected communities' needs and concerns, history, demographics and background. Further, NMED agreed it would consult with community leaders and stakeholders to understand those concerns; and they would make sure that all "vital" information available to the public in English is available in translation or interpretation to Low English Proficiency (LEP) Spanish speakers as well.

Unfortunately, PIPs only address demographics and some language and disability accommodation concerns. **All other concerns including high levels of pollution, numerous other nearby polluting facilities, poor health, poverty, etc. are ignored** in PIPs and in permitting in general. Community leaders and stakeholders are mostly not sought out and most "vital" information is not even identified, let alone translated. This lack of attention to major community concerns is the Achilles Heel of all PIPs. That and the fact that no PIP is ever translated into Spanish makes PIPs of little use in actually involving the public. The WIPP Shaft PIP is no exception. No needs and concerns beyond some participation, translation and notification needs were included. No community leaders were sought out; and the PIP says there is only enough money to translate a small amount of information into Spanish—only the Public Notice and the Fact Sheet (which are described below).

The WIPP PIP does describe good notification requirements including informing LEP persons about language access options and informing disabled people how to request accommodation, in every public notice. Unfortunately, though accommodation information for the disabled is in both the Public Notice and the Fact Sheet, neither includes this required information on language access. Also, though TDD and TTY users are given phone numbers to use for English, no Spanish accommodation phone number is provided in the PIP, the Public Notice or the Fact Sheet though NMED has provided this service for deaf Spanish speakers in other permits.

Instead of consulting community stakeholders and leaders, the PIP only reviews data compiled through the EJSCREEN computer program and census data to understand the impacted communities. These analyses did result in acknowledgment that language services were required, but there are multiple

mistakes in copying data on ethnicity and language use from the EJSCREEN data to the PIP itself. The PIP also incorrectly states that there are no local Spanish language newspapers in southern New Mexico when at least two papers have a Spanish section or a Spanish "day."

Finally, the WIPP Shaft PIP does tell the public that they can review and comment on the PIP. However, though NMED has created a process and a form for the public to use when commenting, this information was not included in the WIPP Shaft PIP. Since, as with all PIPs, the WIPP Shaft PIP was not translated into Spanish, it is impossible, for LEP Spanish speakers to understand the PIP or to make any use of this review process.

The Public Notice

As described above, the WIPP Shaft Public Notice (PN) does not include any information on how LEP persons can access language services or even that such services are available despite this being a requirement in the PIP. Disability accommodation information is included, but again, phone access information for deaf Spanish speakers is missing.

The PN does inform the public (including the LEP Spanish speaking public) that copies of the Draft Permit, the Public Notice, the Fact Sheet, the Permit Modification Request (PMR), public comments, an index of the Administrative Record and other information are available on NMED's website. Unfortunately it doesn't say that the Administrative Record itself is also available online, nor does it say which documents are translated into Spanish.

Usually, paper copies of all those documents are available for viewing at NMED's offices and several libraries around the state. Because of the virus emergency, these offices are closed so viewing is impossible. This is a particular problem for the communities around WIPP as online access is poor in the area and the population is less likely to own a computer or to be proficient with online research. NMED has acknowledged this, but though normal channels are blocked for viewing printed materials, the PN informs the public that they will have to pay for any copies requested. Again, this severely limits public access to information and in particular, limits the very communities that will be most affected by the New Shaft.

The Fact Sheet

The Fact Sheet is required to provide comprehensive information for the public about the WIPP Shaft permit modification. Indeed, because it contains almost all of the information accessible to LEP Spanish speakers, it must at least summarize all the "vital" information necessary to participate meaningfully in public process. Unfortunately, this Fact Sheet performs that role poorly. The Fact Sheet is "light" on information throughout. So much information is left out and so much misinformation is included, that LEP persons are at a real disadvantage. Though English speakers can search for the correct information elsewhere, LEP persons cannot. The Fact Sheet in no way adequately summarizes the Draft Permit or vital hydrologic and geologic information in the Administrative Record. Thus, in a clear case of discrimination, LEP Spanish speakers do not have access to the same level of vital information that English speakers do and cannot participate meaningfully in the WIPP shaft permit process

DOE is digging the shaft now!

Perhaps the most glaring omission in the Fact Sheet is that there is **no mention at all that DOE was given a temporary "emergency" authorization to start construction on the shaft** on April 24, 2020, seven weeks before the draft permit modification was even published. Because information about the Temporary Authorization is omitted, there's also no justification provided for why there was such an emergency need for the New Shaft, that the entire public process had to be short circuited and required studies were not done before digging began.

Justification for the modification

Though the Fact Sheet doesn't give a justification for the Temporary Authorization, it does provide a false justification for the Shaft modification itself and says that the need for the modification "focuses on increased control of ventilation airflow in the underground...and the ability to concurrently perform underground operations." Everyone involved with the WIPP shaft and the modification at DOE and NMED knows that the New Filter Building will come online about two years before the New Shaft would become operational. **The New Filter Building will provide more than 100% of the airflow** that was available underground before the drum explosion (2014) contaminated the ventilation system. So what's the rush and the "emergency" to get the shaft built so fast?

Most past and current commenters claim that the shaft is only needed for the WIPP expansion that DOE is proposing in the future 10-year renewal of the existing permit. The Fact Sheet specifically denies this and continues to claim that the New Shaft is "important for current underground operations and worker safety." It goes on to admit that the New Shaft would be useful for future disposal units but says that WIPP would have to apply for another permit modification of the existing permit and keep to the existing permit capacity limits for waste emplacement.

This is a complex, unlawful scheme to sidestep the required public process and completely disingenuous as NMED is clearly aware that DOE has already applied to expand the WIPP footprint and remove any ending date for operations in the 10-year permit renewal that is only some months away.

Geology and Hydrology at WIPP

Another serious omission is that there is no information at all about hydrology at WIPP and geological information is also almost non-existent. We learn that WIPP is "in a remote desert area¹ where there exists a 2,000-foot-thick salt bed: and that it is "mined within a bedded salt formation." That's it—though the city of Carlsbad might question the "remote" description since they're only 32 miles away. (This is the same type of language the Manhattan Engineering District used to describe the area around the Trinity Site where the first atomic bomb was tested on July 16, 1945—despite the fact that there were tens of thousands of people living within a 50-mile radius.)

In fact, the hydrology and geology in the WIPP area are extremely complex and include one of the largest *karst* areas in the world. Karst geology can be filled with underground caverns and even

underground "rivers." This and other complex geologic features are important when deciding if DOE will be able to seal the new Shaft after closure. This shaft is significantly larger than previous WIPP shafts and DOE has not provided documentation that clearly shows this large diameter shaft can be sealed. If it cannot, nearby communities could be subjected to radioactive and hazardous exposures from radionuclides and hazardous gases seeping out of the shaft.

Exposure & effects information

DOE is required at 40 C.F.R. §270.23(c) to provide information on hazardous exposure pathways for humans or the environment and "on the potential magnitude and nature of such exposures." This information should be in the permit modification request, but it is not. Nevertheless, NMED has determined that the application is both technically and administratively complete and has issued a draft permit for public review and comment with an opportunity to request a public hearing. Such information would include potential post-closure exposures from the New Shaft which would require documentation on whether or not the new, large shaft design can be sealed.

Since this information is required by the regulations, why has DOE been allowed not only to skip this step in the application, but actually to start constructing the shaft before understanding how the surrounding vulnerable population could be affected by the project? The Fact Sheet begins by stating that the Permit must ensure that WIPP's "operations are managed in a manner protective of human health and the environment." But how is it possible to know if human health and the environment are being protected if you have no idea what the effects from the project will be? Needless to say, it is also impossible to know if there will be any disparate effects from the project on nearby Communities of Color.

Information for LEP Spanish speakers

As mentioned above, NMED has agreed to provide the same amount of "vital" information for the LEP Spanish speaking public as is available for the English speaking public. That would include translating or summarizing and translating, at a minimum, the Public Notice, the Draft Permit, the Fact Sheet, all geological and hydrological information about the area, any other studies about the project including health, demographic and disparate impact studies; and information on how to obtain language services. Only the Public Notice and the Fact Sheet have been translated and the Fact Sheet not only does not summarize the draft permit but hardly has any specific information about the draft permit at all. It is impossible to tell from the Fact Sheet if the draft permit includes adequate conditions to protect human health and the environment.

The description of the types and quantities of waste at WIPP is difficult even for English speakers to understand with heavy references to the regulations and much technical jargon. It is impossible for Spanish speakers to understand because they can't go to the English-only regulations to flesh out the information provided in the Fact Sheet.

Finally, as with the Public Notice—the only other information in Spanish—LEP Spanish speakers are not told how to access translation, interpretation, and other language services, even though information on access to accommodation for disabled people is provided. Information about access to both kinds of

assistance is required by the PIP but language assistance information has again been left out of both the Public Notice and the Fact Sheet—thus continuing NMED's discriminatory practices.

Access to documents

As with the Public Notice, the Fact Sheet provides good information that the Draft Permit, the Public Notice, the Fact Sheet, the PMR, public comments, an index of the Administrative Record, and some other information are all available on NMED's website. However, also as with the Public Notice, the Fact Sheet doesn't tell the public that the Administrative Record itself is also online.

The Fact Sheet also requires the public to pay for printed copies of documents. NMED has acknowledged that much of the public near WIPP doesn't have dependable internet service and may not be as adept at online research or even have access to computers as much as other parts of the country that aren't as rural, poor and don't have such high need for language assistance. Charging the very people most potentially affected by the Shaft project for access to vital information about this modification when other access to printed materials has been cut off by this pandemic emergency, only serves to underline NMED's lack of understanding of the communities most affected by the permitting decisions they are making—clear violations of their agreements made in the Resolution Agreement.

Conclusion

Does anyone really believe that, after DOE has spent tens of millions of dollars—possibly more than \$100 million digging the New Shaft, that anything the public could say would make DOE reverse course? And what if NMED did require exposure studies and it turned out this huge, multi-use shaft can't be sealed, will DOE be forced then to walk away from another hundred million dollar failed project? What an irresponsible waste of taxpayer dollars.

The public process is clearly not being respected during this modification of the existing permit. And neither is the 10-year renewal process in the future. NMED and DOE are clearly in partnership and the public isn't invited to the party. Information provided to the public is sketchy, sloppy, incomplete and sometimes just wrong. And if you are an LEP member of the public, there is no way to inform yourself enough with what's provided in Spanish even to approach meaningful participation.

Building the New Shaft while the public is trying to comment on the project also puts a damper on correcting the various mistakes in the public process and documents. It's not possible to ask for these things or an extension of the comment period, even though they're needed, since every day the public process is delayed, the New Shaft is one day closer to being completed.

The only responsible response from NMED would be to withdraw the temporary authorization and deny the permit modification. The New Shaft isn't needed any time soon and we should decide first whether we even need a New Shaft before we start to build it.