

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

Revision 1

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## Introduction

This document is an update to the previous revision of “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” and is a companion to regulations published by the U.S. Environmental Protection Agency (EPA) at 40 CFR Part 194. These regulations are known as the “Waste Isolation Pilot Plant (WIPP) Compliance Criteria.” Much of the guidance remains as it was previously. This revision contains the following updates:

- Section 2.2 provides new language to stipulate EPA’s preference for electronic submissions of the Compliance Recertification Application (CRA)
- Section 3.2 has updated language for the timeline of CRA submissions. EPA recommends submission of the CRA occur on or before the date of the most recent completeness determination of the previous CRA as published in the *Federal Register*. Language throughout the guidance has also been clarified to specify the CRA should reflect new information since submission of the previous CRA
- Section 4.2 gives new examples of where the U.S. Department of Energy (DOE) should perform additional research, testing, and calculations for the performance assessment (e.g., when information could potentially impact long-term performance such as a new waste stream or major facility design changes). Section 4.2.1 also updates language so that meetings between DOE and EPA are periodic rather than bi-annual
- Section 4.4 updates and gives flexibility to the frequency of public meetings
- References to the Carlsbad Area Office (CAO) have been renamed to Carlsbad Field Office (CBFO) throughout the document
- Attachment A Sample Recertification Timeline has been updated to reflect the new recommendation for the CRA submission timeline

EPA initiated this revision on its own initiative so that the guidance is more consistent with the experience EPA has gained from running this and other EPA programs. The Compliance Criteria contain, among other requirements, instructions that DOE must follow when reporting on the ongoing compliance of the WIPP, particularly for the purpose of recertification. EPA is authorized by Section 8 of the 1992 WIPP Land Withdrawal Act (Pub. L. No. 102-579, as amended) to recertify the WIPP every five years after initial receipt of radioactive waste by the WIPP. The first shipment of waste was received at the WIPP on March 26, 1999.

The purpose of this guidance document is to assist DOE with the preparation of recertification applications, first by identifying the regulatory requirements pertinent to recertification, and second by describing EPA’s own approach to planning for recertification, which necessarily affects DOE’s actions. No new Compliance Criteria or other binding rights or duties are established by this guidance, and any inconsistencies between the guidance and the Compliance Criteria are unintentional. The WIPP Compliance Criteria are dispositive of any inconsistencies, if they exist. This revision supersedes the previous version published on December 20, 2000.



## **1. Content of Compliance Recertification Applications**

### **1.1 Applicable Requirement(s):**

*§ 194.15 Content of compliance recertification application(s).*

*(a) In submitting documentation of continued compliance pursuant to section 8(f) of the WIPP LWA, the previous compliance application shall be updated to provide sufficient information for the Administrator to determine whether or not the WIPP continues to be in compliance with the disposal regulations. Updated documentation shall include:*

*(1) All additional geologic, geophysical, geochemical, hydrologic, and meteorologic information;*

*(2) All additional monitoring data, analyses and results;*

*(3) All additional analyses and results of laboratory experiments conducted by the Department or its contractors as part of the WIPP program;*

*(4) An identification of any activities or assumptions that deviate from the most recent compliance application;*

*(5) A description of all waste emplaced in the disposal system since the most recent compliance certification or recertification application. Such description shall consist of a description of the waste characteristics and waste components identified in § 194.24(b)(1) and 194.24(b)(2);*

*(6) Any significant information not previously included in a compliance certification or recertification application related to whether the disposal system continues to be in compliance with the disposal regulations; and*

*(7) Any additional information requested by the Administrator or the Administrator's authorized representative.*

*(b) To the extent that information required for a recertification of compliance remains valid and has been submitted in previous certification or recertification application(s), such information need not be duplicated in subsequent applications; such information may be summarized and referenced.*

### **1.2 Guidance for Content**

Section 8(f) of the Waste Isolation Pilot Plant (WIPP) Land Withdrawal Act requires DOE to submit documentation of continued compliance with 40 CFR Part 191 every five years beginning with the first emplacement of waste until completion of the decommissioning phase. Section 15 of the WIPP Compliance Criteria, presented above, specifically addresses the content of Compliance Recertification Applications (CRA).

The guidance in this section incorporates and expands upon 40 CFR 194.15, as well as statements in EPA's March 1996 Compliance Application Guidance for the WIPP. EPA has highlighted areas in which it anticipates new information from DOE. However, EPA expects to be notified on an ongoing basis of the work that DOE conducts in *all* areas (see also Section 4

below). EPA must be notified immediately of any significant information pursuant to 40 CFR part 194.4(b)(3)(iii).

### General

EPA expects the CRA to include any new information related to the disposal system that was obtained during the five-year period after emplacement of the waste began, or since the time of submittal of the most recent CRA. EPA does not expect DOE to resubmit information included in the previous compliance application, to the extent that the information remains current. The recertification application should clearly reference and/or summarize such information. This practice should aid both DOE and EPA when tracking developments from one application to another.

EPA expects a CRA to include descriptions of:

- all systems and program changes implemented since the submission of the previous recertification application. Any activity or assumption that deviated from what was described in the most recent compliance application should be considered a change (see also Section 4 below). Examples of changes are (this list is not exhaustive or exclusive):
  - grouping of waste in the disposal system by a method other than random distribution
  - changes resulting from monitoring the disposal system, or data collected from experiments, that alter model assumptions or the parameter values used in the computer models of the performance assessment
  - changes in the disposal system design
  - updated information from continuing studies (such as laboratory research and site characterization).

EPA expects the CRA to summarize all changes that EPA reviewed and approved since submission of the previous recertification application (through modification of the certification or other processes). EPA also expects the CRA to indicate where new baseline program elements have been established as a result of changes, and to show which parts of the application have been revised accordingly. EPA will work with DOE to develop an efficient means of capturing readjusted baseline program elements from one application to the next.



## Performance Assessment and Site Characterization

EPA expects a CRA to include descriptions of:

- updated computer codes, code documentation, and code quality assurance documentation accompanied by the appropriate performance and compliance assessments calculations.
- geologic, geophysical, hydrogeologic, geochemical, hydrologic, and meteorological studies of the site and the surrounding areas that were completed since submission of the previous recertification application. Any data or other results, and the interpretation yielded by such studies, should be described in a CRA.
- changes to Features, Events, and Processes (FEPs) identified in the CCA and any subsequent recertification applications. EPA expects that changes to FEPs will be included in a performance assessment, and that this work will be documented in the recertification application.

## Monitoring

EPA expects a CRA to include descriptions of updated monitoring information as follows:

- pre-closure monitoring results collected since the submission of the previous recertification application (geomechanics, groundwater, subsidence, and drilling activities)
- data quality acceptability
  - the implications of the results
  - whether the results change or challenge the conceptual or computer model of the disposal system
  - whether, as a result of any changes, the projection of the system's performance was revised.

## Waste Emplacement and Inventory

EPA expects a CRA to include descriptions of updated waste information as follows:

- generally, information regarding the volume, contents, and placement of wastes that were emplaced during the five-year period immediately following the time at which waste emplacement began, or since the submission of the previous recertification application. If assumptions about the wastes, waste loading, or other aspects of the disposal system change, EPA expects that a CRA will describe such assumptions and the analyses leading to them.

- research and testing related to important waste characteristics as identified under 40 CFR 194.24(b)(1), for example, radionuclide solubility and gas generation
- the location of emplaced wastes and their distribution according to waste components identified under 40 CFR 194.24(b)(2) and characterized under 40 CFR 194.24(c)
- conformance of waste emplacement to assumptions used in performance assessments
- changes in estimates of the waste inventory since the certification or since the submission of the previous recertification application
- status of shipments of waste to the WIPP from transuranic waste sites
- ongoing compliance with 40 CFR 194.24(d) through (g).

### Quality Assurance

EPA expects a CRA to include:

- the most recent revision of the DOE Carlsbad Field Office's (CBFO) Quality Assurance Program Description (QAPD), and a description of how the QAPD continues to establish the NQA standards referenced in 40 CFR 194.22(a)(1) for those items and activities that are important to the containment of transuranic waste in the WIPP. The CRA should include a cross-reference between applicable NQA requirements and the QAPD.
- list of CBFO management procedures that demonstrate implementation of NQA requirements.
- a list of all audits and surveillances performed by CBFO during the previous five-year period to verify the proper execution of NQA programs under 40 CFR 194.8(a) and 194.22(a). The list should include the following information:
  - audit number and dates
  - name of audited organization
  - a brief description of the activities performed by the audited organization that are important to the containment of transuranic waste in the WIPP
  - results of the audit (pass/fail/indeterminate).
- a list of DOE organizations with NQA programs approved by CBFO, and the title and document number of the applicable top-tier plans.
- a description of ongoing compliance with 40 CFR 194.22(b) through (d) for relevant activities.

## Assurance Requirements

EPA expects a CRA to include:

- documentation of changes in the presence of relevant natural resources in the Delaware Basin since submission of the previous application
- a description of any changes made to engineered barriers
- a description of any actions taken to implement the active or passive institutional controls conceptual designs, and a description of any changes made to those conceptual designs.

## **2. Documentation and Format Requirements**

### 2.1 Applicable requirement(s)

*40 CFR 194.12 Submission of compliance applications.*

*Unless otherwise specified by the Administrator or the Administrator's authorized representative, 30 copies of any compliance application, any accompanying materials, and any amendments thereto shall be submitted in a printed form to the Administrator.*

*40 CFR 194.13 Submission of reference materials.*

*Information may be included by reference into compliance application(s), provided that the references are clear and specific and that, unless otherwise specified by the Administrator or the Administrator's authorized representative, 10 copies of the referenced information are submitted to the Administrator. Referenced materials which are widely available in standard textbooks or reference books need not be submitted.*

### 2.2 Guidance for Documentation and Format

EPA recommends that DOE maintain the format used for the CCA: namely, Volume I, Chapters 1-9, followed by Appendices and References. This approach will provide consistency and will ease the process of referring to the CCA. Citations to information in the CCA should be as specific as possible.

EPA advises DOE to communicate with the Agency well in advance of delivery of the CRA about how many copies of the CRA should be submitted and in what form. The regulation states that DOE is to send 30 copies of the application and 10 copies of the references; however, electronic submissions are acceptable and preferred. DOE is to coordinate with the Agency for copyrighted references when used by DOE.

Given the expectation of rapid developments in software and requirements on the use of electronic media, EPA does not consider it beneficial to specify electronic formats here. DOE should consult EPA about the appropriate format for any electronic submissions.

### **3. Recertification Time Frame and Evaluation Process**

#### **3.1 Applicable Requirement(s)**

*LWA, Section 8(f)(1).*

*Not later than 5 years after the initial receipt of transuranic waste for disposal at WIPP, and every 5 years thereafter until the end of the decommissioning phase, the Secretary [of DOE] shall submit to the Administrator [of EPA] and the State [of New Mexico] documentation of continued compliance with the final disposal regulations.*

*LWA, Section 8(f)(2).*

*The Administrator shall, not later than 6 months after receiving a submission under [Section 8(f)(1)], determine whether or not the WIPP facility continues to be in compliance with the final disposal regulations. A determination under this paragraph shall not be subject to rulemaking or judicial review.*

*40 CFR 194.11 Completeness and accuracy of compliance applications.*

*Information provided to the Administrator in support of any compliance application shall be complete and accurate. The Administrator's evaluation for certification pursuant to section 8(d)(1)(B) of the WIPP LWA and evaluation for recertification pursuant to section 8(f)(2) of the WIPP LWA shall not begin until the Administrator has notified the Secretary, in writing, that a complete application in accordance with this part has been received.*

*40 CFR 194.64 Documentation of Continued Compliance*

*(a) Upon receipt of documentation of continued compliance with the disposal regulations pursuant to section 8(f) of the WIPP LWA and § 194.11, the Administrator will publish a notice in the Federal Register announcing that such documentation has been received, soliciting comment on such documentation, and announcing the Administrator's intent to determine whether or not the WIPP facility continues to be in compliance with the disposal regulations.*

*(b) Copies of documentation of continued compliance received by the Administrator will be made available for inspection in the dockets established pursuant to § 194.67.*

*(c) The notice will provide a public comment period of at least 30 days after publication pursuant to paragraph (a) of this section.*

*(d) Any comments received on such notice will be made available for public inspection in the dockets established pursuant to § 194.67.*

*(e) Upon completion of review of the documentation of continued compliance with the disposal regulations, the Administrator will publish a notice in the Federal Register announcing the Administrator's decision whether or not to recertify the WIPP facility.*

### 3.2 Guidance for Time Frame and Evaluation Process

Initial receipt of transuranic waste at the WIPP occurred on March 26, 1999. Based on the requirements listed above, the time frame for the initial recertification is:

- DOE submits the first CRA not later than March 2004
- EPA issues a recertification determination not later than six months after notification to DOE that the CRA is complete.

For reasons discussed in Section 4 below, EPA recommends that DOE submit the CRA in November 2003 in lieu of the annual Change Report. EPA's determination regarding the first recertification consequently would be issued in May 2004. Per DOE's request and EPA's concurrence on an updated submission timeline<sup>1,2</sup>, for recertification applications subsequent to CRA-2019, EPA recommends that DOE use the date of the most recent completeness determination as published in the *Federal Register* as the reference point for submission of the next recertification. For example, EPA's declaration of completeness for the CRA-2019 was published on November 26, 2021. Therefore, submission of the next recertification application would occur on or before November 26, 2026.

EPA's evaluation process will include a completeness review pursuant to 40 CFR 194.11. Should DOE's initial recertification submission be incomplete, EPA will explain the nature of the deficiencies by letter and request that DOE submit the necessary information. Once EPA has notified DOE that a complete application has been received, EPA will commence its six-month review period pursuant to Section 8(f) of the WIPP Land Withdrawal Act.

The recertification process allows EPA to confirm and document that the information, conditions, and activities upon which certification is based continue to exist. EPA will not use recertification as a process to review any significant change to a condition or activity (see also Section 4 below). If the information, conditions, and activities upon which certification is based continue to exist, then the recertification process will proceed and culminate with a recertification determination. However, if during the course of EPA's compliance review it finds evidence that information, activities, or conditions differ from those upon which certification is based, then EPA will determine if the changes were significant and whether it will be necessary to modify, revoke, or suspend the terms or conditions of certification. This process may entail an interruption of the recertification schedule while EPA addresses the changes.

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<sup>1</sup>Bollinger, M. 2023. *Recommended Schedule for Future Compliance Recertification Application Submittals*. Letter from Mark Bollinger (DOE) to Lee Ann Veal (EPA). U.S. Department of Energy, Carlsbad Field Office, Carlsbad, New Mexico. May 1, 2023.

<sup>2</sup>Edwards, J. 2023. *Schedule for Future Compliance Recertification Application Submittals*. Letter from Jonathan Edwards (EPA) to Mark Bollinger (DOE). U.S. Environmental Protection Agency, Washington, DC. August 3, 2023.

EPA's process for providing public notice of the recertification is laid out in § 194.64 of the WIPP Compliance Criteria. 40 CFR 194.64.

## 4. Steps Leading to Recertification: Change Reporting and Modification

### 4.1 Applicable Requirement(s)

#### 40 CFR 194.4(b)(4) Conditions of compliance certification

*(b) Whether stated therein or not, the following conditions shall apply in any such certification:*

*(1) The certification shall be subject to modification, suspension or revocation by the Administrator. Any suspension of the certification shall be done at the discretion of the Administrator. Any modification or revocation of the certification shall be done by rule pursuant to 5 U.S.C. 553. If the Administrator revokes the certification, the Department shall retrieve, as soon as practicable and to the extent practicable, any waste emplaced in the disposal system.*

*(2) Any time after the Administrator issues a certification, the Administrator or the Administrator's authorized representative may submit a written request to the Department for information to enable the Administrator to determine whether the certification should be modified, suspended or revoked. Unless otherwise specified by the Administrator or the Administrator's authorized representative, the Department shall submit such information to the Administrator or the Administrator's authorized representative within 30 calendar days of receipt of the request.*

*(3) Any time after the Administrator issues a certification, the Department shall report any planned or unplanned changes in activities or conditions pertaining to the disposal system that differ significantly from the most recent compliance application.*

*(i) The Department shall inform the Administrator, in writing, prior to making such a planned change in activity or disposal system condition.*

*(ii) In the event of an unplanned change in activity or condition, the Department shall immediately cease emplacement of waste in the disposal system if the Department determines that one or more of the following conditions is true:*

*(A) The containment requirements established pursuant to § 191.13 of this chapter have been or are expected to be exceeded;*

*(B) Releases from already-emplaced waste lead to committed effective doses that are or are expected to be in excess of those established pursuant to § 191.15 of this chapter. For purposes of this subparagraph (b)(3)(ii)(B), emissions from operations covered pursuant to part 191, subpart A of this chapter are not included; or*

*(c) Releases have caused or are expected to cause concentrations of radionuclides or estimated doses due to radionuclides in underground sources of drinking water in the accessible environment to exceed the limits established pursuant to part 191, subpart C of this chapter.*

*(iii) If the Department determines that a condition described in paragraph (b)(3)(ii) of this section has occurred or is expected to occur, the Department shall notify the Administrator, in writing, within 24 hours of the determination. Such notification shall, to the extent practicable, include the following information:*

*(A) Identification of the location and environmental media of the release or the expected release;*



(B) Identification of the type and quantity of waste (in activity in curies of each radionuclide) released or expected to be released;

(C) Time and date of the release or the estimated time of the expected release;

(D) Assessment of the hazard posed by the release or the expected release; and

(E) Additional information requested by the Administrator or the Administrator's authorized representative.

(iv) The Department may resume emplacement of waste in the disposal system upon written notification that the suspension has been lifted by the Administrator.

(v) If the Department discovers a condition or activity that differs significantly from what is indicated in the most recent compliance application, but does not involve conditions or activities listed in paragraph (b)(3)(ii) of this section, then the difference shall be reported, in writing, to the Administrator within 10 calendar days of its discovery.

(vi) Following receipt of notification, the Administrator will notify the Secretary in writing whether any condition or activity reported pursuant to paragraph (b)(3) this section:

(A) Does not comply with the terms of the certification; and, if it does not comply,

(B) Whether the compliance certification must be modified, suspended or revoked. The Administrator or the Administrator's authorized representative may request additional information before determining whether modification, suspension or revocation of the compliance certification is required.

(4) Not later than six months after the Administrator issues a certification, and at least annually thereafter, the Department shall report to the Administrator, in writing, any changes in conditions or activities pertaining to the disposal system that were not required to be reported by paragraph (b)(3) of this section and that differ from information contained in the most recent compliance application.

#### 40 CFR 194.65 Notice of proposed rulemaking for modification or revocation

(a) If the Administrator determines that any changes in activities or conditions pertaining to the disposal system depart significantly from the most recent compliance application, the Agency will publish a Notice of Proposed Rulemaking in the Federal Register announcing the Administrator's proposed decision on modification or revocation, and soliciting comment on the proposal.

(b) Any comments received on the notice will be made available for inspection in the dockets established pursuant to § 194.67.

#### 40 CFR 194.66 Final rule for modification or revocation

(a) The Administrator will publish a Final Rule in the Federal Register announcing the Administrator's decision on modification or revocation.

*(b) A document summarizing significant comments and issues arising from comments received on the Notice of Proposed Rulemaking as well as the Administrator's response to such significant comments and issues will be prepared and will be made available for inspection in the dockets established pursuant to § 194.67.*

#### 4.2 Recertification and Change Reporting

EPA envisions the recertification process as the culmination of the Change Reporting mechanism required under 40 CFR 194.4(b)(4). The Change Report that DOE must send to EPA each November should be used to document changes that *were enacted during the previous year* (that is, changes reviewed and approved by EPA). The CRA should consist of:

- all change reports submitted since the previous recertification application
- a summary description of the nature and impact of any changes for which EPA required a modification of the certification (if applicable)
- information required under 40 CFR 194.15 (see Section 1 above).

The result of this approach will be that, by the time DOE submits the CRA to EPA, the Agency will have reviewed and reached a decision on all relevant proposed changes, including any changes requiring a modification of the certification (if applicable), *prior to* initiating the recertification process. EPA intends to initiate a recertification only after completion of any outstanding modification rulemakings for planned significant changes. If an unplanned change arises near the time when DOE submits the CRA, EPA will determine at that time the appropriate schedule for evaluating the significance of the change and completing the recertification. EPA believes that this approach will reduce the chance that an unresolved technical issue would force a delay in the schedule for recertification. The process of recertification also will serve as EPA's evaluation of DOE's fifth-year changes, as must be reported under 40 CFR 194.4(b)(4).

EPA recognizes that DOE may desire to change various and potentially numerous aspects of the WIPP project as defined in the CCA over the course of the operational period. DOE also may continue to refine important elements of the WIPP performance assessment through laboratory research and computer modeling. In light of this expectation, EPA provides these two important pieces of guidance:

- (1) The Performance Assessment (PA) and Compliance Assessment (CA) described in the CCA, in combination with the Performance Assessment Verification Test and other materials contained in EPA Air Docket A-93-02, were adequate to demonstrate that the WIPP will comply with EPA disposal regulations. DOE is not required by EPA to complete additional research, testing, or calculations for the purpose of compliance with EPA regulations, unless there is new information that could potentially impact long-term

performance of the disposal system, such as a major new waste stream or major facility design changes.

However, in the event that DOE *does* complete additional research, testing, or calculations, EPA expects to be informed in a timely manner of the results of such research, testing, or calculations if the results potentially alter the basis for EPA's certification of the WIPP. Any changes DOE proposes to make – whether based on research and testing, operational efficiency, worker safety, or other motives – must be shown to comply with EPA regulations for the WIPP. Mechanisms for keeping EPA informed about DOE research and testing are discussed in the following sections. EPA strongly recommends that DOE plan to complete another Performance Assessment and/or Compliance Assessment prior to submitting a recertification application in order to capture the cumulative effect of changes and new information in the years preceding recertification. Such calculations will be subject to a rigorous level of documentation and quality assurance similar to the PA that EPA approved in its certification.

DOE must be able to demonstrate that the WIPP will comply with EPA disposal regulations in light of the new information gleaned through research and testing. The results of new PA/CA calculations may be significant and may call for a modification to the certification. EPA therefore advises DOE, should it choose to pursue research and testing related to WIPP performance, to allow sufficient time before submitting the CRA for EPA to complete a modification rulemaking on DOE PA/CA work (see Section 4.3 below).

- (2) The baseline reference for the initial CRA is the October 1996 CCA and all subsequent materials in EPA Air Docket A-93-02. If the WIPP is recertified, the baseline for future recertifications becomes the CCA as amended by all approved changes to date and represented in EPA Air Docket A-98-49. The CRA should describe the program in terms of the adjusted baseline. EPA will work closely with DOE to devise a format that adequately performs this task.

#### 4.2.1 Proposed Changes

Because EPA do not intend to use recertification as a mechanism to evaluate significant changes in the WIPP's certification, it is necessary to establish a process whereby changes may be evaluated in advance of (or after) a given recertification. This section describes EPA's proposed process (Attachment B provides an illustration).

Throughout a given year, DOE must provide advance notice to EPA of intent to implement a significant change, pursuant to § 194.4(b)(3)(i). Because EPA will determine the significance of a change relative to its own certification (see also Section 4.3.1 below), DOE is advised to regard any change under consideration as potentially significant and to provide due notice. For any proposed change, DOE should submit to EPA an information package supporting the change. The specific information EPA will need will vary according to the change, but EPA

expects to receive first, at a minimum, a description of the nature and scope of the change, how it differs from the CCA, and DOE's assessment of the consequences for compliance with EPA's disposal regulations. DOE's assessment may consist of technical reports, performance calculations, laboratory results, or other materials, depending on the nature of the change.

To the extent possible, EPA will respond to proposed changes separately. EPA will send DOE a letter, and a technical report if appropriate, after it has received and analyzed all necessary information. The letter will describe whether EPA thinks the change requires EPA approval, and whether the Agency approves or disapproves the change or thinks the change is significant and warrants a modification in order to approve it. EPA's decisions will be made on a case-by-case basis, and may depend on: the extent to which the change affects multiple areas of compliance; the effect on the performance assessment and CCDF curves; compliance with the conditions of certification; and other factors.

DOE must be prepared to provide adequate evidence to support its conclusions regarding the impact of a proposed change. EPA may require DOE to complete additional technical analysis in order for the Agency to reach a conclusion.

EPA encourages DOE to provide informal advance notice of changes that it is considering. DOE may provide notice through written correspondence, at technical meetings, or both. EPA will schedule technical meetings with DOE as often as needed to learn about proposed changes and to understand the impact(s) of each change. Both DOE and EPA may initiate a technical meeting. Technical meetings will be devoted to presentations by DOE staff, followed by discussion and questions from EPA. At the end of the meeting, EPA will identify any remaining information needs and the time frame for review.

Additionally, EPA proposes that DOE and EPA hold periodic meetings each calendar year for the purpose of general programmatic coordination and recertification planning. The semiannual meetings would address, among other topics: presentation by DOE of changes that may be made or will be made in the near future; summary of waste shipments during the previous period; review of previous and/or upcoming EPA regulatory activities (such as inspections); and discussion of upcoming planning or programmatic issues. See also Section 4.4 below.

### 4.3 Modifying the Certification

Modification, suspension, and revocation require notice and comment rulemaking. The sections below describe EPA's approach to such rulemakings.

#### 4.3.1 When is a modification necessary?

There are two ways for modifications to surface: from unplanned changes and from planned changes. In the case of unplanned changes, certain requirements for timely reporting apply (40 CFR 194.4(b)(3)(iii) and (v)). In the case of planned changes, DOE must notify EPA

in writing in advance of making the change. In both instances, EPA requires DOE to report activities or conditions pertaining to the disposal system that differ significantly from the most recent compliance application (Section 194.4 of the WIPP Compliance Criteria).

The “significance” of a change may be generally understood as the degree to which it departs from a factor that was important to EPA’s determination of compliance with a specific requirement of the Compliance Criteria. EPA comprehensively explained its compliance determination in the compliance certification rule (63 FR 27354-27406) and in the accompanying Compliance Application Review Documents (CARDS). If EPA stated—either in the certification rule, in a CARD, or both—that particular data, information, or representations were important to its compliance determination for a particular Compliance Criterion, then it is likely EPA would consider any change to such data, information, or representations to be “significantly different” under 40 CFR 194.4(b)(3).

There are a variety of factors that could lead EPA to determine that a change is significant, including but not limited to: the extent to which the proposal differs from the baseline CCA or CRA; whether the proposal involves an area subject to conditional approval; and the complexity of the factors involved in analyzing the proposal. EPA’s decision to modify its certification may not be based exclusively on the impact (or lack of impact) of a single change on calculations of the disposal system’s performance. In other words, the significance of a planned change should not be viewed by DOE solely in terms of compliance with EPA’s containment requirements or individual and ground water protection requirements. For example, a change to the passive institutional controls design that EPA approved in the certification would not directly affect performance calculations, but could be significant in relation to EPA’s compliance determination for 40 CFR 194.43. EPA reserves the authority to make its own determination of whether a planned change significantly differs from the most recent compliance application and, by extension, EPA’s certification.

DOE also has an important role in determining whether a planned change represents a “significant” departure from the baseline. EPA expects that DOE will provide a thorough rationale for a change, showing its expected impact(s), when DOE presents the change to EPA. Given that DOE and EPA may have different perspectives on whether a change is significant, EPA recommends that DOE plan sufficient time between reporting and implementing the change, in order for EPA to complete a technical review and reach a decision on significance.

#### 4.3.2 Completing a modification rulemaking

If EPA decides that a proposed change is significant, then it will notify DOE by letter of EPA’s intent to conduct a modification rulemaking in accordance with Sections 194.65 and 194.66 of the WIPP Compliance Criteria. The length of the public comment period for a proposed rule may vary according to the complexity of the proposed change; EPA has assumed a 30-day comment period for purposes of illustration (see Attachment A). In the event that DOE proposes to make multiple significant changes, EPA will decide whether to combine the changes in one rulemaking or to complete separate rulemakings.

EPA's sample schedule for completing a recertification (Attachment A) shows that any modification (should one be necessary) will be completed at least 6 months in advance of EPA receipt of the CRA. This approach is consistent with EPA's intent to complete any modifications before undertaking a recertification, as explained in Section 4.2 above. The sample schedule is only an illustration; a modification rulemaking may occur at any time prior to submission of the CRA, and more than one rulemaking may take place during a five-year recertification window. At present EPA has no specific plans to conduct a modification rulemaking.

Only significant changes must be approved through rulemaking. DOE may implement nonsignificant changes that have been approved by EPA through the change reporting process described in Section 4.2 above.

#### 4.4 Public Involvement in Recertification Activities

EPA values the information it receives from the public about the WIPP project. EPA regulations provide opportunities for public comment before EPA issues a final recertification determination (40 CFR 194.64) and before EPA decides to modify, suspend, or revoke its certification (Section 194.65). EPA requests public comment at those times in order to make the most informed and balanced decision possible. The Agency's final decisions on recertification and modifications will be accompanied by EPA response to comments received by its docket.

Additionally, EPA intends to have some meetings with interested members of the public. EPA plans to invite stakeholders in the WIPP project to give them opportunities to ask questions and raise issues to EPA with DOE staff in attendance. As always, EPA will make documents related to change reporting, technical meetings, inspections, and other matters available to the public in its docket.

### **5. Conclusion**

The emphasis of this guidance is that DOE should report early and often to EPA on planned changes before implementing them, with the purpose of resolving compliance issues in due course and reaching a recertification determination within the time frame established by the 1992 WIPP Land Withdrawal Act. EPA recognizes that the WIPP is a complex undertaking, and that DOE must balance many factors in disposing of waste expeditiously while conforming to regulatory requirements. EPA believes that the goals of efficient waste disposal and regulatory compliance are best achieved when DOE keeps EPA closely involved in its planning, so that EPA and the public understands the impacts of a planned change before the change occurs.

## Attachment A

### Sample Recertification Timeline

<u>2019</u> March	DOE submits CRA-2019
<u>2019</u> December	DOE submits updated CRA-2019 calculations
<u>2021</u> November	EPA declares completeness for CRA-2019
<u>2022</u> May	EPA recertifies WIPP
2022-2023	Meetings and technical exchanges with DOE DOE addresses issues identified in CRA-2019, planning for a planned change request, and updates for the next CRA
<u>2023</u> December	DOE submits Planned Change Request (PCR) on two additional panels
2024-2026	EPA reviews PCR EPA issues decision on the PCR Meetings and technical exchanges with DOE DOE addresses issues identified in the PCR
<u>2026</u> November	DOE submits next CRA covering period between March 2019 to November 2026 (or a date before November 2026)

Attachment B: EPA Decision Making Flowchart

**WIPP CERTIFICATION MODIFICATION PROCESS**

