



[6450-01-P]

DEPARTMENT OF ENERGY

Amended Record of Decision for the Long-Term Management and Storage of Elemental Mercury

AGENCY: Office of Environmental Management, U.S. Department of Energy.

ACTION: Amended record of decision.

SUMMARY: The U.S. Department of Energy (DOE) is issuing this Amended Record of Decision (AROD) to amend its Record of Decision (ROD) for the long-term management and storage of elemental mercury published in the *Federal Register* on December 6, 2019. This AROD withdraws the designation of Waste Control Specialists (WCS) pursuant to the Mercury Export Ban Act of 2008 (MEBA) as the DOE facility for long-term management and storage of elemental mercury. DOE has, however, decided to store at WCS certain elemental mercury to which DOE accepts the conveyance of title pursuant to a legal settlement or proceeding.

ADDRESSES: For electronic copies of this Amended Record of Decision, the December 6, 2019 Record of Decision, the *Long-Term Management and Storage of Elemental Mercury Environmental Impact Statement* (DOE/EIS-0423), the *Long-Term Management and Storage of Elemental Mercury Supplemental Environmental Impact Statement* (DOE/EIS-0423-S1), and the *Supplement Analysis of the Final Long-Term Management and Storage of Elemental Mercury Environmental Impact Statement* (DOE/EIS-0423-SA-01), please go to the following website: <https://www.energy.gov/nepa/nepa-documents>. For paper copies, please contact Dave Haught

at U.S. Department of Energy, Office of Environmental Management, Office of Waste Disposal (EM-4.22), 1000 Independence Avenue, S.W., Washington, DC 20585 or at

David.Haught@hq.doe.gov.

FOR FURTHER INFORMATION CONTACT: For further information on the management and storage of elemental mercury, please contact Dave Haught at *David.Haught@hq.doe.gov* or visit <https://www.energy.gov/em/services/waste-management/waste-and-materials-disposition-information/long-term-management-and>. For general information on the Office of Environmental Management's National Environmental Policy Act of 1969 process, please contact Bill Ostrum, at *William.Ostrum@hq.doe.gov* and at (202) 586-2513.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to Section 5(a)(1) of the Mercury Export Ban Act of 2008 (Pub. L. 110-414), as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, (Pub. L. 114-182) (herein referred to as MEBA) (42 U.S.C. 6939f(a)(1)), the U.S. Department of Energy (DOE) was directed to designate a facility or facilities of DOE for the long-term management and storage of elemental mercury generated within the United States.

On January 28, 2011, DOE published a Notice of Availability in the *Federal Register* (76 FR 5145) to notify the public of the issuance of the *Final Long-Term Management and Storage of Elemental Mercury Environmental Impact Statement* (DOE/EIS-0423) (Final Elemental Mercury Storage EIS). In addition to the No Action Alternative, the Final Elemental Mercury Storage EIS evaluated eight locations at seven government and commercial sites for

management and storage of elemental mercury: the DOE Grand Junction Disposal Site, Grand Junction, Colorado; the DOE Hanford Site, Richland, Washington; the Hawthorne Army Depot, Hawthorne, Nevada; the Idaho Nuclear Technology and Engineering Center and the Radioactive Waste Management Complex at the DOE Idaho National Laboratory, Idaho Falls, Idaho; the DOE Kansas City Plant, Kansas City, Missouri; the DOE Savannah River Site, Aiken, South Carolina; and the Waste Control Specialists, LLC (WCS) facility, near Andrews, Texas. The Final Elemental Mercury Storage EIS identified the WCS facility as its preferred alternative.

On October 4, 2013, the Environmental Protection Agency (EPA) published a Notice of Availability in the *Federal Register* (78 FR 61844) to notify the public of DOE's issuance of the *Final Long-Term Management and Storage of Elemental Mercury Supplemental Environmental Impact Statement* (DOE/EIS-0423-S1; Final SEIS). The Final SEIS evaluated additional alternatives for a facility at and in the vicinity of the Waste Isolation Pilot Plant near Carlsbad, New Mexico, and updated some of the analyses presented in the Final Elemental Mercury Storage EIS. The Final SEIS did not change the DOE preferred alternative, which remained as the WCS facility near Andrews, Texas.

On June 5, 2019, DOE published a *Supplement Analysis of the Final Long-Term Management and Storage of Elemental Mercury Environmental Impact Statement* (DOE/EIS-0423-SA-01; SA) to determine whether supplemental or new National Environmental Policy Act of 1969 (NEPA) documentation was required to address the proposal to manage and store elemental mercury. The SA provided an analysis of the potential impacts presented in the Final Elemental Mercury Storage EIS and Final SEIS to determine if there have been substantial changes to the proposal since 2013 or if there are significant new circumstances or information

relevant to environmental concerns. The SA was prepared in accordance with the DOE NEPA implementing procedures at 10 CFR 1021.314(c) and concluded that there was not a substantial change to the proposal evaluated in the Final Elemental Mercury Storage EIS or Final SEIS or significant new circumstances or information relevant to environmental concerns that would require preparation of an additional SEIS or new EIS. DOE determined that no further NEPA analysis was required.

Section 5(a)(1) of MEBA directs DOE to designate a facility or facilities of DOE for the long-term management and storage of elemental mercury generated within the United States. As stated in the Final Elemental Mercury Storage EIS, DOE proposed to construct one or more new facilities and/or select one or more existing facilities (including modification as needed) for the long-term management and storage of elemental mercury, as required by Section 5(a)(1) of MEBA. In the Final Elemental Mercury Storage EIS, DOE identified a need to provide such a facility capable of managing an elemental mercury inventory estimated to range up to 10,000 metric tons (11,000 tons) for a 40-year period of analysis. In the SA, DOE updated the projected inventory of elemental mercury to 6,800 metric tons (7,480 tons). Any such facility must comply with applicable requirements of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 6901 *et seq.*) and other permitting requirements, except as otherwise provided by Section 5(g)(2) of MEBA.

On December 6, 2019, DOE published the ROD in the *Federal Register* (84 FR 66890). Based on consideration of the analyses in the Final Elemental Mercury Storage EIS, Final SEIS, and SA, DOE decided in the ROD to designate the WCS site near Andrews, Texas, as a DOE facility for management and storage of up to 6,800 metric tons (7,480 tons) of elemental

mercury pursuant to Section 5(a)(1) of MEBA, and to manage and store the elemental mercury in leased portions of existing buildings, the Container Storage Building and Bin Storage Unit 1, at the WCS site. This decision was also based on other programmatic, policy, logistic, and cost considerations.

On December 10, 2019, DOE issued a task order for a lease and services agreement with WCS for the storage space. The lease was signed by DOE and WCS on December 13, 2019, and expires on June 4, 2021.

On December 23, 2019, DOE published in the *Federal Register* a final rule to establish a fee for long-term management and storage of elemental mercury in accordance with MEBA (Fee Rule) (84 FR 70402). Section 5(b)(1)(A) of MEBA provides that DOE shall assess and collect a fee at the time of delivery for providing such management and storage of elemental mercury delivered to the facility.

On December 27, 2019, DOE announced that the Texas Commission on Environmental Quality (TCEQ) had approved an application for a modification to the WCS hazardous waste permit. The permit modification added DOE as co-operator for compartments 6, 7, 8, and 9 of the Container Storage Building for the storage of elemental mercury in recognition of its status as a DOE designated facility under MEBA. DOE's December 27, 2019, announcement also stated that DOE had entered into a lease and services agreement with WCS for management and storage of elemental mercury, and that entities wishing to deliver elemental mercury to the DOE-designated facility for long-term management and storage should contact WCS.

Two domestic generators of elemental mercury subsequently filed complaints in United States District Court challenging, among other things, the validity of the Fee Rule and the ROD designating the WCS site as a DOE facility for the long-term management and storage of elemental mercury (*Coeur Rochester, Inc. v. Brouillette et al.*, Case No. 1:19-cv-03860-RJL (D.D.C. filed December 31, 2019)); *Nevada Gold Mines LLC v. Brouillette et al.*, Case No. 1:20-cv-00141-RJL (D.D.C. filed January 17, 2020)).

On August 21, 2020, DOE and Nevada Gold Mines, LLC (NGM) executed a settlement agreement intended to resolve NGM's complaint in its entirety. As the first step in implementing that agreement, on September 3, 2020, DOE filed a motion in the District Court asking the Court to vacate and remand the Fee Rule.

In the motion, DOE acknowledged that it made errors, omissions, and unclear statements in the Fee Rule. In order to address these legal issues, DOE requested that the Court vacate and remand the Rule to the Department for reconsideration. The District Court granted the motion to vacate and remand the Fee Rule on September 5, 2020.

On remand, the Department will engage in notice-and-comment rulemaking to reconsider the estimates and assumptions used to calculate the fee, obtain updated information, and disclose the documentation necessary to facilitate review and comment by interested parties. The Department will conduct the rulemaking consistent with all applicable laws, Executive Orders, and other rulemaking requirements, and consider comments and information received in developing the final rule to establish the fee.

MEBA Section 5(b)(1)(A) requires DOE to assess and collect a fee at the time that elemental mercury is delivered to the long-term management and storage facility designated under MEBA Section 5(a)(1). In light of the vacatur and remand of the Fee Rule, DOE is presently unable to accept elemental mercury from generators at a facility of the Department of Energy for long-term management and storage. See MEBA Sections 5(a)(1) and 5(b)(1)(A).

Given the rulemaking process required to establish a fee for the long term management and storage of elemental mercury, and the expiration of DOE's current lease with WCS in June 2021, DOE also agreed in the settlement with NGM to withdraw the designation of WCS pursuant to MEBA Section 5(a)(1) as a facility of DOE for the purpose of long-term management and storage of elemental mercury. DOE acknowledges that MEBA's temporary storage provisions remain in effect until such time as DOE designates a facility or facilities of the Department of Energy for long-term management and storage of elemental mercury, and is able to accept elemental mercury shipments at such facility or facilities.¹ At the appropriate time and consistent with the relevant factors set forth in MEBA, DOE will designate a facility or facilities of the Department of Energy for the purpose of long-term management and storage of elemental mercury generated within the United States.

Section 5(b)(1)(C) of MEBA provides that if the facility designated by DOE for long-term management and storage of elemental mercury is not operational by January 1, 2020, then DOE

¹ Specifically, pursuant to MEBA Section 5(g), elemental mercury stored consistent with MEBA Sections 5(g)(2)(B) or (D) shall not be subject to the storage prohibition of section 3004(j) of the Solid Waste Disposal Act (42 U.S.C. 6924(j)) until such time as DOE (1) designates a facility or facilities of the Department of Energy for long-term management and storage of elemental mercury under MEBA Section 5(a)(1); and (2) is able to accept elemental mercury shipments at such facility or facilities.

shall accept the conveyance of title to elemental mercury produced incidentally from the beneficiation or processing of ore or related pollution control activities that has accumulated at certain facilities in accordance with Section 5(g)(2)(D) of MEBA. Section 5(b)(1)(C) of MEBA also provides that DOE shall store or pay the cost of storage of such accumulated elemental mercury in a facility that has been permitted under RCRA. This storage requirement is separate from the requirement under Section 5(a)(1) of MEBA that DOE designate a facility or facilities of DOE for the long-term management and storage of elemental mercury generated within the United States. Under the settlement agreement with NGM, DOE agreed to accept title to and store 112 metric tons of elemental mercury that is currently in temporary storage at NGM facilities in accordance with Section 5(g)(2)(D) of MEBA.

On September 17, 2020, TCEQ issued a permit modification to the WCS hazardous waste permit that authorizes the storage of elemental mercury to which DOE accepts the conveyance of title pursuant to a legal settlement or proceeding. The WCS site thus possesses a RCRA permit for, and is capable of, storing elemental mercury to which DOE accepts the conveyance of title pursuant to a legal settlement or proceeding.

Amended Decision

This AROD reflects DOE's need to revisit the December 23, 2019, (84 FR 70402) final rule establishing a fee for the long-term management and storage of elemental mercury in accordance with MEBA (Fee Rule). This AROD also reflects that both the Fee Rule and DOE's decision to designate WCS as a DOE facility for the long-term management and storage of

elemental mercury are the subjects of a settlement agreement between DOE and Nevada Gold Mines, LLC.

The potential environmental impacts of this AROD were analyzed in the *Final Long-Term Management and Storage of Elemental Mercury Environmental Impact Statement* (DOE/EIS-0423; Final Elemental Mercury Storage EIS), the *Final Long-Term Management and Storage of Elemental Mercury Supplemental Environmental Impact Statement* (DOE/EIS-0423-S1; Final SEIS), and the *Supplement Analysis of the Final Long-Term Management and Storage of Elemental Mercury Environmental Impact Statement* (DOE/EIS-0423-SA-01; SA). The December 6, 2019, ROD announced DOE's decision to designate existing buildings at WCS near Andrews, Texas, as a DOE facility for the purpose of long-term management and storage of up to 6,800 metric tons (7,480 tons) of elemental mercury generated within the United States pursuant to Section 5(a)(1) of the Mercury Export Ban Act of 2008 (Pub. L. 110-414), as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, (Pub. L. 114-182) (MEBA) (42 U.S.C. 6939f(a)(1)).

DOE has decided to withdraw the designation of WCS as a DOE facility for the long-term management and storage of elemental mercury generated within the United States pursuant to Section 5(a)(1) of MEBA. Therefore, as of the date of this AROD, DOE has not designated a DOE facility for the management and storage of elemental mercury generated within the United States pursuant to MEBA Section 5(a)(1). DOE is presently unable to accept elemental mercury from generators at a facility of the Department of Energy for long-term management and storage. See MEBA Sections 5(a)(1) and 5(b)(1)(A). DOE acknowledges that MEBA's temporary storage provisions remain in effect until such time as DOE designates a facility or facilities of the

Department of Energy for long-term management and storage of elemental mercury, and is able to accept elemental mercury shipments at such facility or facilities.²

At the appropriate time and consistent with the relevant factors set forth in MEBA, DOE will designate a facility or facilities of the Department of Energy for the purpose of long-term management and storage of elemental mercury generated within the United States pursuant to MEBA Section 5(a)(1).

Based on consideration of the analyses in the EIS, Final SEIS, and SA, DOE has decided to store elemental mercury to which DOE accepts the conveyance of title pursuant to a legal settlement or proceeding at WCS pursuant to MEBA Section 5(b)(1)(C). As noted in the Background section, in December 2019, DOE entered into a lease and services agreement with WCS to store up to 1,206 MT of elemental mercury in leased portions of the Container Storage Building and Bin Storage Unit 1 at the WCS site. Also in December 2019, the TCEQ approved an application for a modification to the WCS hazardous waste permit that added DOE as co-operator for compartments 6, 7, 8, and 9 of the Container Storage Building for the storage of elemental mercury. On September 17, 2020, TCEQ approved a permit modification to the WCS hazardous waste permit that authorizes the storage of elemental mercury to which DOE accepts the conveyance of title pursuant to a legal settlement or proceeding.

² Specifically, pursuant to MEBA Section 5(g), elemental mercury stored consistent with MEBA Sections 5(g)(2)(B) or (D) shall not be subject to the storage prohibition of section 3004(j) of the Solid Waste Disposal Act (42 U.S.C. 6924(j)) until such time as DOE (1) designates a facility or facilities of the Department of Energy for long-term management and storage of elemental mercury under MEBA Section 5(a)(1); and (2) is able to accept elemental mercury shipments at such facility or facilities.

Signing Authority

This document of the Department of Energy was signed on September 30, 2020, by William I. White, Senior Advisor for Environmental Management to the Under Secretary for Science, Office of Environmental Management, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed at Washington, DC on October 1, 2020

Treena V. Garrett,
Federal Register Liaison Officer,
U.S. Department of Energy.

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