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April 24, 2000

Peter Maggiore, Secretary
New Mexico Environment Department
1190 St. Francis Drive
Santa Fe, NM 87505



Dear Secretary Maggiore:

On April 20, 2000, the Department of Energy ("DOE") and Westinghouse Isolation Division ("WID"), permittees for the Waste Isolation Pilot Plant ("WIPP"), filed a class 1 modification to the permit that you issued on October 27, 1999. The modification requests a change in Permit Condition IV.B.2.b.

Southwest Research and Information Center ("SRIC") strongly opposes the requested modification and asks that you deny the modification. Alternatively, the request should be considered a major modification, subject to public hearing, under § 74-4-4.2.H, NMSA 1978, and 20 NMAC § 4.1.900 (incorporating 40 CFR § 270.42(b) and (c)).

Under the guise of a Class 1 modification, DOE and NMED intend to *fundamentally change* Permit Condition IV.B.2.b by allowing the immediate disposal of hazardous waste in Panel 1 at WIPP. Since Panel 1 already contains waste that was not characterized in accordance with the permit, the disposal of hazardous waste in that unit is currently prohibited by the second sentence of Permit Condition IV.B.2.b. If NMED approves the modification without granting the public the evidentiary hearing to which it is entitled for major permit modifications, it will violate the Hazardous Waste Act and its regulations. Approving the change as a class 1 modification would also make a mockery out of the WIPP permitting process, in which Permit Condition IV.B.2.b. was one of the major issues.

Congress found that "inadequate controls on hazardous waste management will result in substantial risks to human health and the environment." 42 U.S.C. § 6901(b)(5). The hazardous waste permit is the "linchpin" for the regulatory scheme to protect the public health and the environment from the dangers posed by the disposal of hazardous waste. See, *Sierra Club v. Dep't of Energy*, 770 F.Supp. 578, 580 (D. Colo. 1991). The New Mexico Hazardous Waste Act ("HWA") governs the disposal of hazardous waste in the state. See, N.M. Stat. Ann. §§ 74-4-1,



et seq. This includes the disposal of mixed radioactive and hazardous waste at WIPP.¹ A public hearing must be held before a hazardous waste disposal permit is issued. "No ruling shall be made on permit issuance, major modification, suspension or revocation without an opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying as the hearing." N.M. Stat. Ann. § 74-4-4.2.H. A public hearing was held before NMED issued the hazardous waste disposal permit for WIPP. The public hearing lasted 19 days over the course of February 22, 1999 to March 26, 1999. More than 150 citizens and public interest groups, including SRIC, participated. Sworn testimony was received from 23 witnesses. An additional 140 individuals provided comments. Dozens of exhibits were admitted, and the complete record consists of more than 100,000 pages.

Following this extensive public process, the Hearing Officer issued a 104-page Report, dated September 9, 1999. Attached as Exhibit 1. The Hearing Officer Report ("HOR") included nineteen findings of fact (¶¶254-272), eight pages of narrative discussion (pp. 72-79), and eleven conclusions of law (¶¶ 46-56) related to Permit Condition IV.B.2.b. The Hearing Officer considered this condition to be "[p]erhaps [the] most controversial and provocative issue raised in the proceeding." HOR at 72. He specifically stated that "Permit Condition IV.B.2.b, or similar language, is necessary to protect public health and the environment, is beyond serious dispute." HOR at 75. Permit Condition IV.B.2.b. as recommended by the Hearing Officer provided as follows:

Specific prohibition - after this Permit becomes effective, the Permittees shall not dispose non-mixed TRU waste in any Underground HWDU unless such waste is characterized in accordance with the requirements of the WAP specified in Permit Condition II.C.1. The Permittees shall not dispose TRU mixed waste in any Underground HWDU if the Underground HWDU contains non-mixed TRU waste not characterized in accordance with the requirements of the WAP. HOR at 103 (emphasis in the original).

Without the jargon, the second sentence, which DOE requests modification, means that DOE cannot dispose of mixed hazardous and radioactive waste in any underground hazardous waste disposal unit, if the unit already contains non-mixed, i.e. pure radioactive, waste that was not characterized in accordance with the waste analysis plan specified in the permit. The Hearing Officer recommended the addition of the phrase "after this Permit becomes effective" because the permittees already disposed of waste in Panel 1 that was not characterized in accordance with the permit, and they feared "that NMED intends to pursue a permit violation action immediately upon issuance of the permit." HOR at 78. Importantly, the Hearing Officer

¹The HWA requires that each person owning or operating a hazardous waste management facility have a permit. N.M. Stat. Ann. § 74-4-4.A(6); 20 N.M.A.C. § 4.1.900; 40 C.F.R. Part 270. The permit is issued pursuant to regulations promulgated by the New Mexico Environmental Improvement Board, which in significant part incorporate federal regulations. N.M. Stat. Ann. §§ 74-4-4.A(6); 20 N.M.A.C. § 4.1, et seq.

specifically stated:

And, of course, Applicants could not dispose TRU mixed waste in any Underground HWDU if the Underground HWDU already contains TRU non-mixed waste *not* characterized in accordance with the WAP. HOR at 79; emphasis in original.

The Hearing Officer's findings and conclusions on this point are amply supported by the record. The draft WIPP permit, issued on May 15, 1998, did not contain a condition IV.B.2.b. The condition first appeared in the revised draft permit, issued on November 13, 1998 and noticed for public hearing. At the public hearing, on March 18, 1999, NMED submitted a revised condition IV.B.2.b, which was the same as that subsequently adopted by the Hearing Officer, except it did not contain the words "after this Permit becomes effective." New Mexico Environment Department's Direct Testimony Regarding Regulatory Process and Imposed Conditions, Exhibit A, Prohibition of Non-Mixed TRU Waste at 1, attached as Exhibit 2.

NMED stated that the Permit Condition IV.B.2.b "protects human health and the environment by ensuring that the waste[s] managed at WIPP are properly characterized." *Id.* at 1. "Proper characterization is essential to achieving compliance with the environmental performance standards . . ." *Id.* at 1.

NMED stated that Permit Condition IV.B.2.b. was consistent with a permit application in which DOE repeatedly committed to characterize all waste, mixed and non-mixed, "as though it were mixed." *Id.* at 1. "This commitment [was] repeated throughout the Application, related references, and other WIPP documents." *Id.* at 1. NMED "was shocked by DOE's announcement [on May 18, 1998 - after the draft permit was issued] that it intended to dispose [of] waste at WIPP before permit issuance." *Id.* at 2.

NMED stated that Permit Condition IV.B.2.b. was necessary (1) to ensure compliance with the HWA, (2) to protect human health and the environment, and (3) because it reflects a critical commitment by DOE in the permit application which, if changed, raised serious questions regarding the accuracy and completeness of the application. *Id.* at 3 - 4. If DOE had disclosed prior to the issuance of the draft permit, its intent not to honor its commitment to await permit issuance before commencing waste disposal, NMED could have exercised several options, including, (1) ordering DOE to submit a revised application, (2) requesting DOE to submit additional information, and (3) denying the permit application if NMED found that the DOE had knowingly and willfully misrepresented a material fact in the application for a permit. *Id.* at 8.

Most importantly, NMED further stated that DOE's effort to withdraw this crucial commitment in public comments on the draft permit also raises substantial questions. The purpose of public comment is to gather information bearing on the draft permit; it is not an opportunity for the Applicants to propose substantive changes in the Application, particularly when such changes undermine the fundamental bases for the draft permit. *Id.* at 8 (emphasis added). Finally, NMED stated:

If the Applicants no longer intend to characterize all waste in compliance with the terms of the permit, for the reasons stated above, NMED must consider the Application to be inaccurate and incomplete. Further, NMED must recommend the Application to be remanded for revision to address critical issues regarding non-mixed waste, including whether the Applicants intend to dispose alleged non-mixed wastes in a proposed RCRA-regulated unit, the quantity of non-mixed waste involved, the characterization of non-mixed waste, the potential VOC emissions and monitoring, and numerous other issues affecting human health and the environment. *Id.* at 9.

The permit writer for NMED testified that DOE's commitment to not dispose of any waste prior to the issuance of the permit was "critical and key to all the assumptions that went into developing the draft permit" and that changing the commitment was a "major modification." Tr. 2454, ll. 10-13 & Tr. 2455, ll. 14-15. He further testified that the intent of the second sentence of Permit Condition IV.B.2.b was to ensure that if any unpermitted waste is put in a hazardous waste disposal unit at WIPP, then that unit cannot be used for hazardous waste disposal. Tr. 2634, ll. 18-23. The NMED witness also testified that Permit Condition IV.B.2.b. was added to the revised draft permit because NMED received additional information that supported the conclusion that DOE intended to dispose of non-mixed waste at WIPP prior to the issuance of the permit. Tr. 2641, ll. 16-24. Accordingly, Permit Condition IV.B.2.b was designed to address the hazards posed by DOE's disposal of waste at WIPP before it had a permit. [Transcripts cited are attached as Exhibit 3.]

On October 13, 1999, you re-opened the administrative record to allow all parties to respond to the following question:

Does the prohibition regarding disposal of TRU mixed waste referenced in the second sentence of Permit Condition IV.B.2.b. apply to waste disposed of prior to permit issuance? Amended Order issued on October 14, 1999, attached as Exhibit 4.

DOE argued that the second sentence of Permit Condition IV.B.2.b. "is ambiguous" and should be changed to make it clear "that the second sentence applies only to non-mixed waste disposed of after the permit is effective." DOE and Westinghouse Response to the Secretary's Question Regarding Permit Condition IV.B.2.b at 1, attached as Exhibit 5. DOE proposed a revised second sentence:

The Permittees shall not dispose TRU mixed waste in any Underground HWDU if the Underground HWDU contains non-mixed TRU waste which was disposed of after this permit became effective and was not characterized in accordance with the requirements of the WAP. *Id.* at 3.

You did not adopt DOE's suggested language. The language of Permit Condition IV.B.2.b remained unchanged. The language of the Class 1 modification, however, is exactly the same language as that previously proposed by DOE and previously rejected by NMED. Language that was specifically considered and rejected based on an extensive administrative record. Language that was rejected because DOE had made a major and substantial modification to its permit

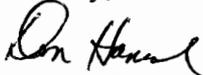
application, after the draft permit had issued and the public hearing commenced, by disposing of waste before it had a hazardous waste permit, contrary in its often repeated commitment that it would not do so. A fundamental and critical change that necessitated Permit Condition IV.B.2.b.

Now, NMED fails to honor its commitment to protect the public health and the environment by proposing to allow the disposal of mixed, i.e. hazardous, waste in units that contain waste not characterized in accordance with the permit and by prohibiting any meaningful public participation is this major and substantive change. Pursuant to the HWA, NMED must hold a public hearing at which all interested persons are given the opportunity to submit data, views, and arguments and to examine testifying witnesses for modifications that are "major." N.M. Stat. Ann. § 74-4-4.2.H. The corresponding regulations specify three classifications of regulations. 20 N.M.A.C. § 4.1.900; 40 C.F.R. §270.42. Class 2 and 3 modifications generally include changes such as increases to a facility's disposal capacity, changes in its disposal unit management practices, and changes to allow the disposal of different wastes. 20 N.M.A.C. § 4.1.900; 40 C.F.R. §270.42(b) & (c). These types of modifications are fairly described as major, and a public evidentiary hearing is required.

The requested modification cannot appropriately be considered as class 1, since it involves a matter that NMED itself characterized throughout the permit hearing as fundamental, critical, substantive, and major. However, NMED has apparently agreed with DOE that the change to Permit Condition IV.B.2.b to allow the disposal of hazardous waste in units that already contain waste not characterized in accordance with the permit, i.e. Panel 1, is a Class 1 modification. It did so at private meetings with DOE related to DOE's appeal of the permit, at which the public, and parties to the litigation, were excluded. SRIC specifically requested to be included in the discussions, but was not permitted to do so. That process is also inconsistent with the requirements of the HWA and the regulations.

In conclusion, SRIC requests that you deny the modification. Alternatively, the request should be considered a major modification, subject to public hearing, under the HWA and NMED regulations. NMED should fully consider this letter and all of the attached exhibits as part of its decision regarding the requested class 1 modification. SRIC also requests that we be notified immediately about NMED's decision.

Sincerely,



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