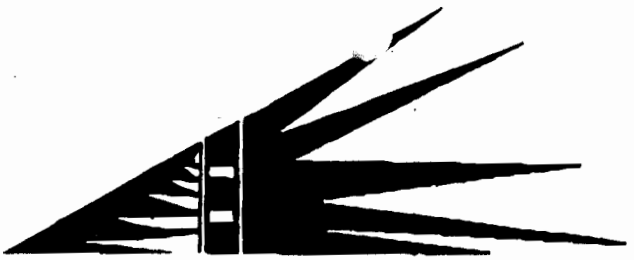

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September 6, 2001

Peter Maggiore, Secretary
New Mexico Environment Department
PO Box 26110
Santa Fe, NM 87502-6110 VIA FAX and U.S. MAIL

Dear Secretary Maggiore:

On August 29, 2001, NMED received the Department of Energy (DOE)/Westinghouse TRU Solutions "Temporary Authorization Request." The request was not available on DOE's website to the public until yesterday morning. SRIC strenuously objects to the Temporary Authorization, which is totally contrary to regulations regarding permit modifications. SRIC asks you to deny the Temporary Authorization.

SRIC also strongly states that the so-called "Class 1 modifications" discussed in the Temporary Authorization do not meet the requirements for Class 1 modifications and that there are not in effect, nor have they ever been in effect.

DOE's Temporary Authorization Request
Page 1 of the request states: "these modifications have already been put into effect." That statement is false and must be false.

Regulatory requirements
Under 40 CFR 270.42(a)(1) "the permittee may put into effect Class 1 modifications," under specified conditions. Under the regulations, any other Class 1 modifications (40 CFR 270.42(a)(2)), Class 2 modifications (40 CFR 270.42(b)), Class 3 modifications (40 CFR 270.42(c)), other modifications (40 CFR 270.42(d)), and temporary authorizations (40 CFR 270.42(e)) are not in effect until approved by NMED.

NMED never approved the Class 1 modifications that are cited in DOE's request, nor has NMED approved the requested modification under any other category. Nor does NMED have authority under the regulations to create additional classes of modifications. For example, NMED could not create a modification that is simultaneously both "in effect" and "not in effect."

Simply put, if the modifications are in effect, there is no basis for considering the request or granting a temporary authorization.

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The activities included in the Temporary Authorization Request are not Class 1 modifications. As an initial comment, three modifications that require a 204-page application to describe could not be Class 1 modifications.

In issuing the regulations regarding permit modifications, the EPA stated: Class 1 modifications are generally "correction of typographical errors; necessary updating of names, addresses, or phone numbers identified in the permit or its supporting documents; upgrading, replacement, or relocation of emergency equipment; improvements of monitoring, inspection, recordkeeping, or reporting procedures; updating of sampling and analytical methods to conform with revised Agency guidance or regulations; updating of certain types of schedules identified in the permit; replacement of equipment with functionally equivalent equipment and replacement of damaged ground-water monitoring wells." 53 Fed. Reg. 37914-15 (September 28, 1988).

Each of the three activities covered in the Temporary Authorization Request -- composited headspace gas samples, airtight sampling device, and drum selection for visual examination -- are highly complex and are in no way typographical errors or similar matters covered by Class 1 modifications. Each of the matters are covered in the WIPP permit and DOE has substantially changed its procedures in order to carry out the activities. The permittees are correct that to make such substantial changes requires a permit modification, but the changes cannot be made through a Class 1 modification.

The compositing of Headspace Gas Samples would be accomplished by use a 250 ml SUMMA canister instead of a 25 ml syringe. This is a totally new device, which is not allowed under the Permit. Rather than collecting up to five samples as is done with the syringe, the changed procedure is to provide for 20 composite samples. The new procedure is a very substantial change in equipment and activity from that provided in the Waste Analysis Plan of the Permit.

The airtight sampling device modification would result is using substantially different procedures and new sampling techniques as compared with the WIPP permit. In addition to the substantial changes in how headspace gas sampling is done, multiple and complex changes would be required to various sections of the Permit.

The drum selection for visual examination(VE) would change procedures such that drums that would be subject to VE under the WIPP permit would be excluded from such examination. This is a very substantial change in procedures which could lead to very different results from VE. Visual examination was a controversial issue during the permitting process, the subject of substantial public comment and technical testimony. Any substantial changes in VE practices cannot be considered as Class 1 modifications.

In addition, NMED has apparently determined that the requested modifications are not Class 1. In its "Administrative Completeness Determination" letter of August 31, 2001, NMED did not approve or approve with changes as Class 1 modifications the modifications included in the Temporary Authorization. So SRIC understands that those modifications have been rejected by

NMED and are not now included in the WIPP Permit.

The Temporary Authorization request must be denied.

As an initial matter, 40 CFR 270.42(e)(2)(i)(A) and (B) provides that a temporary authorization may be requested only for Class 2 or Class 3 modifications. Here again, if the modifications are Class 1, they cannot be considered for a Temporary Authorization.

As already noted, the very first sentence on page 1 of the Temporary Authorization Request falsely states that the modifications are in effect. This statement is repeated in the first sentence of the second paragraph on page 2 and in other places in the Request. Thus, the request is based fundamentally on inaccurate information. The regulations do not provide authority for NMED to approve a Temporary Authorization based on clearly false information. In such a circumstance, NMED must deny the request.

In its appropriate action of December 22, 2000, when NMED rescinded its approval of another DOE requested Temporary Authorization, NMED stated:

> In other words, the permittee must demonstrate that NMED should approve the proposed modification immediately because the facility cannot wait until action is taken on the modification request at the conclusion of the public comment period. To construe this provision in any other manner would subvert the regulatory process for permit modifications under the HWA and RCRA. Page 2, emphasis in original.

Nonetheless, DOE is once again asking NMED to subvert the regulatory process, including public comment process. DOE first did this by submitting the Class 1 modifications on July 20, 2000; November 1, 2000; December 12, 2000; and January 29, 2001 that were not appropriately Class 1. DOE is now trying to subvert the process and public comment by requesting a Temporary Authorization, to again avoid public comment. No such action is allowed under the regulations and NMED may not sanction such behavior; instead NMED should again inform DOE that it cannot and will not approve such a request.

While SRIC has not had time to carefully review the entire 204-page request, we must also point out the ludicrous and insulting nature of the request. For example, on page 14 of the request, DOE states that "granting the temporary authorization will enable timely closure of Panel 1." As you and DOE are well aware, SRIC has advocated for years that Panel 1 not be used and that it be immediately closed. Instead, DOE has continued to use an unsafe Panel 1, even though Panel 2 has been approved for use for a year. For DOE, which has steadfastly resisted requests from SRIC and others to close Panel 1, to now try to justify an inappropriate Temporary Authorization to expedite closure of Panel 1 is hypocritical at best! On page 15, DOE implies that if the Temporary Authorization is not approved, it "could cause a loss of employees" at WIPP. There is absolutely no basis for such a statement, which can only be construed as trying to blackmail NMED to approve a request that has no basis on the grounds that NMED would otherwise be responsible for layoffs.

The other so-called justifications are equally meritless or false and in no way can be used as the basis to approve a Temporary Authorization under 40 CFR 270.42(e)(3).

In summary, SRIC asks that you deny the Temporary Authorization. If there is any doubt that the Class 1 modifications that are included in the request have been rejected and are not in effect, NMED should clarify that fact to the permittees.

Thank you for your consideration. Please provide us with your decision as soon as it is available.

Sincerely,

Don Hancock