



**Subject:** NMED comments on WIPP draft closure plan position paper

**Date:** Thu, 22 Aug 2002 16:14:33 -0600

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Jody -

I received your fax dated August 21, 2002, addressed to James regarding CBFO's draft closure plan position paper dated August 26, 2002. In the cover page, you solicited comments on it from NMED. I have taken some time to review your paper in conjunction with DOE's original permit application, the current permit and the relevant regulations, and provide the following feedback to you.

I have no comment on the section entitled Background.

In the section entitled Permit Modification Request, you state that you have identified a difference between the language of the permit and the regulations. I would have reached the same conclusion if I had not continued reading the regulations under 40 CFR §264.112(c)(2) and (3). However, both the permit application (Chapter I, Closure Plans, Post-Closure Plans, and Financial Requirements, Section I-1d(4), Amendment of the Closure Plan) and the permit (which you cited) clearly track these latter sections of the regulations that you failed to quote. Therefore, I can only conclude that the Permittees are taking a different position than expressed in their application, in that they no longer need to "submit a written request for a permit modification with a copy of the amended Closure Plan at least 60 days prior to the proposed change in facility design."

The apparent intent of 40 CFR §264.112(c)(1) is to provide the broadest time frame within which a permittee may notify the agency of the need to modify or amend a closure plan. Any attempt to construe these regulations to justify notification at the latest possible time appears inconsistent with proper notification requirements elsewhere with RCRA (e.g., notification upon discovery, notification within 7 days of determination, notification within x days that something is expected to happen, etc.)

If you want NMED concurrence on CBFO position #1, you need to convince

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us that the modified panel closure system design being developed is somehow not a "proposed change in facility design." I anticipate that NMED would be somewhat skeptical of arguments along the lines that "facility design" is limited to the design/construction of the mined panels and is somehow unrelated to the design/construction of the panel closure system.

Furthermore, without prior approval for a change in the closure schedule for Panel 1, the Permittees would be in violation of Permit Condition IV.I.1 (Panel Closure) if, following completion of waste emplacement, the panel is not closed "in accordance with the design in Permit Attachment II and the schedule in Figure I-2..." (Attachment I, Section I-1e(1)). I suggest that you reconsider your contention that submittal of a modification request relieves you of complying with existing permit requirements (i.e., to close Panel 1 using Option D upon completion of waste emplacement). Please review Permit Condition I.E, Duties and Requirements, particularly I.E.1 (Duty to Comply) and I.E.5 (Need to Halt or Reduce Activity Not a Defense) for further insight to NMED's position.

Regarding CBFO position #2, NMED would determine the "start date" for implementing the Panel 1 Closure Schedule, possibly independent of EPA's rule making. If implementation requirements (i.e., completing contract agreements, procuring material, etc.) dictate a modification to the schedule beyond the one currently imposed in Figure I-2 of the Closure Plan, the Permittees should request this at the same time as the request to modify the panel closure system design.

Regarding CBFO position #3, NMED reiterates the need for the Permittees to comply with the requirements of the permit. Without prior approval for a change to the closure schedule, the Permittees could not limit activities to simply installing an explosion isolation wall pending EPA's recertification of WIPP. Although installation of an explosion wall may be an appropriate activity pending final agency action on a design modification request, any request to change the closure schedule should fully identify all activities that require consideration prior to approval.

I hope you find these comments constructive. Please contact me with further questions, bearing in mind I will be involved in the DAC public hearing in Santa Fe for the most of next week.

Steve

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