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January 22, 2003

Secretary Ron Curry
New Mexico Environment Department
PO Box 26110-0110
Santa Fe, NM 87502

RE: WIPP Class 1* Modification - Panel Closure

Dear Secretary Curry:

We request that you deny the WIPP Class 1* Modification - Panel Closure, submitted by the permittees on November 25, 2002 and approved by the previous Secretary on December 26, 2002. You have the authority to make such a decision, and we urge you immediately to take the requested action for several reasons.

First, you should consider public comment. In a meeting on November 15 and subsequently, representatives of both the permittees and NMED promised that there would be a reasonable opportunity for public comment on the modification request before NMED took final action. Most of the participants understood that part of the process would be another, similar meeting to discuss that modification request after the engineering study of the expected performance of the partial panel closure system (12-foot wall) was released and before a decision was made. Present at that November 15 meeting were representatives from the permittees, NMED, Senator Jeff Bingaman, the New Mexico Attorney General, Citizens for Alternatives to Radioactive Dumping (CARD), Concerned Citizens for Nuclear Safety (CCNS), Environmental Evaluation Group (EEG), Nuclear Watch of New Mexico, and Southwest Research and Information Center (SRIC). Those at the meeting agreed that the permittees should submit an engineering study of the expected performance of the partial panel closure system (12-foot wall) as part of any permit modification request. That engineering analysis was finally submitted electronically to NMED on December 20 and emailed late in the day by NMED to interested persons.

The decision to approve the Class 1* modification made on December 26 did not allow adequate time for written public comment, nor was another meeting held among interested parties. Because of the holidays, several groups' offices were closed so they did not have an opportunity to provide written comments. The written public comment submitted before the December 26 decision was by SRIC, which strongly opposed the modification request. No written public comment was submitted in support of the modification request. After the decision was made, written comment in opposition to the request was submitted by CARD, and CCNS phoned the Secretary's office to oppose the request. EEG also submitted written comments on January 9, 2003, which, among other things, questioned the timing of the decision. All of the undersigned groups strongly oppose the modification request. Thus, public comment overwhelmingly demonstrates that the modification request should be denied.

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Second, the request is not a proper Class 1* modification. Even the flawed NMED decision of December 26 concluded that the request was not proper when it stated:

"[the modification request] does not provide a schedule in compliance with 20.4.1.500 NMAC (incorporating 40 CFR §264.112(b)(6))." at 2.

Thus, the proper action was to deny the request.

Instead, the December 26 decision changes the modification request to provide schedules for installation of the 12-foot wall within "180 days after the last receipt of waste in Panel 1," and for final closure of Panel 1 "no later than five years after completion of the explosion isolation wall." at 3.

While providing a schedule, the decision also radically changes the permit, which previously did not provide for a partial closure of any panel. Instead, the permit requires, among other things, that "the nominal operational life of the closure system is thirty-five (35) years." Permit Attachment I, I-1e(1). Having a partial panel closure for five years for panel 1 was never previously proposed by the permittees, was not discussed in public comment or at the 19 days of public hearing in February and March, 1999 on the permit application, and thus is not supported by any administrative record. Making a decision to fundamentally change a permit requirement without such a record is improper and is not consistent with the New Mexico Hazardous Waste Act (NMSA §74-4-1 *et seq.*), nor federal or state regulations.

Thus, we request that you deny the Class 1* modification request for Panel 1. Regulations under the New Mexico Hazardous Waste Act (20 NMAC 4.1.900, incorporating 40 CFR 270.42(a)(1)(iii)) provide that NMED may deny any class 1 modification.

We urge you to immediately deny the modification request. If you do not do so, parties could be forced to file a notice of appeal with the New Mexico Court of Appeals, because under the HWA, judicial review of "any final administrative action" must be filed "within thirty days after the action." NMSA §74-4-14.A. SRIC has a challenge to a previously issued class 1 modification related to permit condition IV.B.2.b currently pending before the New Mexico Supreme Court. Southwest Research and Information Center, et al. v. State of New Mexico, New Mexico Environment Department, et al. Case No. 27,578.

Denying the Class 1* modification request would allow for further public discussion and a subsequent, appropriate modification request submittal by the permittees. We would point out that the permittees expect to continue to emplace waste in Panel 1 until at least March 15, 2003.

Thank you very much for your prompt consideration of this request. Please feel free to contact Don Hancock about this matter at 262-1862. Please provide your written response to each of the signers.

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