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July 16, 2003

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

VIA FAX and U.S. MAIL



Dear Secretary Curry:

This morning I received a FedEx package that contained a 51-page "Response to Comments" plus an additional 33 pages in two attachments from the Carlsbad Field Office of the Department of Energy (DOE) regarding permit modifications that were submitted to the Waste Isolation Pilot Plant (WIPP) permit on May 14, 2003. The cover letter in the package stated that the responses were submitted to NMED on July 14, 2003.

Southwest Research and Information Center (SRIC) has significant concerns about those responses that we want to bring to NMED's attention. Some of the responses actually are substantial changes in the permit modification requests that have the effect of circumventing public participation requirements.

Regulations under the New Mexico Hazardous Waste Act (HWA), 20 NMAC 4.1.900, incorporating 40 CFR 270.42(b)(5), state: "The public shall be provided at least 60 days to comment on the [class 2] modification request." This provision is to ensure that the public has adequate time to comment on the modification request because public participation is an essential part of the federal Resource Conservation and Recovery Act (RCRA) and the HWA. RCRA states: "Public participation in the development, revision, implementation, and enforcement of any regulation, guideline, information, or program under [RCRA] shall be provided for, encouraged, and assisted by the [EPA] and the States." 42 U.S.C. §6974(b). The HWA states: The public's involvement is "to help ensure the maintenance of the quality of the state's environment; to confer optimum health, safety, comfort, and economic and social well-being of its inhabitants; and to protect the proper utilization of its lands." NMSA §74-4-2.

Thirty-five pages of the permittees' responses relate to the Drum Age Criteria (DAC) and sealed sources permit modifications which were submitted as class 2 modification requests, and which SRIC believes are "major modifications" for which a public hearing is required. NMSA §74-4-4.2.H. SRIC also notes that the voluminous responses indicate that the modification requests were incomplete, which is grounds for denial of the requests. 40 CFR 270.42(b)(7).



In their July 14 cover letter to you (which was not included in the package sent to SRIC), the permittees state: "In some cases we have provided language that modifies, clarifies or supplements the modification requests." Thus, the permittees have admitted that in some cases they are changing the modification requests.

SRIC recognizes that a permittee may submit additional comments on a modification request. The permittees also may voluntarily revise the request. But when they do so, they should comply with public comment requirements, which did not occur in this case.

For example, in their responses, the permittees now explicitly propose to allow leaking sealed sources to be permitted and submit new language that was not included in the request. Comment 34 response. Public comment could point out the lack of technical analysis of the effects of such leaking containers and the specific incompleteness of the modification request in that regard.

For example, the permittees now add information that was knowingly omitted from the request that the direct loaded 85-gallon drum has not been approved by the Nuclear Regulatory Commission (NRC) and that an application for such approval has not been submitted. Comment 18 response. While SRIC pointed out this incompleteness in its comments, there has not been public comment regarding the changed procedure in which the DAC requests are submitted prior to the approval by the NRC, as was done with other containers. With additional time, SRIC and other members of the public could provide additional comments on the responses.

In several instances in the past when the permittees submitted inadequate and incomplete modification requests, they were voluntarily withdrawn before NMED made any decision. That is still an option related to these modification requests.

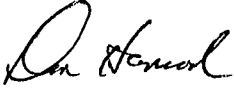
In your January 27, 2003 letter to me, you stated: "During my administration, I will ensure that the public has time to submit comments and decisions will not be rushed through without proper input." Thus, SRIC requests that you take action to ensure that the letter and spirit of public participation requirements are met.

If the permittees do not withdraw the requests, we ask you to take the following actions:

1. Inform the permittees that since they have submitted revised permit modification requests that they must fully comply with the requirements of 40 CFR 270.42(b), including re-noticing the requests, having a public meeting, and providing an additional 60-day comment period, or
2. Deny the DAC and sealed sources permit modification requests, as SRIC and others stated in written public comments.

Thank you for your careful consideration.

Sincerely,

A handwritten signature in cursive script, appearing to read "Don Hancock".

Don Hancock

cc: Charles Lundstrom  
Sandra Martin  
Steve Zappe  
Tracy Hughes