



## **SOUTHWEST RESEARCH AND INFORMATION CENTER**

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January 15, 2004

Steve Zappe  
New Mexico Environment Department  
2905 Rodeo Park Drive, Building 1  
Santa Fe, NM 87505



RE: WIPP Class 2 Permit Modification Request - LANL Sealed Sources

Dear Steve,

Southwest Research and Information Center (SRIC) requests that NMED deny the permit modification request because it is not adequately supported technically and, despite previous public comment and NMED's denial of the request on September 11, 2003, remains incomplete and inaccurate so as to not provide enough basis to approve the modification with changes. Regulations under the New Mexico Hazardous Waste Act (20 NMAC 4.1.900, incorporating 40 CFR 270.42(b)(6)(B)) provide that NMED may deny a Class 2 modification.

1. The request is not properly a class 2 modification request.

In its July 14, 2003, comments on the previous permit modification request, SRIC pointed out that the proposed modification was not properly a class 2 modification, but rather must be submitted by the permittees and considered by NMED as a class 3 modification. Nonetheless, the permittees resubmitted a class 2 modification request.

In its September 11, 2003 denial letter, NMED suggested that another option would be "to seek a modification to the previously approved condition specified in Permit Attachment B, Section B-3a(1)(i), regarding reduced sampling requirements for wastes with no VOC-related hazardous waste codes." Attachment 1, Page 4. Nonetheless, the permittees resubmitted a permit modification request that provides for no headspace gas sampling, as compared with the reduced headspace gas sampling requirements of Section B-3a(1)(i).

Because the request is not properly a class 2 modification, NMED should deny the request. As SRIC has previously suggested, SRIC also believes that NMED should clearly state to the permittees that continuing to waste NMED's and the public's resources with inadequate modification requests is unacceptable. As a related matter, NMED's failure to provide full responses to all the comments submitted to the previous sealed sources modification request, as it has previously done and as was promised in its denial letter on September 11, handicaps both the permittees and the public regarding the resubmitted request.

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2. The request does not state a need upon which NMED can grant the modification. 40 CFR 270.42(b)(1)(iii) requires that the request "explains why the modification is needed." The request states that it "is needed to obtain relief from characterization requirements that should not be applied to the LANL sealed sources waste streams." Page 4. The request also states that there is an urgency based on homeland security. Page 5.

Regarding the first issue, as noted above, the request is not consistent with the existing provisions for reduced headspace gas sampling, because it provides for no headspace gas sampling. That statistical sampling and analysis is allowed for a few waste streams, rather than 100 percent headspace gas sampling, does not demonstrate a need for any modification and certainly not for no headspace gas sampling for any waste stream. The five-year permitting process established the need for headspace gas sampling, and the modification request as submitted does not provide any adequate basis to totally eliminate headspace gas sampling and analysis.

The request states that the drum age criteria (DAC) requires a 152-day delay in conducting headspace gas sampling. Page 2. To address that issue, the permittees should demonstrate that a shorter DAC is justified, rather than eliminating headspace gas sampling entirely.

The second "reason" also was included in the permit request that was denied by NMED on September 11, 2003. In its comments of July 14, 2003, SRIC strongly criticized that "rationale." SRIC pointed out that Congress has provided ten million dollars to DOE "to accelerate the recovery of excess radioactive materials in the United States through the Department's Offsite Source Recovery program" House Report 107-593, page 142. Nothing in that appropriations conference report language states or implies any relationship to WIPP, let alone to the need for a permit modification. SRIC also pointed out information from the General Accounting Office (GAO). Pages 4-5. The resubmitted modification request still does not discuss the GAO report, nor does it adequately respond to SRIC's comments. Thus, the permittees' modification request not only does not describe the need for the modification, as required by the regulations, but it provides inaccurate information, contrary to the requirements of 40 CFR 270.11(d). SRIC once again requests that NMED specifically require an explanation from the signers of the certification submitted with the modification as to why they should not be considered to have intentionally submitted incomplete and inaccurate information.

3. The modification request proposes to bring waste to WIPP that is prohibited by law. The WIPP Land Withdrawal Act (Public Law 102-579, as amended) does not include a mission for WIPP to be for "the recovery of excess radioactive materials." On the contrary, the WIPP Act actually *prohibits* WIPP from being used for much of those excess radioactive materials because they are not "generated by atomic energy defense activities." WIPP Act, Section 2(20).

The GAO has stated that the DOE Offsite Source Recovery program had collected more than 5,000 sealed sources and that it expects to collect more than 14,300 sealed sources. *Nuclear Nonproliferation: DOE Action Needed to Ensure Continued Recovery of Unwanted Sealed*

*Radioactive Sources.* GAO Report 03-483, April 2003, page 3. The vast majority of those sources are not defense transuranic waste that can be disposed at WIPP, even most of the plutonium-239 sources are not defense waste. GAO Report, pages 15 and 23.

In the resubmitted modification request, the permittees' agree that there are more than 14,000 excess sealed sources. Page 2. But they do not establish how many of them are from defense activities. Instead, Appendix 1 is a July 8, 2003 Memorandum that states that DOE has 1,320 excess plutonium-239 sources that are "waste from defense activities as defined in the Nuclear Waste Policy Act."

Appendix 1 is grossly inadequate. If Appendix 1 is to support disposing of 1,320 plutonium-239 sources that the permittees' purport to be from defense activities, the request should so state. However, even regarding the plutonium-239 sources, the request does not establish that the GAO report is incorrect, so it does not provide an adequate basis for NMED to approve the request for even that less than 10 percent of the sealed sources. Alternatively, if the request seeks to bring all 14,000 sealed sources, it provides no information that all of those sources are from defense activities.

In addition, the Appendix 1 analysis does not actually establish that any of the sealed sources are allowed under the WIPP Act. That July 8, 2003 memorandum refers to "defense activities as defined in the Nuclear Waste Policy Act (NWPA)." However, the WIPP Act requirement refers to section 213 of the DOE Authorization Act of 1980, not to the NWPA.

Furthermore, if DOE is not requesting that all sealed sources be disposed of at WIPP, it has still not addressed the fundamental GAO criticism. The GAO Report recommends that DOE "take immediate action to provide storage space for these sources at a secure DOE facility...[and] initiate the process to develop a permanent facility for greater-than-Class-C radioactive waste to carry out the requirements of Public Law 99-240." Pages 28-29. DOE has been ignoring that legal requirement for an additional disposal site for 17 years, and the modification request could not satisfy that criticism unless all sealed sources are to be disposed at WIPP, something that even the Appendix 1 memorandum does not support. Instead, DOE must develop a disposal site for all sealed sources. Such a site would result in no sealed sources being disposed at WIPP.

The request also still includes Attachment D, which as SRIC stated in its July 14, 2003 comments, indicates that sealed sources that are not now defense waste, "may be determined to meet this WIPP eligibility requirement at some time in the future." Attachment D, Page 1. If the modification request is approved, NMED and the public could be excluded from any future such decisions about whether additional sealed sources can be brought to WIPP. Thus, the modification request is for a "blank check" for DOE to send any and all sealed sources to WIPP.

Such a "blank check" is not allowed under the HWA, as it would be in violation of federal law. An adequate modification request would specify how many sealed sources are included and conclusively demonstrate that such sources are all from defense activities.

4. The request does not demonstrate that sealed sources would be adequately characterized.

A major reason that DOE is collecting sealed sources is that many are damaged or leaking and pose a risk to public health and the environment. But the request would allow leaking sealed sources to be brought to WIPP, because it does not include language in the permit to ensure that leaking sources would not be sent to WIPP. The proposed language regarding integrity of the sealed source still includes "documented contamination survey results," but it has been modified to refer to the requirements of 10 CFR 34.27. Page B-4. However, among other things, those NRC regulations include requirements for qualified personnel (10 CFR 34.27(a) and (b)) that are not included in the permit, nor in the B-6 checklists. The proposed permit language does not include a specific requirement that the AK include testing and recordkeeping requirements of 10 CFR 34.27(c).

Further, referring to other regulatory requirements in confusing and adds to the complexity of the permit. In its previous denial, NMED stated that such "reliance on and inclusion of regulatory requirements from several other Agencies into the permit, through our experience, can complicate the compliance process." September 11, 2003 denial letter, Attachment 1, page 4. That concern is still valid and has not been addressed in the re-submitted request.

Another fundamental change that would be required by the request is to have a totally new purpose for Acceptable Knowledge beyond the permit's requirements to delineate TRU waste streams, assess if mixed heterogeneous debris wastes exhibit a toxicity characteristic, and to assess if TRU mixed wastes are listed. Section B4-1. During the permit hearings, it was clearly demonstrated that AK was not adequate and that confirmation and sampling and analysis were required. Including additional AK provisions requires a showing far beyond that included in the request.

5. The modification request conflicts with NMED's pending permit modification.

Sealed sources were not included in the Transuranic Waste Baseline Inventory Report (TWBIR), so they were not to be disposed of at WIPP at the time the permit was issued. On November 26, 2003, NMED issued a permit modification for public comment. At that time, NMED stated that it issued the permit "based on the assumption that all information contained in the permit application and the administrative record was accurate, including the representation that the TWBIR reflected the total DOE TRU waste inventory." Fact Sheet at page 2. At the same time that NMED is considering a modification that would prohibit any waste that was not included in the TWBIR, it should not approve a modification that would allow for such wastes to come to WIPP. As already noted above, there is ample additional reason to deny the request.

In summary, the permit modification request must be denied for many reasons, as stated above, and because it would clearly violate the requirements of the Hazardous Waste Act to protect public health and the environment. Section 74-4-4.A, NMSA; 40 CFR 270.42(b)(7)(iii).

To reiterate, SRIC strongly urges that this permit modification request be denied. NMED should inform the permittees' that any future modification request for sealed sources must be a class 3

modification request. NMED should also require permittees' to explain why, despite their certification, the request includes inaccurate information.

Thank you for your careful consideration of all of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Don Hancock". The signature is written in a cursive style with a large initial "D" and "H".

Don Hancock