



SOUTHWEST RESEARCH AND INFORMATION CENTER

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March 22, 2004

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



RE: Revision to Current WIPP Waste Analysis Plan

Dear Steve,

Southwest Research and Information Center (SRIC) requests that NMED deny the requested permit modification submitted on January 12, 2004, because it is substantially incomplete, the activities proposed do not protect human health and the environment, and many provisions of the request are not consistent with the Hazardous Waste Act and federal and state regulations.

Regulations under the New Mexico Hazardous Waste Act (20 NMAC 4.1.900, incorporating 40 CFR 270.42(c)(6)) provide that NMED may deny Class 3 modifications. SRIC requests that NMED deny the requested modification.

The modification request does not protect human health and the environment and must be denied.

The New Mexico Hazardous Waste Act (HWA) requires that all permits, including the WIPP permit, must "protect public health and the environment." Section 74-4-4.2.C. NMSA. 20 NMAC 4.1.500 (incorporating 40 CFR 264.601) requires that the permit for WIPP, as a miscellaneous unit, must protect human health and the environment.

Despite those legal and regulatory requirements, the request does not demonstrate that the hundreds of changes that would be made to the permit would protect human health and the environment. Indeed, the permittees' overview of the request does not even include the usual statement that the changes "do not reduce the ability of the Permittees to provide continued protection to human health and the environment." Thus, the permittees have implicitly admitted that the changes would not protect public health and the environment.

Moreover, the request provides no technical basis to justify the changes. And many of the proposed changes would endanger human health and the environment. For example, eliminating many sampling and analysis requirements means that prohibited items would come to WIPP. Those prohibitions are necessary to protect human health and the environment, and allowing



prohibited items to come to WIPP, including because of inadequate characterization, endangers human health and the environment.

There is additional evidence that there is no technical basis for the request. The Department of Energy (DOE) requested that the National Academy of Sciences (NAS) review and support its plans to substantially reduce waste characterization procedures, including changing and eliminating procedures such as those included in the permit modification. After conducting its study, the NAS panel concluded that it could not support any particular changes in waste characterization requirements because DOE had not provided adequate technical support for such changes. The Panel found:

Finding 1: DOE has stated that some characterization activities are too expensive and time consuming and can be modified without increasing risks while reducing characterization time and costs. However, DOE has not presented a systematic analysis to support this argument to the regulator or to the public. Although DOE has performed analyses of many aspects of operations related to WIPP performance, including transportation, the committee could find no studies that explicitly, systematically, and quantitatively link its waste characterization program to risks to the public, workers, or the environment. National Research Council, 2003. *Improving the Characterization Program for Contact-Handled Transuranic Waste Bound for the Waste Isolation Pilot Plant*. NMED has the entire report, which also is available at: <http://www.nap.edu/books/0309090903/html/>

SRIC strongly agrees that there are not technical bases included in the modification request. The changes proposed in the request would not protect human health and the environment. Thus, the request must be denied.

The permittees asserted legal basis to justify the modification request is not sufficient basis for NMED to approve the request.

While the permittees do not demonstrate that the modification request would protect human health and the environment, they do provide a justification for the request. The request is "required by Section 311 of the Energy and Water Development Appropriations Act for Fiscal Year 2004 Pub.L. 108-137." Page 1.

While Section 311 is current law, the provision does not amend the WIPP Land Withdrawal Act, Pub. L. 102-579, as amended. Section 9 of the WIPP Act requires that WIPP shall comply with numerous specified federal laws, including "all other applicable Federal laws pertaining to public health and safety or the environment." Section 9(a)(1)(G).

The permittees do not provide any legal analysis that Section 311 amends or repeals the WIPP Act. Nor do the permittees show that Section 311 preempts state law.

SRIC does not believe that Section 311 preempts the HWA or federal and state regulations related to that Act. Thus, SRIC urges NMED to conclude that its authority is not preempted, so it must base its action related to this modification request on its authority under the HWA.

Moreover, the statute, at best, is confusing and poorly drafted. For example, Section 311(a) refers to "hazardous waste analysis requirements" of RCRA. RCRA certainly requires "standards" and "performance standards." The law also requires "records," "operating methods, techniques, and practices," among other things. 42 USC 6924(a). But RCRA does not discuss requirements for "waste analysis." Thus, Section 311 appears to refer to requirements that do not exist.

If Section 311 means to refer to RCRA's regulations, it is true that 40 CFR 264.13 discusses "waste analysis." That regulation requires "detailed chemical and physical analysis of a representative sample of the wastes." 40 CFR 264.13(a)(1). Section 311, however, does not specify those requirements for sampling and analysis, but rather applies to "waste confirmation for all waste received for storage and disposal." Further, Section 311 does not apply to a "representative sample," but rather to a "statistically representative subpopulation." Section 311(a).

Thus, Section 311 may place limitations on the waste confirmation activities that NMED may require at the WIPP site, but it does not clearly place limitations on the "detailed chemical and physical analysis of a representative sample of the wastes" that the WIPP permit imposes at the generator sites. Therefore, the permittees' modification request that would dramatically change the sampling and analysis at the generator sites is not supported by Section 311, nor is it supported technically, so those provisions must be rejected by NMED.

In their permit application and throughout the permit hearing in 1999, the permittees referred to "waste characterization" and "characterization" hundreds of times. The permittees testified: "The purpose of waste characterization is to obtain all the data and the information necessary to make sure that only acceptable wastes are disposed of at the WIPP facility." Transcript, page 426, ll. 21-24. The permittees testified that "the final and only waste characterization will be performed at the generator sites." Transcript, page 460, ll. 13-15. There is nothing in Section 311 that supports eliminating the need for "waste characterization," as the permittees attempt to do in the modification request. Indeed, eliminating waste characterization activities would lead to unacceptable and prohibited items being disposed of at WIPP. Such storage or disposal at WIPP is contrary to federal and state laws and regulations, so any provision that would result in such a result must be rejected.

The permit modification does not comply with Section 311

If Section 311 establishes some changed legal requirements for the WIPP permit, as the permittees apparently believe, many provisions of the request are not based on Section 311.

For example, the request would change the definition of "characterization" and "waste characterization" in Module II.C.1 and several other places in the permit. Section 311 does not discuss "waste characterization," so that new statute cannot justify those changed definitions. The permittees assert that "Section 311(b) addresses characterization activities." Request at 10. In fact, Section 311(b) addresses "disposal room performance standards." There is no basis in law, regulations, or the English language to equate "characterization" with "disposal room performance standards." Thus, those changes in the request are not supported and must be denied.

The modification request would delete provisions of Module II.C.1.b related to requiring generator sites to use EPA Publication SW-846 and requiring generator sites to demonstrate that the results of any new characterization methods "will be at least equivalent to the results from the currently used methods." Section 311 does not provide for deletion of those provisions of the permit. Moreover, the modification request provides no explanation for those changes, so they must be denied.

The modification request would delete "statistically" selecting containers for visual examination (Module II.C.1.c). Section 311 does not specify such a deletion, so the proposed change must be denied.

The modification request would change provisions of Module II.C.1.d related to "quality assurance objectives." Section 311 does not mention quality assurance objectives, so the proposed change must be denied.

The modification request would delete Module II.C.3.i. and II.C.3.j, related respectively to headspace gas sampling and radiography/visual examination (though the request has a typo related to the RTR/VE provision). Page II-6. Such a deletion is not included in Section 311, and is inconsistent with other provisions of Module II.C related to prohibited items, some of which are detected by radiography and visual examination. Thus, the proposed change must be denied.

The modification request would delete numerous references to the permittees' permit application. Pages II-17 and 18 and IV-15. Section 311 does not refer those attachments. SRIC strongly opposes deletion of those references, which, like the permittees' testimony at the permit hearing in 1999, provide the basis for many provisions of the permit, both provisions that permittees now propose to delete and provisions that are not proposed to be changed in the request. There is no technical or legal basis to remove those references, so the proposed changes must be denied.

The modification request would change Module IV.B.2.b provision that waste is characterized in accordance with the WAP requirements. Section 311 does not mention that provision of the permit. As NMED is well aware, that provision has been challenged in, and upheld by, the New Mexico Court of Appeals and Supreme Court, so the provision cannot be changed at the whim of the permittees. The proposed change must be denied.

The modification request dramatically changes Module IV.D.1 regarding room-based limits. The request provides that VOC concentration measurements be "in the closed room adjacent to an open (inactive) room." Section 311(b) refers to "monitoring airborne volatile organic compounds in underground disposal rooms in which waste has been emplaced until panel closure." Limiting VOC measurements to a single room is not consistent with the language of Section 311(b), so the proposed changes must be denied.

The modification request deletes Module IV.D.2.b related to the WIPP Waste Information System Report requirements, even though no such deletion is specified by Section 311. On the contrary, requiring the WWIS to contain VOC disposal room standards is totally consistent with aspects of the permit that would be unchanged by the modification, e.g., Table IV.D.1. Thus, the proposed changes must be denied.

Section 311(b) states that monitoring of airborne volatile organic compounds is required, but it provides no details about such monitoring. The permittees have not provided in the modification request a technical analysis of why their proposed provisions IV.F.2.e, IV.F.2.f, IV.F.2.g, and IV.F.2.h protect public health and the environment or a legal analysis that they are consistent with Section 311. Thus, those proposed changes in the permit are not based on Section 311, and they must be denied.

Based on proposed changes in Modules II and IV, the modification request includes many changes to Attachments B, B1, B2, B3, B4, B5, B6, and N. Many of those provisions are also not consistent with Section 311. Thus, those changes also may not be approved by NMED.

For example, the modification request eliminates the distinction between retrievably stored and newly generated waste on page B-2. Waste Matrix Code Groups are also eliminated on that same page. Section 311 does not address those matters, and the proposed changes must be denied.

The modification request provides for changing the purpose of radiography for retrievably stored waste. Pages B-17 and 18. Radiography would no longer be used on all containers to "verify the absence of prohibited items." Thus, the request would explicitly eliminate a procedure that is necessary to prevent prohibited items from coming to WIPP. Those proposed changes must be denied.

Although Section 311 mentions radiography and visual examination and "a statistically representative subpopulation," it does not specify the 10 percent that the modification request uses. Page B-17. Thus, that percentage, nor any other specific percentage, is supported by Section 311, and the proposed change must be denied.

There are many other examples of provisions in the modification request that are not supported by Section 311. But SRIC does not believe that it is required to comment on each and every provision. As SRIC has often previously done, we strongly object to the permittees filing inadequate, incomplete, and unjustified permit modification requests. Such modification requests waste NMED's time and resources, even assuming the \$1 million included in the legislation is provided. They also waste the time and resources of the public, including SRIC. The HWA regulations require that the permittees justify each provision of their requested modification. The permittees have not done so.

For the many inadequacies noted, the class 3 permit modification should be denied.

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

Sincerely,



Don Hancock