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22 March 2004

Mr. Steve Zappe
New Mexico Environment Department
Hazardous Waste Bureau
2905 Rodeo Park Drive, Building E
Santa Fe, NM 87505

Dear Mr. Zappe:

This letter transmits comments on behalf of the Water, Environment, and Utilities Division of the New Mexico Attorney General's Office concerning the Waste Isolation Pilot Plant (WIPP) Hazardous Waste Facility Permit Modification Request submitted by the U.S. Department of Energy (DOE) on January 12, 2004, containing modifications to the Waste Analysis Plan (WAP). The Environment Department (NMED) has designated this proposed modification for Class 3 modification procedures.

Several overall comments apply to this request:

First, major modifications are sought in this proposal, but essentially no technical support is offered for the changes proposed. Instead, DOE supports its request by reference to Section 311 of the Energy & Water Appropriations Act of 2004 ("Sec. 311"). Thus, there is a recurring issue whether the proposed modifications are required or supported by the language of the legislation. When no technical support is offered for a given change, it is submitted that such change must be required by the clear statutory language or it cannot be part of this modification.

Second, there is a question of the extent to which Congress, in Sec. 311, modified the requirements of the Resource Conservation and Recovery Act (RCRA) or the Hazardous Waste Act (HWA). Courts are reluctant to find exemptions from hazardous waste statutes in the absence of a clear and explicit legislative direction. See, e.g., Connecticut Coastal Fishermen's

Association v. Remington Arms Co., 989 F.2d 1305, 1317-18 (2d Cir. 1993); Hudson Riverkeeper Fund, Inc. v. Atlantic Richfield Co., 138 F.Supp.2d 482, 486 (S.D.N.Y. 2001).

Here, the legislation identifies its subject as "compliance with . . . the hazardous waste analysis requirements of [RCRA] or other applicable laws." The legislation then states that "waste confirmation . . . shall be limited to (1) confirmation that the waste contains no ignitable, corrosive, or reactive waste through the use of either radiography or visual examination of a statistically representative subpopulation of the waste; and (2) review of the Waste Stream Profile Form . . . ." It should be noted that RCRA itself does not, in referring to facilities for the treatment, storage, or disposal of hazardous waste, impose requirements as to waste analysis. See 42 U.S.C. sec. 6924, 6925. The applicable regulation, 40 CFR sec. 264.13, refers several times to waste analysis, and presumably Sec. 311 refers to the process of analysis called for by sec. 264.13. However, Sec. 311 does not place a limit upon waste "analysis." Instead, it expressly limits "confirmation." Thus, the law does not limit all waste analysis, but only the process termed "confirmation." Under Sec. 311 NMED retains the power to require waste analysis other than "confirmation" and, so doing, may impose requirements other than confirmation of the absence of ignitable, corrosive, and reactive waste through radiography or visual examination of a representative sample and review of the waste stream profile form. With this understanding of Sec. 311, NMED is not required to adopt any of the proposed modification that would delete waste characterization used for purposes other than "confirmation."

Third, there is a recurring issue of the effect of Sec. 311 on waste analysis activities carried out under statutes other than RCRA, the HWA, or regulations issued under those laws. Waste destined for WIPP is subject to analysis under various statutes (e.g., the WIPP Land Withdrawal Act and 40 CFR Part 191, Subpart B; the Atomic Energy Act). It would be

erroneous to construe Sec. 311 as modifying the requirements of those other statutes, since it makes no reference to them. Consequently, DOE must explain how modifications which it contends are called for by Sec. 311 can be made without affecting the enforcement of waste examination requirements imposed under other statutes. For example, certain items are prohibited in waste containers based on transportation safety requirements. DOE should explain how such prohibitions will be retained.

Comments on the specific modifications proposed are as follows:

Module II: The proposal calls for application by generator sites of the procedures contained in the revised WAP, which in general limits all waste inspection to the examination of ten percent of the waste containers. However, Sec. 311 may be read to allow waste inspection to verify, e.g., the absence of items dangerous for persons transporting or managing waste. It is DOE's obligation to explain to NMED what waste examination remains, in DOE's view, permitted under Sec. 311 and what is excluded, but DOE has not done so. However, DOE's proposed modification would still require DOE to refuse to accept waste which contains free liquids, pyrophorics, incompatible wastes, explosives, compressed gases, PCBs not allowed by EPA, or remote-handled waste. (II.C.3; see also Sec. B-1c). Thus, DOE seems to acknowledge, without explanation, that NMED may prohibit, and thus may require DOE to prove the absence of, dangerous items such as free liquids or compressed gases.

A change is proposed in Sec. II.C.1.c to delete "statistically" as a requirement for selection of waste containers for visual examination (VE) and radiography. This is a surprising deletion, because Sec. 311 itself calls for "radiography or visual examination of a statistically representative subpopulation of the waste . . . " It is not clear how the system proposed by DOE complies with this statutory requirement.

Module IV: The proposed modification would delete the existing requirement that the WIPP Waste Information System data base be able to generate a report identifying average VOC concentrations and total emission rates. (IV.D.2.b.). Such a requirement is a reasonable regulatory method, and nothing in Sec. 311 prohibits it. If, upon abandonment of headspace gas sampling, it is deemed necessary to change the data source for such a report, the report could still be required. Clearly, a change of this nature should not be made without technical presentations. This comment applies also to IV.F.2.b.

Sections IV.F.2.e through IV.F.2.h detail requirements with regard to VOC monitoring implementation, reporting, action levels, notification, and remedial action. The proposals may or may not make sense from a technical viewpoint, but such questions cannot be determined without a showing of their technical merits, which has not been made. It cannot be contended that these terms in the modification are dictated by Sec. 311, which contains no details as to implementation of VOC monitoring.

Attachment B: The Waste Analysis Plan is drastically modified in the proposal. The text, as modified, eliminates the distinction between retrievably stored and newly generated waste. (see, e.g., p. B-2). Such revisions are not required by Sec. 311, which in fact calls for "confirmation" by the use of radiography or VE—techniques most appropriate for retrievably stored waste.

The deletion of references to Waste Matrix Code groups (p. B-2) is also not supported by Sec. 311.

Likewise, the elimination of distinctions between methods of waste characterization for Summary Category Groups is not required by Sec. 311 and may not, as a technical matter, make the most sense. (p. B-2). NMED may determine that different methods should be used, for

example, for homogeneous solids, soil/gravel, and debris waste, even if the activities carried out are limited to radiography and VE.

Proposed language on page B-4 states that waste confirmation activities for TRU waste "shall be limited to" those set forth in Sec. 311. This is a sweeping statement, referring as it does to activities without limitation as to location and without a definition of "confirmation." Such language might be read to prohibit DOE from conducting radioassay as required by the EPA certification of WIPP to operate, from examining waste for prohibited items listed in Module II.C.3 and Section B-1c, or from examining waste containers for corrosion or leaks.

In Sec. B-1c the proposed language directs DOE to ensure that generator/storage sites examine radiography and VE data records to confirm that the waste stream does not contain unvented compressed gas or residual liquids in excess of one percent. Such confirmation is not authorized by Sec. 311, and DOE does not explain on what ground it would be authorized. Such examination is, of course, essential as a safety precaution for waste management. However, Congress did not mention it, and DOE must explain the theory under which these requirements (if deemed confirmation) may remain in the permit and other similar activities are deleted. For example, in Sec B-2, the text has been changed to state that waste parameters contained in the TSDF-WAC shall be met. It is not clear, after Sec. 311, under what authority such requirement is included in a HWA permit. DOE must explain how it determined to include such requirement and, in addition, how such requirement is to be applied.

In this connection, DOE should explain how acceptable knowledge (AK) is to be used to document compliance with the TSDF-WAC and why the determination of such compliance does not conflict with Sec. 311, which limits waste "confirmation" to verification that the waste contains no ignitable, corrosive, or reactive waste and that assigned EPA hazardous waste

numbers are allowed by the WIPP permit. The same question arises as to the use of AK to estimate waste material parameter weight. These proposals raise both legal questions as to the permissibility of such activities and factual questions as to the effectiveness of the specified methods to enforce the Waste Acceptance Criteria.

The statement appears in new Sec. B-3b that the "prohibition of liquids and containerized gases prevents the shipment of ignitable, corrosive, or reactive wastes." However, liquids are not all corrosive, and containerized gases are not all ignitable. Again, there is discussion of the detection of liquid waste in inner containers, but Sec. 311 does not authorize examination of waste containers for liquids.

The proposed revision calls for "confirmation" of 10% of waste containers randomly selected from each waste stream or waste stream lot. (p. B-17). However, no explanation is given of the choice of the figure 10%, and the number does not appear in Sec. 311, which calls for examination of a "statistically representative subpopulation." Thus, the 10% figure is unsupported. Further, the proposed modification refers to "randomly selected" containers, without explaining what that means, and without support in Sec. 311.

The proposal says that, if a container in a waste stream is found to contain ignitable, corrosive, or reactive waste or does not match the waste stream description, "all subsequent containers will be subject to confirmation." (p. B-17). This language is illogical, because if a container is "representative," it represents the entire waste stream, and the containers previously shipped or disposed of should be individually examined as well as subsequent ones. More importantly, such terms are unsupported by Sec. 311.

DOE does not explain why the sampled containers are representative of the waste stream or waste stream lot. Sec. 311 does not state how representativeness is to be established, except

that it should be done "statistically." The proposal states that representativeness is established by the selection of random samples. (at B-18). It is not explained how random samples would be "statistically representative," nor how random samples are to be taken of waste streams that are, for example, partially buried at the time of selection or waste streams that are in the course of being generated. Thus, the proposal lacks critical details. Further, if such matters were detailed, they would not have their source in Sec. 311. Similar language appears in Sec. B4 at p. B4-10, and these comments apply to that language also. The proposal also adds to the DQOs for radiography and visual examination "to confirm the waste matches the waste stream description." This is not called for by Sec. 311 and cannot be supported.

Section B-4b(1) has several confusing references to processes of "waste stream characterization and confirmation" and "waste stream analysis." Such terms should not be used without careful definition. Further, the expression is used that "the waste does not match the waste stream description." This should be defined.

In Section B-4b(1)(ii) the TSDF-WAC is again invoked. Again, DOE must explain why it considers that the criteria of the WAC apply in light of Sec. 311.

Methods of waste characterization detailed in Att. B1 are proposed for revision to include the 10% sampling requirement (see pp. B1-23, B1-27). Again, it is not explained where the 10% figure came from, and it is not contained in Sec. 311. Further, the function of radiography and VE is proposed to include verification that "the physical characteristics of the TRU mixed waste correspond with the waste stream description as documented in the AK summary report . . . " (pp. B1-23, B1-27). This provision is not contained in Sec. 311 and has no support. Moreover, it is inadequately defined. Further, it is not clear why liquids and compressed gases are specified

as training requirements for radiography and VE, since these items are not mentioned in Sec. 311. (pp. B1-25, B1-28). These changes are not supported.

The proposed revision in Sec. B1-3, calling for estimation of waste material parameter weights, has no source in Sec. 311. There is description of a method of estimating using ratios, but this is without technical or legal support.

Attachment B2 is deleted in its entirety. However, this attachment would contain some vitally needed information, viz: methods to select the statistically representative containers that are to be examined under radiography or VE. Unfortunately, no such methods are offered by DOE.

Attachment B3, covering quality assurance, has been revised significantly. However, Sec. 311 says nothing about quality assurance or quality control matters. Thus, the new material has no statutory support, and, in the absence of any technical support, should not be accepted. For instance, under the existing permit VE is used for quality assurance of radiography. Under the proposed modification such practice would be eliminated. However, Sec. 311 plainly does not call for a change in quality assurance methods, and no technical basis is given for making a change.

Likewise, the proposal contains changes in quality assurance objectives (stating the objective of radiography and VE to be confirmation that the waste matches the waste stream description and the absence of free liquids and compressed gases—all matters that Sec. 311 fails to mention) and definitions of performance measures (precision, accuracy, representativeness, completeness, comparability) (pp. B3-12 through B3-14, B3-22 through B3-23; see also p. B3-32 through B3-36). Further, the proposal would add new notification requirements for

nonconformances (p. B3-39). Such changes are unsupported either by statutory direction or by technical demonstration.

Attachment B3 also contains the direction to estimate Waste Material Parameter values for each container by estimating them based on "waste stream ratios." (p. B3-21). No explanation is given of how such ratios are to be developed. In any case, the concept of assigning parameter weights based on a ratio is unsupported in Sec. 311.

Attachment B4, which concerns AK, would state that AK is now to be used to assess compliance with the Waste Acceptance Criteria and to estimate material parameter weights. (p. B4-1). DOE has not shown that such changes are technically feasible nor that they are required by Sec. 311. In addition, the modification would direct changes in site AK procedures that are also unsupported (pp. B4-4, B4-11). Again, the modification would delete the requirement that AK records be auditable (p. B4-7); this change is clearly not called for by Sec. 311.

The statement appears in proposed modifications to Sec. B4 that AK characterization results "shall be confirmed for TRU mixed waste streams to be stored or disposed of at WIPP." (p. B4-). This language appears to restrict confirmation to mixed waste, rather than applying the existing rule that all waste shall be characterized on the premise that it is mixed waste. No justification is offered for this change. Sec. 311 clearly does not support such a change, for it addresses "all waste received for storage and disposal."

We do not specifically comment on the changes in Att. B6, since the requirements for audit reflect the changes made elsewhere, which have been addressed.

Attachment N, describing the volatile organic compound (VOC) monitoring plan, proposes certain monitoring locations and methods and presents a system of monitoring levels and remedial action levels applicable to the closed room adjacent to the active open room. (p. N-

2). The monitoring methods are plainly not detailed in Sec. 311. (See, e.g., pp. N-4, N-6, N-8). They cannot be adopted without analysis by NMED experts of the validity of the technical support offered for such procedures and public testimony on such matters. The proposed modification refers to a 2003 technical report on room-based VOC monitoring (WRES 2003); however, this report is not posted on the WIPP Internet site. Therefore, it is difficult for the public to comment upon it. Review of an earlier draft of this document shows that the design of the proposed VOC monitoring system relies upon analyses of the VOC composition of the WIPP waste inventory and of the performance of monitoring systems that call for close examination. It should be noted that 40 CFR Sec. 270.42(c)(2)(v) requires public disclosure of where "the modification request and any supporting documents can be viewed and copied."

The modification request, in summary, is quite incomplete, especially in failing to explain the legal approach taken by DOE in claiming that Sec. 311 authorizes the proposed changes. Many of the proposed modifications are clearly not supported by the statute and so cannot be a part of this particular modification. NMED may, under 40 CFR 270.42(c)(6), deny the modification at this stage, and such action would be entirely supportable. Should NMED decide to retain the proposal on its docket, we request that the preceding comments be considered in connection with NMED's continued review, and we look forward to participating in further Class 3 proceedings on the proposal.

Very truly yours,

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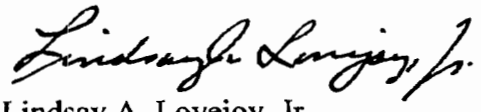

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