

**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT**

**IN THE MATTER OF THE RENEWED
HAZARDOUS WASTE FACILITY PERMIT
FOR THE WASTE ISOLATION PILOT PLANT
CARLSBAD, NEW MEXICO
EPA ID# NM4890139088**

HWB 10-26 (P)



**COMMENTS ON THE HEARING OFFICER'S REPORT OF
SOUTHWEST RESEARCH AND INFORMATION CENTER**

Pursuant to 20.1.4.500.C(2) New Mexico Administrative Code ("NMAC"), Southwest Research and Information Center ("SRIC") submits the following comments on the Hearing Officer's Report ("HOR") for the application of the United States Department of Energy ("DOE") and Washington TRU Solutions LLC ("WTS") for a renewal of a Hazardous Waste Facility Permit for the Waste Isolation Pilot Plant ("WIPP"), collectively, the "applicants").

PRELIMINARY STATEMENT

SRIC supports most of the provisions of the proposed renewal permit because they protect human health and the environment, and, consequently, supports most of the Findings of Fact and Conclusions of Law of the HOR. However, for one issue – surge storage – the HOR does not meet the legal standards of reflecting the relevant facts and preponderance of evidence, nor did the Hearing Officer correctly interpret the applicable regulations regarding burden of proof. Therefore, the Secretary should delete the surge storage provisions of the proposed permit, and add a conclusion of law that surge storage is unnecessary and that the renewal permit without such provisions is protective of public health and the environment, based on the evidence in this proceeding.

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I. The HOR findings of fact do not support the permit provisions that allow surge storage in the waste handling building and parking area.

The HOR Findings of Fact #43 through #47 discuss surge storage. Findings of Fact #43 and #44 describe the elements of the provisions in sections A1-1c(1), A1-1c(2) and Table 3.1.2. Finding of Fact #45 states that the Applicants have never needed to use the surge storage capacity. Finding of Fact #46 states that the surge provisions are identical to those approved by the HOR in 2006. Finding of Fact #47 states that WIPP equipment is older than in 2006, that WIPP has not consistently attained the waste receipt volumes that were assumed in the 2006 HOR, and that NMED's expert testified that the proposed renewal permit will still be protective of public health and the environment without the surge provisions. Thus, the findings of fact clearly show that:

- (1) There is no need shown for the surge provisions,
- (2) a fundamental premise of the 2006 HOR (shipments exceeding the facility's ability to handle accelerated numbers of containers) has not occurred, and
- (3) NMED's unrebutted testimony is that having no surge capacity provisions would result in a permit that is protective of public health and the environment.

Further, three other uncontroverted facts at the hearing (which were included in SRIC's Proposed Findings of Fact and Conclusions of Law of September 22, 2010), provide further evidence that the surge provisions are not necessary:

- During the first seven years of WIPP operations, the lack of surge storage did not prevent WIPP operations. Garcia, Vol. 1, page 136, lines 5-9.
- Without using surge storage, when the number of shipments have exceeded the

weekly throughput level, the facility has continued to operate. Garcia, Vol. 1, page 143, lines 1-7.

- Even with additional funding provided by Congress, the planned throughout is 30 contact-handled waste shipments and 5 remote-handled waste shipments. Garcia, Vol. 1, pages 146, lines 14-22 and page 147, lines 12-23. SRIC Exhibit 2, page 2. Such a throughput is no larger than that stated in the 2006 HOR.

The seemingly logical conclusion from those findings is that the preponderance of the evidence establishes that the surge provisions are unnecessary and improper and should be eliminated from the permit.

II. The Conclusion of Law #15 in the HOR is not consistent with the findings of fact, nor with the requirements of the regulations.

Conclusion of Law #15 is that SRIC and other parties opposing surge provisions “have not carried their burden of proof to establish that the surge provisions are inadequate, improper, or invalid.” Rather, the rationale for maintaining the surge provisions is “as stated in the Hearing Officer’s Report dated September 13, 2006.”

The findings adopted by the Hearing Officer and the three other findings cited above show that SRIC did meet its burden of proof. The surge provisions are improper because they are demonstrably not needed, have never been used, and the record does not show that they would be needed in the future.

Insofar as the HOR implicitly requires that to meet the burden of proof a party must present its own expert witness (which SRIC did not), the regulations do not require such testimony. Indeed, such a requirement would be an onerous burden on public participation and

would be inconsistent with statutory requirements and previous NMED cases in which, for example, public testimony resulted in findings that that permit provisions were inadequate or improper. See *Colonias Development Council v. Rhino Environmental Services Inc. (Rhino)*, 2005-NMSC-024, 138 N.M. 133, 117 P.3d 939.

In the record in this proceeding, in addition to the findings of fact from expert testimony, are SRIC's public comments opposing the surge provisions. SRIC Comments of May 25, 2010 at 3.

Further, the regulations do not state that an applicant's burden of proof is met by a showing that a provision was adopted more than four years ago, which is the effect of citing to the 2006 permit modification. Numerous provisions of the permit that have been in effect for more than four years are being changed in the renewal permit, (see NMED Exhibit 1; Kehrman, Vol. 1, page 109, line 19 – page 110, line 4; Bearzi, Vol. 2, page 175, line 21 – page 193, line 21; Zappe, Vol. 2, page 199, line 23 – page 214, line 20; page 224, line 14 – page 225, line 13), even though such provisions were found necessary in the past. Therefore, the fact that the surge provisions were put into the permit in 2006 is no basis for establishing that those provisions are necessary, proper, and reasonable in 2010. Thus, the applicants have not in this proceeding justified the surge provisions, and the preponderance of evidence supports eliminating those provisions.

CONCLUSION

Conclusion of Law #15 should be deleted and replaced with:

The proposed permit, with the deletion of surge storage provisions, is protective of public health and the environment, pursuant to RCRA and the HWA. 40 CFR § 270.32(b)(2),

incorporated by 20.4.1.900 NMAC.

Therefore, the final renewal permit would be as in the proposed permit, except:

- Parts 3.1.1.3 and 3.1.2.3 are deleted in their entirety,
- Attachment A1-1c(1) [page A1-4, line 24 to page A1-5, line 6] and Attachment A1-1c(2) [page A1-12, lines 23-40] are deleted in their entirety,
- surge storage is deleted on Figures A1-1, A1-2, B3-3, and B3-4 and in the titles of the figures,
- “CH Bay Surge Storage Area” is deleted in Table 3.1.1,
- “Parking Area Surge Storage” is deleted in Table 3.1.2,
- “Parking Area Surge Storage” is deleted in Table J-2,
- changing the first paragraph of Attachment A1-1f(1) [page A1-24, lines 21-28] to:

“The maximum volume of TRU mixed waste on facility pallets that will be stored in the CH Bay Storage and Surge Storage Areas of the WHB is 13 facility pallets @ 2 TDOPs per pallet = 26 TDOPs of waste. 26 TDOPs @ 1,200 gal (4,540 L) per TDOP = 31,200 gal (118,040L) waste container capacity. 31,200 gal (118,040 L) x ten percent of the total volume = 3,120 gal (11,804 L) of waste. Since 3,120 gal (11,804 L) is greater than 1,200 gal (4,540 L), the configuration of possible TDOPs in the storage area is used for the calculation of secondary containment requirements. 3,120 gal (11,804 L) of liquid x one percent liquids = 31.2 gal (118.0 L) of liquid for which secondary containment is needed.”
- deleting in their entirety the last two sentences of Attachment D-1e(3) [page D-7, lines 18-22],
- deleting in their entirety the notification provisions related to use of surge storage in Parts 3.1.1.4 and 3.1.2.4 as unnecessary only if surge storage is not allowed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Don Hancock". The signature is fluid and cursive, with the first name "Don" being more prominent than the last name "Hancock".

Don Hancock

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 2010, a copy of the foregoing

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