



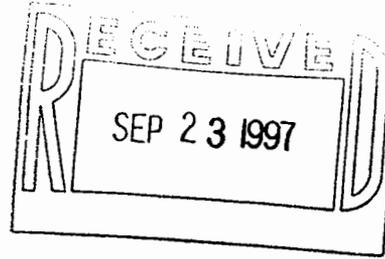
Department of Energy

Carlsbad Area Office
P. O. Box 3090
Carlsbad, New Mexico 88221

September 22, 1997

FEDERAL EXPRESS

Dr. Robert S. (Stu) Dinwiddie, Manager
RCRA Permits Management Program
Hazardous and Radioactive Materials Bureau
2044A Galisteo Street
Santa Fe, NM 87505-2100



RE: U.S. Department of Energy (DOE), Carlsbad Area Office's (CAO) Comments on Proposed Revisions to N.M. Hazardous Waste Fee Regulations, 20 NMAC 4.2

Dear Dr. Dinwiddie:

The DOE/CAO appreciates the opportunity to comment on the proposed revisions to the hazardous waste fee regulations at 20 NMAC 4.2. The attached comments encompass five general comments and twenty-eight section-specific comments.

As you know, we submitted a letter to Secretary Weidler, dated September 12, 1997, requesting that he have you appoint a task force or workgroup of voluntary members from the regulatory and regulated communities and the public to develop a fair and workable hazardous waste fee structure. CAO recognizes NMED's need for additional resources to serve the regulated community, however, as our comments indicate, we have grave concerns about the proposed fee regulation as it is currently drafted. CAO looks forward to working closely with NMED, the regulated community, and the public to revise the fee regulation and will continue to support NMED in this effort.

If you have any questions regarding these comments, please contact me at (505) 234-7329, or Elizabeth Rose at (505) 234-7361.

Sincerely,


Cooper H. Wayman
Area Office Counsel

Enclosure

cc: G. Dials, CAO
G. Barnes, WID
P. Matthews, Matthews, P.A.
P. Schumann, LANL

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U.S. Department of Energy, Carlsbad Area Office's Comments on Proposed Revisions to
New Mexico's Hazardous Waste Fee Regulations, 20 NMAC 4.2

I. General Comments:

- A. The proposed hazardous waste fee revisions is a ten-fold increase of fees paid by TSDFs over the original fee. There is no justification provided for this significant fee increase and no clear explanation of how the fees will be used.
- B. Fees assessed should be reasonable, justifiable and fair. Services received by the regulated community should be clearly linked to the fees paid. If the fees do not directly support services provided, they act as a tax and not as a fee and are likely in conflict with New Mexico law. Pursuant to the provisions of NMSA 74-4-4.2(J), EIB may charge businesses generating hazardous wastes a schedule of fees that must be deposited to the hazardous waste fund. NMSA 74-4-4.5(A) states that such funds may be appropriated for the sole purpose of meeting necessary expenses in the administration and operation of the hazardous waste program.
- C. Permit applicants who, in good faith, disagree with the reasonableness or accuracy of an assessed fee should have some means by which to appeal that fee without incurring potential fines, penalties, late fees, or interest.
- D. Because the amount of work required to process permit applications varies with the type of service provided by NMED (i.e., new permit applications vs. permit renewals or modifications), the fee assessed should be proportional and not a flat fee based on the number of permitted units.
- E. The fee regulation should include incentives for NMED to act in a timely manner. For example, a schedule for response times by NMED to specific documents and an automatic interim approval in the event that NMED fails to act by the end of a scheduled review period should be included.

II. Section-Specific Comments:

A. Subpart I – General Provisions:

- 1. 102: Does the scope of these provisions apply only to TSDF Permittees?
- 2. 103 A&B: The NMED appears to be exceeding the statutory authority cited. NMSA 74-4-4.2(J)(1) authorizes the assessment of a hazardous waste business fee, which is to be an annual flat fee based on the type of activity, not on the number of units. 20 NMAC 4.3, annual business fees, is not specifically repealed

but appears to have been replaced by Section 202 of the proposed revision to 20 NMAC 4.2. How is a ten fold increase in the annual business fee justified?

3. 106: This objective is overly broad. While it is true that all fees collected are payable to the hazardous waste fund, which may be used for the “sole purpose of meeting necessary expenses in the administration and operation of the hazardous waste program” (NMSA 74-4-4.5(A)), permit application fees may not exceed “the estimated cost of investigating the application and issuing the permit (NMSA 74-4-4.2(J)(3)).”
4. 107.2: The term “Area of Concern” should be deleted. An AOC is not a regulatory unit and the addition of this term sets unwarranted precedent.
5. 107.3: Fee assessments apply only to regulatory deliverables specifically required under a permit application. Corrective action work plans and corrective action reports are not regulatory deliverables and are not defined.
6. 107.8: The term “Potential Release Site” should be deleted. As a “generic” term, it is vague and serves no added purpose in the regulation. Moreover, it would be subject to broad interpretation and act as a precursor to a Solid Waste Management Unit (SWMU). The regulation should focus only on SWMUs and NMED should develop interpretive guidelines, as needed and appropriate, for the use of this term.
7. 107.9: The terms used in 107.9 and 20 NMAC 4.3 are inconsistent. The acronym “HWM” for regulated hazardous waste management activities should be added.
8. 107.10: The term “Solid Waste Management Unit” should be defined identically with the federal definition.
9. 107.11: The term “Unit” should be defined as in 20 NMAC 4.1.101 and as delineated in the facility’s RCRA Operating Permit.

B. Subpart II – Business and Permit Application Fees:

1. 201: Delete the word “review.” Delete the last sentence.
2. 202: As noted above regarding Sections 103 A&B, the annual business fee should be based on the type of activity conducted and not the number of units. If NMED intends to define “activity type” by the number of hazardous waste management units, it should justify and explain its decision. NMED should also justify the fees charged by explaining the services it intends to provide for this fee, especially when these fees constitute a ten-fold increase over fees assessed by 20 NMAC 4.3, otherwise these fees must be considered a tax. We note that there is no clear incentive for NMED to close out units and that NMED could continue to charge

for inactive units. If there is no "activity" in a unit, it should be deleted from the fee calculation. Consistent with our above comments on Sections 107.2 and 107.3, the terms "Corrective Action" and "AOC" should be deleted from the SWMU column heading the table.

3. 203: The schedule of fees presented do not make sense, NMED should justify individual fees based on the service provided. NMSA Section 74-4-4.2(J) states that a permit application fee may be assessed "not exceeding the estimated cost of investigating the application and issuing the permit." We also question the reasonableness of a \$50,000 Emergency Permit fee and a \$50,000 Research, Demonstration and Development (RD&D) fee when compared to the actual effort required to issue these permits. Inactive SWMUs should not be charged a fee after removed from a permit by permit modification. As noted above, the terms "AOC" and "PRS" should be deleted throughout.
4. 204.1 and 204.1: Permit renewals should not be assessed the same fees as new permit applications unless NMED can justify that they require the same level of effort and resources as new permit applications. Delete the references to "in violation" and "unresolved enforcement actions" from 204.2.
5. 205: This section should be deleted. The regulated community should not have to pay for reviews initiated by NMED, especially at the same fee schedule as for processing a new permit application when the review could be limited to selected units of parts of the permit.
6. 206: This section cannot be separated from Section 205 and is unjustified. If a fee is charged for a modification, it should be based on the nature of the modification (for example, "nominal" Class I modifications should be assessed a nominal fee) and not incur the same fee as a new permit application. To reiterate, under NMSA 74-4-4.2(J)(3), fees charged for permit applications, which should include applications for permit modifications, must be based on the service provided.
7. 208: Why is the cost of a hearing separate from other costs? The cost of a hearing should be covered under the permit application fee in as much as such costs are part of the "cost of investigating the application and issuing the permit." If a hearing is part of the cost of processing an application, that expense is not required to be paid until "the Secretary notifies the applicant by certified mail that the application has been deemed administratively complete and a technical review is scheduled." NMSA 74-4-4.2(J)(3). Also, Federal Facilities cannot be required to pay a deposit or pay for services in advance. This section should be deleted.
8. 209.1: "Other permit activity" is not defined, may be too broad, and consequently, may be outside the scope of the Hazardous Waste Act's authority.

9. 209.2: This section should be consistent with Section 107. It is not clear what is meant by “unique identification number.” Fees should not be charged for inactive units removed through permit modification. Suggest that this section apply to “each SWMU listed in the facility’s permit.”
10. 209.3: This section is confusing. How are the terms “site” and “cumulative” defined?
11. 209.4: See comments regarding Section 202.
12. 209.5: Please add the statement “In no case will more than one annual business fee be paid.”
13. 209.6: This section should be deleted because it is already addressed by the annual fee. It is not clear what is meant by “document review.” Must the regulated entity pay the equivalent of its entire permit application fee every time it submits a document for review or re-review? There is no incentive for NMED to release a facility from this requirement and there is a positive incentive for NMED to keep requiring document submittals to generate document review fees. The types of documents assessed document review fees should be limited and specifically described, otherwise this section should be deleted.

Subpart III – Manner of Payment and Due Dates:

1. 301.2: Permit application fees and related permit review, renewal, modification and other fees are due upon receipt of appropriate notification pursuant to NMSA 74-4-4.2(J)(3). See comment regarding Section 208, above. Federal Facilities require minimum review periods in order to obtain funding.

Subpart IV – Late Charges and Enforcement:

1. 401: The late charge should be assessed thirty days from the date that the permit applicant is notified by the secretary “by certified mail that the application has been deemed administratively complete and a technical review is scheduled.” NMSA 74-4-4.2(J)(3). Applicants who, in good faith, appeal the assessment charged should not be subject to late fees in the event that their appeal is upheld.
2. 402.1: Modify to reflect changes consistent with recommendation to modify Section 301.2, as appropriate.
3. The permit applicant should not be liable for repayment of required fees in the event that an application must be resubmitted due to NMED’s failure to act in a timely or reasonable manner.

Subpart V – Records and Recordkeeping:

1. Why are time periods not consistent with other RCRA recordkeeping requirements?

Subpart VI – Miscellaneous Provisions:

1. How does this subpart work?
2. Why must funds be transferred from the annual hazardous waste management business fee payment made by TSDFs to a fund for hazardous waste generators? How is this justified?
3. Please explain how the annual hazardous waste management business fee report form will be used. There are no instructions on how to complete this form and the proposed fee regulation revision provides inadequate guidance and explanation.