



Department of Energy
Carlsbad Area Office
P.O. Box 3090
Carlsbad, New Mexico 88221-3090

June 30, 1998



Ms. Jimi Gadzia, Chair
Environmental Improvement Board
1190 St. Francis Drive
Room N-4072
Santa Fe, New Mexico 87502

RE: Proposed Revisions to Hazardous Waste Management Regulations

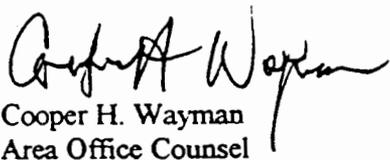
Dear Ms. Gadzia:

The United States Department of Energy's Carlsbad Area Office (DOE/CAO) is pleased to submit for the Board's consideration, its comments on Proposed Revisions to the New Mexico Hazardous Waste Management Regulations at 20 NMAC 4.2 and 4.3. It is the intent of the DOE/CAO to present its testimony to the Board at the July 10, 1998, hearing on this matter. Ms. Elizabeth C. Rose, DOE/CAO Attorney, and I will testify on behalf of the DOE/CAO. Messrs. Cliff Holman and Craig Snider, DOE/CAO technical staff, will be available as to address technical questions raised by the Board, the New Mexico Environment Department, or the general public, if they arise. Ms. Gloria Barnes, Senior Counsel, Westinghouse Waste Isolation Division (WID) will also be present to answer questions and to speak on this matter.

Attached is a summary of DOE/CAO's testimony; the identity of each individual who will testify or may be called upon on behalf of DOE/CAO, their relevant education, qualifications and work experience; the text of DOE/CAO's recommended modifications to the aforementioned regulations; and a list describing the exhibits anticipated to be offered at the July 10, 1998 hearing.

If you have any questions regarding the attached materials, please call me at (505) 234-7329. Thank you for the opportunity to testify on this matter and for your consideration of DOE/CAO's opinion.

Sincerely,


Cooper H. Wayman
Area Office Counsel

Attachments

cc: Ms. Gloria Barnes, WID
Mr. Benito Garcia, NMED
Dr. Stu Dinwiddie, NMED
Mr. Mike McFadden, CAO Manager
Mr. Gary Scott, CAO Deputy Manager

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Manager for CAO contractor Commodore Advanced Sciences, Inc. and has been Chief Counsel at the CAO since 1995.

B. Elizabeth C. Rose Attorney, Area Office Counsel
Carlsbad Area Office
U. S. Department of Energy

Ms. Rose has a B.A. in Biology from Boston University, an M.S. in Environmental Engineering from the University of Southern California. Ms. Rose received her J.D. in 1989 in general law, specializing in environmental law, from Southern Methodist University. In law school, she was associate senior editor on the law journal *The International Lawyer* (ABA). Prior to attending law school, Ms. Rose was an environmental engineer with the Jet Propulsion Laboratory in Pasadena, CA, and was a Resource Conservation and Recovery Act (RCRA) Enforcement Officer with the U.S. Environmental Protection Agency, Region 6. Ms. Rose was an environmental attorney in private practice, in-house environmental counsel for the U.S. International Trade Commission, and has been an attorney with the CAO since 1996.

C. Cliff Holman Team Leader, Program and Technology Development
Office of Development and Research
Carlsbad Area Office
U. S. Department of Energy

Mr. Holman has worked with RCRA regulations since 1986 as a technician at Los Alamos National Laboratory. He was a part of the management team at the Department of Energy, Headquarters Office who wrote guidance and oversaw department compliance activities of the Federal Facility Compliance Act of 1992, which amended RCRA. In 1994, Mr. Holman began work at the CAO as a Technical Analyst responsible for all planning and budgeting for the Office of National TRU Waste Operations. More recently, Mr. Holman managed the planning and execution of the CAO budget, which includes all payments to the State of New Mexico for the RCRA Part B Permit, Impact Assistance, and Emergency Response.

Mr. Holman will not be providing written technical testimony, but may be called upon by Mr. Wayman or Ms. Rose to address technical questions raised by either the Environmental Improvement Board, the New Mexico Environment Department, or the general public.

D. Craig A. Snider RCRA Program Manager
Office of Quality Assurance and Regulatory Compliance
Carlsbad Area Office
U. S. Department of Energy

Mr. Snider has a B.S. in Geology with a minor in Biology from West Texas State University. He has worked as a managing and staff geologist in petroleum exploration. He was in general management with Boeing Military Aerospace, including contracts, procurement and government property management. He has been responsible for programmatic environmental compliance since 1990 with the Texas Natural Resource Conservation Commission and U.S. Department of

Defense. He has been affiliated with the Carlsbad Area Office since 1994 where he has had primary responsibility for the development of the RCRA Part B permit application and No-Migration Variance Petitions.

Mr. Snider will not be providing written technical testimony, but may be called upon by Mr. Wayman or Ms. Rose to address technical questions raised by either the Environmental Improvement Board, the New Mexico Environment Department, or the general public.

D. Gloria J. Barnes

Senior Counsel
Westinghouse Waste Isolation Division (WID)
Carlsbad, New Mexico

Ms. Barnes received her B.A., cum laude, in Political Science from South Carolina State College. Ms. Barnes received an M.A. in History from The Citadel in South Carolina and received her J.D. in general law from the University of South Carolina School of Law. Her legal experience includes acting as legal counsel for Westinghouse in the areas of environmental, transportation and corporate law since 1990. She has served as a Judicial Law Clerk to the Supreme Court of South Carolina, a law clerk to the South Carolina Department of Health and Environmental Control. She was also a legal writing instructor and legal research assistant at the University of South Carolina School of Law.

Ms. Barnes will not be providing written technical testimony, but may be called upon by Mr. Wayman or Ms. Rose to address technical questions raised by either the Environmental Improvement Board, the New Mexico Environment Department, or the general public, or to speak on behalf of the Westinghouse Waste Isolation Division.

II. Summary Testimony Of Cooper H. Wayman/Elizabeth C. Rose In Support Of The New Mexico Environment Department Proposal To Amend 20 NMAC 4.2, As Presented to the New Mexico Environmental Improvement Board on July 10, 1998

Expected Duration: 30 minutes

The following testimony summary is provided by the U.S. Department of Energy, Carlsbad Area Office (DOE/CAO). DOE/CAO appreciates the opportunity to testify before the board on July 10, 1998, regarding the proposed changes to the Hazardous Waste Fee Regulations (20 NMAC 4.2 and 4.3). The proposed changes to these regulations would provide a schedule of fees to be paid for deposit in the Hazardous Waste Fund to meet necessary expenses in the administration and operation of the State's hazardous waste program.

DOE/CAO has worked closely with the New Mexico Environment Department (NMED) to understand the proposed changes to the regulations and the underlying reasons for them. We appreciate the fact that NMED willingly established a Task Force with the regulated community to try and address concerns prior to submission of the proposed changes.

DOE/CAO continues to support, in principle, the proposed changes in the fee structure and recognizes how critical it is to the success of our RCRA permitted activities. We agree with NMED that it must be able to increase its staffing and resources if it is to be able to provide adequate regulatory oversight in a timely manner. However there are several outstanding issues that need to be resolved before we can support, without reservation, the proposed changes to the regulations.

The DOE/CAO strongly concurs with, and fully supports, DOE/AL's comments regarding the excessive amounts of the proposed fees, therefore that testimony will not be duplicated here. Rather, the DOE/CAO's testimony regarding this issue will augment DOE/AL's testimony. We also strongly concur with, and fully support, DOE/AL in their belief that a connection between fees assessed and services rendered and an accounting process to track fee related activities should be established.

Finally, because DOE/CAO concurs with DOE/AL's comments on proposed alternative language for specific sections of proposed 20 NMAC 4.2 and 4.3, DOE/CAO will discuss proposed alternative language on only those sections not already addressed by DOE/AL.

A full discussion of these sections and the text of our proposed changes is included, pursuant to EIB procedures, as a separate document accompanying my testimony entitled "DOE/CAO's Recommended Modifications to the Proposed Regulatory Change to 20 NMAC 4.2."

Proposed Fee Amounts Are Excessive

A review of the RCRA hazardous waste permit fees in the U.S. Environmental Protection Agency Region VI states reveals significantly lower permit fees compared to those proposed at 20 NMAC 4.2. A table comparing these fees among Region VI states will be provided at the July 10th formal hearing. Aside from other facility fees that may be applicable, it appears that the fee for a comparable RCRA hazardous waste permit application in the states of Texas and Oklahoma would not exceed \$50,000. In contrast, the fee for a Subpart X draft permit (proposed 20 NMAC 4.2, Table 2.2) would cost a minimum of \$145,500. Associated closure plan review fees would cost a minimum of \$31,500 (proposed 20 NMAC 4.2, Table 2.3).

To date NMED has received \$2,613,819 for RCRA draft permit, permit hearing, and post-hearing permit activities, not including corrective action fees. Of this total, \$1,887,478 was requested by NMED for draft RCRA permit activities and \$370,328 is designated for post-hearing and final RCRA permit activities. On June 10, 1998, NMED requested an additional \$202,030, of which, \$177,030 was requested to support further draft RCRA permit activities. DOE/CAO expects to pay for all costs associated with the RCRA permit hearing; NMED has received \$356,013 to date to cover its costs associated with the RCRA permit hearing.

A Connection Between Fees and Service Rendered and an Accounting Process to Track Fee Related Activities Should be Established.

In addition to DOE/CAO's concerns about the amount of the proposed fee values, DOE/CAO believes that a connection between fees and service rendered and an accounting process to track fee related activities should be established.

With regard to a connection between fees charged and services rendered, we recognize that sections 201.3.1 and 201.5.1 of the proposed amendments stipulate that NMED is to provide facilities with an estimated review schedule along with their notice of estimated fees. In concert with DOE/AL, DOE/CAO would like to pursue a commitment from NMED to make the estimated review periods commensurate with the estimated staff days used to calculate the fee regulations. If this cannot be done in the regulation itself, it should be pursued in a separate Memorandum of Agreement or similar document.

We note that, 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))." The connection between fees charged and services rendered is fundamental to the success and integrity of this program and would support planning and execution for both NMED and DOE.

Comments on 20 NMAC 4.3

DOE/CAO concurs with and fully supports DOE/AL's comments and proposed alternative language regarding 20 NMAC 4.3.

Alternative Language Proposals for 20 NMAC 4.2

In addition to the issues we have presented thus far, we believe that language in several of the sections of the proposed amendments should be modified. These include modifying Section 107 by (a) adding a definition and defining the scope of the Annual Unit Audit, and (b) revising the definition of a "Document"; modifying Section 201.5 to clarify the applicability of Closure Plan Review Fees; modifying Section 201.7 by deleting the Land Disposal Unit 5 Year Review Fee; and modifying Section 201.12 by revising the payment structure of Hearing Fees. As noted above, we are proposing alternative language for some sections in 20 NMAC 4.3 as well.

The text of these modifications, along with new proposed fees in Tables 2.2 through 2.5 appear in the document "DOE/AL 's Recommended Modifications to the Proposed Regulatory Change to 20 NMAC 4.2," which accompanies my testimony.

III. Recommended Modifications to Proposed Regulatory Change

The Department of Energy, Albuquerque Operations Office, suggests the following changes to the New Mexico Department of Environment's April 1998 version of 20 NMAC 4.2. Recommendations to delete language are provided in strikeout format. Recommendations to add language are provided in underline format. Clarifying comments on why a change was suggested follows the recommended change in parentheses.

Recommended Modifications to 20 NMAC 4.2

Insert the following sentence at the end of Section 104:

This regulation shall expire in a term not less than three years and not more than five years after the effective date, subject to yearly performance reviews.

(This section permits the regulations to continue in perpetuity. Because these regulations are significantly new and broad in scope, these regulations should include a "sunset clause" that would cause these regulations to expire in three to five years after they are approved. This process could be triggered by annual reviews of the regulations' effectiveness prior to the sunset deadline. This would give the regulated community an opportunity to review fees assessed and the NMED's performance under these regulations.)

Delete Section 107.3:

~~"Area of Concern" or "AOC" means any discernable unit or area which, as determined by the Administrative Authority, may have received hazardous waste or solid waste containing hazardous constituents, at any time.~~

(Delete this section because the definition has no meaning in the body of the HWMR. The concept is already encompassed in the term "Solid Waste Management Unit." The term "AOC" provides a grant of authority to NMED which it currently does not have. If NMED wishes to seek such authority it should be placed in the body of the text of the HWMR subject to appropriate rulemaking. The cited term should be deleted from the body of regulations 20 NMAC 4.2 and 4.3 and substituted with the term "Solid Waste Management Unit" or "SWMU.")

Modify the last sentence, as follows, of Section 201:

A facility which has paid for the review of any type of permit application or document, after the effective date of these regulations, shall be required to pay the applicable fee again for any permit application or document that was

withdrawn by the facility, ~~substantially revised and resubmitted with a revision number change or was denied by HRMB for significant technical deficiencies and resubmitted.~~

(The HRMB may request additional, clarifying information or modifications to specific sections of a permit application or document, to which the applicant may assign a revision number for tracking purposes. Such negotiated changes should not be subjected to additional permit fees. As written, the regulation does not distinguish between clarification, modifications, the provision of additional information and revisions. Documents or permit applications requiring substantial revision and resubmission should be formally withdrawn by the facility or have been rejected by HRMB for technical insufficiency.)

Insert the following sentence at the end of Section 201.3:

The permit application, technical adequacy, draft permit, and HSWA module preparation fees shall be for a single complete draft and shall not apply to multiple drafts negotiated with the HRMB that merely clarify, modify or provide additional information at the request of the HRMB.

(This language is consistent with language sought to be added to Section 201, above. Applicants should not be subject to multiple charges for minor changes to a single draft document or permit application.)

Section 201.3.1: The DOE/CAO applauds and encourages NMED's proposal to provide the regulated community with an estimated review schedule. This will greatly assist both the NMED and the regulated community in budgetary operational planning.

Delete all references to Class I permit and closure plan modification fees in Section 201.6 and Table 2.4.

(No fee should be assessed for Class I modifications because they are mere notifications to the state, consisting of mere page replacements, which may include name changes, telephone changes and other bookkeeping modifications.)

Delete the following language from Section 402:

Enforcement actions may include the assessment of additional civil penalties and other permissible civil remedies. ~~but are not limited to the revocation or suspension of any permit issued by NMED pursuant to the Act to the person failing to pay the fees as required.~~

(The permit applicant or permittee should not be subject to such severe penalties. As written, the regulation would allow for the revocation of any or all permits, including one that may be in contention. Applicants who, in good faith, appeal the assessment

charged should not be subject to late fees or penalties in the event that their appeal is upheld. The permit applicant should also not be liable for repayment of required fees in the event that an application must be resubmitted due to events beyond the permit applicant's or NMED's control.)

IV. Summary List of Exhibits

- 1) Hazardous Waste Permit Fee
Regulations from states of Texas, Oklahoma,
Arkansas and Louisiana

- 2) Correspondence between NMED and DOE/CAO
regarding NMED requests for permit fees dated
1/28/92, 1/22/93, 9/24/94, 7/8/97, 2/24/98, and
6/10/98.