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January 15, 1998

Benito Garcia
Bureau Chief
Hazardous & Radioactive Materials Bureau
2044 Galisteo Street
Santa Fe, New Mexico 87505-2100

Re: Comments on Proposed Hazardous Waste Fee Regulations

Dear Mr. Garcia:

Giant Refining Company (Giant) appreciates the opportunity to submit comments on the proposed Hazardous Waste Fee Regulations.

Giant recognizes the need to develop a set of hazardous waste fees that provides the New Mexico Environment Department Hazardous & Radioactive Materials Bureau (HRMB) sufficient funding to handle the workload while being equitable to the regulated community. For this reason, Giant is supportive of reasonable increases in the hazardous waste fee program.

In the proposed hazardous waste fee regulations, however, Giant's potential hazardous waste fees during the next 12 to 18 months could increase from approximately $20-40,000.00 to in excess of **$1,200,000.00 - a 3000-6000% increase!** This amount would provide funding for 17.14 FTEs from Giant alone!

Giant has other concerns with the ultimate purpose of the hazardous waste fees as proposed. If HRMB has a need for additional permitting personnel to operate more efficiently, then Giant can support a limited increase in hazardous waste fees. It has been stated, however, that one of the functions of the proposed hazardous waste fees is to supplant all of the operating costs of the permitting and technical program at HRMB. Giant suggests that HRMB should not eliminate funding from the State's General Fund, EPA grants (regardless of the EPA oversight), as well as the current waste generation fees, but rather use those existing funds to assist in the operation of the RCRA/HSWA program.

Additionally, Giant is concerned with the lack of a "sunset provision" in the proposed fees and the reluctance of the HRMB to discuss such a provision. If the function of the proposed hazardous waste fees is to reduce the backlog of permitting activities as well as normal operating activities, then the need for additional personnel will decrease in the foreseeable future. The reluctance to include a "sunset provision" therefore appears to indicate the possibility that once the backlog of permitting activities is eliminated, personnel working within the permitting / technical group may be shifted over to the

enforcement group or another group within HRMB thereby removing any stimulus for reducing the hazardous waste fees. Giant strongly advocates the inclusion of a "sunset provision" in the proposed hazardous waste fees.

Giant understands that part of the problem with the backlog of permitting activities at HRMB is due to the high number of federal facilities in New Mexico coupled with a low tax base in the State. Giant agrees that federal tax dollars should be used to assist in the funding of permitting activities in HRMB. However, under the proposed hazardous waste fee regulations, private industry is saddled with permit fees that are far out of proportion to the size of the affected facilities. Giant is concerned that not only will this be prohibitively expensive for small businesses, but also that this will injure the State's ability to attract private industry.

Thank you for the opportunity to comment on the proposed hazardous waste fee regulations. Specific comments are enclosed with this letter.

Sincerely:

Lynn Shelton
Environmental Manager
Giant Refining Company

TLS/tls

Enclosure

cc: Stu Dinwiddie, NMED/HRMB
John Stokes, Refinery Manager, Bloomfield
Dick Platt, Refinery Manager, Ciniza
Dave Pavlich, Ciniza
Dorinda Mancini, Ciniza
Steve Morris, Ciniza
Kathleen O'Leary, Corporate Counsel
Monte Swetnam, Vice President, Corporate Affairs

COMMENTS ON THE PROPOSED HAZARDOUS WASTE FEE REGULATIONS TITLE 20, CHAPTER 4, PART 2

SUBMITTED BY GIANT REFINING COMPANY

I. CONCERN - The proposed fees are too high:

DISCUSSION - Several scenarios as to how the proposed fees were developed were given to the Task Force. Despite studying the fees, as proposed, Giant has found it difficult to accept the proposed fee amounts. Under the proposal, a new permit or permit renewal will cost Giant $202,500.00. Giant's Ciniza refinery is currently in the process of creating a permit renewal document using an outside consultant. The costs to create this document, including Giant's staff time, is approximately $45,000.00. If more of the work were performed in-house, those costs typically would be lower. It is difficult to imagine that the review for completeness, the approval of the permit application or modification for accuracy and the approval process for the permit or modification would take as long or longer than the creation of the document.

Other fees are similarly higher than should be expected. A Class III permit modification or closure plan would be charged at a base fee of $52,500.00 plus $2,500.00 per additional item. Again, Giant's cost of developing the documents would be significantly less.

Research Demonstration & Development fees of $72,000.00 are so high that there will be a significant disincentive for using emerging or innovative technologies to enhance hazardous waste operations. Both the regulators and the regulated community should realize that the use of emerging or innovative technologies may be more protective of human health or the environment and should be encouraged. These fees will instead hinder the use of new technology.

Securing an emergency permit should typically be a simple and straightforward process, generally a phone call and a written follow-up. At $72,000.00, there is a strong potential for less responsible entities to resort to midnight dumping ("orphan waste" has been a problem in New Mexico in the past) and/or failure to notify the regulators in the case of an accidental spill. Even if a regulated entity is not required to pay an outrageous price for an emergency permit, a permanent (if necessary) permit application or modification will still generate funds. Again, a potentially regulated entity, facing the possibility of several hundred thousand dollars in permit fees and additional personnel to implement the requirements of a permit, may elect to try to "cover up" a spill, for example, rather than become a responsible party by notifying the regulatory agency.

In addition to the concerns stated above, as they pertain to permit application and review fees, Giant believes that the various corrective action fees listed in Table 2.5 of the proposed regulations are excessive. In Giant's experience, the cost to prepare a document pertaining to various corrective action activities, for agency review, is typically less than $5,000.00 (excluding field sampling and analysis activities). The fees proposed in Table 2.5 are far in excess of facility report preparation costs.

The above are just a few of the problems inherent with the proposed fees. For this reason, Giant proposes an across the board reduction in the proposed fees by an amount of 70% (see attached tables 2.1 to 2.5).

COMMENT - *WITH THE PERMIT ACTIVITIES THAT WILL BE REQUIRED FOR GIANT INDUSTRIES IN THE NEXT 12 TO 18 MONTHS, TOTAL COSTS MAY BE, UNDER THE CURRENT PROPOSAL, IN THE NEIGHBORHOOD OF $1,200,000.00. THIS IS A POTENTIALLY DEBILITATING AMOUNT FOR A COMPANY THE SIZE OF GIANT.*

II. CONCERN - The time frames to perform tasks, as proposed, are unrealistic:

DISCUSSION - Giant believes the time frames proposed in Table 2.2 of the proposed regulations, three FTE years, is an unusually high estimate, regardless of whose table HRMB is using. Such a schedule would be intolerable to Giant where a reasonable level of efficiency is expected. It should not take HRMB three years to complete its approval process when it takes Giant only a fraction of that time to research and assemble the same document. Even with a Notice of Deficiency (NOD) and the subsequent corrections, submission and review of a document can be accomplished much more quickly than three FTE years. The combination of high fees and long approval time punishes disproportionately those in the regulated community who submit accurate, timely and complete documents.

COMMENT - *GIANT HAS OBSERVED IN THE PAST THAT, ALTHOUGH HRMB MAY TAKE MANY MONTHS FOR ACTION ON A PERMIT ACTIVITY, GIANT MUST SUBMIT A RESPONSE IN, TYPICALLY, THIRTY TO FORTY-FIVE DAYS. GIANT AND THE REGULATED COMMUNITY SHOULD RECEIVE THE SAME LEVEL OF RESPONSE FROM HRMB THAT IS REQUIRED OF THE REGULATED COMMUNITY BY HRMB.*

III. CONCERN - Giant does not believe the proposed hazardous waste fees should supplant monies that are currently being received by HRMB:

DISCUSSION - The purpose for the increase in hazardous waste fees is to reduce the backlog of permitting activities and provide HRMB with adequate personnel to operate the RCRA/HSWA program. Giant generally supports a reasonable adjustment of hazardous waste fees, but not if the regulated community is being asked to supplant other monies received currently by HRMB, such as State General Fund monies and EPA Grants. Giant recognizes that receipt of EPA Grant money by the Bureau brings with it the scrutiny of the EPA. This should be of little consequence as, after all, Giant is required to operate under at least as much scrutiny as HRMB.

COMMENT - *GIANT PROPOSES THAT HRMB CONTINUE TO ACCEPT CURRENT FUNDING AND REDUCE THE PROPOSED HAZARDOUS WASTE FEES COMMENSURATELY.*

IV. CONCERN - Giant understands that the change in the hazardous waste fees is intended to add additional personnel to address the current backlog of permitting activities and to operate the RCRA/HSWA program more efficiently:

DISCUSSION - If this is true, then HRMB should be requesting only enough additional funds to pay for the FTEs needed to address the problems stated above.

COMMENT - ***GIANT SUPPORTS THE CONTENTION BY HRMB THAT EIGHT ADDITIONAL FULL TIME EMPLOYEES WILL REDUCE THE CURRENT BACKLOG AND PROVIDE HRMB WITH ADEQUATE PERSONNEL TO OPERATE THE RCRA/HSWA PROGRAM. GIANT PROPOSES THAT HRMB MODIFY THE FEE SCHEDULE BASED ONLY ON THE COST OF THE FULL TIME EMPLOYEES THAT ARE DETERMINED TO BE NECESSARY.***

V. CONCERN - The current proposal does not include a "sunset provision":

DISCUSSION - The proposed hazardous waste fees are needed, ostensibly, to reduce the current backlog of permitting activities and to provide a means to operate the RCRA/HSWA program more efficiently. Giant suggests that a "sunset provision" be included in the proposed hazardous waste fee regulations. Giant has been led to believe that some of the eight FTEs will "go away" when the current backlog is eliminated. This will be much more believable and, therefore, palatable if a "sunset provision" is included in the regulations.

COMMENT - ***GIANT CONTENDS THAT A "SUNSET PROVISION" WILL INSURE THAT THE HAZARDOUS WASTE FEES WILL ULTIMATELY REMAIN CONSTANT OR DECREASE. SUCH A PROVISION WILL INCREASE SUPPORT BY GIANT FOR THE PROPOSED HAZARDOUS WASTE FEE REGULATIONS. AT SUCH TIME THAT THE CURRENT BACKLOG IS ELIMINATED, HRMB CAN AGAIN APPROACH THE SUBJECT OF INCREASED FEES IN ORDER TO PROVIDE FOR ADDITIONAL SERVICES AS IS DETERMINED TO BE NEEDED AT THAT TIME.***

VI. CONCERN - HRMB has indicated that the proposed fees were developed using an EPA schedule (or table) of times needed to complete certain permitting activities:

DISCUSSION - This schedule (or table) was unavailable for review by the task force. Giant checked with contacts at the EPA about the schedule that was referenced. EPA staff was either unaware of that schedule or, in one instance, the recollection by an EPA employee was that such a schedule existed several years ago, but that it is not used by EPA staff at this time. Additionally, the EPA employee that seemed to recall such a schedule stated that the schedule was never officially adopted by the agency because it was ultimately deemed to be unrealistic.

COMMENT - ***GIANT IS CONCERNED ABOUT THE USE OF A DOCUMENT ATTRIBUTED TO, BUT NOT USED BY THE EPA. GIANT SUGGESTS THAT THE USE OF SUCH A DOCUMENT IS INADVISABLE, PARTICULARLY IN LIGHT OF THE UNREALISTIC TIMETABLES USED IN TABLES 2.2 AND 2.3 OF THE PROPOSED REGULATIONS, WHICH HAVE BEEN DISCUSSED PREVIOUSLY IN THESE COMMENTS.***

VII. CONCERN - Pursuant to Subpart II, item 202. Fee Adjustment, Giant proposes that the value of 20% for a fee adjustment (trigger point) be changed to "no greater than 10%":

DISCUSSION - Giant feels that this change will provide for more responsive action to an error in the estimation of the amount of additional money that is to be raised. This change provides to Giant a level of assurance of accountability for the fees that are generated.

COMMENT - ***GIANT BELIEVES THAT THE FIGURE OF "NO GREATER THAN 10%" PROVIDES THE REGULATED COMMUNITY WITH REASONABLE ASSURANCE THAT THE FEES GENERATED ARE MORE TIGHTLY CONTROLLED.***

VIII. CONCERN - Some definitions contained in Subpart I of the proposed regulations, specifically the two definitions 107.3 "Area of Concern (AOC)" and 107.22 "Potential Release Site (PRS)", are inappropriate.

DISCUSSION - In its initial written comments, Giant expressed concern about NMED's proposed definitions of "area of concern" (AOC), "corrective action units", "potential release site" (PRS), and "unit". The proposed definitions of those terms have not changed substantially since Giant's comments were submitted. As a result, Giant remains concerned about the proposed definitions, particularly the definition of "area of concern" (proposed § 107.3) and "potential release site" (proposed § 107.22).

Giant believes that the proposed definitions of AOC and PRS are unconstitutionally vague. In addition, Giant believes that the proposed definition of AOC (1) gives NMED virtually unreviewable authority to determine units or areas which are AOCs; (2) provides substantive authority in the guise of a fee regulation; and (3) exceeds the authority given by the Hazardous Waste Act.

1. The proposed definitions of AOC and PRS are unconstitutionally vague.

A statute or regulation is unconstitutionally vague if "people of common intelligence must guess at its meaning." *State ex rel. Stratton v. Sinks*, 106 N.M. 213, 741 P.2d 435 (Ct. App. 1987), *citing Connally v. General Constr. Co.*, 269 U.S. 385 (1926) and *In re Doe*, 100 N.M. 92, 666 P.2d 771 (1983). "The language of the statute [or regulation] must give adequate warning of the conduct proscribed and must provide standards to enable judges and juries to administer the law fairly." *Id.*

1a. Definition of "area of concern"

As proposed, an AOC is "any discernable unit or area which, *in the opinion of the Administrative Authority,* may have received solid or hazardous waste or waste containing hazardous constituents at any time." Proposed § 107.3 (emphasis added). The phrase "in the opinion of the Administrative Authority" does not give fair warning of how the definition will be applied. There is no notice of the factors that NMED or EPA will consider in reaching the opinion that a unit or site "may have received" specified waste "at any time." Therefore, the definition of AOC is unconstitutionally vague and should be deleted. *See Bokum Resources Corp. v. New Mexico*

Water Quality Control Comm'n, 93 N.M. 546, 603 P.2d 285 (1979)(determining that the WQCC's definition of "toxic pollutants" to those that will, "on the basis of information available to the director or the commission" cause death or other dire consequences was unconstitutionally vague on its face).

1b. Definition of "potential release site"

The proposed definition of PRS does not actually define the term; it merely gives examples of sites that are PRSs. As proposed, a PRS "includes solid waste management units . . . and other sites that have been *identified as suspected of releasing contaminants* or areas of concern (AOCs)." Proposed § 107.22. Again, like the definition of AOC, the definition of PRS does not give fair warning of the types of sites that NMED intends to include as PRSs. The terms "identified" and "suspected" do not indicate or limit the persons who can "identify" that a site is "suspected of releasing contaminants" or who "suspect" the release. Further, the term "contaminants" is not defined, and could be read to include hazardous waste, solid waste, or chemicals that are exempt from the definition of either. Therefore, Giant recommends that the term be deleted or more precisely defined to withstand constitutional challenge.

2. The proposed definition of AOC gives NMED virtually unreviewable authority.

In addition, the use of "in the opinion of the Administrative Authority" makes NMED's determination that a unit or area is an AOC virtually unreviewable. Based on the inclusion of that phrase, a reviewing court would have to determine that it was not the administrative authority's opinion that the unit or are "may have received solid or hazardous waste or waste containing hazardous constituents at any time", to overturn a finding that an area or unit was an AOC. Thus, it is only the existence of the opinion that is reviewable, not the validity of that opinion. *See E.J. Friedman Co. Inc. v. U.S.*, 6 F.3d 1355, 1359 (9th Cir. 1993)(no court review where statute provides that the IRS may "in its discretion" issue a certificate of discharge); *Adams v. FAA*, 1 F.3d 955, 956 (9th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994)(no review of FAA decision to rescind a license where statute provides that license can be rescinded "at any time and for any reason [Administrator] deems appropriate").[1] The broad discretion allowed by proposed § 107.3 should be eliminated and the phrase "in the opinion of the Administrative Authority" deleted.

3. The proposed definition of AOC gives NMED substantive authority in the guise of a fee regulation.

The purpose of the proposed regulation is "to provide a schedule of fees for facilities seeking permits, currently permitted, or undergoing Corrective Action, for past or present hazardous waste management activities". Proposed § 106. It is not intended to provide NMED with

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[1]As the Court stated in Adams:

> Agency action is unreviewable when `the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'"

1 F.3d at 956.

substantive authority; the basis of such substantive authority rests in 20 NMAC 4.1. As drafted, however, the proposed definition of AOC creates substantive authority. Therefore, the proposed definition exceeds the scope of the proposed regulation and that portion of the definition creating such authority should be deleted.

Specifically, the proposed definition provides that "[t]he Administrative Authority *may require investigation* of the unit to determine if it is a SWMU." (Emphasis added.) If the investigation shows the unit to be a SWMU, the proposal requires the AOC to be reported "as a newly-identified SWMU". The proposal also provides that if the investigation does not show that the unit is a SWMU, "the Administrative Authority may determine that no further action is necessary and notify the Permittee in writing."

Clearly, the authority granted by the above-quoted language is substantive. It grants NMED the authority to require permittees to investigate the existence of possible SWMUs, mandates certain reporting to NMED, and provides for an NMED determination that no further action is required. Because the authority is substantive, it exceeds the scope of proposed 20 NMAC 4.2 and should be deleted.

4. The substantive authority in the proposed definition of AOC exceeds NMED's authority under the Hazardous Waste Act.

As stated above, the proposed definition of AOC is designed to allow NMED to require permittees to investigate areas which "may have received solid or hazardous waste or waste containing hazardous constituents at any time." That authority exceeds the authority granted by the Hazardous Waste Act to require such investigations. Thus, the authorization, if adopted by the EIB, would be *ultra vires* and should be deleted. *See Chalamidas v. EID*, 102 N.M. 63, 691 P.2d 64 (Ct. App. 1984); *Kent Nowlin Constr., Inc. v. EID*, 99 N.M. 294, 657 P.2d 621 (1982)(holding that regulatory authorization to conduct private employee interviews was not authorized by the statute and was, therefore, void).

The Hazardous Waste Act contains two provisions authorizing NMED to require a permittee to conduct an investigation. NMSA 1978, § 74-4-4.3.A(1) (1989) requires "any person who generates, stores, treats, transports, disposes of or otherwise handles or has handled *hazardous waste*" to furnish information about the waste to NMED, if NMED so requests. (Emphasis added.) The authority granted by § 74-4-4.3 is limited to "hazardous waste" and does not include "solid waste" or "waste containing hazardous constituents"; the authority granted by proposed § 107.3 is not limited to "hazardous waste", and includes "solid waste" or "waste containing hazardous constituents." Therefore, the authority granted by proposed § 107.3 exceeds the authority granted by § 74-4-4.3, and is void. Thus, the references to "solid waste" and "waste containing hazardous constituents" should be deleted.

Further, NMSA 1978, § 74-4-10.1.A (1989) authorizes the Secretary to require the owner or operator of a facility or site "at which *hazardous waste* is or has been stored, treated or disposed of" or at which "the release of *any such waste* from such facility or site may present a substantial hazard to human health or the environment" to "conduct such monitoring, testing, analysis and reporting as the [Secretary] deems reasonable to ascertain the nature and extent of such hazard." (Emphasis added.) Like the authority of § 74-4-4.3, the authority granted by § 74-4-10.1 is limited to "hazardous waste" and does not include "solid waste" or "waste containing hazardous

constituents". In addition, § 74-4-10.1.D(1) specifies the conditions under which NMED may be reimbursed for its costs. That section limits reimbursement to those situations where the owner or operator of a facility refuses to conduct the required investigative activity and NMED or a local authority is required to perform the activity. Giant believes that the specific reimbursement authority in § 74-4-10.1.D(1) precludes NMED from obtaining fees for its review of those activities in this regulation. Therefore, the authority granted by proposed § 107.3 exceeds the authority granted by § 74-4-10.1, and is void.

COMMENT - *GIANT OPPOSES USING THE FEE REGULATIONS TO IMPLEMENT THE EPA'S PROPOSED CORRECTIVE ACTION RULE OR TO GIVE NMED ADDITIONAL INVESTIGATIVE AUTHORITY. GIANT RECOMMENDS THAT THE PROPOSED DEFINITIONS OF AREAS OF CONCERN AND POTENTIAL RELEASE SITES BE DELETED.*

TABLE 2.1
ANNUAL HAZARDOUS WASTE MANAGEMENT BUSINESS FEE

TYPE OF UNIT	FEE
Disposal	$ 600.00
Post Closure Care	$ 600.00
Treatment	$ 450.00
Storage	$ 350.00
Corrective Action	$ 50.00

TABLE 2.2
PERMIT APPLICATION-TECHNICAL ADEQUACY-DRAFT PERMIT COMPLETION FEES

TYPE OF APPLICATION	APPLICATION & TECHNICAL ADEQUACY	DRAFT PERMIT COMPLETION
Land Disposal	$ 30,750.00	$ 30,750.00
Post Closure Care	$ 30,750.00	$ 30,750.00
Land Treatment	$ 30,750.00	$ 30,750.00
Surface Impoundment	$ 21,825.00	$ 21,825.00
Incinerator	$ 21,825.00	$ 21,825.00
Boiler or Industrial Furnace	$ 21,825.00	$ 21,825.00
Subpart X	$ 21,825.00	$ 21,825.00
Waste Pile	$ 10,800.00	$ 10,800.00
Treatment in Tanks	$ 10,800.00	$ 10,800.00
Treatment in Containers	$ 10,800.00	$ 10,800.00
Storage in Tanks	$ 10,800.00	$ 10,800.00
Storage in Containers	$ 10,800.00	$ 10,800.00
Emergency Permit	$ 10,800.00	$ 10,800.00
Research Demonstration & Development	$ 10,800.00	$ 10,800.00

TABLE 2.3
CLOSURE PLAN REVIEW FEES

Unit Type	Application Technical Adequacy	Draft Closure Plan Completion
Land Disposal	$ 7,500.00	$ 7,500.00
Incinerator	$ 4,500.00	$ 4,500.00
Boiler or Industrial Furnace	$ 4,500.00	$ 4,500.00
Storage	$ 3,500.00	$ 3,500.00
Treatment	$ 3,500.00	$ 3,500.00

TABLE 2.4
PERMIT AND CLOSURE PLAN MODIFICATION FEE

Modification Class	Basic Fee	Additional Item Fee
Class I	$ 350.00	$ 35.00
Class II	$ 6,500.00	$ 350.00
Class III	$ 15,000.00	$ 750.00

TABLE 2.5
CORRECTIVE ACTION FEES

Document Type	Basic Review Fee	Additional Unit Fee
Corrective Measures Implementation Report	$ 9,300.00	$ 150.00
HSWA Module Preparation	$ 7,500.00	$ 150.00
Corrective Measures Study Report	$ 7,100.00	$ 150.00
RCRA Facility Investigation Report	$ 7,100.00	$ 150.00
RCRA Facility Investigation Workplan	$ 6,500.00	$ 150.00
Corrective Measures Study	$ 6,500.00	$ 150.00
Corrective Measures Implementation Plan	$ 6,500.00	$ 150.00
Installation Workplan	$ 6,500.00	$ 150.00
RCRA Program Implementation Plan	$ 6,500.00	$ 150.00
RCRA Implementation Plan	$ 6,500.00	$ 150.00
Map Studies	$ 6,500.00	$ 150.00
RCRA Facility Assessment	$ 4,500.00	$ 150.00
Expedited Cleanup Plan or Report	$ 2,000.00	$ 100.00
Voluntary Corrective Action Plan/Report	$ 2,000.00	$ 100.00
Interim Measure Plan	$ 2,000.00	$ 100.00
Release Assessment	$ 1,500.00	$ 100.00
Phase Report (if on an approved RFI Report)	$ 1,500.00	$ 100.00
Petition For NFA Review (per SWMU)	$ 5,000.00	$ 200.00
Other Facility Wide Corrective Action Studies, e.g. Background Studies, Hydrogeological Workplans/Studies	Negotiable	—