

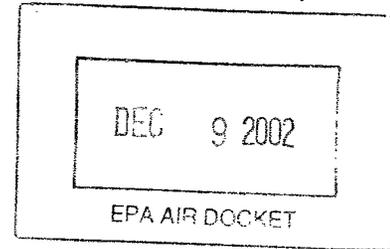


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Attention Docket ID No. OAR-2002-0005

The following comments are submitted by Southwest Research and Information Center (SRIC) regarding EPA's proposed rule to change certain provisions of 40 CFR 194, as published in the *Federal Register* on August 9, 2002, pages 51930 to 51946. The contact person at SRIC regarding these comments is Don Hancock, Southwest Research and Information Center, PO Box 4524, Albuquerque, NM 87106, (505) 262-1862, sricon@earthlink.net.

SRIC has been actively involved regarding health and safety issues related to WIPP for more than 25 years. This organization was an active participant in the original rulemaking to develop 40 CFR 194 and in the WIPP certification.

These comments are in addition to oral comments made at the public hearing in Albuquerque, New Mexico on September 24, 2002. As is acknowledged by EPA, SRIC expects full consideration of both written and oral comments.

1. Public hearing process.

As stated in our oral comments, SRIC strongly believes that EPA substantially mishandled the public hearing process in this matter, thereby substantially reducing the amount of public participation that otherwise would have occurred. The timing of the hearings in Albuquerque and Santa Fe precluded most interested people from being able to participate because of the large number of other WIPP-related matters that had nearer term deadlines. The transcripts of both hearings, which SRIC reviewed, further support SRIC's concern. Only two people, in addition to SRIC, testified in Albuquerque on September 24. Those other two people represented an existing WIPP subcontractor and the second, while speaking as an individual, is a employee of Sandia National Lab, which is a major WIPP contractor. And only four people, including a representative of Westinghouse TRU Solutions, the WIPP operating contractor, testified in Santa Fe on September 25.

In contrast, in past EPA rulemakings, dozens of members of the general public testified in both Albuquerque and Santa Fe. Based on this experience, SRIC strongly reiterates its request that for future rulemakings or other public processes, EPA consult with leading citizen organizations, including SRIC, Concerned Citizens for Nuclear Safety, Nuclear Watch of New Mexico, and Citizens for Alternatives to Radioactive Dumping, as well as state officials, *prior to scheduling any hearings*.

## 2. Proposed changes to 40 CFR 194.2

SRIC does not object to adding the definition of acceptable knowledge. SRIC does object to the lack of clarity in defining "minor alternative provision." SRIC believes that a better, preferable definition is:

*Minor alternative provision* means an alternative provision to these Compliance Criteria that only clarifies an existing regulatory provision, and does not substantively alter the existing regulatory requirements.

Also, see our further comments under #3 that follows.

## 3. Proposed Changes to 40 CFR 194.6

SRIC's major concern regarding 40 CFR 194.6(b) is about potential differing impressions of the EPA and the public regarding what constitutes a "minor alternative provision."

SRIC is especially concerned about this possibility because of our experience with how a different agency -- the New Mexico Environment Department (NMED) -- has interpreted a somewhat similar EPA regulation. The other regulation is 40 CFR 270.42(d)(2)(i) regarding "minor changes" to RCRA permits. Because NMED interpreted minor changes to include a total reversal of condition IV.B.2.b of the WIPP permit, SRIC is before the New Mexico Supreme Court challenging the NMED decision. (Docket No. 27,578 -- *Southwest Research and Information Center, et al vs. State of New Mexico, New Mexico Environment Department, et al.*)

SRIC notes that EPA would continue to maintain a public comment period before making its decision on the "minor alternative provision," something that minor, class 1 RCRA modifications do not require. However, SRIC believes that the public comment period should be longer than 30 days, as

proposed. SRIC favors a 60-day comment period to ensure that the public is informed and has an adequate time to comment. Given that there is not instant notification of all interested persons and that the 30 days could sometimes include holiday seasons or even other times when the public is very burdened with other matters (as is the current situation), 30 days would not provide sufficient time for public comment, especially if the same notice include several alternative provisions.

Further, SRIC is concerned that the proposed rule does not specifically provide for a change being considered under both 40 CFR 194.6(a) and (b). For example, EPA could notice a change as "minor" under subsection (b), but after considering public comment, it may be clear that it is not minor and must be considered under subsection (a). In that instance, SRIC believes that EPA must issue a notice of final rulemaking rejecting the change and then re-notice it for public comment under 40 CFR 194.6(a).

SRIC also advocates an additional provision 40 CFR 194.6(b)(3), also renumbering the existing subsection (3) to become (4):

(3) In making its final determination about whether a change is "substantive," EPA will rely on public comment and will fully justify its determination.

SRIC believes that such an additional provision is necessary to significantly lessen the possibility that a change in the Compliance Criteria that EPA initially deems "minor," but that the public views as major, could be approved without going through the requirements of the existing rule or revised 40 CFR 194.6(a).

#### 4. Proposed changes to 40 CFR 194.8

SRIC agrees that public involvement in the approval of waste characterization programs has been inadequate. And we say that as one of the few persons that has commented under the existing 40 CFR 194.8(b).

SRIC believes that a significant source of the problem is related to the fact the EPA issued 40 CFR 194.8 as part of the WIPP certification decision on May 18, 1998, so there was no opportunity for public comment on a proposed provision.

SRIC's major concern is that EPA has decided that the existing requirement should be changed because DOE's program "will overwhelm our resources." 67 Fed. Reg. 51939 That's not an appropriate justification, since SRIC and the public are concerned about health and safety of present and future generations so there should be adequate resources available for EPA to do what it needs to do. The WIPP Land Withdrawal Act (LWA), Public Law 102-579, as amended, Section 23, is a commitment from Congress to provide adequate resources to EPA.

EPA's proposed solution to the "problem" is unacceptable. The proposed Baseline Compliance Decision could apply to all wastes to be characterized at a site for the next 30 years! Even waste that hasn't been generated!

SRIC strenuously objects to the open-ended nature of the proposed 194.8(b). We believe that for the WIPP site that is supposed to operate for 35 years and safety contain radionuclides for 10,000 years and more that a one-time approval of waste characterization practices would be unsafe and irresponsible. Thus, any baseline decision should be limited by rule to no more than a specified number of years. SRIC would suggest no more than three (3) years. Thus, the baseline would need to be reviewed and updated at least every three years.

As further support for SRIC's position, we would note that all existing sites have had some difficulties fully complying with EPA's existing requirements. Another deficiency of the proposed rule is that it does not describe instances of non-compliance. For example, under the existing system in 2001 the Idaho National Engineering and Environmental Laboratory (INEEL) sent at least 54 shipments to WIPP that had drums that were not properly certified. While that situation is briefly mentioned (67 Fed. Reg. 51940), SRIC does not believe that EPA has adequately described that and other problems and how the proposed rule will improve DOE's performance and EPA's oversight. In fact, the open-ended nature of the baseline is likely to compound the problem of what procedures need to be re-inspected because the incentive for a site (and perhaps EPA) is to make the Baseline so generic and general to cover a wide number of waste streams, quality assurance processes (including possible future changes), and other procedures so as to forego future re-inspections.

Further, the waste characterization problems at other sites are not mentioned, nor is there any discussion of how the revised rule will bring about improvements at those other sites. For example, Los Alamos National Lab (LANL), the only site approved in the certification determination in May 1998, made 17 shipments under the initial approval and has made on 11 more shipments over the past 38 months. One of the reasons for the inability to ship have been problems with waste characterization procedures. The proposed rule does not describe that situation, nor how the proposed rule will make improvements to LANL or EPA inspection procedures, nor how the public participation process will be improved. Thus, EPA has not provided an adequate rationale for the revised procedures.

Regarding the oral comments on behalf of John Hart Associates and Westinghouse TRU Solutions at the September 24-25 hearings, SRIC disagrees with the concerns expressed regarding proposed 40 CFR 194.8(b)(3)(i). Those contractors expressed concerns that waste characterization programs and processes that are not adequately implemented at a generator site could result in modification, suspension, or revocation of the WIPP certification under 40 CFR 194.4(b)(1) and (2). Those contractors do not believe that it is appropriate to tie certification requirements for WIPP disposal with waste characterization problems at individual sites. SRIC strongly disagrees.

The proposed rule does not require, but only allows, EPA to take action under subsection 4(b)(1) and (2). Thus, the only immediate action that could be taken is suspension, as modification or revocation could only be done through rulemaking, pursuant to 40 CFR 194.4(b)(1). Thus, DOE and other interested parties would have full opportunity to comment to EPA before the WIPP certification could be modified or revoked. However, SRIC certainly believes circumstances could arise in which major, substantial noncompliance with waste characterization at a generator site should cause suspension of the certification.

Under the proposed rule, such suspension could only occur if EPA first determined that a site was not in compliance with approved waste characterization programs or processes. Such a determination would almost certainly occur after such noncompliance had persisted for some

time, perhaps months or years and possibly related to large amounts of waste being emplaced at WIPP. In such a circumstance, wastes could have been emplaced at WIPP that exceed limits established in the WIPP certification, or otherwise violate requirements of the certification. Certainly, EPA should be clearly authorized to not only suspend shipments from the generator site, as provided in the proposed rule, but to also take action regarding the WIPP certification, including suspending operations at WIPP.

SRIC would also point out in further support of the proposed rule that EPA has always considered DOE/WIPP to be responsible for the certification and its compliance. 67 Fed. Reg. 51935. Further making clear to the Carlsbad Field Office (CBFO) that its ability to maintain the WIPP certification and the site's operations could be dependent on each generator site's compliance with the waste characterization requirements of the WIPP certification is appropriate, and indeed necessary, as it creates strong incentives for CBFO to ensure that generator sites are adequately characterizing their wastes before sending them to WIPP. Thus, SRIC supports the proposed 40 CFR 194.8(3)(i) and encourages EPA to preserve it in the final rule and to not modify or remove it as was suggested by the two contractors' oral comments.

SRIC believes that 40 CFR 194.8(b)2)(iii) should provide for at least a 60-day public comment period. In the language of the proposed rule, there is no timeframe given for the public comment, although the preamble states that there would be a 30-day public comment period. at 51936. As noted above, SRIC believes that a 30-day comment period is too brief for "minor alternative provisions," and it is also too brief for meaningful public comment on what should be voluminous documents regarding a specific site's compliance.

SRIC believes that another reason for the small number of public comments regarding waste characterization at generator sites is the 30-day comment period that has been provided. If EPA genuinely wants improved public involvement, it must provide a longer public comment period in 40 CFR 194.8.

#### 5. Proposed changes to 40 CFR 194.12 and 194.13

SRIC does not oppose the reduction in the number of paper copies of

compliance applications and reference materials so long as each of the New Mexico dockets receives a paper copy of compliance applications and all reference materials and ready access to an alternative format. If EPA's proposed five paper copies does not include copies for the New Mexico dockets, the number of paper copies should be increased to provide copies for those dockets. Further, EPA should state in its preamble to the final rulemaking that the intent is to provide paper copies to each New Mexico docket.

SRIC's concern is that New Mexico is one of the nation's poorest states, and many people do not have access to the internet and must depend on paper copies. Thus, SRIC would strongly oppose any reduction in availability of written copies in the dockets. At the same time, SRIC also recognizes the limited resources of the libraries in which the dockets are located so that they should be provided with compact disks or similar electronic format materials so that some docket users can have that format readily available, should they so desire.

SRIC also believes that the rule should require that DOE make copies of compliance applications and reference materials widely available to the public in either written or electronic form. Thus, we propose the following language to be included in both sections:

The Department shall ensure that copies of compliance applications [or reference materials] are made available to the general public, upon request.

#### 6. Proposed change to 40 CFR 194.24

SRIC does not object to the change from "process knowledge" to "acceptable knowledge."

Thank you for your careful consideration of our oral and written comments.

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