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PUBLIC HEARING

EPA PROPOSED ALTERNATIVES TO THE COMPLIANCE CRITERIA  
FOR THE WIPP

TRANSCRIPT OF PROCEEDINGS  
SEPTEMBER 24, 2002

BE IT REMEMBERED that on the  
24th day of September, 2002, this matter  
came on for public hearing before FRANK  
MRACINOWSKI, Director of EPA's Radiation  
Protection Division, as the Hearing  
Officer, and BARBARA K. HARRIS, Certified  
Court Reporter of the firm SANTA FE  
DEPOSITION SERVICE, 110 Delgado Street,  
Santa Fe, New Mexico, at the Albuquerque  
Convention Center, Albuquerque, New Mexico.

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2 EPA PANEL:

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FRANK MARCINOWSKI - HEARING EXAMINER  
Director EPA's Radiation Protection Division

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BETSY FORINASH - Director of the Federal  
Regulations Center

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KEITH MATTHEWS - Office of General Counsel

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10 1. SHARLA BERTRAM 9

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1           MR. MARCINOWSKI: Good afternoon. We're  
2 going to get started here and open up the hearing at this  
3 point. Currently we don't have anybody scheduled to  
4 testify, but I wanted to get the opening remarks on the  
5 record right now and get things started. So good  
6 afternoon. I want to welcome you to the U.S.  
7 Environmental Protection Agencies public hearing to  
8 receive oral testimony on the Proposed Alternative  
9 Provisions to the Criteria for the Certification and  
10 Recertification of the Waste Isolation Pilot Plant's  
11 Compliance with the Disposal Regulations.

12           I'm Frank Marcinowski, the Director of EPA's  
13 Radiation Protection Division. I'm going to serve as  
14 today's Presiding Officer. Before I explain the ground  
15 rules and procedure for today's hearing, I would like to  
16 introduce Betty Forinash. She's the director of our  
17 Center for Federal Regulations within EPA and is  
18 responsible for the day-to-day management of our  
19 regulation of the WIPP facility. And I would also like to  
20 introduce Keith Matthews. He's an attorney with EPA  
21 working with us on the WIPP project.

22           Now let me briefly describe our reason for being  
23 here. In 1992 Congress established EPA as the regulator  
24 of the WIPP site. We set disposal standards in 1993,  
25 requiring radioactive waste disposal facilities, such as

1 the WIPP, to perform safely for thousands of years into  
2 the future. In 1996 we followed these general standards  
3 with more specific Compliance Criteria for the WIPP site  
4 itself. We used these criteria to determine whether the  
5 WIPP complies with our radioactive waste disposal  
6 regulations. In October 1996 we received DOE's Compliance  
7 Certification Application and immediately began its  
8 review. On May 18, 1998, we recertified that WIPP met our  
9 disposal regulations and could safely contain transuranic  
10 radioactive waste. This decision was based on our  
11 independent technical evaluation of DOE's plans for the  
12 WIPP and on public input.

13         Since that time, we have conducted many  
14 independent technical reviews and inspections of the WIPP  
15 and DOE's transuranic waste facilities around the country  
16 to verify continued compliance with our WIPP disposal  
17 regulations and with the conditions we established for the  
18 WIPP's certification. So based on nearly four years of  
19 oversight of the WIPP's operation, we have determined that  
20 several changes should be made to our criteria to improve  
21 the effectiveness and efficiency of our oversight.

22         The most significant of these changes we propose  
23 is to revise the procedures for approving DOE's waste  
24 characterization programs. The proposed changes are  
25 intended to provide EPA more control and flexibility to

1 schedule and conduct inspections of the ways  
2 characterization programs at DOE's waste generator sites.  
3 These alternative provisions would not change the  
4 technical approach EPA uses during these independent  
5 inspections and does not lessen the waste characterization  
6 requirements the site must meet to demonstrate  
7 compliance. In fact, we believe that these changes will  
8 provide equivalent or improved oversight of waste  
9 characterization activities.

10         We will continue to enforce the waste  
11 characterization requirements, to ensure that DOE's waste  
12 characterization programs are properly implemented. And  
13 the proposed alternative provisions will give us  
14 flexibility to focus our oversight efforts on the most  
15 important waste characterization activities at a given  
16 site. We are also clarifying and updating several other  
17 provisions, and you may comment on any of the changes that  
18 we proposed.

19         Now, for the process that we will follow for the  
20 hearing. No one will be sworn in and there is no cross  
21 examination. The speakers will be asked to present their  
22 testimony and not expect a response from the panel  
23 members. We are here to listen to your comments. We will  
24 respond to all comments received after the public comment  
25 period closes.

1           We have a court reporter present whose job is to  
2 produce a verbatim transcript of today's proceedings, so  
3 it is important that we get a clear and uninterrupted  
4 record. If you have a written copy of your statement, we  
5 will be glad to accept it when you are called to testify.  
6 I ask all speakers to identify themselves for the court  
7 reporter, to spell their names, speak slowly and clearly,  
8 and stop if either the court reporter or I signal a halt.  
9 Of course, it may be necessary for the court reporter,  
10 members of the panel, or I to ask some questions of the  
11 speakers for the purpose of clarifying their statements.

12           Individuals are allowed five minutes to testify  
13 and individuals representing an organization, such as a  
14 citizens group, are allowed ten minutes. As stated in the  
15 Federal Register Notice announcing the public hearings,  
16 only those people who registered in advance are guaranteed  
17 an opportunity to do so. Speakers not registered in  
18 advance may register at the table outside the door and  
19 will be scheduled to testify. We will use a timer that  
20 operates similar to a traffic light. I will tell you when  
21 it is time to begin your statement, and the timekeeper  
22 will start the timer and the green light will appear.  
23 When you have two minutes left, the light will turn yellow  
24 and you should begin closing your remarks. When your time  
25 has elapsed the light will turn red and I will ask you to

1 stop.

2 Those of you whose statements are longer than  
3 the allotted five or ten minutes will be recalled and  
4 allowed to continue speaking to the extent possible. Time  
5 permitting, this procedure will be repeated until  
6 everybody who wishes to be heard has completed their  
7 statements or the session reaches its closing time. I  
8 believe this system will be fair to all parties.

9 As I mentioned earlier, we'll gladly accept  
10 written comments today, or you can submit them to the  
11 official EPA docket until December 9, 2002. That means  
12 that anything you do not get to say today, or anything you  
13 want to say in response to what someone else says, may be  
14 submitted in writing for our consideration. Comments may  
15 be submitted electronically, by mail, or by fax. We  
16 consider all comments equally, whether presented to this  
17 panel or provided to the docket.

18 Please see the information table or refer to the  
19 flyer that was passed out on your way in for the docket  
20 locations and hearing ground rules. A transcript of  
21 today's proceedings will be available for review at the  
22 dockets in a few weeks.

23 Again, EPA's purpose today is to solicit  
24 comments only on the Proposed Alternative Provisions  
25 published in the Federal Register on August 9, 2002. So

1 we ask you to confine your comments and remarks to that  
2 topic.

3 I want to thank all of you for taking the time  
4 to attend and testify today, and we look forward to  
5 hearing from as many people as we can.

6 At this point in time we have nobody currently  
7 registered to speak, so if anybody would like to step up  
8 and speak we would certainly be willing to hear you now.  
9 If not, I think we're going to recess until somebody comes  
10 who wants to speak. So is there anybody willing at this  
11 point?

12 (Negative response.)

13 MR. MARCINOWSKI: Okay, then I think  
14 officially we'll go on recess until we get somebody who  
15 wants to speak.

16 (There was a recess until 1:27 p.m.)

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1 MR. MARCINOWSKI: Okay. We're going to  
2 reopen the hearing now. And when we initially opened it,  
3 there were some procedures that we have with regard to the  
4 time allotted for speakers. At this point in time we  
5 don't have a great many speakers, so if you want to go  
6 beyond your time limit at this point, I would say let's  
7 just keep proceeding until you're through with your  
8 statement, or somebody else comes in and wants to testify,  
9 and we'll schedule it at that point, but this is Sharla  
10 Bertram. Maybe you could just spell your name for the  
11 court reporter.

12 MS. BERTRAM: I also gave her a copy.

13 MR. MARCINOWSKI: That would be great.

14 MS. BERTRAM: My name is Sharla Bertram,  
15 S-h-a-r-l-a B-e-r-t-r-a-m. I'm speaking on behalf of John  
16 Hart Associates of Albuquerque. Good afternoon to the  
17 hearing officers and ladies and gentlemen. Thank you for  
18 the opportunity to comment.

19 John Hart and Associates performs environmental  
20 and regulatory analyses for the WIPP Project. Prior to  
21 employment with JHA I was with Sandia National  
22 Laboratories, the WIPP's scientific advisor. While at  
23 SNL, I was responsible from 1986 to 1999 for analyzing and  
24 tracking the development and implementation of  
25 40 CFR Parts 191 and 194 and assisting the laboratory to

1 focus scientific investigations to be responsive to  
2 relevant requirements of the regulatory program. And in  
3 that capacity I analyzed all of the EPA's proposed and  
4 final requirements for the Department of Energy. Our  
5 comments today build on that experience.

6 We are particularly concerned about the  
7 reference in the proposed Section 194.8(b)(3)(i), to  
8 Section 194.4(b)(1) and (2). We believe this simple  
9 reference could change the relationship between the  
10 processes of certification and recertification of the WIPP  
11 and the processes of determining baseline and continued  
12 compliance of waste generator sites.

13 More separation is needed between Section 194.8  
14 and the remainder of Part 194. Waste generator sites  
15 should be dealt with separately from and independently of  
16 the WIPP certification and recertification requirements.  
17 The provisions dealing with waste generator sites should  
18 implicitly state that the EPA's decisions regarding waste  
19 generator sites have no bearing on the WIPP certification  
20 or recertification.

21 The problem. The title of Part 194 does not  
22 address certification of waste generator sites to ship  
23 waste to the WIPP. The title implies that the rule  
24 addresses nothing but certification and recertification of  
25 the WIPP. The proposed Section 194.8(b)(3)(i)

1 inappropriately invokes Section 194.4(b)(1) and (2). The  
2 provisions of Section 194.4 are specific to the WIPP  
3 certification and are not appropriate responses to  
4 noncompliance at a waste generator site. In fact, EPA  
5 made this argument in the Supplemental Information for the  
6 Final Certification Decision, and I quote:

7           "The EPA certification is based on the  
8 Agency's determination that the WIPP will comply with  
9 the disposal regulations for the inventory described  
10 in the performance assessment. Conditions 2 and 3 of  
11 the certification (related to waste generator sites)  
12 change neither the performance assessment assumptions  
13 nor the terms on which the WIPP is authorized for  
14 disposal, but ensure that DOE adheres to the  
15 assumption on which compliance is based. The EPA  
16 believes this approach is consistent with  
17 Congressional intent (as reflected in the WIPP Land  
18 Withdrawal Act) and with the disposal regulations and  
19 compliance criteria." This was quoted from  
20 63FR27360.

21           "In the Response to Comments for 40 CFR  
22 Part 194," this was in docket, A-92-56, Item V-C-1,  
23 pages 6-5, 6-8, and 6-20, "EPA emphasized that  
24 compliance with the requirements would be confirmed  
25 through inspections or audits and would not serve to

1 reopen the certification rulemaking."

2 This is at 63FR27359 CFR. End quote of that  
3 one.

4 The EPA stated in the Supplemental Information  
5 to the currently proposed rulemaking that, quote:

6 "The principal difference between the existing  
7 and proposed provisions is the process by which EPA  
8 verifies compliance with the provisions and notifies  
9 the public of that process. This new process will  
10 not substantively affect the Compliance Criteria's  
11 implementation of EPA's radioactive waste disposal  
12 regulation 40 CFR Part 191."

13 This is from 67FR51938, and I added emphasis.

14 If you invoke Section 194.4(b)(1) and (2) in the  
15 proposed Section 194.8(b)(3)(i), you imply that the WIPP  
16 certification rulemaking would be reopened and would be  
17 substantively altered -- or would substantively alter the  
18 circumstances under which the WIPP certification can be  
19 suspended, modified, or revoked. Suspending shipments is  
20 a reasonable measure to correct a problem at an individual  
21 waste generator site. Inspections of a waste generator  
22 site and the subsequent findings are irrelevant to the  
23 long-term performance of the WIPP repository. Suspending,  
24 revoking, or modifying the WIPP Certification due to  
25 problems at a waste generator site would be arbitrary and

1 capricious because the EPA has neither explained how nor  
2 justified why noncompliance at a waste generator site  
3 could invalidate the certified performance of the WIPP.

4         The result. This exacerbates confusion on the  
5 part of stakeholders and others as to whether  
6 certification and recertification of the WIPP is dependent  
7 on certification of the waste generator sites. It  
8 contradicts the stated intent of the EPA in the  
9 Supplemental Information to the Final Certification  
10 Decision and in the SI to the present proposal. And I  
11 would ask you to see, for example, Docket A-98-49, items  
12 II-A3-27 and 29, and an August 11, 1999 letter to  
13 Administrator Browner from the Southwest Research and  
14 Information Center, all of which attempt to apply to waste  
15 generator sites certain provisions of the rule that are  
16 specific to the WIPP. The results are confusion, I  
17 think.

18         The solution to this problem. The EPA is  
19 proposing to amend Section 194.8 so that first the system  
20 for approving waste sites and waste streams will be  
21 optimized; and second, stakeholder confusion will be  
22 avoided. And this was at 67FR51938. We believe the EPA  
23 should at the same time resolve the confusion that the  
24 agency perhaps inadvertently created when it included  
25 Section 194.8 in the WIPP certification rule.

1           We propose two options, each of which could  
2 resolve this problem. Referring back to the First Circuit  
3 Court statement in the 1987 remand decision, and I quote,  
4 A final rule which contains changes from the proposed rule  
5 need not always go through a second notice and comment  
6 period. An agency can make even substantial changes from  
7 the proposed version, as long as the final changes are 'in  
8 character with the original scheme' and 'a logical  
9 outgrowth of the notice and comment,'" end quote.

10           And on the basis of that quote, Option 1, you  
11 could resolve the problem within Part 194 by:

12           First. Amending the title of the rule to  
13 Criteria for the Certification and Recertification of the  
14 Waste Isolation Pilot Plant's Compliance with the 40 CFR  
15 Part 191 Disposal Regulations and Approval Process for  
16 Waste Shipment from Transuranic Waste Generator Sites for  
17 Disposal at the Waste Isolation Pilot Plant.

18           Second. Move the requirements into two separate  
19 subparts, one for the WIPP which would be the current Part  
20 194 minus Section 194.8, and one for the waste generator  
21 site, which would be the current 194.8 as amended in this  
22 proposed rulemaking.

23           Third. Add to the new subpart containing  
24 Section 194.8(b)(3)(i) some new language to clarify that  
25 such actions are specific to approved waste generator

1 sites for the situation where waste characterization  
2 programs or processes are not adequately established or  
3 implemented, and clarify that such actions do not affect  
4 the WIPP Compliance Certification and Recertification.  
5 The reference to Section 194.4 should be deleted. If  
6 actions analogous to those in Section 194.4 are intended,  
7 the EPA should add sufficient language to the new subpart  
8 containing Section 194.4(b)(3)(i) to delineate and  
9 authorize the intended actions.

10         And fourth. Under that option, add to the new  
11 subpart new reporting requirements for changes at waste  
12 generator sites. The reporting requirements in Section  
13 194.4(b)(3) B-3 and (4) are not appropriate for waste  
14 generator sites because the requirements pertain to the  
15 WIPP disposal system.

16         Another possible option, our second option,  
17 would be to separate the requirements into two separate  
18 rules. The WIPP specific rule would remain 40CFR Part 194  
19 without Section 194.8. The waste generator site rule  
20 would become a new part at Title 40 CFR containing the  
21 current Section 194.8 as amended in this proposed  
22 rulemaking. And there are seven steps which I think would  
23 be necessary for this option.

24         First, for example, the new rule could be titled  
25 Approval Process for Waste Shipment from Transuranic Waste

1 Generator Sites for Disposal at the Waste Isolation Pilot  
2 Plant.

3         The rule could contain a subpart A which would  
4 be Quality Assurance Programs at Waste Generator Sites,  
5 which now resides at 194.8(a).

6         Subpart B could be Waste Characterization  
7 Programs at Waste Generator Sites, which now resides at  
8 Section 194.8(b) and is the subject of the EPA's proposed  
9 amendments.

10         Fourth. References to Sections 194.21 194.22,  
11 194.24, and 194.67 could remain in this new rule.

12         Fifth. The reference to Section 194.4 should be  
13 removed. The new rule should contain its own discussion  
14 of suspension, modification, and revocation of a waste  
15 site's Baseline Compliance Decision, because the  
16 provisions of Section 194.4 are specific to the WIPP  
17 Compliance Certification and Recertification and are not  
18 appropriate responses to noncompliance at a waste  
19 generator site.

20         Subpart C to the new rule could be analogous to  
21 Section 194.4, but specific to approved waste generator  
22 sites for the situation where waste characterization  
23 programs or processes are not adequately established or  
24 implemented. This subpart C would incorporate the  
25 proposed Section 194.8(b)(3) and should clarify that



1 actions under this new subpart do not affect the WIPP  
2 Certification, thereby avoiding any reference to Section  
3 194.4. Reporting requirements should be specified in the  
4 new subpart.

5 And finally in this option, Section 194.8 should  
6 be deleted from Part 194 and references to Section 194.8  
7 in Conditions 2 and 3 of Part 194 should be corrected  
8 appropriately.

9 Thank you for your attention and your  
10 consideration to our suggestions.

11 MR. MARCINOWSKI: Thank you, Ms. Bertram.  
12 Both your oral and written statements will be entered into  
13 the record.

14 MS. BERTRAM: Thank you.

15 MR. MARCINOWSKI: Is there anyone else in  
16 the audience right now who would like to come up and make  
17 a statement? If not, then again we will be in recess --  
18 do you want to make a statement at this point, Don?

19 MR. HANCOCK: I suppose if there is nobody  
20 else here. My name is Don Hancock from Southwest Research  
21 and Information Center here in Albuquerque. I won't go  
22 through my background because I think the panel is  
23 familiar with me and my organization's extensive  
24 involvement in this rule and the certification.

25 I guess I want to start off by noting for the

1 record that when the proposed rule was issued and before  
2 the hearings were scheduled, we told EPA that the hearings  
3 should not occur in New Mexico until at least mid  
4 October. And the reason that was stated at the time and  
5 is still true today is because there are too many other  
6 things going on at WIPP that related organizations and  
7 concerned members of the public are involved in.

8       We have seven major modifications to the WIPP  
9 RCRA permit that are currently in public comment. The  
10 comments are due next Friday, October 3rd, so folks are  
11 working on those. And the fact that, appropriately, your  
12 rule has a comment period going on for more than two  
13 months more from now, means that the hearings in  
14 Albuquerque and Santa Fe are being prematurely scheduled  
15 in terms of the public having an adequate time to look at  
16 the proposed rule, prepare comments, and come and  
17 testify.

18       So as I said at the time when I talked to EPA, I  
19 and other people would give you better comments if you had  
20 the hearing in October. That's still true here today. )  
21 So my point is twofold.

22       The first point is that in the future, when EPA  
23 has hearings either related to proposed rule changes or  
24 other matters, I believe before EPA establishes actual  
25 hearing dates they should confer with state agencies and

1 stakeholder groups in New Mexico as to the best and  
2 appropriate times to do such hearings. If you do that,  
3 you will get better and more extensive public comment in  
4 the future than what will occur today and tomorrow.

5         The second issue, or the substantive issue, I'll  
6 get to in a second when we deal with some of the changes  
7 that you are proposing in the 194 certification.

8         My last little caveat here is obviously I am  
9 speaking for Southwest Research when I say more time is  
10 needed, so the comments I'm giving today are some initial  
11 thoughts that we have on the proposed rule. We will be  
12 making more extensive written comments, and we would be  
13 able to make more extensive oral comments at the hearings  
14 then scheduled for later.

15         So let me go through various proposed changes.  
16 Regarding 194.6, our major concern relates to how there  
17 may be differing impressions or interpretations between  
18 EPA and the public about what constitutes a, quote, "minor  
19 alternative provision." My organization is especially  
20 concerned about this issue because of our experience with  
21 how a different agency, the New Mexico Environment  
22 Department in this case, has interpreted a somewhat  
23 similar EPA regulation on a similar matter.

24         The other regulation I refer to is 40 CFR  
25 270.42(d)(2)(i), which relates to, quote, "minor changes,"

1 the operative word being "minor" in both your proposal and  
2 in the existing EPA RCRA rule, minor changes to RCRA  
3 permits, because New Mexico Environment Department  
4 interpreted "minor changes" to include a total reversal of  
5 Condition 4(b)(2)(b) of the WIPP permit.

6 Just yesterday my organization filed its brief  
7 in chief before the New Mexico Supreme Court challenging  
8 the Environment Department's decision and its  
9 interpretation of what is minor.

10 So for your reference, the docket number of that  
11 case is 27,578, Southwest Research and Information Center  
12 et al. vs. State of New Mexico, New Mexico Environment  
13 Department, et al.

14 MR. MATTHEWS: Could you give me that  
15 again, please, Don?

16 MR. HANCOCK: The Supreme Court docket  
17 number is 27,578, Southwest Research and Information  
18 Center, et al., vs. State of New Mexico, New Mexico  
19 Environment Department, et al. So I want to note I  
20 recognize there are differences between RCRA procedures  
21 and 194 procedures. That, in fact, is good, because under  
22 your so-called Class 1 minor modifications in RCRA, there  
23 is no public hearing. There in fact isn't even a public  
24 notice in this case that we are challenging. There wasn't  
25 even a public notice of the change. It was put into

1 effect as a total reversal, et cetera.

2 I recognize the fact under your minor  
3 alternative provisions there still is an opportunity for  
4 30 days of public comment. However, as you might imagine,  
5 I don't think 30 days is sufficient. If, for example, we  
6 have exactly the same situation that has happened now, if  
7 you would have noticed this -- if you would have noticed  
8 the what you consider minor modifications that you were  
9 proposing in early August as you did, the 30 days would  
10 have been up in early September, precisely the same time  
11 we have all of these other things going on. So while you  
12 may think 30 days is sufficient, I don't. And it's for  
13 several reasons.

14 One is the reason I just mentioned. You can  
15 have circumstances where EPA may think the only thing that  
16 is related to WIPP and stakeholders going on is your  
17 supposed minor modification, but we in New Mexico might  
18 say, Hey, there is a lot else going on. So 30 days is not  
19 enough. 30 days is also really not 30 days for the public  
20 because the public doesn't get notified instantaneously,  
21 number one.

22 Number two, your 30 days can also occur during,  
23 for example, between Thanksgiving and Christmas, or over  
24 the Christmas holidays, when once again people are going  
25 to want to be able to focus on something other than

1 commenting on an EPA proposed rule.

2       So, we would strongly oppose the 30-day  
3 provision. We think at least 60 days should be required  
4 to ensure that the public has the opportunity to be  
5 informed and have an adequate time in which to comment.

6       Another issue related to proposed 194.6 is that  
7 we don't see that the rule or the explanation addresses  
8 the specific possibility of a proposed rule change being  
9 considered under both Subsection A and B. And let me give  
10 you more than one for instance I can think of when that  
11 might apply. Let's assume that EPA proposes something  
12 under B as a minor change, but based on the public comment  
13 it becomes clear that it's not a minor change. What do  
14 you then do?

15       Our view would be that you would have to not  
16 approve the change under 194.6(b) and instead, if you were  
17 going to do it, you would have to reissue and renote it  
18 under 194.6(a). And if you are going to have this new  
19 Subsection B, we would argue that that would need to be  
20 what you do. But clearly EPA must, in issuing any final  
21 rule, clarify its thinking, either in the actual  
22 regulations or in the preamble and the explanation that  
23 goes with it.

24       Okay. So let's move on to the famous, what is  
25 now famous, based on the earlier testimony this afternoon,

1 Subsection 194.8. I guess I want to say two things in  
2 kind of introduction about this. One is that part of the  
3 problem which was either inferred or it might have been  
4 actually stated by the previous speaker, but it's  
5 something that we have always been concerned about, is  
6 that there wasn't any public comment on any proposed  
7 194.8. There was no 194.8 in the original Part 194 rule,  
8 and you-all developed it as part of certification  
9 process. And so some of the problems that you all are now  
10 seeing, my organization and others recognized immediately  
11 when we first saw it in May of 1998.

12         So I guess part of the point of that is that  
13 that's the reason you need to propose things and get  
14 public comment on them before you do them. Whether you  
15 believe, as was discussed by the previous speaker, you  
16 have the legal authority to do it or not, you will have  
17 better regulations if you have public comment on them as  
18 proposals.

19         Now, I guess the second introductory point is I  
20 agree, we agree, organizationally, with what you have said  
21 in the proposed rule that there needs to be improvement in  
22 the public involvement process related to waste  
23 characterization programs. And we say that as one of the  
24 few persons and parties who have, in fact, commented on  
25 more than one occasion under the existing 194.8

1 requirements. And we note, as EPA itself has said, there  
2 hasn't been a lot of public involvement. And I would  
3 strongly suggest that's not because there isn't public  
4 interest. It's because primarily a couple of things: One  
5 is that it's unclear to us, as an organization that has  
6 commented, that EPA pays much attention to what those  
7 comments are; and number two, it's an ineffectual  
8 process. The public is supposed to comment on paperwork  
9 that they may or may not be able to understand and can't  
10 ask questions of, can't get more information about, et  
11 cetera.

12         So it is more appropriate, in my view, for the  
13 public to be able to comment, not only on waste  
14 characterization plans, which is what we're commenting on  
15 up to now, as well as more substantive detail in terms of  
16 what is actually going on at the site related to any kind  
17 of audit or inspection.

18         However, having said that there is a need for  
19 change, we're extremely concerned about EPA's rationale  
20 for the change. What you say on page 51939 of the  
21 proposed rule is that EPA wants to change the existing  
22 requirement because DOE's program "will overwhelm our  
23 resources." That's not an appropriate reason to change.  
24 There is a need for a change, but because DOE is going to  
25 overwhelm you is not a reason to change.



1           People in New Mexico were promised in the 1992  
2 WIPP Land Withdrawal Act, which sets EPA up as the  
3 regulator, codified this whole regulation, or statutorily  
4 authorized EPA to issue the compliance regulations under  
5 the law, that EPA was supposed to be a regulator and there  
6 were going to be adequate resources for EPA to be a  
7 regulator. So to tell us that there are not adequate  
8 resources for EPA to be a regulator is not okay. And the  
9 solution to that problem is not to change your  
10 regulations; it's to tell Congress that you don't have  
11 enough money. And the implication for that is sites  
12 aren't going to be -- sites are not going to have their  
13 characterization programs certified, and the implication  
14 for that is that sites aren't going to be able to ship to  
15 WIPP.

16           And if Congress says, "Fine, you don't need  
17 anymore money," then, fine, that will delay the shipment  
18 of waste to WIPP. If Congress wants to make -- Congress  
19 said there were going to be enough resources. If Congress  
20 is now saying there aren't going to be enough resources,  
21 the implication of that is that health and safety and  
22 characterization requirements and public involvement are  
23 going to be sacrificed, which is arguably what you're  
24 proposing. Rather the solution -- there is a different  
25 solution to the problem.

1           So, while we can agree, and I'll talk more about  
2 some of the specific provisions that you're proposing, we  
3 can agree that there should be improvements in 194.8, we  
4 don't think any improvements should be made based on a  
5 resource question, and that EPA needs to go back to  
6 Congress if that is, in fact, what your problem is.

7           So, let's talk about your proposed solution to  
8 this problem. It's not okay. It is -- I've tried to  
9 think of a good analogy and I don't have a real good one,  
10 but, you know, you're going from a situation where you're  
11 thinking you have too many inspections and too many audits  
12 and too many requirements, you know, so you're going from  
13 what you think is that extreme, basically to the total  
14 opposite extreme. That's not the way you fix a problem.  
15 You're going to the opposite extreme because your proposed  
16 Baseline Compliance Decision, the way it's written, could  
17 mean that a site gets certified, approved, based on the  
18 Compliance Decision, and that's what's going to apply to  
19 all the waste that it generates and characterized for 30  
20 years.

21           Well, that's obviously absurd on its face.  
22 That's way too long a period of time.

23           The other reason it's absurd is all of the  
24 sites, with the possible exception of Rocky Flats, have a  
25 lot more waste that they are going to generate and send to

1 WIPP than even exists now. So your baseline compliance is  
2 going to be based on existing waste and existing programs  
3 and then basically some speculation, if you're going to  
4 actually be talking about the generators, based on total  
5 speculation in terms of what the wastes are, what the  
6 processes are, what are the characterization that they  
7 would use, what the methods, et cetera, would be. So  
8 that's absurd. So that is not okay. We would strenuously  
9 object to that.

10         We think that if you are going to do some kind  
11 of baseline program, it has to be very specifically in the  
12 rule time limit, not just, as I take you're proposing, you  
13 can give a time limit, give it various times, and in terms  
14 of your actual decision, the rule needs to be time  
15 limited.

16         We would suggest that the time limit be no more,  
17 no longer, than three years, so that at least every three  
18 years you would have to come back and relook at the  
19 baseline and update it and see how it's going.

20         As further support for this concern, we note the  
21 fact that all the existing sites, those five sites that  
22 you have approved at one time or another, all of the sites  
23 one way or another have had problems. And, frankly, the  
24 deficiency of what you have proposed is that you didn't  
25 talk about or mention any of those and you need to talk

1 about what the problems have been. I mean, you're  
2 changing this based on what is going to be happening in  
3 the future. DOE is going to overwhelm you with all the  
4 sites and all the waste streams, et cetera. You need to  
5 be talking about how the rule has worked up to now, how  
6 it's worked and hasn't worked, and how a change that you  
7 make is going to improve the situation.

8         So, for example, as you all are well aware, a  
9 little over a year ago EPA suspended shipments from INEEL  
10 because at least 54 shipments containing more than 800  
11 drums were not properly certified. How does the change  
12 that you are proposing, how would the change you are  
13 proposing fix that problem and prevent it from happening  
14 in the future? I don't think it would.

15         In fact, I think it's more likely if you put  
16 your new procedure in effect that we will have many more  
17 occurrences like what happened at INEEL. That's the  
18 opposite of what you should be doing. So you need to talk  
19 about what the problems have been and how what you are  
20 proposing is going to improve the situation. There are  
21 other examples of problems which I won't go into. You all  
22 know what they are, and if you don't, ask.

23         So let me talk briefly, knowing that I've  
24 already exceeded my time limit, about 194.12 and 13,  
25 innocuous minor changes that you all are proposing,

1 according to your discussion. Let me first of all say  
2 that Southwest Research and Information does not oppose  
3 reducing the number of paper copies, necessarily. One of  
4 the things we are very concerned about, though, is we  
5 don't see -- we did not understand and we don't see stated  
6 in the proposal what the purpose of the five paper copies  
7 are. We think one of the purposes of the paper copies  
8 should be that each of the New Mexico dockets will get a  
9 paper copy. And if that's what you are proposing, you  
10 should so state. And if you have a different idea -- and  
11 I see Frank shaking his head so I'm assuming that you're  
12 saying, yes, the idea of five is so there would be one,  
13 but if the five does not include paper copies for each of  
14 the New Mexico dockets, the number needs to be changed to  
15 ensure that there are sufficient number of paper copies so  
16 that New Mexico dockets all get a paper copy.

17         New Mexico is a poor state, one of the poorest  
18 in the country. A lot of people don't have access to the  
19 internet and other kinds of things, so it's very important  
20 for members of the public to be able to go and see a paper  
21 copy and read it, et cetera. So the paper copies in the  
22 dockets are extremely important and they have to be  
23 maintained.

24         Now, what about electronic versions? Yes, we  
25 are fine with CDs or other kinds of things. That's more

1 efficient for you all in some cases, and that's fine. We  
2 think electronic versions, however, need to be available  
3 and that the rule should require that not only EPA is able  
4 to get them, but that DOE, in this case, should also be  
5 providing copies to interested members of the public.

6       As we move forward, particularly with things  
7 like recertification where comment periods are going to be  
8 short, we think that you should not just go on DOE's  
9 goodwill that they will not only submit to you, but make  
10 them available to the public, but you clearly have the  
11 authority to make that -- put that requirement in the  
12 rule. And we would urge you to do so to ensure that  
13 copies of documents are -- certification related documents  
14 and the references are available not only to EPA in an  
15 easily accessible form, but to interested members of the  
16 public and public organizations. I will stop now. Thank  
17 you.

18       MR. MARCINOWSKI: Okay. Thanks, Don. Is  
19 there anyone else at this point in time that wishes to  
20 make a statement? Then I think we will be in recess until  
21 another speaker joins us. Thanks.

22       (There was a recess from 2:05 until 5:05 p.m.,  
23 at which time the proceeding was adjourned until the  
24 evening session at 7:00 p.m.)

25

1 MR. MARCINOWSKI: All right. I think we  
2 will just reconvene this hearing, and actually the only  
3 one signed up this evening is yourself, Ruth.

4 MS. WEINER: Well, thank you.

5 MR. MARCINOWSKI: And we'll forego any time  
6 limitations, so take as much time as you would like, and  
7 if other people show up we'll adjust accordingly, but for  
8 now the floor is yours.

9 MS. WEINER: I don't have very much to say  
10 anyway.

11 MS. FORINASH: But you have two hours to  
12 fill.

13 MS. WEINER: We can have a big discussion  
14 about WIPP. We can pay 25 cents. You guys can answer  
15 questions. I'm Ruth Weiner, and I'm a resident of  
16 Albuquerque. My address is 7336 Lou Wallace, Northeast.  
17 I'm here testifying for myself only. So I was going to  
18 drop my time from ten minutes to five minutes, but who  
19 cares at this point?

20 On a whole, I think the revisions that have been  
21 suggested are very good. I mean, anything that makes --  
22 that speeds the process up and makes it more efficient is  
23 a good idea. And I especially would like to commend EPA  
24 for substituting "acceptable knowledge" for "process  
25 knowledge" and for accommodating small changes that are

1 like, you know, changes, minor changes in the rules and  
2 things like that.

3         The question I have, the big thing that you're  
4 doing, is saying that you are going to have a single --  
5 you're going to make a single determination per site  
6 instead of a determination on each waste stream. And that  
7 looks good, because that saves a great deal of, you know,  
8 regulatory back and forth. You have fewer publications in  
9 the Federal Register, the comment periods don't overlap,  
10 and it probably saves some work for DOE.

11         My question is, if you're going to have a public  
12 comment period, before, and receive comments and respond  
13 to them before you certify a site -- certify isn't quite  
14 the right word, I can't find it now -- what is to prevent  
15 the people who would like to stop the shipments from  
16 simply asking for delay after delay after delay?

17         I mean, we all know that the standard mantra is  
18 there is not enough time for the comment period, it's a  
19 30-day comment period and that does not give us enough  
20 time, we want 45 days, we want 60 days, we want 120 days,  
21 in which case a site could be stopped more or less  
22 indefinitely from shipping anything. And I think there  
23 needs to be something in the rule that either says we're  
24 going to stick to our comment period and under no  
25 circumstances is it going to be longer than X, or some



1 other way to prevent some kind of endless extension of  
2 comment periods that essentially limit the ability of a  
3 site to ship anything.

4 One of the advantages of the waste stream by  
5 waste stream certification, if you will, was that a site  
6 could ship some stuff while waiting to get another waste  
7 stream approved. This way they can't do anything until  
8 the site can be approved.

9 And I think that is really the burden of my  
10 comments. And it's the major point I wanted to make. I  
11 think this is something you really have to think about.  
12 Otherwise there will be sites that will simply be bottled  
13 up and prevented from shipping anything for indefinite  
14 periods of time.

15 The other question I have is that you're going  
16 to reinspect, it says on page 51937, that EPA is proposing  
17 to reinspect the sites that have already been authorized  
18 to ship, using the revised process. In other words,  
19 you'll perform a full scope inspection at Hanford, INEEL,  
20 Los Alamos, Rocky Flats, and Savannah River in order to  
21 meet the Baseline Compliance Decision, based on current  
22 activities at the site.

23 I'm not quite sure of your rationale for that.  
24 Does it imply that EPA hasn't been doing their job when  
25 they authorized the sites to begin shipment? Wouldn't it

1 make sense if you have authorized shipments of several  
2 waste streams at each site, wouldn't it make sense for  
3 those sites to complete that authorization, and looking at  
4 the waste streams that haven't yet been authorized to be  
5 shipped?

6 But again you're putting these sites, which are  
7 big sites, especially INEEL, in a position of essentially  
8 having to start all over again, and the rationale for that  
9 is not very clear. The implication, in fact, is that the  
10 authorization was not particularly well done in the first  
11 place, and I'm sure that that's not true. So I think you  
12 need to take another look at that. You need to consider  
13 whether there isn't some intermediate, other than doing a  
14 complete reauthorization, Complete Baseline Determination,  
15 for the sites where you have already authorized shipment.

16 That's all I have. And if you have any  
17 questions.

18 MR. MARCINOWSKI: Any questions?

19 MS. FORINASH: No.

20 MS. WEINER: Okay. You all can go home  
21 now.

22 MR. MARCINOWSKI: Thanks for your comments,  
23 Ruth, and actually if you had anything written you wanted  
24 to submit we can take that.

25 MS. WEINER: I wish that I had. I just

1 would have submitted it.

2 MR. MARCINOWSKI: Okay. Thank you for your  
3 comments.

4 MS. WEINER: Sure.

5 MR. MARCINOWSKI: I have feel obligated to  
6 ask. Anything else? Okay. Does anybody else want to  
7 speak at this time? Then I guess we're in recess again  
8 until other speakers show up.

9 (There was a recess from 7:14 until 8:07 p.m.)

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1           MR. MARCINOWSKI: It's 8:07. We haven't  
2 had a speaker or anybody sign up since 7:15. And so we're  
3 going to close the hearings for the evening and start them  
4 up again in Santa Fe tomorrow.

5           (The hearing was in recess  
6 until September 25, 2002.)

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CERTIFICATE OF COMPLETION

I, Barbara K. Harris, CCR #114, DO HEREBY CERTIFY that on September 24, 2002 I did report in stenographic shorthand the proceeding set forth herein, and the foregoing is a true and correct transcript of the proceeding to the best of my ability.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case, and that I have no interest whatsoever in the final disposition of this case in any court.

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BARBARA K. HARRIS, RPR-CM  
Certified Court Reporter #114  
My Commission Expires: 12/31/02