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JOHN R. D'ANTONIO, Jr.
SECRETARY

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

December 26, 2002

Dr. Inés Triay, Manager
Carlsbad Field Office
Department of Energy
P. O. Box 3090
Carlsbad, New Mexico 88221-3090

Mr. John Lee, General Manager
Westinghouse TRU Solutions LLC
P.O. Box 2078
Carlsbad, New Mexico 88221-5608

**RE: FINAL DETERMINATION, CLASS 1* MODIFICATION REQUEST
WIPP HAZARDOUS WASTE FACILITY PERMIT
EPA I.D. NUMBER NM4890139088**

Dear Dr. Triay and Mr. Lee:

On November 25, 2002, the New Mexico Environment Department (NMED) received a Class 1* permit modification request (PMR) for extension of time to perform closure of Panel 1 from the US Department of Energy Carlsbad Field Office and Westinghouse TRU Solutions, LLC (**the Permittees**). This request was submitted as a Class 1* modification requiring NMED approval prior to implementation, based upon an analysis of 20.4.1.900 NMAC (incorporating 40 CFR §270.42 Appendix I, Item D.1.b). This category of modification addresses “[c]hanges to the closure schedule for any unit, changes in the final closure schedule for the facility, or extension of the closure period, with prior approval of the Director.” The Permittees further requested that NMED “issue a timely response regarding this proposal.”

Prior to submittal of this PMR, the Permittees met with NMED representatives and interested members of the public on November 15, 2002 to discuss a draft PMR that outlined the technical and regulatory framework for requesting an extension to the closure schedule for Panel 1. At this meeting, the Permittees agreed to consider modifying this draft PMR to address concerns raised by various parties prior to formal

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submission to NMED. The Permittees also agreed to provide NMED with an engineering analysis report (**Report**) describing the expected performance of a twelve-foot explosion isolation wall that would serve as the initial element of the panel closure system until a final panel closure design had been approved by both NMED and the US Environmental Protection Agency (**EPA**).

NMED notes for the record that, although the PMR was received November 25, 2002, the initial Report was not received until December 19, 2002. Following discussions with NMED, the Permittees submitted a revised Report incorporating a registered professional engineer's certification, which NMED received on December 23, 2002. NMED was unable to commence review of the full PMR until receipt of the Report. Thus, considering the revision to the Report and the need for appropriate review, NMED was precluded from issuing a final determination any earlier than today.

NMED has reviewed the PMR and revised Report and determined that together they constitute an administratively complete submission. The New Mexico Hazardous Waste Fee Regulations require assessment of fees when administrative review of a document is complete, as specified in 20.4.2.301 NMAC. NMED will issue an invoice to you under a separate letter. Payment is due within sixty (60) calendar days from the date that you receive the invoice.

The proposed revised permit text in the PMR for Attachment I, Section I-1d(1), Schedule for Panel Closure does not provide a specific date or time period to satisfy the regulatory intent of a "closure schedule." In identifying the required elements of a closure plan, 20.4.1.500 NMAC (incorporating 40 CFR §264.112(b)(6)) states that a schedule for closure:

"... must include, at a minimum, the total time required to close each hazardous waste management unit and the time required for intervening closure activities which will allow tracking of the progress of partial and final closure."

Instead, the Permittees have proposed eliminating any deadline for completion of final closure of Panel 1 by stating on Page A-7 of the PMR:

"Subsequent closure activities will take place in conformity with this Permit as it may or may not be amended by final NMED administrative action on the panel closure design modification request submitted to NMED on October 7, 2002."

Although this proposed language change is a statement of the obvious (i.e., the Permittees must comply with the panel closure requirements of the permit), it does not provide a schedule in compliance with 20.4.1.500 NMAC (incorporating 40 CFR §264.112(b)(6)). NMED believes the Permittees may have used this language in an attempt to address the uncertainty associated with the timing of NMED's final agency

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action on the Class 3 panel closure design PMR, as well as to anticipate EPA's delay in reviewing the design change until after their recertification process is complete sometime in 2004.

Upon review of the Report, NMED has determined that the PMR must be altered to satisfy the regulatory requirements of a schedule for closure. This can be accomplished by linking the expected performance of the explosion isolation wall described in the Report to a specific schedule following completion of construction of the wall. NMED has modified the language in Attachment I, Section I-1d(1) to read as follows:

“The Permittees will initially block ventilation through Panel 1 as described in Permit Attachment M2 once Panel 1 is full to ensure continued protection of human health and the environment. The Permittees will then install the explosion isolation wall portion of the panel closure system that is described in Permit Attachment I1, Section 3.3.2, Explosion- and Construction-Isolation Walls. Construction of the explosion isolation wall will not exceed 180 days after the last receipt of waste in Panel 1. Final closure of Panel 1 will be completed as specified in this Permit no later than five years after completion of the explosion isolation wall.”

Furthermore, NMED has modified Note 5 to Table I-1, Anticipated Earliest Closure Dates for the Underground HWMUs to read as follows:

“NOTE 5: The anticipated closure end date for Panel 1 is for installation of the 12-foot explosion isolation wall. Final closure of Panel 1 will be completed as specified in this Permit no later than five years after completion of the explosion isolation wall.”

EPA clarified the use of Class 1* modifications in the preamble to the permit modification final rule (53 Fed. Reg. 37915, September 28, 1988), where it states:

“As proposed, EPA is allowing certain Class 1 modifications – such as changes in interim dates in schedules of compliance or minor changes in incinerator trial burns – only after the permitting Agency has approved the modification. This provision is contained in §270.42(a)(2). Those Class 1 modifications which require prior Agency approval are identified in Appendix I with an asterisk. This approval procedure is analogous to the former minor modification procedures. The Permittees must notify persons on the facility mailing list within 90 calendar days after the Director approves the request.”

As stated in the first paragraph of this final determination, the Permittees submitted this PMR after identifying it in Appendix I of 40 CFR §270.42 as Item D.1.b. NMED

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concludes that the PMR, as modified to incorporate an enforceable closure schedule, is appropriately classified as a Class 1* modification.

NMED hereby approves, with changes noted above, the Class 1* modification to the Permit extending the time to perform closure of Panel 1. NMED will issue a revision to the WIPP Hazardous Waste Facility Permit within thirty (30) days reflecting the changes approved by this final determination.

If you have any questions regarding this matter, please contact Steve Zappe at (505) 428-2517.

Sincerely,

John R. D'Antonio, Jr.
Secretary

JRD/soz

cc: Paul Ritzma, NMED
James Bearzi, NMED HWB
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