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March 22, 2004

**RE: GENERAL RESPONSE TO COMMENTS, CLASS 2 MODIFICATION REQUESTS
WIPP HAZARDOUS WASTE FACILITY PERMIT
EPA I.D. NUMBER NM4890139088**

Dear Citizen:

On March 15, 2004, the New Mexico Environment Department (**NMED**) took final administrative action on a Class 2 permit modification request (**PMR**) to the Waste Isolation Pilot Plant (**WIPP**) Hazardous Waste Facility Permit. The Department of Energy Carlsbad Field Office and Washington TRU Solutions LLC (**the Permittees**) submitted this PMR to the Hazardous Waste Bureau in the following document:

- Request for Class 2 Permit Modification (LANL Sealed Sources), Letter Dated 11/13/03, Rec'd 11/14/03

The Permittees identified one (1) item in their PMR submittal:

1. LANL Seals Sources Waste Streams Headspace Gas Sampling and Analysis Requirements

NMED approved Item 1 with changes for the reasons specified in the attached response to comments. The revised permit issued on that date also included a February 27, 2003 Class 1* PMR for Change of Operation, which required further agency review prior to approval. Although the Class 1* PMR was not subject to a formal public comment period, NMED has provided a general statement of the issues in this PMR and identified the changes imposed in the approved permit language in the attached response.

This PMR listed above were evaluated and processed by NMED in accordance with the requirements specified in 20.4.1.900 NMAC (incorporating 40 CFR §270.42(b)). It was subject to a sixty (60) day public comment period running from November 16, 2003 through January 15,

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2004, during which NMED received written comments from a total of nine individuals and organizations. NMED's general responses to the comments based on the submitted PMR are summarized in the attachment to this letter.

Further information on this administrative action may be found on the NMED WIPP Information Page at <<http://www.nmenv.state.nm.us/wipp/>>. Please contact Steve Zappe at (505) 428-2517 or via e-mail at <steve_zappe@nmenv.state.nm.us> if you have further questions or need additional information.

Sincerely,

John E. Kieling
Manager
Permits Management Program

Attachment

cc: Sandra Martin, HWB
Steve Zappe, HWB
R. Paul Detwiler, DOE/CBFO
Steven Warren, Washington TRU Solutions LLC

**NMED GENERAL RESPONSE TO COMMENTS ON CLASS 2 PERMIT MODIFICATION TO WIPP
HAZARDOUS WASTE FACILITY PERMIT (WIPP PERMIT)
SUBMITTED NOVEMBER 2003**

Item 1. LANL Sealed Sources Waste Streams Headspace Gas Sampling and Analysis Requirements

Background: The Permittees revised and resubmitted a permit modification request (PMR) regarding “sealed sources.” Congress has directed the Department of Energy (DOE) to collect sealed sources from around the country at Los Alamos National Laboratory (LANL) under the Off-Site Source Recovery Project (OSRP). Sealed sources are nuclear materials encased in metal capsules designed to prevent leakage or escape of nuclear contents and used in applications that require high surface dose rates. DOE and other entities (commercial, academic, medical, etc.) use sealed sources to calibrate radiological equipment and to provide standards in the laboratory for analytical samples that are being tested for radiation. This PMR as proposed would eliminate existing permit requirements for headspace gas (HSG) sampling and analysis for sealed sources waste streams at LANL. In its place it would substitute HSG sampling of surrogate drums (i.e., drums with packaging materials but no waste) and assign the analytical volatile organic compound (VOC) results to all containers in the waste stream. As before, the PMR proposed additional acceptable knowledge (AK) and visual examination (VE) requirements to ensure continued compliance with the permit. This revised PMR also included actual AK information for a sample sealed source used to demonstrate the lack of VOCs in this and other sealed sources. Under the existing permit, these sealed sources are required to undergo the same characterization activities as other contact handled transuranic mixed waste, including HSG sampling for every waste container. To date, two containers from a sealed sources waste stream at LANL have been disposed of at WIPP under the existing permit.

Comments: Several commenters believe that this Class 2 PMR was not properly classified, and should instead be processed as a Class 3 modification because it eliminates, rather than reduces, HSG sampling and analysis. Commenters believe that reliance upon AK alone for characterization is unacceptable, and recall the original permit hearing of 1999 where LANL AK was deemed questionable. Other commenters cited a 2003 General Accounting Office (GAO) report critical of DOE’s failure for the past 17 years to develop a congressionally mandated disposal facility suitable for all discarded sealed sources. These same commenters expressed concern that DOE might try to improperly dispose of sealed sources at WIPP that are otherwise not allowed (e.g., non-TRU waste, non-defense generated waste, etc.). Some commenters noted that DOE did not identify sealed sources as a waste type in the original inventory of waste expected for disposal at WIPP, and that approving this PMR was inconsistent with a permit modification currently proposed by NMED that limits waste eligible for disposal to the original inventory. Finally, some commenters pointed out that the practice of including only the citations to non-RCRA regulations in the permit rather than explicitly stating the requirements contained within those regulations could create problems if the regulations change.

Response: NMED approved this PMR with changes that were based upon public comment. NMED believes that processing this PMR as a Class 2 is consistent with previous PMRs in light of the Permittees’ submittal of new information in the revised PMR and the updating of records to include sealed source VOC analytical data. Some of the new information

submitted included detailed manufacturer specifications and records that should be available for each sealed source demonstrating the non-hazardous nature of the source(s). In this approval, NMED imposed an additional requirement to collect the same type of AK information as was provided in the PMR to ensure that adequate data and record collection occurs. NMED stated that the agency has much greater confidence in AK data collected under the current permit process than was presented at the original permit hearing. NMED concurs with the GAO's concern about the lack of disposal capacity for sealed sources, and notes that the report also questions whether all of the sealed sources containing plutonium-239 that the OSRP plans to recover meet the legal and regulatory requirements for disposal at WIPP. NMED shares the commenters' concern about attempts to dispose of sealed sources that are not generated by atomic energy defense activities or are not clearly TRU waste. Furthermore, NMED identified a September 9, 1996 memorandum in the public record from DOE Headquarters General Counsel providing DOE's position regarding the legal and regulatory determination of defense waste. NMED is aware that sealed sources were not identified as part of the waste inventory at the time the permit was issued, but denying this PMR on that basis is premature because the agency has yet to approve the NMED-proposed modification, and NMED believes the issues must be addressed separately. NMED resolved the commenter concern about references to non-RCRA regulations by citing a specific edition date to be associated with the referenced regulation. Any future changes to these regulations that impact WIPP activities will require a new PMR.

Item 2. Class 1* Modification Regarding Change of Operational Control at the WIPP Facility

Background: In February 2003, NMED notified the current management and operating (M&O) contractor of the WIPP facility, Washington TRU Solutions LLC, that they must submit a PMR reflecting a change of operational control in order to satisfy the transfer of permits requirement of the regulations. This was necessary because the M&O contract had been held by several different legal entities following submittal of the original WIPP permit application to NMED and subsequent issuance of the permit, and the regulations require NMED approval whenever there are changes in the ownership or operational control of a permitted hazardous waste facility such as WIPP. NMED received this PMR as a Class 1* modification from the Permittees on February 28, 2003, which under the regulations requires agency approval before implementation, but does not require a public comment period. This PMR provides a chronology of the changes of M&O contractors at WIPP since 1997, and identifies changes that occurred prior to and after issuance of the original WIPP permit.

Comments: Although NMED was not obligated by regulation to establish a specific comment period, the agency accepted comments from interested parties prior to making a final determination. One commenter agreed that the permit needed to discuss the new contract awarded by DOE in 2000, and that the date when operations began at WIPP needed correction. Another commenter stated that any change in equity ownership of a non-public company or partnership (or any change in control of a public company) that operates a major hazardous waste facility such as WIPP should follow the appropriate permit modification procedures.

Response: NMED approved this PMR with changes based upon the comments received and the need to reflect an accurate chronology of M&O contractors in the final permit language. NMED attempted to clearly identify the legal entities, corporate structure, and relationships between parent companies and subsidiaries in the chronology. NMED placed each of the pre-permit notifications in context by noting where in the overall permit issuance process each notification occurred. NMED identified when the notifications of permit modification submitted by the Permittees failed to satisfy the requirement to modify the permit to reflect a change of operational control. In response to a commenter, NMED inserted into the chronology a reference to the new contract awarded by DOE that was announced on December 15, 2000. However, NMED did not change the date when operations began, because the date in the permit reflects the start of operations under the permit, not the initial receipt of waste before the permit was issued. Finally, NMED removed extraneous information from the final permit language related to the prior elimination of the financial assurance requirements from the permit in 2000.