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2/5/02

02-004

BEFORE THE ENVIRONMENT DEPARTMENT  
STATE OF NEW MEXICO



IN THE MATTER OF THE DRAFT )  
FINAL PERMIT FOR THE TRIASSIC )  
PARK WASTE DISPOSAL FACILITY )  
U.S. EPA NO. NM0001002484 )

No. HRM 01-02(P)

**NMED HAZARDOUS WASTE BUREAU'S COMMENTS**  
**ON THE HEARING OFFICER'S REPORT**

Pursuant to 20.1.4.500.C(2) NMAC, and the Hearing Officer's Order on Post-Hearing Submittals filed February 5, 2002, the Hazardous Waste Bureau ("HWB") of the New Mexico Environment Department ("NMED") respectfully submits the following comments to the Hearing Officer's Report.

NMED agrees with the Hearing Officer's Report, the Hearing Officer's Proposed Findings of Fact and Conclusions of Law, and the proposed Final Order, and provides the following comments to certain items contained in Section IV., Discussion/Analysis, as clarification on its rationale for agreement with the above-listed documents and support for adoption of the proposed conditions contained in the five Attachments to this document. In each case, a quotation from the Hearing Officer's report is shown in italics, followed by NMED's comment.

Permitting Process, A.1. (p. 74)

*"In retrospect it may seem illogical that a presentation would be given only in English, to be followed by questions and answers about the presentation in Spanish, but having met the request as stated, it is not correct to state now that the department and the*

*Applicant have 'prevented...participation [in the process], particularly by members of the public who neither speak no read English.'"*

NMED agrees with the Hearing Officer, and notes that NMED makes every effort to honor public requests as specified by the public.

Permitting Process, A.3. (p. 77)

*"First, I urge the Bureau to revise its personal disclosure statement forms in at least two respects: clarify that the forms are not, in fact, 'confidential when completed,' although some small portions of them may be; and if OSHA violations must be disclosed with other environmental violations, state that clearly on the form to avoid misunderstanding."*

NMED accepts the Hearing Officer's recommendations as valid. NMED's Office of General Counsel will advise by memorandum all NMED bureaus that blanket confidentiality language on disclosure forms is not legally binding and therefore misleading, and that it should be removed where it exists. Additionally, OGC will advise all bureaus to include language on disclosure forms indicating that the Occupational Health and Safety Act (the NM state counterpart to the federal Occupational Safety and Health Act) is an "environmental statute" for purposes of disclosure information.

Permitting Process, A.4 (p. 78)

*"The Bureau noted in its response to one motion that the documents had not been relied on in issuing the draft permit. This may be arguable in the instance of the Applicant's response to a NOD, but I do not believe it warranted reopening the hearing."*

NMED does not believe that the Applicant's response to a NOD was among the documents at issue in the motions addressing the administrative record index. NMED

believes the Hearing Officer may be referring to a Request for Supplementary Information, dated March 5, 1997, issued by NMED, to which the applicant subsequently responded. The applicant's response was always included in the administrative record and its index, and contains the information upon which NMED relied in issuing the draft permit.

Environmental Justice, B. (p. 83)

*"I believe the procedural regulations already assure full access without discrimination to the permitting process for those who wish to participate (see above, Section A), but improvements are always possible. Establishing criteria for when Spanish will be used for public notices and fact sheets would be helpful, for example, in making the provision of such notices less reactive and subjective. Codifying our now established practice of providing for public comment outside of working hours in all hearings with significant public interest might reduce confusion."*

NMED agrees with the Hearing Officer that the procedural regulations assure full access without discrimination to the permitting process. NMED will assess establishing criteria, but does not believe that codifying NMED's practice of providing for public comment outside of working hours is appropriate. NMED has a good track record of accommodating public access by holding hearings at appropriate times, and believes that flexibility is important to ensure that the public is indeed accommodated in any given situation and location.

Environmental Justice, B. (p. 84)

*"If we are to require the Bureau to make its analysis explicit, however, it is appropriately a regulatory matter so that it can be collaboratively developed with those*

*who will be affected by it, and promulgated with full consideration of the other regulations it will have to be reconciled with."*

NMED agrees that requiring NMED to provide explicit analysis of disproportionate impact and environmental justice issues generally is appropriately addressed through the regulatory promulgation process.

Endangered Species Act, C. (p. 87)

*"Without agreement by the Applicant, however, that these conditions may be 'imposed' in the permit, I see no authority for their imposition where the species are not listed."*

NMED agrees with the Hearing Officer that, because the Applicant has not agreed to imposition of the additional mitigation measures proposed by CURE, and because the Lesser Prairie Chicken and the Sand Dune Lizard are not listed as endangered by either the state or federal government, NMED lacks authority to impose conditions requiring said mitigation measures.

Acceptance of Waste from Mexico, F. (p. 99)

*"I recommend that Section 2.3.1 be clarified or amended to reflect that it does not preclude the acceptance of waste properly imported from countries under the La Paz Agreement, properly manifested, and properly delivered with the required waste characterization to the facility."*

NMED accepts the Hearing Officer's recommendations as valid. In accordance with the Hearing Officer's recommendation, NMED proposes to strike from Permit Condition 2.3.1 the prohibition on acceptance of waste from a generator located outside the United States. See proposed new language in P.C. 2.3.1 in Attachment 1. To assure

that wastes from outside the U.S. are properly characterized, NMED proposes, in addition to the specific requirements set out in 40 CFR 262.60 for imports of hazardous waste, that for such wastes the Representative Sample Analysis requirements in Permit Conditions 2.5.2.a and 4.5.2 (WAP) be expanded to not only include analysis for each underlying hazardous constituent as identified in 40 CFR 268.48, but to include analysis for *all* hazardous constituents listed in 40 CFR 268.48. *See* proposed new language in P.Cs. 2.5.2.a , and 4.5.2 (WAP) in Attachments 2 and 3 respectively.

This additional analysis condition for waste from generators outside the U.S. is necessary to protect human health and the environment, given that unlike U.S. generators, non-U.S. generators are not subject to RCRA's specific generator requirements. *See generally*, 40 CFR Part 262.

Generators of RCRA waste inside the U.S. are required to comply with such requirements as record keeping and reporting for wastes generated. *See* 40 CFR 262.40-41. For generators of waste outside the U.S. there is no way to verify compliance with these or any of the generator requirements of Part 262. Further, generators of waste are required to provide certification statements regarding waste analysis and testing and certify under penalty of law as to the accuracy of such statements. *See for example* 40 CFR 268.7(a)(3)(i). Unlike with regard to the certification statements provided by U.S. generators, there is no penalty of law applicable to a non-U.S. generator for misstatements made in certification statements regarding waste analysis and testing.

Requiring that the Applicant expand the Representative Sample Analysis requirements in P.C.4.5.2 to include analysis for all hazardous constituents listed in 40 CFR 268.48 for wastes accepted from generators outside the U.S. will identify if any

additional hazardous wastes are present in a waste stream beyond those identified by the non-U.S. generator. This expansion of the analysis under P.C.4.5.2 for non-U.S. generated wastes will provide NMED (and the Applicant) with the necessary mechanism to assure accurate waste analysis.

Lastly, as the Hearing Officer noted, at this time there is no specified method for expatriation of waste received from a generator of waste outside the U.S. in the Draft Permit. F. (p. 98). There are, however, provisions in the permit (and RCRA) that address expatriation generally. See, Draft Permit, Permit Condition 2.5.3.b; Attachment F, Condition 4.4.4.1; and 40 CFR 262.20 (d). Furthermore, Annex III, Article IV of the La Paz Agreement specifies that “[t]he country of export shall readmit any shipment of hazardous waste that may be returned for any reason by the country of import.” It is NMED’s position that the current language in the permit regarding expatriation is sufficient should waste from a generator outside the U.S. need to be returned.

Closure and Post-Closure, G. (p. 100)

*"The provision may benefit from more specificity, so I would recommend adding to the end of Section 8.2.4.a or 8.2.4.d the words "Surface water diversions or surface drainage ditches shall be installed as necessary to prevent gullies from forming."*

NMED has no objection to the Hearing Officer's recommended language, and has incorporated that language into the Draft Permit. See proposed new language in P.C. 8.2.4.d in Attachment 4.

Closure and Post-Closure, G. (p. 101)

*"Reviewing Section 8.1.2.b of the draft permit, again, I think it would benefit from more specificity, not that the specific information would be submitted at this time, but as part of the amended closure plan prior to closure. I would recommend language such as 'In its submittal on the re-vegetation of the Landfill and Surface Impoundment areas, Permittee shall address soil quality, the seed mix planned in order to establish native grasses, the maintenance of the vegetation, and plans for re-seeding in the event that original vegetation planted fails.'"*

NMED has no objection to the Hearing Officer's recommended language, and has incorporated that language into the Draft Permit. See proposed new language in P.C. 8.1.2.b in Attachment 5.

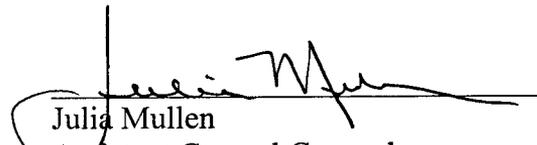
Conclusion

For the reasons listed above, NMED supports adoption by the Secretary of Environment of the Hearing Officer's Proposed Findings of Fact and Conclusions of Law, including and subject to adoption of the proposed conditions contained in Attachments 1-5 submitted herewith.

Respectfully submitted,

NEW MEXICO ENVIRONMENT  
DEPARTMENT

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**Attachment 1**

## 1.1 CONSTRUCTION AND OPERATION

The Permittee shall construct, maintain, and operate the Facility as specified at Permit Attachments A, Section 2.0, *Treatment, Storage, and Disposal*; L; L1; L2, *Specifications for the Landfill, Surface Impoundment and Associated Facilities Liner and Cover System Construction*; M, *Construction Quality Assurance Plan for Landfill, Surface Impoundment and Associated Facilities Construction*; and N, *Operations and Maintenance Plan*; and as required by 20.4.1 NMAC (incorporating 40 CFR 260 through 273) and this Permit. The Permittee shall follow the specifications contained at Permit Attachments L; L1; L2; and M; for construction of the Surface Impoundment and the Landfill, as required by 20.4.1.500 NMAC (incorporating 40 CFR 264.19) and this Permit. The Permittee shall ensure that the construction, maintenance, and operation of the Facility minimizes the possibility of a fire, explosion, or any unplanned, sudden, or nonsudden release of hazardous waste to air, soil, ground water, or surface water which could threaten human health or the environment, as required by 20.4.1.500 NMAC (incorporating 40 CFR 264.31).

## 1.2 RUN-ON/RUN-OFF CONTROLS

The Permittee shall construct the Stormwater Detention Basin and Facility run-on diversion ditches and run-off collection ditches as specified at Permit Attachments L, Section 2.1.4, *Facility Storm Water Control*; and L1.

## 1.3 PERMITTED AND PROHIBITED WASTE SOURCES

### 1.3.1 Hazardous Waste from Sources Located Outside of the United States

The Permittee shall ~~not~~ accept hazardous waste from a generator of hazardous waste located outside of the United States of America (i.e., foreign waste) in accordance with Permit Condition 2.3.2, Hazardous Waste from an Off-site Source, shall perform the additional representative sample analysis specified in Permit Condition 2.5.2.a, and shall notify both the Regional Administrator of the U.S. Environmental Protection Agency and the Secretary in accordance with 20.4.1.500 NMAC (incorporating 40 CFR 264.12(a)(1)). ~~If the Permittee wishes to receive hazardous waste from a source located outside of the United States, the Permittee must apply for and receive a modification to this Permit in accordance with 20.4.1.900 NMAC (incorporating 40 CFR 270.42).~~

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**Attachment 2**

be selected, as applicable, to meet waste characterization requirements, and to ensure compliance with LDR treatment standards and with regulations and operational limits as specified at Permit Attachment F.

The Permittee shall use analytical methods contained at Permit Attachment F, Tables 4-1 through 4-3; or in EPA publication SW-846. If the Permittee wishes to use an alternative method, the Permittee shall demonstrate to the Secretary that such alternative method is equivalent to the approved method contained in Permit Attachment F or EPA publication SW-846.

<sup>2</sup>  
**4.5.2.a Representative Sample Analysis**

Following Permittee approval of the Waste Profile Form and associated characterization information and prior to initial acceptance of a waste stream, the Permittee shall obtain a representative waste stream sample from the generator for each waste stream. The Permittee shall submit the representative sample to a qualified laboratory other than that used by the generator for analysis as described at Permit Attachment F, Sections 4.3.3, *Representative Sample Assessment*, and 4.5.2, *Representative Sample Analysis*. Representative sample analysis shall include, at a minimum, testing for each hazardous waste code contained in the waste stream and parameters listed in Permit Attachment F, Table 4-1, *Parameters and Methods for Pre-Acceptance Representative Sample Analysis*; as well as applicable parameters listed in Tables 4-2, *Tests and Analytical Methods for Fingerprint Samples* and 4-3, *Additional Tests and Analytical Methods*; as required to ensure complete analysis. Additional parameters not listed in Tables 4-2 and 4-3 may also be selected. The Permittee shall assess these data as required at Permit Condition 2.5.3.a.ii.

For foreign wastes, in addition to the conditions specified above, representative sample analysis for each waste stream shall include testing for all constituents listed in 40 CFR 268.48 using practical quantitation limits capable of measuring the standards specified in 268.48. The results of this test will be used to perform the comparison with the generator's Waste Profile Form specified in the Representative Sample Assessment Section (Waste Analysis Plan Condition 4.3.3). Testing for all constituents listed in 40 CFR 268.48 shall not be required for the annual analyses.

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**Attachment 3**

#### 4.5.2 Representative Sample Analysis

The facility will select parameters for analysis to ensure that the criteria for waste acceptance identified in Section 4.2 are met. The analysis will include, at a minimum, testing for each hazardous waste contained in the waste stream, as identified by EPA hazardous waste code, and for each underlying hazardous constituent, as identified in 40 CFR 268.48, Table 4-1, *Parameters and Methods for Representative Sample Analysis*. Additionally, parameters on Tables 4-2, *Tests and Analytical Methods for Fingerprint Analysis*, and 4-3, *Additional Tests and Analytical Methods*, will be included, as applicable.

~~For foreign wastes, in addition to the conditions specified above, representative sample analysis for each waste stream shall include testing for all constituents listed in 40 CFR 268.48 using practical quantitation limits capable of measuring the standards specified in 268.48. The results of this test will be used to perform the comparison with the generator's Waste Profile Form specified in the *Representative Sample Assessment* Section (Waste Analysis Plan Condition 4.3.3). Testing for all constituents listed in 40 CFR 268.48 shall not be required for the annual analyses.~~

Hazardous debris, as defined in 40 CFR 268.2(g), that has already been treated to meet the LDR treatment standards as described in 40 CFR 268.45 does not have to meet the representative sample analysis requirements if the facility determines that the generator provided waste characterization information that demonstrates that the proper EPA Hazardous Waste Numbers were applied and indicates whether or not the LDR treatment standards have been met.

#### 4.5.3 Annual Analysis

The representative sample analysis for each waste stream from each generator will be repeated annually at an independent laboratory not used by the generator (see Section 4.4.3.2).

#### 4.5.4 Fingerprint Analysis

Fingerprint samples will be analyzed for all parameters listed on Table 4-2, and may include tests for physical appearance, pH, and radioactivity. Additional fingerprint parameters will be selected based on the pre-acceptance waste characterization data, shipment paperwork, physical form of the waste, and the visual inspection of the contents of containers and bulk waste. The facility will follow the additional parameter selection process described in Section 2.2 of the EPA guidance document, *Waste Analysis at Facilities That Generate, Treat, Store, and Dispose of Hazardous Wastes* (EPA, OSWER 9938.4-03, April 1994).

Because the facility already knows the detailed chemical and physical properties of a waste, additional necessary and appropriate fingerprint or spot check parameters can be chosen easily, since the purpose of the fingerprint is only to verify that the waste fingerprint analysis will include, at a minimum, the parameters received is the waste expected. These parameters will be analyzed at the on-site laboratory. Analyses which are not within the on-site laboratory's capability will be sent to an independent laboratory for analysis.

Fingerprint analysis will also include parameters as necessary to ensure that the waste is within the facility regulatory and operational acceptance limits (see Table 4-3). To select these additional sample parameters, the facility will consider:

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**Attachment 4**

- extend the post-closure care period if the Secretary determines that this is necessary to protect human health and the environment (e.g., leachate or ground water monitoring results indicate a potential for migration of hazardous wastes at levels which may be harmful to human health or the environment).

#### **8.2.4 Post-Closure Care Requirements for the Landfill**

The Permittee shall comply with the post-closure care requirements for the Landfill specified at Permit Attachment P, Section 8.2.2, *Landfill Final Cover*, and 20.4.1.500 NMAC (incorporating 40 CFR 264.310(b)). The Permittee shall maintain and monitor the leachate and vadose zone monitoring systems (and ground water monitoring system, if one is required by the Secretary), the Landfill cover, and the storm water collection system, and shall comply with all other applicable requirements of 20.4.1.500 NMAC (incorporating 40 CFR 264, Subpart F and 264.310(b)), during the post-closure care period, as required by 20.4.1.500 NMAC (incorporating 40 CFR 264.117(a)(1)).

##### **8.2.4.a Cover Maintenance**

The Permittee shall maintain the integrity and effectiveness of the final Landfill cover, including making repairs to the cover as necessary to correct the effects of settling, subsidence, erosion, or other events, as required by 20.4.1.500 NMAC (incorporating 40 CFR 264.310(b)(1)).

##### **8.2.4.b Leak Detection Systems Monitoring**

The Permittee shall continue to operate the LDRS and LCRS until leachate is no longer detected, as determined by the Secretary, in accordance with 20.4.1.500 NMAC (incorporating 40 CFR 264.310(b)(2)).

##### **8.2.4.c Landfill VZMS Monitoring**

The Permittee shall maintain and monitor the Landfill VZMS sump and wells semi-annually throughout the post-closure period, as specified at Permit Attachment I, Section 4.1, *Monitoring Frequency*, and comply with all other applicable requirements of 20.4.1.500 NMAC (incorporating 40 CFR 264, Subpart F and 264.310(b)).

##### **8.2.4.d Run-On/Run-Off Control**

Surface water diversions or surface drainage ditches shall be installed as necessary to prevent gullies from forming. The

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**Attachment 5**

## **8.1.2 Closure Plan Modification**

### **8.1.2.a Amendment When Necessary**

The Permittee shall amend the Closure Plan through Permit modification, as required by 20.4.1.500 NMAC (incorporating 40 CFR 264.112(c)(2)), whenever:

- changes in operating plans or Facility design affect the Closure Plan;
- there is a change in the expected year of closure;
- unexpected events during partial or final closure require a modification of the approved Closure Plan;
- changes in statutory or regulatory requirements;  
or
- changes in available technology.

The modified Closure Plan shall identify the steps necessary to perform closure of a permitted unit or the Facility at any point during its active life, in accordance with the requirements of 20.4.1.500 NMAC (incorporating 40 CFR 264.112(b)).

The modified Closure Plan shall be approved by the Secretary, in writing, prior to implementation. If the Secretary does not approve the modified Closure Plan submitted by the Permittee, the Secretary will notify the Permittee, in writing, of Closure Plan deficiencies and will specify a due date for submission of a revised Closure Plan. Upon approval by the Secretary, the modified Closure Plan, including revised schedules of implementations and revised cost estimates, shall be incorporated into this Permit by replacement or modification, as appropriate, of Permit Attachments O and O1 and made an enforceable part of this Permit.

### **8.1.2.b Landfill and Surface Impoundment Closure Plan Modification Prior to Closure**

The Permittee shall amend the Closure Plan for the Landfill and, if necessary, the Surface Impoundment through Permit modification, and shall submit the amended Plan to the Secretary for approval 60 calendar days prior to the commencement of partial or final closure activities. The Permit modification must provide revised implementation schedules and cost estimates, a discussion of closure activities in accordance with appropriate parts of Permit Conditions 8.1.10, 8.1.11, and 8.3, and detailed

plans and specifications for the Landfill cover and, if necessary, the Surface Impoundment cover, and revegetation of the Landfill and Surface Impoundment areas. In its submittal on the re-vegetation of the Landfill and Surface Impoundment areas, Permittee shall address soil quality, the seed mix planned in order to establish native grasses, the maintenance of the vegetation, and plans for re-seeding in the event the original vegetation planted fails.

**8.1.2.c Storage and Treatment Units, Closure Plan Modification**

If, at closure, the Permittee determines that the clean closure performance standard contained at Permit Condition 8.1.1.b cannot be met at any of the hazardous waste storage or treatment units, the Permittee shall prepare and submit to the Secretary for approval a Permit modification request to amend Permit Attachment O, as it pertains to the affected area or unit, in accordance with all the closure, post-closure, and financial responsibility requirements that apply to landfills, and as required by 20.4.1.500 NMAC (incorporating 40 CFR 264.310), pursuant to 20.4.1.500 NMAC (incorporating 40 CFR 264.112(c)(3) and 264.197(b)).

This Permit modification request shall be submitted no later than 60 calendar days after the Permittee or Secretary has determined that the affected unit must close as a landfill, or no later than 30 calendar days if the determination is made during partial or final closure of the affected unit.

**8.1.2.d Receipt of Non-Hazardous Waste**

The Permittee may request a modification to receive nonhazardous waste for disposal in the Landfill or the Surface Impoundment after the final receipt of hazardous waste at either unit, in accordance with 20.4.1.500 NMAC (incorporating 40 CFR 264.113(d)).

**8.1.2.e Modification Required by the Secretary**

The Secretary may require Closure Plan modification under the conditions described at Permit Condition 8.1.2.a, in accordance with 20.4.1.500 NMAC (incorporating 40 CFR 264.112(c)(4)).

**8.1.3 Closure Schedule**

**8.1.3.a Notification of Closure**

The Permittee shall notify the Secretary of the start of Closure Plan implementation at least 60 calendar days prior to the date on which the Permittee expects to commence closure of any

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U.S. EPA NO. NM0001002484 )

**CERTIFICATE OF SERVICE**

I hereby certify that on the 15<sup>th</sup> day of February, 2002, I served a true and correct copy of the document entitled "NMED Hazardous Waste Bureau's Comments on the Hearing Officer's Report", with Attachments 1-5, filed on February 15, 2002, via U.S. Mail, postage prepaid, to the following persons:

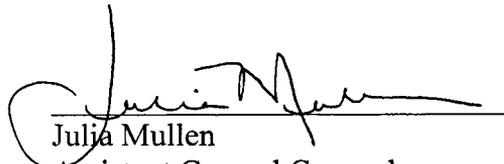
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