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August 11, 2005

Karen D. Higginbotham, Director  
EPA Office of Civil Rights (Mail Code 1201A)  
1200 Pennsylvania Ave. NW  
Washington, D.C. 20460-1000



Re: EPA File No. 09R-02-R6

Dear Ms. Higginbotham:

The New Mexico Environment Department (NMED) Office of the Secretary received your letter dated June 27, 2005 on July 6, 2005, noting that the Office of Civil Rights has accepted for investigation an administrative complaint filed against NMED on September 12, 2002 by Citizens for Alternatives to Radioactive Dumping (CARD), Conservative Use of Resources and the Environment (CURE), Water Information Network, Magil Duran, and Noel Marquez (collectively CARD). Please accept this letter as NMED's initial response to the complaint.

NMED does not dispute that CARD's allegations meet the jurisdictional requirements for acceptance of an administrative complaint under Title VI or EPA's Title VI implementing regulations. However, NMED does dispute CARD's allegations that NMED discriminated against Spanish-speaking residents in the general area of the Triassic Park Waste Disposal Facility in its hazardous waste permitting process. NMED further disputes that there is a statewide pattern or practice of discriminatory permitting or the prevention of public participation generally in the permitting process.

The Department's applicable permitting and procedural regulations allow full access to the Department's permitting process without discrimination. Although New Mexico's environmental permitting laws do not contemplate a consideration of disparate impact as part of the permitting process, and although New Mexico Hazardous Waste Act statute does not provide such a ground for denial of a permit application, even if such an analysis had been performed and such a ground for denial did exist, the permit would not have been denied.

## State Authorization

The State of New Mexico is authorized by the New Mexico Hazardous Waste Act (HWA) and the Resource Conservation and Recovery Act (RCRA) to permit and regulate hazardous waste facilities. NMSA 19878, 74-4-1 *et. seq.*, 50 Fed. Reg. 1515 (Jan. 11, 1985). The New Mexico Legislature has designated NMED as the state agency responsible for administering, implementing, and enforcing all requirements under the HWA and the regulations promulgated to carry out the HWA.

## The Triassic Park Facility

The Triassic Park Waste Disposal Facility (Triassic Park Facility or Facility), EPA ID Number NM0001002484, is classified as a hazardous waste treatment, storage and disposal facility under the HWA and Subtitle C of RCRA.<sup>1</sup> All waste placed in the Facility will meet Land Disposal Restrictions (LDR) prior to disposal. The Facility will accept polychlorinated biphenyl (PCB) wastes that are not regulated by Toxic Substances Control Act (TSCA). Administrative Record (AR-079). Two treatment processes will be used at the Facility, including an evaporation pond for managing wastewaters that meet LDR standards and a stabilization process for treating liquids, sludges, and solids to ensure that no free liquids are present and that LDR standards are met prior to placing wastes in the landfill. (AR-079). Two container storage areas (roll-off storage area and drum handling unit) will be used to stage waste at the Facility for treatment or disposal. (AR-079). Four aboveground storage tanks will be utilized to accumulate regulated bulk liquid hazardous wastes prior to stabilization. (AR-079). A landfill will be utilized for the disposal of waste that meets LDR standards. (AR-079). Wastes that do not meet LDR standards will not be accepted for placement into the landfill or evaporation pond until appropriate treatment is performed. Infectious wastes and radioactive wastes will be prohibited at this Facility. (AR-079).

## The Triassic Park Facility Location

The Triassic Park facility, named by its owner-operators Gandy Marley, Inc. for the Triassic-era clay sediments at depth beneath the site, is located in southeastern New Mexico on approximately 480 acres of land in eastern Chaves County. The site is located in Sections 17 and 18 of Township 11 South, Range 31 East, and by road is approximately 43 miles east of Roswell and 36 miles west of Tatum. Hagerman and Dexter are more than thirty miles from the Facility. The only major road in the vicinity is U.S. Highway 380, which runs east and west approximately 4 miles north of the proposed site. State Highway 172, which runs north and south, is approximately 4 miles east of the proposed site. State Highway 172 is not a major thoroughfare and does not provide access to the proposed site.

Eastern Chaves County and this site in particular have historically been utilized primarily as rangeland for livestock grazing and for limited oil and gas activities. The residence nearest the site is owned by Marley Ranches, Ltd. (one of the Facility's co-owner-operators) and is located approximately 2.9 miles to the east-southeast. (AR 00-079) The second nearest residence is the

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<sup>1</sup> The Facility has to date not been constructed.

Kolb residence, 4.75 miles away. There are fewer than a dozen residences within 10 miles. The nearest oil/gas production well is 3 miles from the site. (AR-079) NMED concluded that there is no evidence of harmful effects on any neighboring communities; therefore there are no harmful effects on either minority or low income individuals within that community. NMED concluded that there was no evidence of any effect on any neighboring communities, because of the siting of the facility.

### **The Triassic Park Facility Permit Application**

Gandy Marley, Inc. (GMI) submitted Part A of its RCRA permit application to NMED on November 17, 1994. AR #94-013. GMI submitted Part B of its RCRA permit application on December 3, 1997. AR #97-037. NMED deemed GMI's permit application for the proposed Triassic Park Facility administratively complete on October 16, 1998.

Prior to issuance of the Draft Permit for the proposed Triassic Park Facility, NMED issued 24 Notices of Deficiency (NOD) regarding GMI's permit application. On April 4, 1996, NMED issued a draft permit for the proposed Triassic Park Facility for public comment and review. AR #96-024. Based on public comment, NMED rescinded the April 4, 1996 draft permit and required GMI to amend the permit application. AR #97-023, 024. On March 15, 2001, NMED issued a second draft permit for public comment and review. AR #01-029. Due to errors in the published version of the March 15, 2001 draft permit, NMED rescinded the March 15, 2001 draft permit. AR #01-076.

On June 15, 2001, NMED issued its final Draft Permit for the proposed Triassic Park facility. AR #01-090. Pursuant to 20 NMAC 4.1.901.C, NMED publicly noticed the availability of the Draft Permit for review and comment through publication in newspapers of local and statewide circulation, radio announcements, and mailing out notices to GMI, EPA, state government entities, and approximately eight hundred (800) persons who requested such notice. AR #01-089, 090.

Pursuant to 20 NMAC 4.1.901.C(4), the Public Notice provided for in the Draft Permit sets forth the date of the Public Hearing if requested and the process for requesting a hearing, the NMED Hazardous Waste Bureau as the entity responsible for processing the permit, the name and address of GMI and the proposed location of the Facility, the activities to be carried out at the Facility (as well as reference to the Fact Sheet for more detail), the address and phone number of Mr. Stephen Pullen at the Hazardous Waste Bureau to contact for more information, reference to the two previous notices of draft permits in this matter, and that the Draft Permit may be reviewed at the Roswell Public Library, Tatum Town Hall, NMED Hazardous Waste Bureau, and NMED web site.

In total, NMED allowed one-hundred twenty-five (125) days for review and comment on the Draft Permit, eighty (80) days beyond the regulatory requirement set out in 20.4.1.901.A.3.

## **Issuance of the Fact Sheet**

As part of publicly noticing the availability of the Draft Permit for review, NMED also noticed the availability of the Fact Sheet regarding the proposed Triassic Park facility. This ten (10) page Fact Sheet was translated in Spanish. Pursuant to 20.4.1 NMAC 901.D.2, the Fact Sheet contains a brief description of the activities to be carried out at the facility, the type of wastes to be treated and stored at the facility, an outline of the permit as well as the basis for conditions imposed under the permit and basis for the ground water monitoring variance. AR #01-082.

Pursuant to 20.4.1 NMAC 901.D(2)(e), the Fact Sheet references the Public Notice for a description of the procedures for reaching a final decision on the Draft Permit. In the Public Notice the procedures for requesting a public hearing, requirements and deadlines on submitting general and technical comment, information on party status, and the address and phone number of Mr. Stephen Pullen are listed for those seeking additional information. AR #01-089, 090. On August 27, 2001, NMED issued a Supplemental Fact Sheet to reflect changes made in the Permit Application just prior to issuance of the Draft Permit. AR #01-142.

## **Public Hearing**

As part of the June 15, 2001 Public Notice, NMED stated that a public hearing on the Draft Permit was scheduled for October 15, 2001. The public notice was translated into Spanish and published in the Roswell Daily Record and the Albuquerque Journal. AR # 01-090. Based on public interest in the proposed facility and the Applicant's request for a public hearing, by order of the NMED Secretary, a public hearing on the Draft Permit was set for October 15, 2001. Hearing Record (HR) #8. Additionally, the deadline to file Notice of Intent to Present Technical Testimony (NOI) at the Public Hearing was extended, by order of the Secretary, to allow for submittal until September 21, 2001. HR #7. NMED again published notice of the October 15, 2001 Public Hearing along with notice of extension of the public comment period on August 15, 2001. HR #11.

On August 23, 2001, counsel for CURE moved that the Public Hearing be rescheduled for no earlier than November 12, 2001 and that GMI be required to hold additional public meetings to better disseminate information in Spanish regarding the proposed facility. HR #15. On October 3, 2001, CURE's motion was denied in part and granted in part by the appointed Hearing Officer. No extension was granted, based on the long review and comment period (125 days rather than the 45 days required by regulation) and the long public hearing notice period (125 days rather than the 30 days required) and the Department's concern that with the extensive notice already issued, rescheduling might actually have an adverse impact on public participation. However, an additional public meeting was held prior to the hearing with a Spanish translator, and a translator was ordered for the entirety of Public Hearing.

Five NOIs were filed with the Hearing Clerk on or before the September 21, 2001 deadline. See generally HR #26-35. Six Entry of Appearances were filed with the Hearing Clerk before the deadline. The Public Hearing in this matter was held one-hundred twenty-five (125) days after the June 15, 2001 Public Notice, from October 16 through October 19, 2001. See generally Transcript (TR).

At the public hearing, the following parties presented technical oral public comment: GMI (engineer Patrick Corser; geologist Jim Bonner; zoologist/ecologist Joe Merino; meteorologist R. C. Cudney and toxicologist Albert Westerman; governmental relations consultant Ken Schultz; and GMI officers and directors Dale Gandy, Larry Gandy, and Mark Marley), TR Vol 1, pgs. 53-147; Forest Guardians (Nicole Rosmarino), Vol. 1, pgs. 286-292; CURE (Jimi Gadzia, Holly Harris-Schott, Michael Porter, Elisabeth Price, Deborah Petrone, Librado de la O and Victor Blair; environmental researcher and educator Paul Robinson, hydrologist George Rice; and research biologist James Bailey), Vols. 2-3, pgs. 339-669; CARD (Deborah Reade), Vol. 3, pgs. 712-738; Allen and Linda Squire, veterinarians, Vol. 3, pgs. 752-762; NMED (Stephen Pullen and David Cobrain, and RCRA consultants Constance Walker, Stephen Druschel and June Dreith), Vols. 3-4, pgs. 794-905. All of these parties were given an opportunity to fully participate in the hearing and provide input.

Additionally, many speakers provided non-technical public comment: M. Tom Stewart, Einar Johnson, Mary Deborde, Linda Shirley, Tod Rockefeller, D.C. Birdsong, Jose Trivizo, Maria de la O, Mark Robinson, Tom Blake, Betty Richards, Tim Jennings, Magil Duran, Max Coll (statement read by Ms. Petrone), Alba Najera, Ana Najera, Oscar Najera, Baudello Ramirez, Michael McKee, Reece Blake, Christopher Meeks, Katie Bird Humphreys, Jaime Chavez, Sue Graham, Tammy Gill, Stuart M. Pritchard, Catherine Montano and Sue Ann Carpenter. All of these persons were given an opportunity to participate and provide meaningful input. Jim Ficklin of Southwest Sound and Video and his staff provided interpreting services, translating the entire four (4) day public hearing between English and Spanish.

Beyond the public comment taken at hearing, the hearing record was left open for an additional week for the purpose of accepting written statements from those attending a meeting in Hagerman facilitated by Mr. Pullen with a Spanish-language interpreter. Although there were many opportunities to give public comment during the hearing, the Hazardous Waste Bureau was concerned that some in Hagerman had been unable to travel to the hearing, or were intimidated by the setting, and went there to facilitate the preparation of written statements that became part of the record.

Pursuant to 20 4.1.901.E.4 NMAC, the public hearing was recorded by a certified court reporter; transcripts were furnished to all persons for review at the Hearing Clerk's Office, the Roswell Public Library and the Hazardous Waste Bureau in Santa Fe, New Mexico.

Ultimately, NMED received public comment on the Draft Permit from two hundred ninety eight (298) persons on or before October 25, 2001. All of these comments were reviewed by the Hearing Officer and the Secretary prior to final decision being made. Pursuant 20 4.1.901.A.7 NMAC, the NMED Secretary is required to give due consideration and weight appropriate to all comments received during the public comment period and to all relevant facts and circumstances presented at the public hearing prior to ruling on Applicant's final permit. NMED responded to public comments (technical and non-technical) on the Draft Permit. See NMED's Index of Comments and Response to Comments.

Based upon public comment, the Bureau also recommended certain revisions to the Draft Permit and set out the basis for those revisions. The Bureau's revisions to the Draft Permit were incorporated into the Proposed Final HWA Permit. AR #01-89, 90; NMED's Exhibit A. The Hearing Officer made further revisions based on the hearing record, and the Secretary made further revisions still, primarily based on the testimony given by the experts presented by CURE. These revisions included a new requirement to place true vadose zone monitoring devices such as suction lysimeters and neutron access tubes or probes that would enhance the potential effectiveness of the vadose zone monitoring system proposed; new financial assurance requirements to account for the cost of water necessary for a third party to implement the closure/closeout plan; a water budget and additional costs associated with drilling and potential development of infrastructure; cost estimation handbooks; and additional detail on the re-vegetation of the landfill and surface impoundment areas. (Final Order, attachment with changes to Findings and Conclusions)

### **Public Outreach**

In addition to the regulatorily required public notice, NMED worked with GMI to provide for greater public outreach and dissemination of information to the public. GMI, with support from NMED, held five public information meetings. These meetings were held twice in Roswell on May 4, 2001 and July 17, 2001, in Santa Fe on July 16, 2001, in Tatum on July 18, 2001, and in Hagerman with a Spanish translator on July 19, 2001. NMED also provided the Fact Sheet in Spanish to all those who requested it.

### **Potential Impacts of the Facility**

NMED would not permit a facility if it were apparent that there would be adverse impacts on the air or water of a nearby community. GMI presented as one of its witnesses Mr. Cudney, a meteorologist with a specialty in modeling the transport of airborne contaminants. In evaluating the transport of airborne contaminants from the Triassic Park Facility, he relied primarily on the data set commonly used by the New Mexico Environment Department Air Quality Bureau in the Permian Basin. He also used site-specific data from the Roswell area.

Mr. Cudney was asked to evaluate worst-case accidents and release scenarios from normal operations of the facility. He modeled both with artificially conservative assumptions and with real data. For the release scenario he assumed the compound was benzene, which is highly volatile, carcinogenic and toxic. His modeling showed concentrations a couple orders of magnitude below EPA's levels of concern at three miles, so in his opinion there is virtually no exposure in the towns 30-45 miles away. This includes potential exposure to PCBs, much less volatile than benzene, which would be indistinguishable from background. (Tx. Cudney, Tr. pp. 90-107.)

Regarding water, the site is about one mile west of the Ogallala Formation, and physically below it. Mudstones, clays and siltstones made up the Upper Dockum, which is called the Chinle Formation in other parts of the state. Below the Upper Dockum is a thick sequence of very low permeability dark red-purple mudstones. The Lower Dockum is considered the uppermost aquifer. The quality of the water in the Lower Dockum is very poor, in excess of 10,000 parts

per million total dissolved solids (TDS), and not protected by New Mexico groundwater regulations. Seven miles away and five miles away, the UISGS has regional water quality wells showing the same poor quality water.

GMI did apply for a ground water waiver from monitoring the deeper unit. Instead of monitoring a zone of poor quality water 600 feet down, they are monitoring a vadose zone within a couple hundred feet of the facility. The purpose of monitoring this vadose zone is to know of a release much sooner. In order to qualify for the waiver, they had to perform contaminant transport modeling. NMED set out various monitoring requirements for the facility, including monitoring of the vadose zone and sediments above and within the Triassic beds. (Tx. Bonner, Tr. pp. 124-179.)

Cumulative impacts on the air or water of any nearby community were not in question; NMED has not permitted any other facilities of this type or a similar type nearby.

### **Environmental Justice Efforts Since Triassic Park**

At the time this matter went to hearing and the Secretary's Final Order was issued, written direction from EPA on environmental justice was limited primarily to the Interim Guidance issued to investigators reviewing complaints of environmental injustice. Since that time, EPA has published draft regulations and made other resources available to permitting agencies. NMED has devoted substantial time and resources to its own environmental justice efforts. In 2003, NMED's Deputy Secretary formed an internal committee to organize New Mexico's environmental justice efforts. Then NMED formed an Environmental Justice Planning Committee (EJPC), consisting of persons of color from all areas of the State, to design and hold public listening sessions, discuss important process issues and develop a protocol for an authentic participatory process. Their Final Report, dated November 1, 2004, is available on the NMED website. A number of subcommittees were formed to spearhead the listening sessions and community liaisons were sought to optimize public participation.

In addition to the EJPC, the Secretary appointed an Environmental Justice Policy Committee (Policy Committee), with the Deputy Secretary as Chair, to address issues raised by the listening sessions and make recommendations to the Secretary to institute beneficial changes in New Mexico on environmental justice issues. The Policy Committee is continuing the work in environmental justice, and is anticipating an Executive Order soon from the Governor of New Mexico, which will form the basis for further development of an environmental justice program. NMED has also recently hired an Environmental Justice Coordinator and is devoting significant resources to the environmental justice issues.

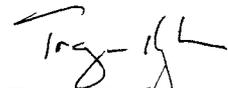
A recent New Mexico Supreme Court decision in another permitting matter has also provided a legal basis for bolder consideration of quality of life issues and community impacts near a facility permitted by NMED. Although the permit in the Supreme Court case was a solid waste landfill permit under a different statute, we anticipate that some of the resulting changes in permitting processes will eventually be more broadly applied.

## Conclusions

In conclusion, the Triassic Park Facility was not sited in a location raising any environmental justice considerations. NMED concluded that there was no evidence of harmful effects on any neighboring communities; therefore there are no harmful effects on either minority or low income individuals within that community. The administrative process by which the permit was issued included extensive public participation at every step, and much of that participation made a difference in the permit ultimately issued. NMED has greatly increased the attention and the resources it devotes to the question of environmental justice in its permitting since October 2001, and anticipates still greater changes in the future.

We would be happy to provide additional information, or to make any part of the administrative and hearing records available for your review. Please contact me at 505-827-2750, if you would like your record supplemented in anyway. We would respectfully request an opportunity to respond to any OCR preliminary findings of noncompliance.

Sincerely,



Tracy Hughes  
General Counsel

Cc: Cindy Padilla, WWMD Director  
James Bearzi, HWB Chief