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CERTIFIED MAIL - RETURN RECEIPT REQUESTED

August 30, 2001

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, TEN-DRUM OVERPACK VOLUME CLASS 2 MODIFICATION
REQUEST, AND REJECTION OF CLASS 1 MODIFICATION
WIPP HAZARDOUS WASTE FACILITY PERMIT
EPA I.D. NUMBER NM4890139088**

Dear Dr. Triay and Mr. Lee:

The New Mexico Environment Department (NMED) hereby denies the above referenced Class 2 permit modification request to the WIPP Hazardous Waste Facility Permit, as submitted to the Hazardous Waste Bureau in the following document:

- Request for Class 2 Permit Modifications, Letter Dated 5/1/01, Rec'd 5/2/01

The Department of Energy Carlsbad Field Office and Westinghouse TRU Solutions LLC (**the Permittees**) identified two separate modifications in their submittal: Ten-Drum Overpack (TDOP) Volume – Class 2, and Drum Age Criteria (DAC) – Class 2. This letter addresses the TDOP Volume modification, which was processed by NMED in accordance with the requirements specified in 20.4.1.900 NMAC (incorporating 40 CFR §270.42(b)), and a related Class 1 modification processed under 20.4.1.900 NMAC (incorporating 40 CFR §270.42(a)). The bases for the rejection of the Class 1 modification and the denial of the Class 2 modification are addressed below, while NMED's general comments on this proposed permit modification are in Attachment 1.

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The TDOP Volume Class 2 modification request is based in large part on a Class 1 modification "Item 2.d" contained in the Permittee's July 20, 2000 submittal to NMED. This change proposed modifying the text to include additional allowable waste containers, including the direct loading of ten-drum overpack containers and 85-gallon drums (rather than just using them as overpack drums), and the addition of 100-gallon drums. NMED hereby rejects this Class 1 modification under 20.4.1.900 NMAC (incorporating 40 CFR §270.42(a)(1)(iii)) because it is not a non-substantive change.

Further, Item 2.d of the Permittee's July 20, 2000 submittal does not meet the definition of "equipment replacement or upgrading with functionally equivalent components" specified in 20.4.1.900 NMAC (incorporating 40 CFR §270.42) Appendix I.A.3. Examples of non-substantive changes provided by EPA in the preamble to the permit modification final rule (53 FR 37914-15, September 28, 1988) include "...correction of typographical errors; necessary updating of names, addresses, or phone numbers identified in the permit or its supporting documents; upgrading, replacement, or relocation of emergency equipment; improvements of monitoring, inspection, recordkeeping, or reporting procedures; updating of sampling and analytical methods to conform with revised Agency guidance or regulations; updating of certain types of schedules identified in the permit; replacement of equipment with functionally equivalent equipment; and replacement of damaged ground-water monitoring wells." The underlying modification clearly does not meet this standard of simplicity for Class 1 modifications, and the Permittees are directed to comply with the original permit conditions as required by 20.4.1.900 NMAC (incorporating 40 CFR §270.42(a)(1)(iii)).

As a consequence of NMED's rejection of Item 2.d of the July 20, 2001 submittal as a Class 1 modification, the proposed Class 2 TDOP Volume modification has no basis and is therefore denied. Because the proposed volume increase was based upon direct loading of TDOPs, and direct loading of TDOPs is precluded by denial of the inappropriate Class 1 modification, no changes can be made based upon the proposed Class 2 TDOP Volume modification.

These two submittals are inextricably linked, such that NMED could not simply grant the capacity increase while denying the remaining portions of the Class 2 modification. NMED suggests that the Permittees submit a complete modification request embodying the aspects of all proposed modifications to date as well as relevant public comment. NMED advises the Permittees that such a submittal might be considered a Class 3 modification if the total increased capacity exceeds 25% of the existing, approved capacity of the facility.

This TDOP Volume modification request was subject to a sixty (60) day public comment period, which ran from May 8, 2001 through July 6, 2001. NMED received written comments on the TDOP Volume modification request from nine individuals and organizations during this time.

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The list of commentors and NMED's responses to these comments are incorporated in the following attachments:

- Attachment 2 is a list of commentors, their affiliation, the date their comment was received, and the number of pages of comments.
- Attachment 3 is a spreadsheet providing NMED's direct response to each comment submitted. This document will be mailed to each individual commentor. Only TDOP comments are included on this spreadsheet.

NMED will also develop a general summary of the permit modification request, the typical comments received, and NMED's general response to those comments. This document will be mailed to all other individuals and organizations on NMED's WIPP facility mailing list within seven days of this decision to inform the public of NMED's actions on these permit modifications.

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

Sincerely,


Gregory J. Lewis
Director
Water and Waste Management Division

GJL/soz

Attachments

cc: Paul Ritzma, NMED
James Bearzi, NMED HWB
John Kieling, NMED HWB
Steve Zappe, NMED HWB
Susan McMichael, NMED OGC
David Neleigh, EPA Region 6
Connie Walker, TechLaw
File: Red WIPP '01

Attachment 1

NMED General Comments on the TDOP Volume Permit Modification Request

NMED Comments on the TDOP Volume Modification

1. The change specified in the underlying Class 1 modification proposed changing the text to include additional allowable waste containers. The modification included the direct loading of ten-drum overpack (TDOP) containers, the direct loading of 85-gallon drums (rather than just using them as overpack drums) and the addition of 100-gallon drums. Under the permit, these types of containers are not authorized. The modification was not an administrative and non-substantive change. Moreover, there were several issues associated with the addition of large (TDOP, 85- and 100-gallon) containers. One issue regarded the perhaps unintentional increase in maximum storage capacity for the WHB and Parking Area Units, which the TDOP Volume Class 2 modification sought to rectify. Although "container equivalent" annotation is used in the Permit for information purposes, a Standard Waste Box (SWB) was generally assumed as the basis for deriving the maximum capacities listed in Tables III.A.1 and III.A.2. Another issue was the impact on the requirements for calculating secondary containment at the container storage areas. While these calculations were provided as part of the underlying modification, NMED had a responsibility to ensure that the public also has an opportunity to review and provide comment on these calculations. The Permittees did not include these calculations in any document that was provided for public comment.

The numerous text changes in the underlying Class 1 modification should have also been checked to ensure consistent listing of the various configurations (3-, 4-, 7-packs, SWBs, TDOPs) for shipping, storage, etc., in each Permit Attachment. Again, the TDOP Volume Class 2 modification attempted to address this issue as well. A figure is necessary in Permit Attachment M1 depicting the 100-gallon container. Finally, many of the changes specified in the proposed text as redline/strikeout did not accurately reflect the current permit text to be changed (e.g., Items 2.d.1, 2.d.2, 2.d.5, etc.) primarily because this modification was submitted prior to NMED's August 4, 2000 rejection of previous Class 1 modifications.

For the reasons stated above, NMED has therefore rejected this underlying modification as a Class 1 modification.

2. NMED acknowledges that in its August 4, 2000 Administrative Completeness Determination letter, the agency did not directly raise concerns regarding the appropriateness of the classification for Item 4 in the Permittees' November 15, 1999 Class 1 notification, which also proposed direct loading of TDOPs and 85-gallon overpack containers. NMED expressed concern at that time that "... the submitted language was poorly written and presented..." However, NMED's silence at that time concerning the proposed modification as not meeting the Class 1 standards of being "non-

substantive” in no way precludes the agency from making such a determination at a later date.

3. NMED was unable to approve only a portion of the Class 2 TDOP Volume modification, because it was inextricably linked with the rejected underlying Class 1 modification. For example, approving only the storage capacity increase requested in the Class 2 modification would have had to rely primarily upon the secondary containment calculations found only in the Class 1 modification, which the public had no opportunity to review or comment upon. Furthermore, it would be impractical to provide the additional storage capacity without also providing an appropriate mechanism to achieve it (i.e., direct-loaded TDOPs) because the number of pallets or storage locations was not proposed to be increased at the same time.
4. Although the Class 2 TDOP Volume modification addressed container storage capacity in the Waste Handling Building (**WHB**) Unit, it did not consider the need to also provide for increased storage capacity in the Parking Area Unit. In order to be consistent, the same assumptions made to calculate storage requirements in the WHB Unit should also be employed to calculate storage requirements in the Parking Area Unit.
5. If the Permittees decide to submit another modification request addressing additional containers, new uses for existing containers, and the impacts on facility storage capacity, they should provide sufficient information to determine whether the modification would be considered a Class 2 or a Class 3 modification. This determination would be based upon calculations demonstrating the percent increase in the facility’s container storage capacity, considering the impact on both the Parking Area Unit and the WHB Unit.

Attachment 2

List of Commentors

**Comments Received by NMED on WIPP Permit Modifications
 Modifications Submitted to NMED on:
 April 27, 2001
 Drum Age Criteria
 Ten Drum Overpack**

		<u>Receipt Date</u>	<u>Author</u>	<u>Organization/Citizen</u>	<u># Pages</u>	<u>Mod Request #</u>	
						<u>1</u>	<u>2</u>
A	1	14-May-01	Deirdre Lennihan	Citizen	3	1	
B	2	01-Jun-01	Robert Kehrman	WTS	7	1	1
C	3	25-Jun-01	Don Hancock	SRIC	3		1
	4	06-Jul-01	Don Hancock	SRIC	6	1	1
D	5	26-Jun-01	Matthew Silva	EEG	3		1
	6	29-Jun-01	Matthew Silva	EEG	12	1	
E	7	03-Jul-01	Marina Day	Citizen	3	1	1
F	8	06-Jul-01	Penelope McMullen	Sisters of Loretto	1	1	1
G	9	06-Jul-01	Lindsay Lovejoy	NMAGO	4		1
	10	06-Jul-01	Lindsay Lovejoy	NMAGO	3	1	
H	11	06-Jul-01	Triay/Lee	CBFOWTS	47	1	1
I	12	06-Jul-01	Joni Arends	CCNS	4	1	1
J	13	06-Jul-01	Deborah Reade	CARD	5	1	1
			10 commentors	Total Pages =	91	10	10

- 1 Drum Age Criteria
- 2 Ten Drum Overpack

Attachment 3

Direct Response to Comments (TDOP Volume Request Only)

Response to Comments by NMED on WIPP Class 2 Modification Request (TDOP Only)
Received May 2, 2001

Comment Number	Commentor/ Affiliation	Topic Area	Commentor Number	Comment Summary	Response	Include in Permit? y/n	Reviewer (initials)
2	Robert Kehrman, Westinghouse TRU Solutions	Drum Age Criteria Permit Modification Request and Ten Drum Overpack	B	The Commentor provided revised pages reflecting changes to the permit for the Ten Drum Overpack and Drum Age Criteria modifications on behalf of DOE. The changes update the B6 checklist revisions, presenting the changes in the six part rather than 10 part format.	The response is satisfactory in that the revisions must be presented in the six part rather than ten part B6 checklist format. However, NMED has denied the TDOP request revisions (see comment 3).		
3	Don Hancock, Southwest Research and Information Center	Ten Drum Overpack	C	The Commentor believes that because the Permittees did not properly notice the Class 1 permit modification allowing direct loading to TDOPs and because the it is questionable whether the change would be considered Class 1 in nature, this Class 1 should not be in effect. Also, the TDOP should be considered a Class 3 rather than Class 2 modification because of the dramatic increase in storage capacity. Additionally, the Commentor objected to the increase in storage capacity to show that the 160 cubic ft capacity is reasonable and the TDOP is designed to handled double the intended weight.	NMED agrees that the supporting Class 1 permit modification allowing direct loading to TDOPs was inappropriate as a Class 1 permit modification. As such, because the Class 2 permit modification is predicated on an improper Class 1 request, the Class 2 request has been denied. NMED notes that the basis for determining the class of a modification which increases storage capacity is based upon an increase of the total facility capacity, not the capacity of individual containers as the commentor suggested.		
4.1	Don Hancock, Southwest Research and Information Center	Ten Drum Overpack	C	The Commentor believes that the class 2 modification for the 10 drum overpack must be denied because the modification request is incomplete, the modification does not comply with other regulations covering the operating standards for hazardous waste storage and disposal facilities, and the conditions of the modification fail to protect human health and the environment.	See response to comment no. 3		

Response to Comments by NMED on WIPP Class 2 Modification Request (TDOP Only)
Received May 2, 2001

5.1	Matthew Silva/ EEG	Ten Drum Overpack	D	The Commentor believes that the request combines two separate and unconnected modifications -- increased storage capacity in the WHB and consolidation of container descriptions -- into the same item. The Commentor points out that the downside of this approach is that rejection of one aspect spells rejection of the other, and the Commentor further points out that the Class 2 process makes this approach problematic.	NMED agrees that the TDOP requests lead to many questions pertaining to the appropriateness of permit modification classification, and the approach used by the Permittees to achieve TDOP approval was problematic. See response to comment 3.		
5.2	Matthew Silva/ EEG	Ten Drum Overpack	D	The Commentor believes that the portion of the modification request dealing with expansion of the storage capacity is reasonable.	NMED agrees that the request to expand the storage area is not necessarily unreasonable, but the request failed to consider the need to increase storage capacity in the Parking Area Unit at the same time for the same reason (i.e., direct loading of TDOPs). Other Commentors believe that the associated increased storage capacity for direct TDOP loading was not appropriately public noticed, and therefore this Class 2 permit modification, which is dependant on allowance of TDOP direct loading, should not be granted. See response to comment 3.		
5.3	Matthew Silva/ EEG	Ten Drum Overpack	D	The Commentor points out that the container-related modifications made in previous (i.e., July, 2000) Class 1 permit modification requests cannot be considered administrative and informational changes and exceed the boundaries of what should be considered a Class 1 permit modification.	NMED agrees with this analysis. See response to comment 3.		

Response to Comments by NMED on WIPP Class 2 Modification Request (TDOP Only)

Received May 2, 2001

5.4	Matthew Silva/ EEG	Ten Drum Overpack	D	The Commentor points out that the Permittees did not request changes to all necessary portions of the permit (i.e., Module IV,) with respect to container descriptions. The expressed intent of the modification request-- to consolidate container descriptions-- has not been met by the alterations.	NMED concurs with this analysis.		
5.5	Matthew Silva/ EEG	Ten Drum Overpack	D	The Commentor states that changes to the HWFP should be placed in the proper locations, as there are incorrect citations in the permit modification request.	NMED agrees with the observations made by the Commentor.		
7	Marina Day, citizen	Drum Age Criteria Permit Modification Request and Ten Drum Overpack	E	The DAC modification is quite complex and should be considered a Class 3 permit modification request. The Commentor also believed that the storage capacity increase should be considered a Class 3 permit modification request.	See response to Comment 4.2.		
8.1	Penelope McMullen, Loretto Community of Sisters and Comembers	Ten Drum Overpack	F	The Commentor opposes surface storage of any waste, stating that the TRUPACTs should be unloaded in rooms with air locks. The Commentor does not oppose consolidation of container descriptions.	Allowable surface storage areas are presented in Module III of the permit, which specifies four allowable locations in the WHB storage unit. See response to comment 3.		
9	Lindsey Lovejoy, NMAGO	Ten Drum Overpack	G	The Commentor points out that the multiple permit modification requests confuse the issue of storage volume increases, making it unclear what the ultimate increase in storage size would be. An increase in container storage capacity in excess of 25% requires a Class 3 modification. The Commentor concludes that the TDOP proposal should be denied and all proposals for capacity increases be consolidated with the Centralized Confirmation Facility proposal and be considered under Class 3 procedures.	NMED concurs that the multiple permit modification requests confuses the actual storage capacity increases, imparting through incremental "small" changes an overall larger change. However, the overall change in capacity does not appear to exceed 25%. See response to comment 3.		

**Response to Comments by NMED on WIPP Class 2 Modification Request (TDOP Only)
Received May 2, 2001**

11.29	Inés Triay, DOE	Ten Drum Overpack	H	Response to EEG Comment No. 1: Comment 5.1.	See response to comment 5.1		
11.30	Inés Triay, DOE	Ten Drum Overpack	H	Response to EEG Comment No. 2, Comment 5.2. No response necessary.	See response to comment 5.2		
11.31	Inés Triay, DOE	Ten Drum Overpack	H	Response to EEG Comment No. 3, Comment 5.3. The Permittees indicate that the placement of filters on TDOPs (cited by the EEG as an example of an inappropriate Class 1 permit modification request) were requested to cover the possibility that such configurations may be acceptable. The Permittees also states that the requirements that the filters work and that the container meet applicable transportation requirements have not changed.	The Permittees' response does not address the issue raised by EEG that inappropriate Class 1 permit modification requests were made. See response to Comment 5.3.		
11.32	Inés Triay, DOE	Ten Drum Overpack	H	Response to EEG Comment No. 4, Comment 5.4. The Permittees requested a modification to address EEG's concerns about Module IV.	See response to comment 5.4.		
11.33	Inés Triay, DOE	Ten Drum Overpack	H	Response to EEG Comment No. 5, Comment 5.5. The Permittees	See Response to comment 5.5		
12.1	Joni Arends/ CCNS	Ten Drum Overpack	I	The Commentor believes that the TDOP permit modification request should be denied. The request was incomplete, as the copy CCNS downloaded from the Internet prior to the June 7, 2001 public meeting is different from the redline copy sent after the meeting, specifically with respect to Acceptable Disposal Containers. In addition, the container volumes are not consistent within the Permit.	See response to comment 3.		
13.1	Deborah Reade, CARD	Ten Drum Overpack	J	The Commentor believes that the TDOP Class 2 permit modification request should be denied because more than one version of the request was submitted.	See response to comment 3.		