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CERTIFIED MAIL - RETURN RECEIPT REQUESTED

September 24, 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
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RE: DENIAL OF TEMPORARY AUTHORIZATION REQUEST, PROCESSING MODIFICATIONS UNDER CLASS 2 PROCEDURES
WIPP HAZARDOUS WASTE FACILITY PERMIT
EPA I.D. NUMBER NM4890139088

Dear Dr. Triay and Mr. Lee:

The New Mexico Environment Department (**NMED**) received your "Temporary Authorization Request, TRU Waste Characterization at the WIPP Facility" on August 29, 2001 as an attachment to your letter transmitting a request for previously submitted Class 1 modifications to be processed under Class 2 procedures. In the transmittal letter from DOE and Westinghouse (**the Permittees**) dated August 28, 2001, you stated "[b]ecause these modifications have already been put into effect and because they meet the requirements of §270.42(e)(3)(ii)(C) and (E), the Permittees request that NMED exercise its discretion under Part 270 to grant a temporary authorization for these modifications. Additional information setting forth the justifications for the temporary authorization is included in the enclosed documentation."

1. ***The Class 1 Modifications Are Rejected***.

NMED must first address the issue of the Class 1 modifications that the Permittees have "already put into effect." The Permittees proposed to modify the hazardous waste facility permit under

Class 1 procedures specified in 20.4.1.900 NMAC (incorporating 40 CFR §270.42(a)) to allow the following activities:

- Use of composited headspace gas data and to allow up to 20 composited samples
  - Item 14, July 20, 2000 Notice of Class 1 Permit Modification
  - Item 2, November 1, 2000 Notice of Class 1 Permit Modification
- Establishing safety conditions for visual examination
  - Item 4, November 1, 2000 Notice of Class 1 Permit Modification
- Requirements for sampling through the existing filter vent hole
  - Item 3, November 1, 2000 Notice of Class 1 Permit Modification
  - Item 1, December 12, 2000 Notice of Class 1 Permit Modification

NMED identified each of these modifications in the August 31, 2001 Administrative Completeness Determination letter by stating, "The Permittees' August 29, 2001 revised submittal for a temporary authorization and application of the Class 2 process on this previously submitted Class 1 modification is being evaluated and shall be addressed under a separate administrative action." These specific modifications, and the general issue of permit modification classification, were also the subject of several meetings between NMED and the Permittees, as summarized in NMED's letter of September 10, 2001 from Paul Ritzma, NMED General Counsel.

NMED hereby rejects all of these as Class 1 modifications under 40 CFR §270.42(a)(1)(iii) because they are not non-substantive changes. Examples of non-substantive changes provided by EPA in the preamble to the permit modification final rule (53 Fed. Reg. 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." Id. The preamble to the final rule also states, "the changes listed as Class 1 are minor in nature and for the most part should be easily reversible." Id. The preamble to the proposed rule (52 Fed. Reg. 35843, September 23, 1987) further portrays Class 1 modifications as being of a "trivial nature." These modifications clearly do not meet this standard of simplicity for Class 1 modifications.

NMED recognizes, however, that the Permittees may require some time to complete reversal of these rejected modifications. EPA guidance contemplates situations where a Class 1 modification reversal cannot be accomplished immediately, allowing the agency to establish an appropriate schedule for completion (See 53 Fed. Reg. 37915). For this reason, NMED requires the Permittees to comply with the following Schedule for Completion:

a) As of the date of this letter, the Permittees are hereby directed to comply with the original Permit conditions as required by 40 CFR §270.42(a)(1)(iii) ***for the characterization of waste***, and may not continue to use or implement the procedures previously submitted as Class 1 modifications that have been rejected in this letter.
b) From the date of this letter until November 27, 2001, the Permittees may ***manage, store, and dispose of waste*** which was characterized prior to the date of this letter using the procedures previously submitted as:
    i) Item 14, July 20, 2000 Notice of Class 1 Permit Modification (ref. SW-846 Method 8260B);
    ii) Item 3, November 1, 2000 Notice of Class 1 Permit Modification; and
    iii) Item 1, December 12, 2000, Notice of Class 1 Permit Modification.
c) After November 27, 2001, the Permittees shall comply with ***all requirements*** of the Permit (i.e., characterization, management, storage, and disposal of waste), as the Permit exists after that date.

2. ***The Permittees' Request For A Temporary Authorization Is Denied.***

The Permittees seek a temporary authorization for five Class 1 modifications put into effect between July 20 and December 12, 2000 (Permittees Temporary Authorization Request, pg. 2). Further, the Permittees also elected in their August 28, 2001 transmittal letter to follow the procedures set forth in 40 CFR §270.42(a)(3) for Class 2 modifications. For the reasons stated below, the Permittees have misinterpreted the procedural process for Class 1 modifications and requests for temporary authorizations.

A. A Temporary Authorization Is Not Proper For Class 1 Modifications.

The procedural process relied upon by the Permittees (e.g., 40 CFR §270.42(a)(3)) is inappropriate. RCRA regulations provide that the Permittees may "elect to follow the procedures under 40 CFR §270.42(b) for Class 2 modifications...[and] must inform the Director of this decision in the notice required in §270.42(b)(1)." As EPA explained in the preamble to the final rule, 40 CFR §270.42(a)(3)) was added explicitly for Class 1 modifications "that require prior approval" and "are identified in Appendix I with an asterisk." 53 Fed. Reg. 37915. The provision was added to assure the Permittees that the agency would make a decision for Class 1 modifications requiring prior agency approval within a specified timeframe of 90 to 120 days. Id. Under these circumstances, using the Class 2 procedures for public participation and decision deadlines would result in an approach that balanced the concerns of the agency, the public and the Permittees. Id. Thus, to invoke 40 CFR §270.42(a)(3), the Permittees must: (a) submit a Class 1 modification that requires prior agency approval, as identified with an asterisk in 40 CFR §270.42 Appendix I; (b) inform the agency of their decision to follow the procedures for a Class 2 modification; and (c) comply with the procedural requirements set forth in 40 CFR §270.42(b) for a Class 2 modification, including public notice and comment.

As explained above, the Class 1 modifications at issue here are not identified by rule as a type of modification requiring prior agency approval, and further are rejected as Class 1 modifications. For these reasons, NMED cannot approve these modifications as Class 1 modifications under 40 CFR §270.42(a)(3)).

The Permittees' request for a temporary authorization is internally inconsistent with regulations. Temporary authorization requests are only appropriate for Class 2 and Class 3 modifications, as clearly stated in 40 CFR §270.42(e)(2). A request for temporary authorization for Class 1 modifications is inappropriate and unnecessary, because these types of modifications are put into effect immediately and without notice and comment, unless the Class 1 requires prior agency approval. The modifications at issue here are not Class 1 modifications.

B. The Permittees Must Clarify The Classification Of The Modifications They Are Requesting.

It appears that the Permittees may have intended to submit a request for approval of the original Class 1 modifications as Class 2 modifications. If the Permittees seek approval of these modifications as Class 2 modifications, they appear to have satisfied the requirements of 40 CFR §270.42(b)(2) – (3). However, it does not appear that the Permittees' August 28, 2001 submittal satisfies 40 CFR §270.42(b)(1). To comply with the requirements of 40 CFR §270.42(b)(1), the Permittees must immediately (i.e., within 5 business days) transmit a revised permit modification request overview (pp 1 – 2). NMED also requires the Permittees to immediately re-notice their Class 2 modification request explicitly as a Class 2, instead of as a Class 1.

C. The Permittees Have Not Demonstrated That A Temporary Authorization Is Necessary.

Even if the Permittees properly submitted a temporary authorization request for a Class 2 modification, NMED still has several concerns that have not been addressed by the Permittees. Under 40 CFR §270.42(e), the Permittees may request a temporary authorization to allow them to conduct activities necessary to respond promptly to changing conditions, without prior public notice or comment. NMED interprets this regulation to allow a temporary authorization only in situations where there is a one-time, short-term need at the facility for which the full modification process is inappropriate, or to allow a facility to initiate a necessary activity while its permit modification request is undergoing the Class 2 or Class 3 review process. See 53 Fed. Reg. 37919.

The regulations governing approval or denial of such requests require that two independent criteria must be met, as specified in 40 CFR §270.42(e)(3)):

- The authorized activities are in compliance with the standards of 40 CFR §264; and

- The temporary authorization is necessary to achieve one of five listed objectives before action is likely to be taken on the modification request.

With regard to the first criterion, NMED has reviewed the proposed permit modifications for technical adequacy, and has found several deficiencies. NMED submits the attached comments to the Permittees, and suggests the Permittees address the deficiencies. At this time NMED has determined that the request to grant temporary authorization for use of composited headspace gas data does not comply with 40 CFR §264.

Even if the remaining two proposed activities were in compliance with the prescribed standards, NMED has serious concerns with the second criterion. The basis for a temporary authorization is to allow a facility to initiate a necessary activity while its permit modification request is undergoing the Class 2 or 3 modification review process. See 40 CFR §270.42(e)(2)(ii)(B); §270.42(e)(3)(ii); 53 Fed. Reg. 37919. In other words, the Permittees must demonstrate that NMED should approve the proposed modification immediately because the facility cannot wait until action is taken on the modification request at the conclusion of the public comment period. To construe this provision in any other manner would subvert the regulatory process for permit modifications under the Hazardous Waste Act (**HWA**) and RCRA.

Under 40 CFR §270.42(e)), the Permittees must demonstrate that one of the following objectives relevant here must be met to receive approval for a temporary authorization request.

- To prevent disruption of ongoing waste management activities – In their request, the Permittees seek a temporary authorization on the basis that they have already implemented changes to the WIPP permit as Class 1 modifications (Permittees Temporary Authorization Request, pg. 1). According to the Permittees, if they were not now allowed to continue implementing the activities implemented by these Class 1 modifications, the facility and generator sites would experience substantial disruption. Id. Thus, it appears that the sole basis for the alleged disruption stems from the Permittees' implementation of permit modifications that were neither proper Class 1 modifications nor approved by NMED. Further, the anticipated disruption would not have resulted from lawful "ongoing waste management practices" at WIPP or generator sites, but instead would be a direct result of improperly implementing Class 1 modifications without public notice and comment. Under these circumstances, NMED cannot agree that the Permittees have demonstrated that their request for temporary authorization is "necessary" such that they cannot wait until the outcome of the decision-making process on the proposed modifications. To temporarily authorize continuation under these circumstances would be unreasonable and inconsistent with the HWA and its regulations.

- To facilitate other changes to protect human health and the environment – The Permittees state that granting temporary authorization for two of the modifications will result in improvements to worker safety at generator sites (Permittees Temporary Authorization

Request, pg. 12). However, the Permittees' concerns are misplaced by focusing on worker safety issues at generator sites. The Permittees failed to provide sufficient evidence that the citizens of New Mexico would experience any greater protection of human health and the environment by the implementation of these modifications under a temporary authorization, and thus that a temporary authorization of these activities is necessary.

For the above reasons, NMED denies the request for temporary authorization for those modifications. Please note that this denial of the temporary authorization request does not prejudice NMED action on any Class 2 modification request. This denial only means that the activities as proposed were not eligible for a temporary authorization, as explained above.

If you have any questions regarding this matter, please contact James Bearzi at (505) 428-2512.

Sincerely,

Gregory J. Lewis
Director
Water and Waste Management Division

GJL/jpb

Attachment

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

Attachment
NMED Technical Comments on August 28, 2001 Permit Modification Request

General Comments

The Permittees submitted a permit modification (Item 1, "Use of Composited Headspace Gas Data and to Allow Up to 20 Composited Samples") with significant technical implications. The primary issue with compositing headspace gas samples prior to analysis is the impact on identifying and reporting tentatively identified compounds (**TICs**).

Compositing as proposed by the Permittees impacts TICs because as diluted concentrations get closer to detection limits, the ability to discern sample peaks from instrument noise diminishes. The permit modification language must therefore ensure all TICs that would have been identified in single samples are also identified in composite samples (i.e., not identified as unknowns). Furthermore, although the proposed TIC identification method might allow composited TICs to be identified, it would not necessarily require their reporting. Therefore, the permit modification language must also ensure all TICs that would have been reported in single samples are also reported in composite samples. The permit modification must reflect both of these aspects, requiring generator sites to closely monitor results and taking necessary steps to identify unknown TICs in composite samples, up to and including cessation of compositing activities until the true nature of the TICs can be identified.

Specific Comments

1. The Permittees included an email response from EPA (in Attachment B, "Information Supporting Item 1") apparently as a result of the Permittees' question about the basis for compositing up to 5 samples prior to GC/MS analysis. The Permittees conclude from the response that the EPA representative agreed that the 20-sample composite is appropriate. However, the Permittees did not include the original inquiry, such that NMED is unable to determine if the question also asked about the impact of compositing on identification and reporting of TICs, or made it clear that the method as employed by the Permittees had been modified to analyze gas samples. It is unclear if the EPA representative was aware of the TIC criteria and subsequent implications that compositing may have on TIC reporting in a RCRA setting.

   Furthermore, although Section 7.5.7 of SW-846 Method 8260B indicates that up to 5 samples may be composited, it does not imply that compositing of more than 5 samples is acceptable. The ability to provide a larger sample aliquot alone does not endorse compositing. Thus, the conclusion in the email response stating that "there is nothing in the method" that precludes 20-sample compositing appears to be premature. Without the complete correspondence between the Permittees and EPA, NMED cannot determine whether the EPA representative was given sufficient information to render an informed opinion.

2. NMED has no concerns regarding the effect of compositing on UCL_{90} calculations. The Permittees appear to have adequately demonstrated that arithmetic averaging of analytical results from individual containers is equivalent to analytical results from composited samples.

3. Apart from the comparison provided in "Technical Evaluation of Headspace Gas Compositing, August 2001" (Attachment B, Section 2.4, pages 8 – 28), the Permittees failed to provide any information supporting the practical limitations for compositing up to 20 samples. The Permittees should evaluate the need to provide additional relevant quality assurance objectives (e.g., instrument MDLs, ability to identify and report TICs) whereby generator sites can determine whether it is both appropriate and practical for them to composite a greater number of samples.

4. In the "Technical Evaluation" discussion of TICs (Attachment B, Section 3.1, pages 29 – 30), the Permittees provide a calculation to demonstrate that no TICs will be "lost" to dilution. However, although the amount of TIC present in the composited sample (14.75 ng) is above the MDL of 10 ng and therefore would be *detected*, it is less than 10% of the nearest internal standard (59 ng) and therefore would not be *reported* as a TIC.

   Furthermore, the Permittees identify as a "factor" the EPA convention that TICs are to have "at least 10% of the nearest internal standard's area." NMED notes that this is only convention for Contract Laboratory Program methodology under the Superfund program:

neither SW-846 criteria for Method 8260B (Section 7.6.2) nor the Permit (Permit Attachment B3, Section B3-1, "Identification of Tentatively Identified Compounds") include this as a criterion for identifying TICs. If the Permittees intend for this to be an additional criterion for reporting TICs, they should propose it explicitly as revised text in the modification request. However, the criterion must be adapted to account for the number of samples being composited, such that TICs for composited samples are reported with the same level of accuracy as non-composited samples.

5. The Permittees must ensure the proposed revised permit text in the modification request conforms to the current language in the Permit. For example, Item 1.a.1 references Permit Attachment B, Section B-3a(1), but the text as provided fails to include the Class 2 modification language submitted March 30, 2000 and incorporated into NMED's August 8, 2000 version of the Permit regarding "statistically selected containers from waste streams that meet the conditions for reduced headspace gas sampling."