

ENTERED



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GOVERNOR

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**ENVIRONMENT DEPARTMENT**

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JOHN R. D'ANTONIO, Jr.  
SECRETARY

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

October 11, 2002

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: NOTICE OF CLASS DETERMINATION AND ADMINISTRATIVE COMPLETENESS  
WIPP HAZARDOUS WASTE FACILITY PERMIT  
EPA I.D. NUMBER NM4890139088**

Dear Dr. Triay and Mr. Lee:

The New Mexico Environment Department (NMED) acknowledges receipt of the following modification request to the WIPP Hazardous Waste Facility Permit:

- Request for Class Determination and Permit Modification (Closure Plan Amendment), Letter Dated 10/7/02, Rec'd 10/8/02

Attached to this letter is the basis for NMED's determination that this submittal should be processed as a Class 3 modification. NMED conducted this class determination as specified in 20 NMAC 4.1.900 (incorporating 40 CFR §270.42(d)(2)).

Further, NMED has reviewed this document and determined that the permit modification request is administratively complete. This modification request is currently being processed by NMED in accordance with the requirements specified in 20.4.1.900 NMAC (incorporating 40 CFR §270.42 (c)).

The New Mexico Hazardous Waste Fee Regulations require assessment of fees when administrative review of a document is complete, as specified in 20.4.2.301 NMAC. NMED will

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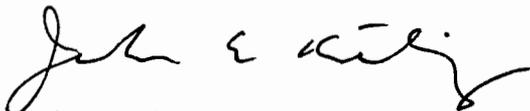


Dr. Inés Triay  
Mr. John Lee  
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issue an invoice to you under a separate letter. Payment is due within sixty (60) calendar days from the date that you receive the invoice.

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

Sincerely,



John E. Kieling  
Manager  
Permits Management Program

Attachment

cc: Greg Lewis, NMED WWMD  
James Bearzi, NMED HWB  
Steve Zappe, NMED HWB  
Phillis Stevens, NMED HWB  
Cindy Abeyta, NMED HWB  
Chuck Noble, NMED OGC  
Betsy Forinash, EPA ORIA  
Laurie King, EPA Region 6  
Connie Walker, Trinity  
File: Red WIPP '02

## Attachment

### Class Determination for October 7, 2002 Submittal WIPP Hazardous Waste Facility Permit EPA I.D. Number NM4890139088

#### 1. **Class 3 modification: Amended Closure Plan**

This modification request seeks to amend the closure plan by replacing the panel closure system design identified in the permit as “Option D”, consisting of a 12-foot explosion isolation wall and a 26-foot concrete monolith, with what the modification request identifies as the “WIPP Panel Closure”, consisting of a 30-foot masonry explosion isolation wall and a 100-foot run of mine salt backfill. In requesting NMED to determine that this modification should be reviewed and approved as a Class 2 modification, the Permittees cite 40 CFR §270.42 Appendix I, Item D.1 (changes to the closure plan) as the most analogous category of modifications. Although none of the subsections listed are directly applicable to this modification, all of them are either Class 1 modifications requiring Agency approval or Class 2 modifications. The Permittees contend that approval of the modification request is required in a timely manner because the requirement to close Panel 1 is rapidly approaching. The Permittees also cite EPA’s proposed and final rules on permit modifications to hazardous waste management facilities [52 FR 35838 and 53 FR 37912] pointing out that, overall, Class 2 modifications do not substantially alter the conditions of a permit or reduce protection of human health and the environment. Finally, the Permittees argue against a Class 3 determination because closure of a panel secures the waste in a unit rather than “substantially altering the facility or its operation.”

NMED considered the similarity of this modification to other modifications codified in Appendix I of 40 CFR §270.42, and identified that the closest analogy to a panel closure system for an underground hazardous waste disposal unit (HWDU) was a final cover system for a landfill, because both involve partial or final closure of land disposal units. 40 CFR §270.42 Appendix I, Item J.3 (addition or modification of a [landfill unit] ... final cover system) is identified as a Class 3 modification, whereas Item J.4 (modification of a landfill unit without changing a ... final cover system) is identified as a Class 2. Thus, modification of the design of a closure system for a HWDU would appear to be a Class 3 modification.

NMED disputes the contention that the modification request should be processed as a Class 2 because the Permittees need to respond “in a timely manner” due to imminent closure of Panel 1. The Permittees have been aware of the design specifications since EPA’s final rulemaking notice on WIPP’s certification on May 13, 1998, and could have submitted a modification request earlier. NMED notes that the Permittees have been contemplating changes to the panel closure system design for nearly 18 months, as evidenced by an April 30, 2001 submittal to NMED of minor enhancements proposed to the panel closure specifications. In addition, the Environmental Evaluation Group published its analysis of this design in their December 2001 publication EEG-82, “Evaluation of Proposed Panel Closure Modifications at WIPP.” Given these facts, asking NMED to make a Class 2 determination primarily to facilitate responding “in a timely manner” is

an insufficient reason to determine that this modification should be processed under Class 2 procedures. Furthermore, the Permittees never identified a technological advancement or new regulation to which they must respond in a timely manner, as specified in 20.4.1.900 NMAC (incorporating 40 CFR §270.42(d)(2)(ii)).

The Permittees improperly cited the EPA final rule on permit modifications in supporting the contention that Class 2 modifications “do not substantially alter the conditions of a permit or reduce protection of human health or the environment.” On the contrary, 20.4.1.900 NMAC (incorporating 40 CFR §270.42(d)(2)(i)) makes it clear that these are instead the attributes of a Class 1 modification. NMED flatly rejects any argument that this submittal could be considered a Class 1 modification.

Likewise, NMED rejects the assertion that because “only five regulatory requirements and only two [Permit] sections are impacted” by this modification request, this somehow “demonstrates the simple nature of the change and further supports the Class 2 determination.” NMED believes submittal of a modification that includes a detailed design report, signed and certified by two New Mexico registered professional engineers and intended to completely replace the existing Permit Attachment II, is not a simple change. In fact, these certifications by registered professional engineers are generally required by the regulations because “certain technical data, such as design drawings and specifications, and engineering studies” (40 CFR §270.14(a)) can be highly complex, requiring qualified individuals to attest to their truth, accuracy, and completeness.

NMED instead finds that this permit modification request to amend the closure plan by proposing a new design for the panel closure system “substantially alter[s] the facility or its operation” specified in 20.4.1.900 NMAC (incorporating 40 CFR §270.42(d)(2)(iii)). The logic behind the Permittees’ argument that “securing” a unit by closure is different from altering the facility or its operation misses the salient point: the issue is not the act of closing the panel, but rather changing the design of that closure system, much like changing a landfill liner or final cover system. Furthermore, the proposed modification is sufficiently complex that the Class 3 process, with both the opportunity for detailed technical review and comment and the issuance of a draft permit for additional public comment, is appropriate. NMED has therefore determined that this item is a Class 3 modification, subject to the permit modification requirements of 20 NMAC 4.1.900 (incorporating 40 CFR §270.42(c)).