



Attorney General of New Mexico

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8 April 2003

Mr. Steve Zappe
New Mexico Environment Department
Hazardous Waste Bureau
2905 Rodeo Park Drive, Building E
Santa Fe, NM 87505



Re: WIPP Hazardous Waste Act permit; proposed Class 1* modification, "Change in Operation," February 27, 2003

Dear Mr. Zappe:

This letter submits comments by the Water, Environment, and Utilities Division of the New Mexico Attorney General's Office (the WEU Division) to the Environment Department (the Department) concerning a proposed modification to the Hazardous Waste Act permit for the Waste Isolation Pilot Plant (WIPP). The proposed modification, cast as a Class 1* modification, is dated February 27, 2003, and is entitled "Change in Operation."

This Class 1* modification follows a series of changes in ownership or control of the co-operator of the WIPP facility. WIPP is operated under a management and operating contract with the Department of Energy (DOE); the contractor is now an entity known as Washington TRU Solutions LLC. The history, as shown in the Class 1* proposal, is as follows:

- a. Before December 1997 the co-operator was a division of Westinghouse Electric Company, known as Westinghouse Waste Isolation Division.

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- b. In December 1997, CBS Corporation acquired Westinghouse Electric Company, and Westinghouse Waste Isolation Division became a division (or a division of a division) of CBS Corporation.
- c. In September 1998 CBS Corporation sold Westinghouse Waste Isolation Division to a joint venture comprised of British Nuclear Fuels, Ltd. and Morrison-Knudsen Corporation, known as MK/BNFL GESCO LLC.
- d. In March 1999 the name of the joint venture, MK/BNFL GESCO LLC, was changed to Westinghouse Government Environmental Services LLC.
- e. In October 1999 the Hazardous Waste Act permit was issued.
- f. In February 2001, after bids were received and reviewed, the co-operator under a new contract became Westinghouse TRU Solutions LLC.
- g. In December 2002 the co-operator's name was changed to Washington TRU Solutions LLC.

These events should be considered against the background of several regulatory requirements:

1. First, the RCRA Part A application is required under 40 CFR sec. 270.13(d) to show the operator's ownership status.
2. Second, section 74-4-4.7 of the Hazardous Waste Act requires applicants for a permit to file a disclosure statement on a form developed by the Department. In the event of any change in the information submitted, the new information must be submitted within 30 days. See sec. 74-4-4.7.E. There is an exemption in section 74-4-4.7.F for, inter alia, public corporations that can submit certain documents filed with the Securities and Exchange Commission

pursuant to the Securities Act of 1933 and the Securities Exchange Act of 1934.

3. Third, under applicable rules, a permit may be transferred to a new owner or operator only in compliance with 40 CFR sec. 270.40, which requires that the permit be modified or revoked and reissued. Section 270.40(b) contains requirements for the submission of a revised permit application no later than 90 days before the scheduled change and a written agreement between the current permit holder and the successor specifying the date for transfer of permit responsibility.
4. Fourth, section 74-4-4.7 requires the Department of Public Safety to prepare an investigative report on the applicant and to submit it to the Secretary of the Environment.

The WEU Division has discussed the proposed "Change in Operation" modification with representatives of DOE and Washington TRU solutions and had the opportunity to determine additional facts. We are now informed that the disclosure materials called for by sec. 74-4-4.7 have been completed and filed. We are informed that the entity now holding the management and operating contract, Washington TRU Solutions, is a joint venture in which Roy F. Weston, Inc. holds a 12% interest and Westinghouse Government Environmental Services holds an 88% interest and is styled as managing partner. Further, there is an agreement under which all contractual powers and obligations of Westinghouse Government Environmental Services were "taken over" by Westinghouse TRU Solutions. In addition, we are told that DOE has the power to terminate the management and operating contract at any time and in three years may

“recompete” the position of contractor. In the meeting DOE and Washington TRU Solutions offered to file with NMED the contract or contracts under which the successor management and operating contractor assumed the powers and obligations of the predecessor.

The explanations and commitments given at the meeting went far toward answering the questions that the modification proposal raised for the WEU Division. It now seems to be agreed that (i) the joint venture (British Nuclear Fuels, Ltd. and Morrison-Knudsen) which acquired the business of Westinghouse Waste Isolation Division in 1998 and (ii) the second joint venture which acquired a new contract in February of 2001 were each ineligible for the exemption for public corporations in sec. 74-4-4.7.F(3) and so were required to comply with the disclosure requirements in sec. 74-4-4.7.A. There was evidently some confusion about the forms to be used to fulfill such requirements, but that has now been cleared up. It is the WEU Division’s recommendation that NMED make clear what type of “new information” calls for revision of the disclosure filings under sec. 74-4-4.7.E.

Further, there was a transfer of the permit in February 2001 to a different entity from the one that previously held the contract. The permittees have stated that the new entity was controlled by the same entity that held the previous contract. However, the rule (40 CFR sec. 270.40) refers to a new owner or operator, and we submit that the formation of a new partnership entity to hold the contract called for compliance with the remainder of the rule, including modification by, at minimum, a Class 1* modification request and submission of contractual agreements governing the transfer of permit obligations. These processes do not seem to have been completed at the time of the

transfer in February 2001. However, the permittees are completing the record at this time. It is the WEU Division's recommendation that NMED make clear what type of reconfiguration of an operating entity constitutes a "new owner or operator" under sec. 270.40, since changes in partnership structure may occur again. We submit that any change in equity ownership of a non-public company or partnership, or any change in control of a public company, should call for a permit modification under sec. 270.40.

We submit that the Department and the public are entitled to full information about the identity of persons who operate major facilities for the management of hazardous wastes, such as WIPP, and that existing disclosure requirements must be met. Some further clarification by NMED should improve the process for the benefit of all concerned.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Lindsay A. Lovejoy, Jr.", written in a cursive style.

LINDSAY A. LOVEJOY, JR.
Assistant Attorney General

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