State of New Mexico
ENVIRONMENT DEPARTMENT
Hazardous Waste Bureau
2905 Rodeo Park Drive East, Building 1
Santa Fe, New Mexico 87505-6303
Telephone (505) 428-2500
Fax (505) 428-2567
www.nmenv.state.nm.us

BILL RICHARDSON
GOVERNOR

RON CURRY
SECRETARY

DERRITH WATCHMAN-MOORE
DEPUTY SECRETARY

ENTERED

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

August 8, 2003

Dr. Inés Triay, Manager
Carlsbad Field Office
Department of Energy
P.O. Box 3090
Carlsbad, New Mexico 88221-3090

Dr. Steven Warren, President
Washington TRU Solutions, LLC
P.O. Box 2078
Carlsbad, New Mexico 88221-5608

RE: NOTICE OF DEFICIENCY (NOD), CLASS 3 PERMIT MODIFICATION REQUEST FOR REMOTE HANDLED WASTE
WIPP HAZARDOUS WASTE FACILITY PERMIT
EPA I.D. NUMBER NM4890139088

Dear Drs. Triay and Warren:

This letter is in partial response to your letter of May 5, 2003 to Mr. James Bearzi providing your response to the March 5, 2003 Notice of Deficiency (**NOD**) to the Class 3 Permit Modification Request (**PMR**) for Remote Handled (**RH**) TRU waste. In that letter, you express significant concern with a statement by NMED in the cover letter regarding the RH waste characterization program proposed in the PMR and the "current legal standard." You state, "…it is our understanding that the 'legal standard' for any changes to the existing WIPP [Hazardous Waste Facility Permit] is existing law, i.e. applicable statutory and regulatory requirements." You further state, "The Permittees consider this to be an extremely important point." Following receipt of your letter, staff in the Hazardous Waste Bureau and NMED's Office of General Counsel met to discuss this matter and formulate a response.

NMED must first correct a misstatement in your letter that appears to form the basis for your concerns over what constitutes the appropriate "legal standard" for permit modifications, in this case dealing specifically with a PMR proposing a new waste analysis plan (**WAP**) for RH waste. You allege NMED stated, "…the contact handled (CH) waste characterization process is the 'current legal standard' for the RH TRU mixed waste characterization program…" The exact quote from NMED's March 5, 2003 letter is "…the RH waste characterization program proposed

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in the permit modification request … is not based on a reasoned departure from the contact handled (**CH**) waste characterization process, the current legal standard." This says the current legal standard for waste characterization of TRU mixed waste destined for WIPP is contained in the fully adjudicated CH WAP found in the permit. NMED makes it very clear in the subsequent NOD comments that, from NMED's perspective, it is *desirable* for the Permittees to develop an RH WAP that is a "reasoned departure" from the existing, approved WAP. However, NMED explicitly states in Comment General-4 that the "primary evaluation criterion for any RH PMR is whether the PMR meets the requirements of 20.4.1.500 (incorporating 40 CFR §264)."

NMED concurs with your statement, "…the 'legal basis,' i.e. the regulatory requirements for waste characterization, are set forth in the applicable regulations." The applicable legal standard is that the PMR must meet New Mexico's legal requirements under the Hazardous Waste Act and Hazardous Waste Management Regulations, including conditions necessary to protect human health and the environment. NMSA 1978 Section 74-4-4.2 (1992). The March 5, 2003 NOD comments make numerous references to the necessity to comply first and foremost with regulatory requirements, as these selected excerpts demonstrate (emphasis added):

- "The comments below reflect NMED's careful analysis of the RH PMR and *comparison of the proposed changes with the requirements specified in the New Mexico Hazardous Waste Management Regulations (20.4.1 NMAC) and with the administrative record for WIPP Hazardous Waste Facility Permit established during the 1999 public hearing.*" (Introduction to NOD Comments, first paragraph, page 1)
- "NMED's primary evaluation criterion for any RH PMR is *whether the PMR meets the requirements of 20.4.1.500 NMAC (incorporating 40 CFR §264).*" (Comment General-4, page 2)
- "…the Permittees must still propose an *RH waste characterization program that complies with all storage and disposal requirements in 40 CFR §264.*" (Comment General-4, page 2)
- "The RH program should be developed based on the accepted CH program with deviations from the CH program based on operational and safety concerns and technically justified. *The resulting RH program must be compliant with the management, storage and disposal requirements specified in 40 CFR §264.13.*" (Comment General-5, Item 1, page 3)
- "*The Permittees must demonstrate that any proposed RH characterization program* that differs from the current approved CH program *still meets all of the necessary regulatory characterization requirements pertinent to storage and disposal units.* NMED believes the current CH program complies with regulatory requirements and should have been the basis from which the RH program was developed with reasonable departures from the CH program explained and *compliance of the resulting RH program with RCRA demonstrated.*" (Comment 5-2, page 9)
- "Instead, RH characterization requirements should be based upon reasonable and justified deviation of the CH program based upon technical and safety concerns, with *the resulting RH program still compliant with all RCRA requirements for storage and disposal facilities.*" (Comment 5-9, pages 12-13)

- "*...the RH characterization process proposed by the Permittees is inappropriate and does not set forth an adequate methodology for ensuring that 40 CFR §264.13(a) characterization requirements are met.*" (Comment 5-11, page 14)

Your letter also states, "There are often a number of ways to meet a legal standard. Although the regulatory requirements for CH and RH TRU mixed waste characterization are the same, the way in which the requirements are met can be different." While NMED agrees with this statement, the current Permit (through the CH WAP) has been clearly demonstrated through the public hearing process to satisfy existing legal and regulatory standards.

NMED acknowledges the Permittees' belief that the May 5, 2003 response to the NOD and "the proposed RH TRU WAP complies with applicable RCRA requirements." However, NMED requires adequate information and data to allow it to independently determine that the proposed permit modification complies with applicable legal requirements. Failure by the Permittees to provide adequate information and data that adequately justifies the permit modification request may result in the imposition of permit conditions by NMED to ensure the draft Permit is fully protective of human health and the environment and complies with applicable regulations.

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

Sincerely,

Sandra Y. Martin
Acting Chief
Hazardous Waste Bureau

cc: John Kieling, NMED HWB
Steve Zappe, NMED HWB
Charles Lundstrom, NMED WWMD
Tracy Hughes, NMED OGC
Chuck Noble, NMED OGC
Laurie King, EPA Region 6
Betsy Forinash, EPA ORIA
Connie Walker, Trinity Engineering
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