



Department of Energy  
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Carlsbad, New Mexico 88221  
January 30, 2004



Mr. Steve Zappe  
New Mexico Environment Department  
Hazardous Waste Bureau  
2905 Rodeo Park Drive East, Building 1  
Santa Fe, NM87505

Subject: Comments and Request for Hearing on the Proposed Agency-Initiated Permit Modification of the HWFP for the WIPP, EPA Id. No. NM4890139088, NMED Public Notice No. 03-12, dated November 26, 2003

Dear Mr. Zappe:

In accordance with the New Mexico Environment Department (NMED) Public Notice No. 03-12, dated November 26, 2003, the United States Department of Energy (DOE) and Washington TRU Solutions, LLC (WTS), hereby submit their Comments and Request for a Hearing regarding the NMED's proposed Agency-Initiated Modification and Draft Permit.

The NMED's Draft Permit proposes to modify the WIPP Hazardous Waste Facility Permit (HWFP) to limit waste eligible for disposal at WIPP to the inventory identified when the permit was originally issued in October 1999. The enclosed comments reflect our concerns that the proposed Draft Permit is not in accordance with law, includes provisions that would hinder transuranic waste disposal operations, is unnecessary and unduly burdensome, and would not result in increased benefits to human health or the environment.

In the enclosed documents, we have requested that the Agency-Initiated Modification be withdrawn or denied in its entirety. We have also requested a public hearing pursuant to 20.4.1.901 NMAC and Public Notice No. 03-12.

If you have any questions, please contact Mr. R. Paul Detwiler at (505) 234-7300.

Sincerely,

R. Paul Detwiler, Acting Manager  
Carlsbad Field Office  
U.S. Department of Energy

FOR  
Mr. Steve Warren, General Manager  
Washington TRU Solutions, LLC

Enclosure



**STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF THE ENVIRONMENT DEPARTMENT**

**IN THE MATTER OF THE PROPOSED  
AGENCY-INITIATED MODIFICATION  
OF THE HAZARDOUS WASTE FACILITY  
PERMIT (HWFP) FOR THE WASTE  
ISOLATION PILOT PLANT (WIPP)**

**REQUEST FOR PUBLIC HEARING**

**COMES NOW** the United States Department of Energy (DOE) and Washington TRU Solutions, LLC (WTS) (Permittees) by and through their Attorney of Record, Dolan & Domenici, P.C. (Pete V. Domenici, Jr.) and request a Public Hearing pursuant to 20.4.1.901 NMAC and Public Notice No. 03-12, New Mexico Environment Department (NMED) Notice of Public Comment Period and Public Hearing Concerning Intent to Approve an Agency-Initiated Modification to the Hazardous Waste Facility Permit (HWFP) for the Waste Isolation Pilot Plant (WIPP), Carlsbad, New Mexico, EPA Id. No. NM4890139088, dated November 26, 2003. The Permittees request that a public hearing be held on the Agency-Initiated Modification, including the Draft Permit for the Agency-Initiated Modification for the WIPP.

The Draft Permit proposes to modify the HWFP for WIPP, EPA Id. No. NM4890139088. In support of this Request, Permittees, state as follows:

- (1) The Permittees hold the HWFP for the WIPP facility. The United States DOE is the owner and operator of the facility, and WTS is the co-operator. As Permittees, they have interest in all the matters relating to the Agency-Initiated Modification and the Draft Permit;
- (2) Requesters are the United States DOE and WTS;

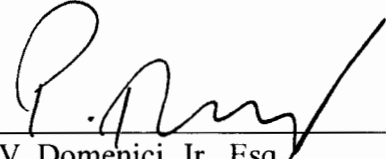
(3) The Permittees object to the Agency-Initiated Permit Modification in its entirety. Specifically, the Permittees object to all of the Draft Permit language proposed by the NMED and request that the Agency-Initiated Modification be withdrawn or denied in its entirety;

(4) The issues the Permittees would raise for consideration at a hearing include issues set forth in the Comments filed by the Permittees on January 30, 2004, and any other issues necessary to establish that the NMED cannot meet its burden of proof, and that NMED's issuance of the Draft Permit and the terms and conditions of the Draft Permit are arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the record, and otherwise not in accordance with law. The DOE would raise the issues of federal pre-emption and sovereign immunity. NMED cannot establish the "cause" required for an Agency-Initiated Modification as required by the New Mexico Hazardous Waste Act, § 74-4-4.2.D, and implementing regulations, including 20.4.1.901.B(1) NMAC and 40 CFR Part 270. The Administrative Record is deficient on factual and legal grounds. The Permittees would raise issues at the hearing regarding every element on which the State bears the burden of proof and are prepared to present legal and factual evidence in support of its objections and arguments that the Agency-Initiated Modification should be withdrawn or denied. The Permittees incorporate by reference their Comments as well as the documents attached thereto in reference therein; and

(5) At the hearing, Permittees will present both technical and non-technical evidence in support of their position.

**WHEREFORE**, the DOE and WTS respectfully request that a public hearing be scheduled and held in this matter.

DOLAN & DOMENICI, P.C.

A handwritten signature in black ink, appearing to read "P. Domenici, Jr.", written over a horizontal line.

Pete V. Domenici, Jr., Esq.  
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**COMMENTS OF THE UNITED STATES DEPARTMENT OF ENERGY  
AND WASHINGTON TRU SOLUTIONS, LLC, REGARDING THE  
PROPOSED STATE-INITIATED MODIFICATION PURSUANT TO PUBLIC NOTICE NO. 03-12**

**I. INTRODUCTION**

On November 26, 2003, the New Mexico Environment Department (NMED) issued Public Notice No. 03-12 stating that it intends to approve an agency-initiated modification to the Waste Isolation Pilot Plant's (WIPP's) Hazardous Waste Facility Permit (HWFP), EPA Id. No. NM4890139088. NMED also issued a Fact Sheet setting out the purported basis for the proposed modification. The NMED's modification would "limit waste eligible for disposal at WIPP to the inventory identified when the permit was originally issued." (Public Notice, p. 2.) Based upon applicable law and the attached record, the U.S. Department of Energy (DOE) and Washington TRU Solutions, LLC, (the Permittees) have concluded that the proposed modification is not in accordance with law and should be withdrawn for the following reasons:

- The proposed modification is unnecessary in that the WIPP HWFP already prevents the management of any waste at WIPP that does not comply with the HWFP, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, or the New Mexico Hazardous Waste Act (HWA), NMSA 1978 § 74-4-1 *et seq.*;
- The Fact Sheet, which is the basis for the proposed modification, contains numerous erroneous statements, does not contain substantial evidence to justify the modification, attempts to rewrite the administrative record of the proceedings that led to issuance of the HWFP, and seeks to regulate matters beyond NMED's authority; and
- NMED is acting arbitrarily, capriciously and not in accordance with law in proposing this modification to the WIPP HWFP.

The Permittees' specific comments and legal positions are set forth in the following sections of this submittal. The Permittees incorporate by reference the WIPP HWFP, subsequent modifications to the WIPP HWFP, and the administrative records for the initial WIPP HWFP and subsequent modifications. The Permittees also incorporate by reference the documents submitted with these comments and listed on the attached index. (Exhibits for Submission to NMED with Permittees' Comments on the Agency-Initiated Permit Modification of Nov. 26, 2003.)

## **II. THE WIPP HAZARDOUS WASTE FACILITY PERMIT AND WIPP OPERATIONS**

### **(a) WIPP's Purpose and Scope**

Located 26 miles east of Carlsbad in Eddy County, WIPP is a geologic repository for the permanent disposal of TRU waste. As defined by the Waste Isolation Pilot Plant Land Withdrawal Act (WIPP LWA), Pub. L. No. 102-579, 106 Stat. 4777 (1992) and Pub. L. No. 104-201, 110 Stat. 2851-2854 (1996), TRU waste consists of special nuclear or byproduct materials containing more than 100 nanocuries of alpha-radiation emitting transuranic isotopes with half-lives greater than 20 years per gram of waste. Transuranic isotopes are radionuclides with atomic numbers greater than 92 such as plutonium, curium, and americium. The terms "transuranic," "byproduct material," and "special nuclear material" are terms that describe the radioactive characteristics of the waste based on the isotopes in the waste and its origin. (Appendix A, DOE M 435.1-1 Radioactive Waste Management Manual.) The TRU waste disposed of at WIPP is generated by atomic energy defense activities at various DOE sites located throughout the United States and includes both "mixed waste" and "non-mixed waste." (Pub. L. No. 96-164.) TRU mixed waste contains both radioactive materials and hazardous wastes as defined pursuant to RCRA and the HWA. TRU non-mixed waste does not contain

hazardous wastes. The WIPP LWA prohibits the disposal of high-level waste and spent nuclear fuel at WIPP. (WIPP LWA § 12.) The terms “high-level waste” and “spent nuclear fuel” are terms that describe the radioactive characteristics of some highly radioactive material based on the process that generated the material. (Nuclear Waste Policy Act, 42 U.S.C. § 10101 *et seq.*) The WIPP LWA also imposes a limit on the volume of TRU waste that may be disposed of in the WIPP repository, and several limits on remote-handled TRU waste. (WIPP LWA § 7.)

**(b) The WIPP HWFP**

On October 27, 1999, NMED issued the WIPP HWFP, which authorizes the Permittees to dispose of contact-handled TRU mixed waste (CH TRU waste). (HWFP Module I, Condition 1.A.) Pursuant to 20.4.1.500 NMAC (incorporating 40 C.F.R. § 264.601), the WIPP facility is a miscellaneous unit and must meet the environmental performance standards set forth in §264.601. “A miscellaneous unit must be located, designed, constructed, operated, maintained, and closed in a manner that will ensure the protection of human health and the environment.” (40 C.F.R. § 264.601.) Module IV of the HWFP sets forth the design, construction and operation requirements necessary to meet the applicable environmental performance standards. Because the fundamental basis for regulation of a miscellaneous unit is performance and not waste inventory, the permit does not include a list of “approved” waste streams. Instead, the HWFP lists waste properties that must be known (e.g., absence of free liquids) to manage the waste in compliance with 20.4.1.500 NMAC, incorporating 40 C.F.R. Part 264.

The HWFP includes numerous conditions that constitute a process, independent of waste inventory information, by which mixed waste is determined to be acceptable for disposal at WIPP. These HWFP provisions include the following:

#### **A. General Permit Conditions**

The HWFP only authorizes the Permittees to manage, store, and dispose of contact handled TRU mixed waste at WIPP, and the HWFP establishes the general and specific standards governing such activities pursuant to the HWA and RCRA. (HWFP Module I, Condition I.A.)

#### **B. General Facility Conditions**

The HWFP also includes four general facility conditions that establish which TRU mixed wastes are acceptable for disposal at WIPP:

1. **Waste Sources:** The Permittees may only receive TRU waste from generator sites that comply with the applicable requirements of the WIPP's Waste Analysis Plan (WAP), which is included as an attachment to the HWFP. (HWFP Module II, Condition II.B.1.)
2. **Waste Analysis Plan:** The Permittees cannot manage, store or dispose of TRU mixed waste that fails to meet the characterization requirements of 20.4.1.500 NMAC, which are specified by the HWFP and the WAP. (HWFP Module II, Condition II.C.1.)
3. **Treatment, Storage, and Disposal Facility Waste Acceptance Criteria (TSDF-WAC):** The Permittees cannot accept TRU mixed waste at WIPP that fails to meet the waste acceptance criteria of the HWFP, including the criterion that all waste must be compatible with backfill, seal and panel closure materials, container and packaging materials, shipping container materials, and other wastes. (HWFP Module II, Conditions II.C.3. and II.C.3.d.)
4. **Permitted TRU Mixed Wastes:** The only TRU mixed waste containers the Permittees can accept are those which contain hazardous wastes identified in the



Hazardous Waste Permit Application Part A, which is incorporated into HWFP Attachment O. (HWFP Module II, Condition II.C.4).

These general facility conditions, in conjunction with the general permit conditions and requirements of the WIPP WAP, determine the acceptability of TRU mixed waste for disposal at the WIPP.

**C. Waste Analysis Plan**

The eligibility of TRU mixed waste for disposal at WIPP is further limited by application of the WIPP WAP, which is incorporated into the HWFP as Attachment B. The WIPP WAP includes numerous requirements defining the eligibility of TRU mixed wastes for disposal at WIPP. There are four WAP requirements that are relevant to NMED's permit modification:

**1. Hazardous Waste Codes Identified in the Permittees' RCRA Part A Permit**

**Application:** The WAP specifies that the Permittees can only accept TRU mixed wastes bearing the EPA hazardous waste codes identified in Part A of the Hazardous Waste Permit Application. It also specifies that if, in the course of implementing the WAP waste characterization processes at generator sites, EPA hazardous waste codes are identified that are not in the Part A, the site cannot send such waste to WIPP until the Permittees submit a permit modification and gain approval from NMED for the receipt, storage, and disposal of the newly identified hazardous waste codes. (HWFP Attachment B, WAP, Section B-1b.)

**2. Prohibition on Incompatible Waste:** The WAP also prohibits the acceptance at WIPP of any TRU mixed wastes that are incompatible with backfill, seal and panel closure materials, container and packaging materials, shipping container materials, or other wastes. The WAP further specifies that if any mixed waste streams are identified as

containing incompatible materials, or materials incompatible with waste containers, such mixed waste streams cannot be shipped to WIPP until the incompatibilities have been addressed. (HWFP Attachment B, WAP, Section B-1c, pp. B-6 and B-7.)

**3. Examination of Waste Stream Profile Forms and Container Data Checks for**

**Incompatibilities:** The WAP provides that all containers of TRU mixed waste must be evaluated to ensure that there are no incompatibilities before the waste is shipped to WIPP. The WAP further provides that compatibility will be determined using Appendix C1 of the WIPP Part B Permit Application. (HWFP Attachment B, WAP, Section B-4b(1)(ii).)

**4. Assembly of Required TRU Mixed Waste Stream Information:** The WAP requires that each generator site assemble required information about mixed waste streams so that the information can be evaluated against the conditions of the HWFP and requirements of the WAP. The WAP specifies that assembled information must include the chemical content, physical waste form, and compatibility of the mixed waste stream. (HWFP Attachment B4, Section B4-2b.)

The process for determining waste acceptability set forth in the HWFP is effective and identifies those waste streams that are compatible with other materials in the repository and acceptable for disposal at WIPP. There is no justifiable or legally permissible basis for NMED to change the current process for determining the acceptability of waste for disposal at WIPP.

**(c) The TRU Waste Baseline Inventory Report (TWBIR)**

The Permittees prepared the WIPP's Performance Assessment (PA) and Compliance Certification Application (CCA) to satisfy U.S. EPA's radioactive waste disposal regulations in 40 C.F.R. Part 191, Subparts B and C. The TWBIR was developed to support the PA and CCA. It was provided to NMED during the permit application process to provide general information on the waste to be received at WIPP. The TWBIR contains general descriptions of the TRU waste (mixed and non-mixed) stored at various DOE sites around the country, and its objective was to provide necessary information for the PA and CCA. The TWBIR explained its objectives as being to: "1. Establish a methodology for grouping wastes of similar physical and chemical composition . . . 2. Define the anticipated disposal inventory of TRU waste destined for WIPP [and] 3. Calculate the disposal inventory in terms of waste material parameters." (Waste Isolation Pilot Plant Transuranic Waste Baseline Inventory Report, Revision 0, June 1994, CAO-94-1005, pp. 1-12.)

The text of the TWBIR also explained that it was developed with the best information available at the time, and that the TWBIR would be updated periodically as new information became available. As discussed below, the evolving nature of the TWBIR was also reflected in the subsequent revisions published in February 1995 (Rev. 1), December 1995 (Rev. 2), and June 1996 (Rev. 3). The revised inventory DOE is currently developing that the Fact Sheet refers to [Fact Sheet, p.4] will be used to satisfy the requirements of 40 C.F.R. § 194.15 for recertification of the WIPP repository by EPA. The revised inventory contains the most recent estimates of waste properties that are important for determining WIPP's continued compliance with EPA's regulations.

### **III. NMED'S PROPOSED PERMIT MODIFICATION, THE ADMINISTRATIVE RECORDS AND OTHER RELEVANT DOCUMENTS**

NMED proposes to modify the HWFP to prevent the disposal of waste that is not directly traceable to the inventory identified in the TWBIR. As stated in the Fact Sheet:

NMED proposes to insert the following language into Module II of the permit under the heading entitled "II C.3. Treatment, Storage, and Disposal Waste Acceptance Criteria (TSDF-WAC)":

II.C.3.i. Documented waste inventory- wastes that are not directly traceable to waste streams in the '*Transuranic Waste Baseline Inventory Report (Revision 2)*', DOE/CAO-95-1121, December 1995, are not acceptable at WIPP unless specifically approved and listed in Table II.C.3.i below.

Similar language will also be inserted into Attachment B (Waste Analysis Plan) under the heading entitled "B-1c Waste Prohibited at the WIPP Facility."

NMED also proposes to insert a table in Module II that would clearly identify those waste streams that are not directly traceable to the TWBIR Revision 2 that have been approved for acceptance at WIPP, in the event of future permit modifications allowing the disposal of these wastes. These approvals will be based upon completion and approval of a Waste Stream Profile Form (WSPF) by the Permittees, NMED review of the WSPF, and modification of the permit to list the approved WSPF.

(Fact Sheet, p. 4.)

The current HWFP requirements for waste acceptance at WIPP are not based on or limited to specific inventories. Instead, as described in Section II above, and as required by the HWA and RCRA, the HWFP sets forth the parameters that must be met for any type of mixed TRU waste to be accepted for management at WIPP. If the waste meets these acceptance criteria, including compliance with the WAP, it may be disposed of at the WIPP under the HWFP.

The HWFP includes a list of permitted hazardous wastes identified by EPA hazardous waste numbers (commonly referred to as "hazardous waste codes"); it does not contain a list of waste streams. The TSDF-WAC and the WAP establish a rigorous process for determining the

acceptability of waste streams, including those waste streams not identified in the TWBIR. The determination of acceptability of a particular waste stream is not based on its listing in the TWBIR, but on whether it meets the conditions of the HWFP, TSDF-WAC, and WAP, and whether it has been properly characterized and confirmed as evidenced by the Waste Stream Profile Form (WSPF).

WIPP has been in operation under the terms of the HWFP since November 1999. During this time, as NMED is aware, waste streams that were not identified in the TWBIR have been approved for disposal in accordance with the provisions of the HWFP. In addition, the HWFP specifically allows the disposal of both retrievably stored and newly generated TRU mixed waste. (HWFP Attachment B, Introduction.) According to the HWFP, “retrievably stored waste” is waste that was initially packaged or repackaged prior to the approval of a generator site’s waste characterization program, and “newly generated waste” is waste that is packaged or repackaged after the generator site’s waste characterization program has been approved. These terms are related to the way waste characterization information is collected and confirmed under the HWFP. In either case, it must be shown that the waste meets the fundamental performance parameters of the WAP, not that it appears on an inventory list developed before much of the waste was generated. This process has worked for retrievably stored, newly generated, and repackaged waste streams and it will work for other waste streams regardless of whether they were listed in the TWBIR.

A comparison of the waste streams that have been accepted for disposal at the WIPP with the information in Revision 2 of the TWBIR shows that a significant portion of the waste already in the repository was not identified in the TWBIR. There have been a total of 60 waste streams approved for disposal and, of those 60, eight waste streams were not enumerated in the 1995

TWBIR. As of December 2003, the eight waste streams account for more than 12,000 drum equivalents of the waste in the repository. Through the audit and surveillance process, NMED is aware that these additional waste streams have been determined to be acceptable for disposal. Through its access to the WIPP Waste Information System (WWIS) (Module II, Condition II.C.1.g), NMED is aware that each container in these waste streams complies with the TSDF-WAC and other criteria required for approval of its disposal in WIPP. WSPFs are required as part of the waste acceptance processes for WIPP and all approved WSPFs are sent to NMED.

The Fact Sheet does not explain the basis for NMED's contention that the acceptability of other waste streams not identified in the TWBIR cannot be determined using the processes already in the HWFP. The Fact Sheet states:

NMED has reason to believe that the inventory of waste may be expanded to include waste streams that were not considered eligible for disposal at WIPP at the time the WIPP permit application was submitted, such as waste from HLW tanks at the Hanford, INEEL, and the Savannah River Site that DOE may declare as waste incidental to reprocessing.

This information makes clear that DOE intends to dispose of waste that was not contemplated by the inventory review ordered by Congress, and was not contemplated, analyzed or reviewed by NMED when the original permit was issued. This waste has not been evaluated by the state for compatibility with TRU mixed waste or for other characteristics that may make disposal at WIPP a danger to public health or the environment. It is on this basis that NMED proposes to modify the permit to prohibit wastes that are not directly traceable to the TWBIR.

(Fact Sheet, p. 4.) NMED does not provide any analysis as to why the HWFP, TSDF-WAC and WAP would not adequately determine which new waste streams are "eligible for disposal at WIPP." The Notice, Fact Sheet and the Administrative Record provided by NMED (hereinafter referred to as the "Modification Administrative Record") do not disclose any evidence, analysis or support for the proposition that the WAP is deficient in any way as to the concerns that NMED asserts are the basis for the proposed modification. As set forth in detail below, NMED's

position at the 1999 WIPP permit hearing, and in communications leading up to the hearing, was that the processes in the HWFP and WAP were the mechanisms for determining the acceptability of waste streams for disposal at WIPP. The process for determining waste acceptability, as proposed in the permit application and WAP, was addressed by the Permittees through their comments on Notices of Deficiency and their testimony at the permit hearing. The Modification Administrative Record provides no support for the proposition that the concerns now raised by NMED are not fully and completely addressed by the use of the processes established by the current HWFP.

NMED's Public Notice and Fact Sheet mischaracterize (1) the context in which the TWBIR was submitted in WIPP's permit application; (2) the representations that the Permittees made about the TWBIR; and (3) NMED's own understanding of the TWBIR as reflected in the Administrative Record for the 1999 permit proceedings (hereinafter referred to as the "Permit Administrative Record"). As discussed below, from 1994 through the issuance of the permit in October 1999, NMED was well aware of and understood that the main purpose of the TWBIR was to provide information necessary to satisfy U.S. EPA's disposal regulations in 40 C.F.R. Part 191. NMED also knew that the various TWBIR revisions contained the information available at the time and that the TWBIR was an evolving document that would be periodically updated as more information became available, with updates occurring after the WIPP's RCRA permit was issued, such as those DOE prepares for its recertification applications. More importantly, NMED knew that the TWBIR contained limited information that would satisfy only in part the requirements of 40 C.F.R. § 270.14(b)(2), and that the WIPP Waste Analysis Plan, and not the TWBIR, was the process by which the additional information needed to satisfy section 270.14(b)(2) would be provided. Given that the Permit Administrative Record shows that the

NMED was well of aware of these facts during the permit proceedings, if it had concerns regarding the information in the TWBIR, or any future updates to the TWBIR, NMED was under an affirmative obligation to raise such concerns during the permit proceedings. (20.4.1.901.E.6 NMAC.) “Applicants are charged with the burden of proving that the permit application should be granted and a HWA permit issued. NMED has the burden of proving that the conditions it proposes in the Proposed Final Permit are justified. After establishing a *prima facie* case, any person opposed to the Permit, or to any imposed condition therein, has the burden of going forward with any adverse evidence proving that the Permit should not be granted.” (Hearing Officer Report, Conclusion 6; *see also* 20.1.4.400.A(1) NMAC.)

During the permit application process, the Permittees provided NMED with accurate information concerning the inventory that had, at that time, been identified for possible disposal at the WIPP facility. The Permit Administrative Record reveals the context in which inventory information was submitted and the representations the Permittees made about the TWBIR. Between 1994 and October 1999, the Permittees submitted several revisions of WIPP's permit application to the NMED. During this time, they also had meetings with NMED staff and submitted letters to NMED related to the permit application. Concurrent with development of the permit application, the Permittees prepared the WIPP's PA and CCA to satisfy U.S. EPA's radioactive waste disposal regulations in 40 C.F.R. Part 191. As addressed above, the TWBIR was developed to support the PA and CCA. Nonetheless, it was provided to NMED during the permit application process to provide general information on the waste to be received at WIPP. The TWBIR described generally the TRU waste stored at various DOE sites around the country.

Revision 0 of the TWBIR included numerous passages revealing the tentative and uncertain nature of some of the TRU waste inventory information:



Additionally, there is a high uncertainty in and a current lack of data on wastes produced from decontamination and decommissioning (D&D) and environmental restoration (ER) activities. Therefore, the anticipated inventory has been "scaled" to the WIPP capacity. The scaling of the inventory in future revisions of the TWBIR will be derived from the best available data and assumptions.

(Waste Isolation Pilot Plant Transuranic Waste Baseline Inventory Report, Revision 0, June 1994, CAO-94-1005, ES-1.)

Subsequent revisions of the TWBIR also contained statements regarding the tentative and uncertain nature of the inventory information. (e.g., the Waste Isolation Pilot Plant Transuranic Waste Baseline Inventory Report, Revision 2, December 1995, DOE/CAO-95-1121, p. XI, which discussed ongoing analysis and update of RH inventory that would be reported in later versions of the TWBIR.) Revision 2 of the TWBIR was provided to NMED in late December 1995. In Chapter 5 of that document, the Permittees notified NMED of other TRU waste that might be disposed of at the WIPP facility, including waste stored in some tanks at the Hanford site:

Another category of possible future TRU waste is from Hanford site. The tank wastes at Hanford can be classified as high-level wastes (HLW), transuranic (TRU) wastes, or low-level (LLW). For purposes of receipt, storage, and management, all tank wastes are managed as HLW. As the tank wastes are characterized and retrieved, those wastes classified as TRU wastes will be maintained as a separate waste stream for purposes of treatment and immobilization at Hanford and potential disposal at the Waste Isolation Pilot Project (WIPP). A very preliminary estimate of the volume of immobilized TRU tank waste from Hanford that would be potentially disposed in WIPP as the tank wastes are characterized and retrieved (if these wastes are able to be segregated), is approximately 1300 m<sup>3</sup>.

(TWBIR, Revision 2, December 1995 pp. 5-8.) Other waste streams that might be sent to WIPP, although they were not included in the TWBIR, were also described in Revision 2 of the TWBIR. (*Id.*)

The TWBIR was submitted by the Permittees to satisfy, in part, the general waste information requirements of 40 C.F.R. § 270.14(b)(2), which requires applicants to provide

chemical and physical analyses of the wastes to be handled at the facility. (20.4.1.900 NMAC, incorporating 40 C.F.R. § 270.14(b)(2).) The Permittees also submitted actual chemical analyses from 930 drums of TRU waste at the DOE's Rocky Flats Environmental Technology Site (RFETS) and the Idaho National Engineering and Environmental Laboratory (INEEL). Various permit application revisions, and the associated correspondence between the Permittees and NMED clearly show (1) the context in which the TWBIR information was submitted as part of the permit application, (2) the representations that the Permittees made about the TWBIR, and (3) NMED's understanding of the inherent limitations of the TWBIR information - especially NMED's recognition that the TWBIR would undergo future updates as more information became available and as new wastes streams were generated.

The Permit Administrative Record shows that NMED recognized that the TWBIR only provided general information about the TRU waste that might be accepted at WIPP. In May 1995, the Permittees submitted Revision 5 of the WIPP permit application to the NMED. Chapter C of Revision 5 included a general description of the TRU wastes that WIPP was expected to receive, and included summary information from the TWBIR in the form of tables. After reviewing Revision 5, NMED provided written comments on the application and specifically noted that the information from the TWBIR summarized in the application was not sufficient to satisfy 40 C.F.R. § 270.14(b)(2) and was incomplete. (Letter from B. Hoditschek of NMED to G. Dials of DOE, November 2, 1995, at p.15; Comment 11; at p. 34; Comment 106.) In response to NMED's comments on Revision 5, the Permittees emphasized that the mechanisms in the WAP (e.g., radiography) would be used to provide information about the waste because the TWBIR did not provide such information. (Letter from M. McFadden of DOE to B. Garcia of NMED, December 20, 1995, pp.13-14; Comment 11.) The Permittees'

response also made clear that the TWBIR represented the best available information at the time and would be revised in the future as more information became available. (*Id.* at p. 66; Comment 106.)

In the Public Notice and Fact Sheet for the proposed modification, NMED makes several references to the one-page letter of December 28, 1995, by which DOE transmitted Revision 2 of the TWBIR. However, nowhere in its Notice, Fact Sheet or Modification Administrative Record does NMED acknowledge the numerous communications following that transmittal, none of which referred to, or in any way relied upon, the language in the transmittal letter. On the contrary, numerous later communications clearly indicate (1) the context in which the TWBIR information was presented in the permit application, (2) the representations the Permittees made about the TWBIR information, and (3) NMED's final determination as to use of the TWBIR information to satisfy 40 C.F.R. § 270.14(b)(2).

The Permit Administrative Record shows not only that NMED understood that the TWBIR only provided general information about waste that would be sent to WIPP, but also that NMED recognized that the TWBIR would be periodically updated after permit issuance. Moreover, the Permit Administrative Record shows that NMED recognized and approved of the WAP process as the methodology by which waste is determined to be acceptable for disposal at WIPP, and did not view the information in the TWBIR as sufficient to satisfy section 270.14(b)(2).

NMED's attempt to support its proposed modification with statements from the December 28, 1995, transmittal letter (which it did not refer to or rely on in the Permit Administrative Record) rewrites the record of the 1999 permit process and misrepresents the positions NMED took in that process. NMED cannot rely on these statements after participating

in an administrative process in which NMED took the position that the WAP process, not the TWBIR, was the sole method of determining waste acceptability. In March 1996, NMED issued a notice of deficiency (NOD) to Revision 5.2 of the permit application. NMED's NOD stated that the waste description information in the application was too general. (Letter from B. Garcia of NMED to G. Dials and J. Epstein of WIPP, March 14, 1996, p. NOD-10, Comment 5.) NMED also requested that the Permittees revise Appendix C1 of the permit application, which contains the compatibility analysis. (*Id.* at NOD-23, Comment 2). In response, the Permittees stressed to NMED the limitations of the TWBIR and emphasized that the WAP, not the TWBIR information, would be used to determine what waste would be acceptable for WIPP disposal.

The Permittees' response to the NOD stated:

Table C-2 includes a breakdown of the Waste Summary Category Groups into waste streams and the EPA hazardous waste codes associated with those waste streams. This information is extracted from the WIPP Transuranic Waste Baseline Inventory Report (Rev. 1). **The [TWBIR] is a projected summary of the waste at the generator/storage sites, and all waste will be characterized to the requirements of the WAP before it is sent to the WIPP for disposal.** At this time, the [TWBIR], and this Table C-2, are all of the information available linking Waste Summary Category Groups to EPA hazardous waste codes. A reference to Table C-2 has been added into the discussion on the Summary Category Groups.

The information in Table C-2 was taken from the [TWBIR] which was not based on waste characterization information. **Waste characterization activities will be conducted independent of the information contained in the [TWBIR].** When characterization of a waste stream is complete, the waste stream will be presented for approval to the WIPP on a Waste Stream Profile Form.... **Approval of a waste stream for disposal at the WIPP facility will be based solely on the information supplied on and with the Waste Stream Profile Form, not on the information contained in the [TWBIR].**

(Permittees' Response to NMED's NOD, delivered to B. Garcia of NMED, April 12, 1996, p. 19, response to Chapter C Specific Comments, Comment 5, and p. 49, response to Comment 2. (emphasis added).)

Along with the responses to NMED's Notice of Deficiency, the Permittees submitted Revision 6 of the permit application. This revision formed the basis of NMED's draft permit. Revision 6 reiterated that the WAP, not the TWBIR, would be used to determine what waste was eligible for WIPP disposal. The Revision stated:

**Waste stream information has been provided by the generator/storage sites and is documented in the WIPP Transuranic Baseline Inventory Report (WTWBIR) (see Table C-2). The information provided by the generator/storage sites in the [TWBIR] is not the result of waste characterization. It is an estimate of waste stream constituents. Therefore, one [TWBIR] waste stream may relate to numerous waste streams for the purpose of waste characterization. The [TWBIR] information was compiled in order to estimate waste volumes and properties for long-term performance assessment. All waste characterization activities must still be conducted and each waste stream submitted to the WIPP facility on a Waste Stream Profile Form for approval. Waste stream descriptions will be finalized over the course of waste characterization at the sites.**

(WIPP RCRA Part B Permit Application, Revision 6, April 12, 1996, DOE/WIPP 91-005, Chapter C, Waste Analysis Plan, p. C-8 (emphasis added).)

Revision 6 of the permit application emphasizes that a waste stream described in the TWBIR can relate to numerous waste streams for purposes of waste characterization. This is in direct contradiction to NMED's proposed modification that contends that all waste streams sent to WIPP would be "directly traceable to the TWBIR."

In May 1998, NMED issued the first draft permit for WIPP, and in November issued a revised draft of the HWFP. In February and March 1999, NMED's hearing officer conducted a public hearing on the revised draft permit. During this hearing, Ms. Constance Marie Walker, a witness for NMED, testified that the TWBIR-related information in the application did not satisfy 40 C.F.R. § 270.14(b)(2) and that the WAP established the process by which the information needed to satisfy this provision would be collected and confirmed. Ms. Walker testified:

Q. If you could continue with your testimony.

A. 20 NMAC 4.1.900, incorporating 40 CFR 270.14(b)(2), requires that a permit application for a hazardous waste management facility such as WIPP contain, and this a quote which was just handed out: "chemical and physical analysis of the hazardous waste and hazardous debris to be handled at the facility. At a minimum, these analyses shall contain all the information which must be known to treat, store or dispose of the wastes properly in accordance with Part 264 of this chapter." This statement indicates that the chemical and physical analysis of waste is to be included in the permit application. Typically, land disposal facilities such as WIPP include some detailed representative chemical and physical analyses in the permit applications, and this may be provided by the generator sites. . . . In addition, 20 NMAC 4.1.900, incorporating 270.14(b)(3) requires that a permit application for hazardous facility such as WIPP contain a copy of the waste analysis plan. At the waste disposal facilities such as WIPP this plan usually includes, just in general terms, enough activities to ensure that that waste is characterized, and there are several components to that waste analysis plan.

But additionally, as required in 264.13(a)(4), pertinent to offsite disposal facilities, the Permittees must inspect and, as necessary, analyze each hazardous waste movement received at the facility to determine whether that waste matches what the generator sites have told them it is. This type of analysis is called "confirmatory analysis" or "fingerprint analysis" and the waste analysis plan should include provisions for fingerprint analysis.

Q. Did the permit application for WIPP include this information?

A. No, not directly. The permit application did not include provision for WIPP site fingerprint analysis onsite and included only Table C-2 and some discussion in the text regarding the general waste information. **However, the permit application did include a detailed process by which the required, detailed, representative chemical and physical analysis would be attained, and this process, as described in the waste analysis plan, also included activities to check the waste once the initial waste characterization was achieved, which is somewhat analogous to fingerprint analysis—or is analogous. Take away the word 'somewhat.'**

Q. And how would the Permittees acquire this information?

A. **The Permittees require their generator storage sites to acquire this information and to provide it to them and require them to follow the processes specifically in the waste analysis plan.**

(Testimony of NMED Witness C. Walker, March 19, 1999, pp. 2717–19 (emphasis added).)

Ms. Walker also served as NMED's technical expert to assist NMED in responding to public comments on the May 1998 draft of the permit. In written responses to the public

comments, the NMED reiterated the primacy of the WAP process as the mechanism to determine the acceptability of waste for disposal at WIPP in lieu of case-by-case permit modifications:

The permit has been revised to remove the condition requiring permit modification for each generator/storage site because NMED has determined that the WAP process, conditioned upon approval of the audit requirement, is sufficient to meet the requirements of 20 NMAC 4.1.500 (incorporating 40 CFR § 264.13). NMED shall make the audit report available to the public, and the public may provide written comments to NMED.

(Summary of May 15, 1998 Draft Permit Public Comments and Responses to Comments by NMED, Module II.C, NMED response to comment N-46, reviewed by C. Walker.)

NMED also submitted written testimony that was consistent with Walker's testimony and that demonstrated that NMED understood that the information gained from processes set forth in the WAP, and not information in the TWBIR, would be the information used to determine which waste would be acceptable for disposal at WIPP. In its direct written testimony regarding section 270.14(b)(2), NMED stated:

NMED regulations at 20 NMAC 4.1.900 (incorporating 40 CFR § 270.14(b)(2)) requires a permit application to contain:

"Chemical and physical analyses of the hazardous waste and hazardous debris to be handled at the facility. At a minimum, these analyses shall contain all the information which must be known to treat, store, dispose of the wastes properly in accordance with Part 264 of this chapter."

In addition, 20 NMAC 4.1.900 (incorporating 40 CFR § 270.14(b)(3)) requires a permit application to contain "[a] copy of the waste analysis plan required by § 264.13 (b) and, if applicable §264.13(c)."

Revision 6.4 of the Application did not contain a detailed and representative chemical and physical analysis of waste streams to be disposed at WIPP. Typically, proposed Subpart X facilities, such as WIPP, submit applications containing detailed chemical and physical analyses provided by generator sites, as well as detailed waste analyses plans for implementation by the facilities to ensure that the generator sites properly characterized the wastes. In addition, the permit applications typically contain provisions for periodic waste analyses by the facilities to confirm the waste characterization by generator sites. These analyses, called on-site confirmatory or fingerprint analyses, are required to determine the accuracy of hazardous waste manifests. See 40 CFR 264.13(a)(4). However, the Applicants proposed no such analyses, arguing that multiple sampling of

waste containers raised radiological health concerns. In the place of fingerprint analyses, the Applicants proposed to “review” waste characterization information prepared by the generator sites.

While the regulations indicate that permit applications must include chemical and physical analyses, they also state that the disposal facility must obtain these analyses prior to waste disposal. See 40 CFR 264.13(a). **In recognition of the unique features of WIPP and the inclusion of general waste information in the permit application (Table C-2, Revision 6.0 of the permit application), NMED concluded that the provision of detailed and representative chemical and physical analyses could be obtained through implementation of the WAP at generator Sites, as confirmed by audits conducted by the Applicants with NMED oversight. As a result, the only method to ensure compliance with the WAP is to audit the generator Sites.** Similarly, NMED must be able to approve the audits, because such approval is the only way for NMED to ensure that WIPP is enforcing the WAP at the generator sites.

(New Mexico Environment Department's Direct Testimony Regarding Regulatory Process and Imposed Conditions, 1999, Audit Requirement, II. Regulatory Analysis, pp. 1 - 2 (emphasis added).)

The hearing officer recognized not only the inherent limitations of the information in the TWBIR, but also that the processes required by the WAP would provide the information needed to determine what wastes would be acceptable for disposal at WIPP. In a proposed finding, the hearing officer stated:

Permit Condition II.C.2 is a condition necessary to achieve compliance with 20 NMAC 4.1.900 (incorporating 40 C.F.R. § 270.14(b)(2) and § 270.32(b)(1)) in order to address permit application deficiencies; to demonstrate compliance with the WAP; and to obtain all the information which must be known to manage, store and dispose TRU mixed waste at WIPP in accordance with 40 C.F.R. Part 264.20 NMAC 4.1.901.A.8 and NMSA 1978 §74-4-4.2(C) (Repl. Pamp. 1993).

(Report of the Hearing Officer, Conclusions of Law, p. 91, Conclusion 12.) The Secretary of NMED adopted this finding without change in his order that resulted in the issuance of a permit to WIPP. (Order of the Secretary of the New Mexico Environment Department “In the Matter of the Final Permit Issued to the United States Department of Energy and Westinghouse Electric Company Waste Isolation Division (‘Westinghouse’) for a Hazardous Waste Permit for the



Waste Isolation Pilot Plant, US EPA No. NM 4890139088,” October 27, 1999) (“Final Order”). NMED is judicially estopped from changing its oral and written testimony and collaterally estopped from challenging the hearing officer’s finding regarding section 270.14(b)(2), which NMED adopted. *See Gallegos v. Pueblo of Tesuque*, 2002-NMSC-012, 132 N.M. 207; *Shovelin v. Central New Mexico Electric Cooperative*, 115 N.M. 293, 850 P.2d 996 (1993); *In the Matter of the Application of GTE v. Corporation Commission*, 98 N.M. 749, 758, 652 P.2d 1200, \_\_\_\_ (1982).

The WIPP HWFP was issued in October 1999 after an extensive administrative proceeding, including the submission of numerous revised permit applications, the issuance of two draft permits by NMED, extensive public comment, a full public hearing and submission of post-hearing documents. The Permittees were clear that the TWBIR was an estimate of waste stream constituents, and that they would be updating the inventory based on the availability of additional waste information. NMED was well aware that the inventory was an estimate and it would be updated periodically. Moreover, nothing in the documents in the Permit Administrative Record indicates that NMED relied on TWBIR information in the manner it now contends it did in the Fact Sheet. NMED’s modification states “NMED has reason to believe that the inventory of waste may be expanded to include waste streams that were not considered eligible for disposal at WIPP at the time the WIPP permit application was submitted, such as waste from HLW tanks at the Hanford, INEEL, and the Savannah River Site that DOE may declare as waste incidental to reprocessing.” (Fact Sheet, p. 4.) Despite having the burden of proof on this modification, NMED provides no evidence that this is somehow new information, or that NMED ever believed until late 2003 that the TWBIR inventory was relevant to waste acceptance. The evidence is to the contrary. If the waste streams described in the Fact Sheet

meet the requirements of the WIPP LWA, the HWFP, the WAP, and the TSDF-WAC, they are acceptable for disposal at WIPP. NMED provides no basis for its assertion that such wastes would have been ineligible for disposal at WIPP. RCRA and the HWA cannot prohibit the disposal of these waste streams at WIPP if they meet the requirements of the WAP. In the Fact Sheet, NMED contends that these “new” waste streams are new information. The Permit Administrative Record shows that it is not new information. In the Fact Sheet, NMED contends that these “new” waste streams have not been evaluated for compatibility or other characteristics and, therefore, may constitute a danger to the public health or environment. Careful review of the Permit Administrative Record shows NMED’s concerns are unwarranted and their statements regarding the 1999 process and the importance of the TWBIR are inaccurate. Their own witness, Ms. Walker, an expert who worked for years on the WIPP permit and who testified on numerous technical issues for the NMED, stated that NMED was aware and agreed that the TWBIR would not satisfy the requirements of 40 C.F.R. § 270.14(b)(2). The general information from the TWBIR contained in the permit application and the specific compatibility information in Appendix C1 of the permit application were combined with the requirements in the WAP to satisfy not only section 270.14(b)(2), but also section 264.13. This procedure for determining waste acceptability was developed after the December 28, 1995, letter transmitting Revision 2 of the TWBIR to NMED. Revision 2 of the TWBIR pointed out the DOE might dispose of waste not on the inventory at WIPP, including the Hanford tank waste that the NMED now contends is new information. (TWBIR Rev. 2; December 1995, pp. 5-8.)

In the evolution of the WIPP draft permit, and during the permit hearing, NMED made it clear to the Permittees, interested parties, and the hearing officer that it would rely on use of the WAP to determine the acceptability of waste for disposal at WIPP, not on the TWBIR

information. The Permit Administrative Record does not support NMED's contention that the HWFP should be revised because of revisions to the TWBIR. NMED proposes to override a lengthy permit development process, specific testimony of its witnesses, and a conclusion of law it adopted because NMED wants to prohibit certain wastes from WIPP on the basis of the waste's purported radiological classification, not its hazardous characteristics.

NMED's Fact Sheet states that the Permittees used the TWBIR in the Permit Application to weight the headspace gas sampling and analyses data for performance modeling (i.e., emissions of volatile organic compounds -- VOCs). On the contrary, the Permittees used the TWBIR to identify the VOCs that should be monitored at the facility in order to comply with the environmental performance standards established pursuant to 40 C.F.R. § 264.601. The weighting of the VOC data was done consistent with EPA guidance for identifying risks to human health and the environment. (Permit Application, Revision 6, Appendix D13.) This estimate of potential VOC emissions was necessary because the WIPP had not yet received any TRU waste for disposal. Recognizing the limitations of the VOC emissions estimates in the permit application, the final permit included conditions requiring the Permittees to actively monitor for VOCs in the repository. Since the opening of WIPP, the VOC monitoring has shown that the emissions are significantly lower than the estimates contained in the application.

NMED's Fact Sheet also claims that because the TWBIR has been updated with new information, the VOC emissions estimates contained in the April 1996 Permit Application must be revisited. The notion that revisions to the TWBIR somehow trigger a reopening of the HWFP is not supported by the HWA, RCRA regulations, the Permit Administrative Record, or WIPP VOC monitoring data. As shown above, NMED was well aware as early as 1995 that the TWBIR information would be updated in the future and at no time asserted that future updates to

the TWBIR would require that the VOC emissions estimates in the Permit Application be revisited. Furthermore, since the beginning of disposal operations in 1999, NMED has received annual VOC monitoring reports in accordance with conditions of the HWFP. (HWFP Module IV, Geologic Repository Disposal, Section IV.F.2.b., Reporting Requirements.) These reports provide information demonstrating that WIPP meets the environmental performance standards established pursuant to 40 C.F.R. § 264.601.

NMED should not be allowed to revise the permit history or alter its position on how compliance with 40 C.F.R. § 270.14(b)(2) would be demonstrated. NMED has not accurately portrayed the Permit Administrative Record, and has failed to provide substantial evidence to support its proposed modification.

**IV. THE PERMIT MODIFICATION IS NOT AUTHORIZED PURSUANT TO 40 C.F.R. § 270.41 OR OTHER APPLICABLE LAW.**

**(a) The information that NMED has identified as the basis for the permit modification is not the type of information that would require or authorize an agency-initiated modification under section 270.41.**

NMED may only modify a hazardous waste permit on its own initiative based on the limited circumstances set forth in the HWA or in 40 C.F.R. § 270.41. The Secretary may modify a permit only upon a showing that he has cause for modification as set forth in 40 C.F.R. Part 270 and the HWA, 20.4.1.901.B(1) NMAC. The HWA, §74-4-4.2.D, lists specific circumstances that allow the Secretary to modify a permit for cause, none of which apply to the NMED's proposed modification. Like the New Mexico HWA, 40 C.F.R. § 270.41 allows NMED to modify permits on its own initiative only if the Department can show that one or more of the causes for modification listed in the section exists.

When the [Secretary] receives any information (for example, inspects the facility, receives information submitted by the permittee as required in the permit (see § 270.30), receives a request for revocation and reissuance under § 124.5 or conducts a review of the

permit file), he or she may determine whether one or more of the causes listed in paragraphs (a) and (b) of this section for modification, or revocation and reissuance or both exist. If cause exists, the [Secretary] may modify or revoke and reissue the permit accordingly. . . . **If cause does not exist under this section, the [Secretary] shall not modify or revoke and reissue the permit, except on request of the permittee.**

(40 C.F.R. § 270.41)

The information that NMED has identified in the Fact Sheet and the Modification Administrative Record as the basis for the proposed modification is not the type of information that allows an agency-initiated modification. Section 270.41 lists types of information that must exist before a permit can be modified by the agency. The information must be derived directly from the facility, from the management of the facility or from the terms and conditions of the permit.

Unlike the types of information listed in section 270.41, NMED relies on information that is not directly related to WIPP or any of its permit conditions. The information listed in the Fact Sheet was not submitted by the Permittees pursuant to the HWFP, is not the result of an inspection of the facility or a review of the permit file and was not obtained from a request for revocation or re-issuance of the HWFP. Instead, the information upon which NMED is relying is general information about DOE's radioactive waste management practices, information concerning possible decisions as to radioactive waste management at particular sites (INEEL and Hanford), or court decisions that do not involve issues concerning the management of hazardous wastes – all of which is irrelevant to the State's regulation of WIPP under RCRA and the HWA. The information relates only to the radiological properties of the waste, which are outside the NMED's regulatory authority and are not relevant to the terms and conditions of the HWFP.

The Fact Sheet does not contain new information relevant to the management and disposal of hazardous waste at WIPP. Nor does it contain information relevant to the hazardous

wastes regulated by the HWFP. Because the information listed in the Fact Sheet is not directly related to the WIPP HWFP or the management and disposal of hazardous waste at WIPP, it does not trigger section 270.41. The revised inventory currently under development and referenced in the Fact Sheet [Fact Sheet, p. 4] will be used to satisfy the requirements of 40 C.F.R. § 194.15 for recertification by the EPA and represents DOE's current estimate of waste properties that are important to WIPP compliance with EPA's regulations. As always, any waste on the updated inventory must meet the applicable disposal requirements of both EPA and NMED (as contained in the existing HWFP, including the WAP and TSDF-WAC) before it can be placed in the repository.

The provisions of section 270.41 allow NMED to modify a permit on its own initiative under very limited circumstances. Allowing NMED to rely on the type of information set forth in the Fact Sheet undermines the purpose of both section 270.41 and the protections offered by a permit. (See 40 C.F.R. § 270.4(a) "compliance with a RCRA permit during its term constitutes compliance, for purposes of enforcement, with subtitle C of RCRA.") The specific limiting language of section 270.41, which states that "[i]f cause does not exist under this section, the [Secretary] shall not modify or revoke and reissue the permit, except at the request of the permittee" (emphasis added), must be given effect.

**(b) The proposed permit modification is outside the State's authority over WIPP.**

It is apparent from the type of information upon which the permit modification is based that NMED seeks, by means of its proposed modification, to regulate waste based on its radiological classification, which is beyond NMED's authority. EPA has the sole authority, through the certification and re-certification processes established by the WIPP Land Withdrawal Act, to determine if the WIPP facility complies with the EPA's radioactive waste disposal

standards in 40 C.F.R. Part 191, Subparts B and C. While NMED has the authority to regulate the hazardous components of the waste, it may not regulate the radioactive component.

The proposed permit modification is an attempt by the State to prevent WIPP from disposing of waste that it believes is high-level waste using its revisionist history of the permit process to support its inaccurate claim that such wastes must be traceable to the original inventory report. The focus of the information supporting the modification is the classification of the waste based on its radiological constituents, not its hazardous constituents. Each of the events discussed in the Fact Sheet under the heading "Events Contemporaneous With or After Permit Issuance" deal with the classification of radioactive waste and do not address the hazardous components of the waste. NMED's administrative record for the proposed modification contains documents that evidence the actual intent behind the proposed modification, as do documents submitted by the Permittees with these comments.

In order for waste to be classified as TRU waste, it must meet the definition contained in the WIPP Land Withdrawal Act, which specifically excludes high-level radioactive waste. (Pub. L. No. 102-579, Section 2(18).) Once waste is classified as TRU waste, it must be characterized in accordance with the WAP in order to determine whether it can be managed at WIPP. (Permit Conditions IV.B.1.a. and IV.B.2.b.(1).) If it is determined to be TRU mixed waste, it must be managed in compliance with the other provisions of the HWFP. However, the State's effort to regulate the waste disposed of at WIPP based on its radiological properties is (1) contrary to the Atomic Energy Act (AEA), 42 U.S.C. § 2011 *et seq.*; (2) disregards the Supremacy Clause of the United States Constitution VI, cl.2; and (3) exceeds the waiver of sovereign immunity contained in RCRA because the modification attempts to regulate materials outside the statutory definition of solid waste, which excludes "source, special nuclear and byproduct material)." (42 U.S.C.

§ 6903(27)); *see also United States v. New Mexico*, No. CIV 99-1280 M (Memorandum Opinion and Order of July 24, 2000, at 3, 4, 9); *State ex rel. Madrid v. Richardson*, 39 F. Supp. 2d 48, 53-54 (D.Ct. D.C. 1999). The exclusion of waste from WIPP on an arbitrary basis would violate the Commerce Clause of the Constitution and may violate other federal statutory and regulatory provisions.

The proposed modification also exceeds NMED's authority as to TRU non-mixed waste. As this non-mixed waste does not contain hazardous constituents, it is not subject to RCRA or the HWA. The only obligation the permit imposes on TRU non-mixed waste is that it be "characterized in accordance with the requirements of the WAP" if it is disposed of in an underground hazardous waste disposal unit of the repository. (Permit Condition IV.B.2.b.(1)) The purpose of this condition was to establish the WAP as the procedure for making hazardous waste determinations for TRU non-mixed waste under 40 C.F.R. § 262.11 (20.4.1.300 NMAC, incorporating 40 C.F.R. § 262.11). Section 262.11 sets out requirements for demonstrating that a waste is not a hazardous waste. In the context of WIPP, permit condition IV.B.2.b.(1) establishes the WAP as the process for determining whether transuranic waste is TRU non-mixed in compliance with section 262.11. Under the proposed modification, NMED could exclude TRU non-mixed waste from the repository that was characterized in accordance with the WAP if the non-mixed waste is not in the TWBIR. Neither RCRA nor the HWA gives NMED the authority to impose any conditions on the disposal of non-mixed waste beyond those required by section 262.11 as embodied in permit condition IV.B.2.b.(1).

In addition, NMED's proposal is inconsistent with the Energy and Water Development Appropriations Act, 2004, Pub. L. No.108-137 (December 1, 2003). Section 311 of this statute states:



(a) The Secretary of Energy is directed to file a permit modification to the Waste Analysis Plan (WAP) and associated provisions contained in the Hazardous Waste Facility Permit for the Waste Isolation Pilot Plant (WIPP). For purposes of determining compliance of the modifications to the WAP with the hazardous waste analysis requirements of the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.), or other applicable laws waste confirmation for all waste received for storage and disposal shall be limited to: (1) confirmation that the waste contains no ignitable, corrosive, or reactive waste through the use of either radiography or visual examination of a statistically representative subpopulation of the waste; and (2) review of the Waste Stream Profile Form to verify that the waste contains no ignitable, corrosive, or reactive waste and that assigned Environmental Protection Agency hazardous waste numbers are allowed for storage and disposal by the WIPP Hazardous Waste Facility Permit.

(b) Compliance with the disposal room performance standards of the WAP shall be demonstrated exclusively by monitoring airborne volatile organic compounds in the underground disposal rooms in which waste has been emplaced until panel closure.

Section 311(a)(2) provides that the WSPF is to be used to satisfy the waste analysis requirements of RCRA and the HWA with regard to confirmation that the waste contains no ignitable, corrosive, or reactive waste and that the EPA hazardous waste numbers assigned to the waste are only those allowed by the HWFP.<sup>1</sup> Waste so confirmed is acceptable for disposal at the WIPP under Section 311. NMED's modification changes the current WSPF process by adding the condition of an NMED review and a permit modification to obtain approval of a waste stream not listed in the TWBIR that would otherwise be acceptable to WIPP. (Fact Sheet, p. 4.) To the extent the proposed permit modification requires that a prospective waste stream be "directly traceable" to Revision 2 of the TWBIR in order to be eligible for disposal at WIPP, the requirements are invalid and unenforceable under section 311.

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<sup>1</sup> As required by Section 311, Permittees submitted a proposed modification to NMED that would revise the HWFP in the manner section 311 requires. (Request for Class 3 permit modification to the Hazardous Waste Facility Permit No. NM 4890139088-TSDF, Implementing Section 311 of Pub. L. No. 108-137, January 9, 2004.)

**V. THE PERMIT MODIFICATION DOES NOT MEET THE “FOR CAUSE” REQUIREMENT OF SECTION 270.41.**

NMED’s authority to modify the HWFP is specifically limited by section 270.41, which states that, if cause does not exist under the specific provisions of the section, permits shall not be modified or revoked and reissued, except on request of the permittee. Based on the language of section 270.41, NMED may only modify the HWFP on its own initiative based on one of the causes listed in the regulation. The listed causes for modification under paragraph (a) of section 270.41 are (1) “material and substantial alterations or additions to the permitted facility or activity;” (2) information received by the Secretary that was not available at the time of permit issuance and that “would have justified the application of different permit conditions at the time of issuance;” (3) new statutory requirements or regulations; (4) existence of good cause to modify compliance schedules; and (5) a need to modify a permit for land disposal to assure that the facility continues to be in compliance. Paragraph (b) allows the Secretary to modify or revoke and reissue a permit if there is cause for termination of the permit or if the permit is going to be transferred. If NMED cannot show that cause exists under section 270.41, it is prohibited from modifying the permit on its own initiative.

The NMED alleges that it has received information that justifies the proposed modification. (Public Notice, p. 2.) In order to modify the HWFP based on this information, NMED must show (1) “the information was not available at the time of permit issuance (other than revised regulations, guidance or test methods)” and (2) the information “would have justified the application of different permit conditions at the time of issuance.” (40 C.F.R. § 270.41(a)(2)) NMED has not met the “for cause” requirements and therefore may not modify the HWFP as proposed.

**a) NMED has not shown that the information that serves as the basis for its permit modification “was not available at the time of the permit issuance.”**

The “for cause” requirement under section 270.41(a)(2) requires a showing that the information upon which the permit modification is being based “was not available at the time of the permit issuance.” NMED has not met the requirement of section 270.41(a)(2). The fact that there are waste streams that may be eligible for disposal that were not included in the TWBIR is not new information. In the permit application the Permittees provided NMED with general information about wastes not in the TWBIR that had already been identified for possible disposal at the WIPP facility. For example, Revision 2 of the TWBIR includes specific information on the Hanford tank waste. (Revision 2, p. 5-8.) Numerous pieces of correspondence in the record discuss the changing nature of the TWBIR. As discussed above, the Public Notice and the Fact Sheet mischaracterize both the Permittees’ statements concerning the TWBIR and its intended use. At the time the inventory information in the TWBIR was provided to NMED, the Permittees stated that it was based on information available at that time and that it would be updated periodically as new information became available. NMED was and is well aware that additional waste streams that were not identified in the TWBIR have already been approved for disposal pursuant to the HWFP. NMED also is, and has been, aware that the inventory is updated periodically, and that the TWBIR was never intended to be a final and comprehensive list of the waste streams that would eventually be disposed of at WIPP, as the Permit Administrative Record makes clear.

None of the information identified by NMED in support of its modification to prohibit wastes that are not directly traceable to the TWBIR is information that was not available at the time of permit issuance. Therefore, NMED does not have the authority to rely on the information set forth in the Fact Sheet or the Modification Administrative Record to reopen the

HWFP by proposing new permit conditions. *See In Re Rohm and Haas Company*, 9 EAD 499 (EAB 2000); *In Re GMC Delco Remy*, 7 EAB 136 (EAB 1997); *In Re General Electric*, 4 EAD 615 (EAB 1993). Because NMED knew about anticipated revisions to the TWBIR and had information about wastes not in the TWBIR that could be sent to WIPP for disposal in the future, the information set forth in the Fact Sheet is not “information...not available at the time of permit issuance.” *See also Hill v. Burnworth*, 85 N.M. 615, 514 P.2d 1312 (Ct. App. 1973).

**(b) NMED has not shown that, if the information had been available at the time of permit issuance, it “would have justified the application of different permit conditions at the time of issuance.”**

Even if NMED could show that the information was not available at the time the permit was issued, it cannot show that this information “would have justified the application of different permit conditions at the time of issuance.” (40 C.F.R. § 270.41(a)(2)) The fact that the TWBIR did not include all of the waste DOE might send to WIPP would not have justified the application of different permit conditions at the time of permit issuance.<sup>2</sup> As the Permit Administrative Record shows, the acceptability of waste for disposal at WIPP is determined solely by the conditions in the HWFP and the requirements of the WAP and TSDF-WAC, not by information in the TWBIR. Additionally, NMED, through the audit program set forth in the HWFP, has the opportunity to ensure that conditions in the permit, WAP, and TSDF-WAC are adhered to in determining the acceptability of mixed waste streams for disposal at WIPP. Moreover, NMED’s hearing officer concluded that the WAP and audit requirements of the HWFP determine waste acceptability, not the TWBIR. (Report of the Hearing Officer, Conclusions of Law, p. 91, Conclusion 12.)

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<sup>2</sup> NMED has the burden of proof for this modification and it would have had the burden of proof for a different condition at the time of issuance. (20.1.4.400.A(1) NMAC). NMED also has the burden of proof for a challenged condition of a permit or license which the NMED has proposed.

The fact that there may be additional waste streams would not have justified a prohibition on the disposal of waste streams that are not directly traceable to the TWBIR. In fact, the permit anticipates that additional waste streams would be identified by allowing the disposal of newly generated waste. The permit does not include a list of "approved" waste streams because the permit is performance-based, not inventory-based. A process for analysis and approval of all waste streams, including those that were not identified in the TWBIR, was established in the HWFP when it was issued. The HWFP also provides a mechanism to determine compatibility of additional waste streams. Additional waste streams are required to meet the waste acceptance criteria and the characterization requirements of the WAP before being accepted for disposal. The current HWFP process for determining waste acceptability and compatibility works effectively for newly identified waste streams, as evidenced by the Permittees' June 2002 permit modification request to add U134 as a new EPA hazardous waste number.<sup>3</sup>

The permit specifically states that mixed TRU wastes that meet the requirements of the WAC are acceptable at WIPP. Any waste that meets the WAP is, by definition, compatible with the waste already in the repository, with packaging materials, with backfill, and with panel closure materials. (HWFP Module II, Condition II.C.4.) Conditions already in the HWFP address the concerns raised by NMED; the imposition of different conditions would not have been justified at the time of permit issuance and are unnecessary.

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<sup>3</sup> The effectiveness of the process set forth in the HWFP was demonstrated recently in the case of an Idaho National Engineering and Environmental Laboratory (INEEL) waste stream that was determined to carry a listed EPA hazardous waste code not identified in Part A, which is Attachment O of the WIPP HWFP. This INEEL waste stream was the subject of a WIPP permit modification request (PMR) that sought the addition of the new EPA hazardous waste code to the HWFP. In addition to seeking the inclusion of the new EPA hazardous waste code in the HWFP, the PMR also evaluated the compatibility of the waste stream for WIPP disposal in accordance with Appendix C1 of the WIPP RCRA Part B Permit Application. (Class 2 Permit Modification Request, Add U134 as a New Hazardous Waste Number, June 27, 2002). After considering the PMR, including the compatibility evaluation, the NMED modified the HWFP to allow the WIPP to accept TRU waste bearing the added EPA hazardous waste code. (Letter from G. Lewis of NMED to I. Triay of DOE, November 25, 2002).

NMED cannot demonstrate that decisions regarding the disposal of additional waste streams cannot be made pursuant to the terms of the existing permit. Both the permit conditions and the history of operations demonstrate that a prohibition on mixed wastes that are not directly traceable to the TWBIR is not necessary to meet RCRA or HWA requirements. Such a prohibition is also not needed to protect human health and the environment and therefore would not have been justified at the time of permit issuance.

NMED also proposes to add additional permit conditions that would require additional waste streams, which have already been accepted for disposal, be approved by NMED through a permit modification process. (Fact Sheet, p. 4.) NMED proposes to add a table to the permit "that would clearly identify those waste streams that are not directly traceable to the TWBIR Revision 2 that have been approved for acceptance at WIPP, in the event of future permit modifications allowing disposal of these wastes. These approvals will be based upon completion and approval of a Waste Stream Profile Form (WSPF) by the Permittees, NMED review of the WSPF, and modification of the permit to list the approved WSPF." (*Id.*) The current permit does not include a list of "approved WSPFs" and it does not require the Permittees to submit a permit modification in order to secure NMED approval of a particular waste stream. The permit provides a mechanism, through the audit and surveillance process, for NMED to review the waste streams that have been approved by the Permittees for disposal. The purpose of the audit process is to allow NMED a mechanism for ensuring that the requirements and conditions of the permit, including the WAP, are met. If NMED determines that permit conditions are not being met, it has the authority to take the appropriate enforcement actions, including prohibiting the disposal of wastes that do not meet the requirements. The proposed permit modification requiring approval of additional waste streams by NMED is unnecessary.

During the proceedings leading to issuance of the HWFP for WIPP, NMED followed the practice it has used for other hazardous waste facility permits in New Mexico with respect to application of 40 C.F.R. § 270.14(b)(2). None of the permits for these facilities contains conditions requiring waste inventory reports to determine waste acceptability. The Part B applications for these permits included a Waste Analysis Plan. In each final permit, the permittee was restricted to receiving only hazardous waste described in an attachment that lists EPA hazardous waste codes, estimated annual throughputs of waste, and process codes. None of the other HWFP permits issued by the NMED contain or in any way use or refer to inventory reports to satisfy either section 270.14(b)(2) or section 264.13. The practice NMED followed in granting the HWFP to WIPP is consistent with EPA guidance. (Hazardous Waste Storage and Disposal in Geologic Repositories, Permit Guidance Under the Resource Conservation and Recovery Act, pp. 7-1, 7-2.) NMED has made no showing that would justify changing the manner of compliance with section 270.14(b)(2) from that contained in the WIPP HWFP and other facilities' permits. Therefore, NMED's existing practice, not a new interpretation, should apply. *See generally High Ridge Hinkle Joint Venture v. City of Albuquerque*, 119 N.M. 29, 888 P.2d 475 (Ct. App. 1994); *Moly Corp., Inc. v. State Corporation Commission*, 95 N.M. 613, 624 P.2d 1010 (1981).

NMED's technical witness at the WIPP permit hearing, Ms. Constance Walker, provided similar testimony in the Triassic Park permit hearing regarding the use of the WAP as the process for determining the acceptability of waste streams regardless of the location of the generator or a waste inventory report identifying the waste stream. In questioning on whether the proposed Triassic Park HWFP would satisfy requirements for imported waste, Ms. Walker stated:

**Q.** I think your testimony was that the waste analysis plan would--don't want to mischaracterize it, but somehow would protect the RCRA requirements at this facility regardless of the location where the waste came from?

**A.** Speaking internally within the United States, certainly.

I have no knowledge, and I am not an expert in waste being imported from outside the United States to facilities, so I would hesitate to make a judgment concerning the specific requirements, other than the fact that I can say that because the permit requires a generator, whoever that might be, to follow the waste analysis plan.

The specifics on this I cannot testify to in terms of the detail and legality of shipping across the border. I can't testify.

**Q.** But if the generator, wherever they are, satisfies the requirements of the waste analysis plan--then you would be satisfied?

**A.** From my limited perspective.

(Transcript of Hearing Proceedings for the Triassic Park Hazardous Waste Disposal Facility, pp. 857-59.)

NMED attempted to disallow a potential imported waste stream based on the origin of the waste. In the hearing officer's report for the Triassic Park Permit, the officer stated:

The Bureau's consultant on the waste analysis plan, Ms. Walker, agreed that the permit requires a "generator" to follow the waste analysis plan, whether that generator is in the U.S. or has accepted waste from outside the U.S. (TR 857-859).

I do not see the legal basis for excluding waste delivered to the facility by a U.S. "generator" in circumstances where that generator has received foreign waste, has met the requirements of the waste analysis plan, and the manifests are in order.

(Report of the Hearing Office In the Matter of the Draft Final Permit for the Triassic Disposal Facility, U.S. EPA No. NM 0001 02 2484, 97-98). This example shows that NMED's permits rely on the WAP process to identify which wastes can be managed at a particular facility; DOE does not intend to import waste from foreign generators.



The language of section 270.14(b) indicates that information provided under this section is used to satisfy “general informational requirements.” NMED’s practice under this section is to require a general description of the types of waste, including the EPA hazardous waste codes, a list of process codes, and estimates of quantities of waste that will be managed at the facility. NMED has further established the WAP as the regulatory control on waste acceptability, which establishes and satisfies RCRA and HWA requirements for determining which waste can enter the facility. There is no indication that the use of a waste inventory report with specific waste streams is required by the language of section 270.14(b), EPA guidelines, or any grounds related to danger to public health or the environment. NMED cannot meet the “for cause” requirements by attempting to establish an alternative interpretation of section 270.14(b) from that which was established in the hearing on the permit, recognized and approved by NMED’s technical consultants and the hearing officer, and which has been relied upon by the Permittees and the generator sites for several years. *See In the Matter of Application of GTE, supra.* Such an effort would be contrary to NMED’s practice and would constitute an arbitrary and capricious act. *Id.*

NMED has not provided any regulatory or other appropriate basis for prohibiting the acceptance of additional waste streams that were not identified at the time of permit issuance. Nor has NMED provided any basis for changing the method by which waste streams are currently approved. There is no evidence in the Modification Administrative Record that the current HWFP requirements are not adequate to determine the acceptability for disposal at WIPP of any waste streams that may be identified in the future. “Any agency’s action is arbitrary and capricious if it provides no rational connection between the facts found and choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand.” *See*

*Atlixco Coalition v. Maggiore*, 1998 NMCA-134, 125 N.M. 786, 965 P.2d 370 (1998); *Colonias Development Council v. Rhino*, 2003-NMCA-141.

**VI. THE PROPOSED MODIFICATION IS NOT NECESSARY TO PROTECT HUMAN HEALTH AND THE ENVIRONMENT; IS NOT SUPPORTED BY THE NEW MEXICO HAZARDOUS WASTE OR RCRA REGULATIONS; IS ARBITRARY, CAPRICIOUS, AND AN ABUSE OF DISCRETION; AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

Hazardous waste facility permits are required to include "permit conditions necessary to achieve compliance with the Act [RCRA] and regulations, including each of the applicable requirements specified in Part 264 and 266 through 268." (40 C.F.R. § 270.32) In addition, permits "shall contain terms and conditions as the Administrator or State Director determines necessary to protect human health and the environment." *Id.*; see also NMSA 74-4-4.2(C). The WIPP HWFP contains all of the applicable requirements of Parts 264 and 266 through 268 and other conditions necessary to protect human health and the environment. In particular, the HWFP contains waste acceptance criteria, a waste analysis plan and specific repository performance requirements as a miscellaneous unit. The purpose of the permit conditions and requirements is to ensure that the waste received at the WIPP facility may be managed and disposed of safely.

NMED's proposed permit modification is arbitrary and capricious. Under the present permit, the acceptance of additional waste streams for disposal is not dependant upon their being "directly traceable to the BIR." Instead, the acceptance of waste depends on its meeting the specific permit conditions in the HWFP, as well as the TSDF-WAC and the WAP requirements in the HWFP. The HWFP, WAP and TSDF-WAC set forth specific requirements that must be met prior to the acceptance of TRU waste for disposal at WIPP. Through these provisions, as outlined above, the HWFP provides a process for determining the acceptability of all waste

streams, including an evaluation of their compatibility with packaging materials, repository materials, and other TRU mixed waste. In fact, since the issuance of the HWFP, many waste streams, including some not identified in the TWBIR, have been determined to be acceptable and have been approved for disposal using the processes included in the permit. There is no basis for NMED to impose a permit condition that changes the basis for waste acceptance and that changes the method whereby additional waste streams are reviewed and accepted for disposal.

Additionally, there is no regulatory basis or precedent for basing determinations of waste acceptance on inventory reports provided as general information during the permit application process. Once the permit is issued, waste acceptance is regulated by the specific criteria in the permit, not by the general waste information provided in the application. NMED has not imposed similar permit requirements on other hazardous waste facilities in New Mexico that receive wastes from off-site sources.

## **VII. THE PERMIT MODIFICATION WILL ADVERSELY IMPACT THE CLEANUP OF THE COLD WAR'S LEGACY.**

The modification described in NMED's Fact Sheet will cause adverse and significant impacts to the DOE's clean up of contaminated sites around the nation, including the Los Alamos National Laboratory in New Mexico. Since issuance of the WIPP's HWFP in 1999, many DOE generator sites have relied upon the HWFP waste acceptability process to plan and manage the cleanup of numerous waste streams comprising tens of thousands of cubic meters of TRU waste. DOE is continuing to assess the impacts of the proposed modification on its cleanup obligations. In addition to excluding any of the wastes listed in the Fact Sheet that are determined to be transuranic waste, the proposed modification would exclude TRU waste at Los Alamos and the Savannah River site that DOE planned to send to WIPP in the next 18 months.

## **VIII. CONCLUSION**

The permit modification proposed by NMED is not supported by the administrative record and does not meet the requirements of 40 C.F.R. § 270.41. It is also not supported by any provisions of the HWA or RCRA, by applicable regulations, or by substantial evidence. It is not necessary to protect human health and the environment. NMED's proposed modification seeks to exclude waste not on the basis of its hazardous constituents but on the basis of the State's opinion as to its radiological classification. The types of radioactive waste that DOE can manage at WIPP are defined by federal law and are not subject to state authority. The current HWFP requirements and conditions address the concerns identified by NMED in the Public Notice and Fact Sheet, and ensure that only TRU mixed waste meeting the HWFP's criteria is disposed of at WIPP. NMED has not set forth any credible justification of the proposed modification. Therefore, the Permittees request that the proposed permit modification and draft permit be withdrawn.

**INDEX**  
***Exhibits for Submission to NMED With WIPP's Comments to  
the 11/26/03 Agency-Initiated Permit Modification***

	No.	Date	Description
Volume 1 of 4	1.	9/10/99	Report of the Hearing Officer In the Matter of the Final Permit Issued to the U.S. Department of Energy and Westinghouse Electric Company Waste Isolation Division for a Hazardous Waste Act Permit for the Waste Isolation Pilot Plant, USEPA No. NM4890139088
	2.	June 1994	Waste Isolation Pilot Plant Transuranic Waste Baseline Inventory Report, Revision 0, Book 1 of 2, CAO-94-1005
	3.	June 1994	Waste Isolation Pilot Plant Transuranic Waste Baseline Inventory Report, Revision 0, Book 2 of 2, CAO-94-1005
	4.	Feb. 1995	Waste Isolation Pilot Plant Transuranic Waste Baseline Inventory Report, Revision 1, Volume 1, CAO-94-1005
Volume 2 of 4	5.	Feb. 1995	Waste Isolation Pilot Plant Transuranic Waste Baseline Inventory Report, Revision 1, Volume 2, CAO-94-1005
Volume 3 of 4	6.	Feb. 1995	Waste Isolation Pilot Plant Transuranic Waste Baseline Inventory Report, Revision 1, Volume 3, CAO-94-1005
	7.	June 1996	Transuranic Waste Baseline Inventory Report, Revision 3, DOE/CAO-95-1121
	8.	11/2/95	Letter from B. Hoditschek of NMED to G. Dials of WIPP transmitting NMED comments on Revision 5 of the WIPP Part B RCRA Permit Application (Chapters A, B, and C), and requesting additional information
	9.	12/20/95	Letter from M. McFadden of WIPP to B. Garcia of NMED providing responses to NMED's 11/2/95 comments on Revision 5 of the WIPP Part B RCRA Permit Application
	10.	3/14/96	Letter from B. Garcia of NMED to G. Dials and J. Epstein of WIPP transmitting a Notice of Deficiency (NOD) regarding Revision 5.2 of WIPP's Part B RCRA Permit Application
	11.	4/12/96	WIPP's responses to NMED's 3/14/96 NOD, hand delivered to B. Garcia of NMED on 4/12/96
	12.	3/19/99	Verbal hearing testimony of NMED's technical expert Constance Marie Walker during WIPP's 1999 RCRA Permit hearing, transcript pages 2717 - 2719
	13.	6/25/99	Summary of May 15, 1998 Draft Permit Public Comments and Responses to Comments by NMED, Module ILC, NMED response to Comment N-46, as reviewed by "CMW"
	14.	3/23/99	NMED's Direct Testimony Regarding Regulatory Process and Imposed Conditions
	15.	Jan. 2004	NMED Green Gazette Newsletter, Volume I, Issue 1, Winter 2004
	16.	1/9/04	Request for Class 3 Permit Modification to the Hazardous Waste Facility Permit, Permit Number NM4890139088-TSDF, Implementing Section 311 of Public Law 108-137, transmittal letter from I. Triay and S. Warren of WIPP to S. Zappe of NMED
	17.	6/27/02	WIPP Class 2 Permit Modification Request, Waste Characterization Updates and Other Process Improvements, Add U134 as a New Hazardous Waste Number, transmittal letter from I. Triay and J. Lee of WIPP to S. Zappe of NMED
	18.	11/25/02	Letter from G. Lewis of NMED to I. Triay of WIPP approving 6/27/02 Class 2 PMR to add U134 as a new hazardous waste number
	19.	Dec. 2001	Rinchem Company, Inc., Albuquerque, NM - Final RCRA Operating Permit
	20.	12/2/97	Rinchem Company, Inc., Albuquerque, NM - NMED request for supplementary information regarding Rinchem's Waste Analysis Plan in the Permit Application
	21.	4/24/96	Rinchem Company, Inc., Albuquerque, NM - NMED Notice of Deficiency regarding February 1995 Permit Application
	22.	2/7/95	Rinchem Company, Inc., Albuquerque, NM - RCRA Permit Application
	23.	Sept. 2003	Safety-Kleen, Albuquerque, NM - Final RCRA Operating Permit

Volume 4 of 4	No.	Date	Description
	24.	11/15/02	Safety-Kleen, Albuquerque, NM - NMED NOD regarding 7/27/01 Permit Application
	25.	3/9/03	Safety-Kleen, Albuquerque, NM - responses to NMED's 11/15/02 NOD
	26.	1/27/01	Safety-Kleen, Albuquerque, NM - RCRA Permit Application
	27.	Sept. 2003	Safety-Kleen, Farmington, NM - Final RCRA Operating Permit
	28.	11/15/02	Safety-Kleen, Farmington, NM - NMED NOD regarding the 10/4/00 Permit Application
	29.	3/9/03	Safety-Kleen, Farmington, NM - response to NMED's 11/15/02 NOD
	30.	10/4/00	Safety-Kleen, Farmington, NM - RCRA Permit Application
	31.	Mach 2002	Gandy Marley, Inc. Triassic Park Waste Disposal Facility, Chavez County, NM, RCRA Operating Permit
	32.	6/11/99	Fax from P. Corser of Montgomery Watson to G. Starkebaum of TechLaw, re: Preliminary Draft of Gandy Marley, Inc. Response to Request for Supplemental Information - May 1999
	33.	6/10/99	Letter from J. Bearzi of NMED to L. Gandy of Triassic Park, re: Draft Responses to Request for Supplemental Information
	34.	5/5/00	Letter from S. Kruse of NMED to R. Davis of State Fire Marshal's Office, re: Proposed Hazardous Waste Landfill
	35.	March 1988	"Hazardous Waste Storage and Disposal in Geologic Repositories - Permit Guidance Under the Resource Conservation and Recovery Act, OSWER Directive 9523.00-1", U.S. EPA
	36.	10/17/01	Verbal hearing testimony of NMED's technical expert Constance Marie Walker during Triassic Park's RCRA Permit hearing, transcript pages 857-859
	37.	10/19/01	Hearing Officer's Report, In the Matter of the Draft Final Permit for the Triassic Disposal Facility U.S. EPA No. NM0001022484, pages 97 - 98
	38.	4/12/96	WIPP RCRA Permit Application, Revision 6 - Table of Contents and Cross-Reference Table
	39.	4/12/96	WIPP RCRA Permit Application, Revision 6 - Chapter A (incl. Part A Permit Application Form Revision 7)
	40.	4/12/96	WIPP RCRA Permit Application, Revision 6 - Chapter B