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RON CURRY
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March 22, 2004

**RE: SPECIFIC RESPONSE TO COMMENTS, CLASS 2 MODIFICATION REQUEST
WIPP HAZARDOUS WASTE FACILITY PERMIT
EPA I.D. NUMBER NM4890139088**

Dear Concerned Citizen:

On March 15, 2004, the New Mexico Environment Department (NMED) took final administrative action on a Class 2 permit modification request (PMR) to the Waste Isolation Pilot Plant (WIPP) Hazardous Waste Facility Permit. The Department of Energy Carlsbad Field Office and Washington TRU Solutions LLC (the Permittees) submitted this PMR to the Hazardous Waste Bureau in the following document:

- Request for Class 2 Permit Modification (LANL Sealed Sources), Letter Dated 11/13/03, Rec'd 11/14/03

The Permittees identified one (1) item in their PMR submittal:

1. LANL Seals Sources Waste Streams Headspace Gas Sampling and Analysis Requirements

This PMR listed above were evaluated and processed by NMED in accordance with the requirements specified in 20.4.1.900 NMAC (incorporating 40 CFR §270.42(b)). It was subject to a sixty (60) day public comment period running from November 16, 2003 through January 15, 2004, during which NMED received written comments from a total of nine individuals and organizations. You are receiving this mailing because you provided public comment on this modification.

On March 15, 2004, NMED approved Item 1 with changes for the reasons specified in the response to comments. The revised permit issued on that date also included a February 27, 2003 Class 1* PMR for Change of Operation, which required further agency review prior to approval.

040351



March 22, 2004

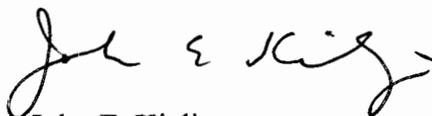
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Although the Class 1* PMR was not subject to a formal public comment period, NMED has provided a general statement of the issues in this PMR and identified the changes imposed in the approved permit language in the attached general response.

Attachment 1 lists all commenters; Attachment 2 incorporates NMED's specific response to all comments; and Attachment 3 incorporates NMED's general responses to summarized comments. Further information on this administrative action may be found on the NMED WIPP Information Page at <<http://www.nmenv.state.nm.us/wipp/>>.

Thank you for your participation by submitting comments on these permit modification requests. Please contact Steve Zappe at (505) 428-2517 or <steve_zappe@nmenv.state.nm.us> if you have further questions or need additional information.

Sincerely,



John E. Kieling

Manager

Permits Management Program

Attachments

cc: Sandra Martin, HWB
Chuck Noble, NMED OGC
Steve Zappe, HWB
R. Paul Detwiler, DOE/CBFO
Steven Warren, Washington TRU Solutions LLC

**Attachment 1
Commenter List**

**Comments Received by NMED on WIPP Permit Modifications
 Modifications Submitted to NMED on:
 November 13, 2003
 LANL Sealed Sources**

	<u>Receipt Date</u>	<u>Author</u>	<u>Organization/Citizen</u>	<u># Pages</u>	
A	1	01-Dec-03	Chrysa Wikstrom	Citizen	1
B	2	13-Jan-04	Marina Day	Citizen	1
C	3	13-Jan-04	* Penelope McMullen	Sisters of Loretto	2
D	4	15-Jan-04	Coila Ash	Creative Commotion	1
E	5	15-Jan-04	Don Hancock	SRIC	5
F	6	15-Jan-04	Lloyd Piper/ Steve Warren	CBFO/WTS	4
G	7	15-Jan-04	Joni Arends	CCNS	2
H	8	15-Jan-04	* Ben Walker	Citizen	2
I	9	15-Jan-04	Lindsay Lovejoy	NMAGO	3
		9 commentors		Total Pages =	21

* Denotes electronic comment submitted

Attachment 2
Specific Response to Comments

Comments Received By NMED on the WIPP Class 2 Permit Modification Request for Sealed Sources

Comment Number	Commenter/ Affiliation	Topic Area	commenter Identifier	Comment Summary [Original comment, DOE response to the comment]	Response
1.1	Chrysa Wikstrom, Citizen	Sealed Sources	A	The commenter stated that the fact that the DOE is frequently asking for "modifications" to the hazardous waste facility permit is cause for alarm. It is insanity to continue producing waste materials that are so hazardous as to require a process like this, which only pretends to keep the public informed.	NMED recognizes that several PMRs have been requested since issuance of the Permit. However, this is the regulatory and legal process by which the Permittees may amend the Permit, and NMED cannot reject PMRs based solely on the number that have been submitted.
2.1	Marina Day, Citizen	Sealed Sources	B	The commenter does not support the PMR because not enough testing has been done to show if this proposed modification request to the WIPP permit is safe or not.	It is unclear whether the commenter is referring to testing of the entire waste population as a whole, or testing of the specific sealed sources waste stream.
3.1	Penelope McMullen, Sisters of Loretto	Sealed Sources	C	The commenter opposes the permit modification request; it should be a class 3 request because it is a substantial change that merits a public hearing, since sealed sources were not included in the inventory for the permit.	NMED notes that revisions to allow statistical sampling of headspace gas for certain wastes was approved as a class 2 modification. This request, too, singled out a waste form for specific consideration, much as these previous PMRs did. Since NMED's initial denial of the PMR, the Permittees have resubmitted information which clarified the nature of the AK information available with respect to the sealed sources, and which also clarified that hazardous waste codes, if applicable, would still be assigned based on AK for other constituents (i.e., metals) using AK as is currently done under the permit. Additionally, AK information provided by LANL, as well as packaging configuration information for the sealed sources prior to receipt at LANL, helped NMED understand the nature of the request, and specifically why the request was made in terms of viability of AK and difficulty associated with sealed sources sampling. (continued below)

Comments Received By NMED on the WIPP Class 2 Permit Modification Request for Sealed Sources

Comment Number	Commenter/ Affiliation	Topic Area	commenter Identifier	Comment Summary [Original comment, DOE response to the comment]	Response
					<p>(cont. from above) While the Permittees did not provide information during these conversations which showed that containers sampled "with and without" sealed sources show no headspace gas differences, NMED has examined the headspace gas data for the few sealed sources containers currently in place, and has determined that these containers reported no headspace gas VOCs. This information has been placed in the NMED record. Therefore, with the provision of new information in the PMR and updating of the record to include sealed source VOC information, NMED believes that maintenance of this PMR as a Class 2 is consistent with previous decisions made by NMED.</p> <p>The concern regarding whether the PMR merits a public hearing because sealed sources were not in the original inventory for the permit is not relevant to this PMR, but may be addressed under a separate agency action. See also response to comment 6.9</p>
3.2	Penelope McMullen, Sisters of Loretto	Sealed Sources	C	The commenter believes that characterization by "acceptable knowledge" (AK) alone is not "acceptable" to the public because of its known inadequacies and LANL's poor record keeping.	As part of the Permittees resubmission of the PMR, additional example AK data was included which demonstrates the detail that should be available for each source regarding its manufacture and, hence, its hazardous constituent content. NMED believes that if the type of information presented in the PMR is collected for each sealed source, then the Permittees can adequately demonstrate that that specific source is non hazardous (or can assign appropriate codes based upon detailed manufacturer's specifications). To address public comments concerning the viability of AK, NMED has imposed an additional requirement in the revised permit to collect AK information as detailed in the PMR to ensure that adequate data collection occurs. Regarding headspace gas sampling and analysis, this method detects only volatile organic material, the inclusion of which appears contrary to the manufacture of sealed sources based upon AK data provided and reviewed by NMED (continued below).

Comments Received By NMED on the WIPP Class 2 Permit Modification Request for Seated Sources

Comment Number	Commenter/ Affiliation	Topic Area	commenter Identifier	Comment Summary [Original comment, DOE response to the comment]	Response
					(cont. from above) Therefore, NMED concludes that if sufficient AK data are collected to the detail and level presented in the PMR example (as required under the NMED imposed condition), headspace gas sampling is unnecessary for this specific waste stream.
3.3	Penelope McMullen, Sisters of Loretto	Sealed Sources	C	The PMR does not explain how LANL will make the non-defense determination.	NMED's public record includes a September 9, 1996 DOE HQ memorandum prepared Mr. Robert R. Nordhaus, General Counsel, that clarifies DOE's method for making defense determinations consistent with the Nuclear Waste Policy Act. While the permit is silent with respect to the defense determination, the commenter is referred to this public record available from DOE or NMED that documents DOE's position regarding the legal and regulatory determination of defense waste.
3.4	Penelope McMullen, Sisters of Loretto	Sealed Sources	C	The commenter states that DOE says that headspace gas sampling would destroy the sealed source container, but if despite today's technology there are no ways to take a sample without destroying the capsule, then those capsules should either be repackaged or they should not go to WIPP.	The Sealed Source Container, once retrieved from the offsite source, is sealed shut and the bolt attaching the lid of the outer containment device is sheared off. Therefore, the configuration of the collection device used by LANL is not amenable to collecting a headspace gas sample immediately adjacent to the source. See response to comment 3.1.
3.5	Penelope McMullen, Sisters of Loretto	Sealed Sources	C	There are other ways to ensure LANL worker safety besides eliminating HSG sampling. Allowing a procedure that could lead to unacceptable waste at WIPP could eventually be unsafe for not only WIPP workers but also for the environment.	The PMR does not appear to justify, as a major cornerstone of the request, that headspace gas sampling of sealed sources compromises LANL worker safety.
3.6	Penelope McMullen, Sisters of Loretto	Sealed Sources	C	The commenter opposes the plan to sample five containers to estimate mean VOC concentration values because she does not trust the DOE's selection process for determining mean values	NMED's experience, through observation of site audits is that sites are capable of and have generally demonstrated adequate ability to randomly sample waste streams without bias.
3.7	Penelope McMullen, Sisters of Loretto	Sealed Sources	C	The General Accounting Office strongly criticized the plan to move sealed sources to WIPP in its report #03-483, stating that many sealed sources are not defense waste and are therefore prohibited from disposal at WIPP.	NMED concurs that the subject report does state that many sealed sources are not defense related. See Response to comment 3.3.
3.8	Penelope McMullen, Sisters of Loretto	Sealed Sources	C	At the previous Sealed Sources public meeting, the commenter was told that DOE headquarters plans to add new items to the list of materials that go into sealed sources. Since we don't know what these future items might be, NMED should deny changes to sealed-source procedures.	It is assumed that this comment is made in reference to the addition of current non-defense related sealed sources. See response to comments 3.3 and 3.7.

Comments Received By NMED on the WIPP Class 2 Permit Modification Request for Sealed Sources

Comment Number	Commenter/ Affiliation	Topic Area	commenter Identifier	Comment Summary [Original comment, DOE response to the comment]	Response
3.9	Penelope McMullen, Sisters of Loretto	Sealed Sources	C	The commenter supports NMED's PMR to limit WIPP waste to the list in the Transuranic Waste Baseline Inventory Report.	See response to comment 6.9.
4.1	Coila Ash, Creative Commotion	Sealed Sources	D	The commenter strongly opposes the permit modification request because it is not properly a Class 2 modification, but rather should only be submitted and considered as a Class 3 modification.	See response to comment 3.3.
4.2	Coila Ash, Creative Commotion	Sealed Sources	D	During the permit hearing process, it was conclusively demonstrated that AK can be faulty. Thus, NMED may not rely on AK to demonstrate that sealed sources contain no volatile organic compounds, are not leaking, and are otherwise adequately characterized.	<p>NMED agrees that during the hearing, the viability of AK was brought to question due to the misclassification of a LANL waste. Since that time, however, the Permittees have enacted the more rigorous AK process mandated by the Permit. Additionally, AK data specific to sealed sources and provided as part of the PMR do show that DOE is capable of collecting adequate AK. In response to the numerous comments questioning the viability of AK, NMED has included specific data collection requirements for sealed sources consistent with the data sources presented in the PMR attachments. These requirements are consistent with the information the Permittees have indicated will be collected for sealed sources.</p> <p>Also, because the Permittees have stated that the waste is non-hazardous and this non-hazardous designation is an apparent cornerstone of DOE's argument to not require HSG sampling, NMED is also including a requirement that if AK does indicate the presence of organic material interior to the innermost container surrounding a source, and the presence of this material would render the waste hazardous, then this waste must undergo headspace gas sampling. In this fashion, public concerns regarding the viability of AK are also addressed.</p>
4.3	Coila Ash, Creative Commotion	Sealed Sources	D	The General Accounting Office report points out that many sealed sources are not defense waste and are therefore prohibited from disposal at WIPP.	See response to comment 3.3.
4.4	Coila Ash, Creative Commotion	Sealed Sources	D	There is no need for the requested modification. Instead, DOE must develop a safe, secure site for all of its sealed sources, and that site cannot be WIPP.	No response offered.

Comments Received By NMED on the WIPP Class 2 Permit Modification Request for Sealed Sources

Comment Number	Commenter/ Affiliation	Topic Area	commenter Identifier	Comment Summary [Original comment, DOE response to the comment]	Response
5.1	Don Hancock, SRIC	Sealed Sources	E	The commenter requests that NMED deny the permit modification request because it remains incomplete and inaccurate so as to not provide enough basis to approve the modification with change.	NMED believes that considering information provided as part of the revised PMR and with the addition of certain elements to the PMR based in direct response to public comment, that the PMR is acceptable. Also see response to comment 3.9.
5.2	Don Hancock, SRIC	Sealed Sources	E	The request is not properly a class 2 modification request, so NMED should deny the request. NMED should clearly state to the Permittees that continuing to waste NMED's and the public's resources with inadequate modification requests is unacceptable.	See response to comment 6.9.
5.3	Don Hancock, SRIC	Sealed Sources	E	NMED's failure to provide full responses to all the comments submitted to the previous sealed sources modification request, as it has previously done and as was promised in its denial letter on September 11, handicaps both the Permittees and the public regarding the resubmitted request.	NMED apologizes for failing to provide response to public comments in a timely fashion, and is issuing those late responses at the same time as these responses to comments.
5.4	Don Hancock, SRIC	Sealed Sources	E	The request does not state a need upon which NMED can grant the modification. The modification should demonstrate that a shorter DAC (less than 152 days) is justified, rather than eliminating headspace gas sampling entirely.	See response to comments 3.1 and 3.4. NMED believes the impracticability of sampling the sealed sources, and demonstrated capability of AK (if adequately mandated) to ensure knowledge of interior materials, are sufficient justification to approve the PMR. In addition, the PMR includes general information pertaining to national security concerns. However, the PMR did not include specific information found in the previously-mentioned GAO report concerning the physical limitations of the sealed source storage area and apparent security requirements of this area. It is NMED's understanding that the area in which sealed sources are stored, which requires relatively high levels of security, is very limited. Therefore, with LANL mandate to collect sealed sources quickly under the homeland security-related Offsite Source Recovery Program, LANL does not appear to have enough room to store all sources at this time and therefore cannot hold the sources for the 152 day DAC mentioned by the commenter.

Comments Received By NMED on the WIPP Class 2 Permit Modification Request for Sealed Sources

Comment Number	Commenter/Affiliation	Topic Area	commenter Identifier	Comment Summary [Original comment, DOE response to the comment]	Response
5.5	Don Hancock, SRIC	Sealed Sources	E	Nothing in the Department's Offsite Source Recovery Program House Report 107-593 language states or implies any relationship to WIPP, and the resubmitted modification request still does not discuss the GAO report. Thus, the Permittees' modification request not only does not describe the need for the modification, as required by the regulations, but it provides inaccurate information, contrary to the requirements of 40 CFR 270.11(d).	It is agreed that the subject report authorizes funds for the Offsite Source Recovery Program, and does not mandate where the sources should "go" once retrieved. While the PMR does discuss the requirements of the House Report (including a specified time period), the PMR does not appear to be relying on this House Report as requiring disposition of the material to WIPP. Therefore, it is not clear how the commenter's concern that inaccurate information (with respect to this specific Report) is included in the PMR.
5.6	Don Hancock, SRIC	Sealed Sources	E	The modification request proposes to bring waste to WIPP that is prohibited by law. The WIPP Act prohibits WIPP from being used for much of these excess radioactive materials because they are not "generated by atomic energy defense activities." WIPP Act, Section 2(20). DOE does not establish how 14,000+ sealed sources are from defense activities. Instead, Appendix 1 is a July 8, 2003 Memorandum that states that DOE has 1,320 excess plutonium-239 sources that are "waste from defense activities as defined in the Nuclear Waste Policy Act." If the request seeks to bring all 14,000 sealed sources, it provides no information that all of those sources are from defense activities.	See response to comment 3.3.
5.7	Don Hancock, SRIC	Sealed Sources	E	The GAO Report recommends that DOE "take immediate action to provide storage space for these sources at a secure DOE facility...[and] initiate the process to develop a permanent facility for greater-than-Class-C radioactive waste to carry out the requirements of Public Law 99-240." DOE must develop a disposal site for all sealed sources. Such a site would result in no sealed sources being disposed at WIPP.	The referenced report also explicitly mentions the use of WIPP for disposal of plutonium 239 wastes, including that the DOE shall take initiatives to assess the current regulatory and legal framework associated with WIPP allow the disposal of waste currently defined as non-defense related at WIPP. Therefore, while the report does not specify a disposal facility, it does not preclude WIPP for appropriate use and does include discussion of the WIPP for disposal of appropriate and allowable wastes. It is also agreed, however, that the GAO report does not preclude the development of a specific sealed source facility, which may be required for those waste which are not acceptable at WIPP.

Comments Received By NMED on the WIPP Class 2 Permit Modification Request for Seated Sources

Comment Number	Commenter/Affiliation	Topic Area	commenter Identifier	Comment Summary [Original comment, DOE response to the comment]	Response
5.8	Don Hancock, SRIC	Sealed Sources	E	The Permittees state that some now-ineligible sealed sources may be determined to meet this WIPP eligibility requirement at some time in the future. If the modification request is approved, NMED and the public could be excluded from any future such decisions about whether additional sealed sources can be brought to WIPP.	See response to comments 3.3 and 5.7.
5.9	Don Hancock, SRIC	Sealed Sources	E	The request does not demonstrate that sealed sources would be adequately characterized. The proposed permit language does not include a specific requirement that the AK include testing and recordkeeping requirements of 10 CFR 34.27(c). The PMR establishes a totally new purpose for acceptable knowledge beyond the permit's requirements to delineate TRU waste streams, assess if mixed heterogeneous debris wastes exhibit a toxicity characteristic, and to assess if TRU mixed waste are listed. During the permit hearings, it was clearly demonstrated that AK was not adequate and that confirmation and sampling and analysis were required.	NMED has considered numerous comments that the current PMR does not address NMED's concerns regarding referencing of regulation outside of RCRA in the RCRA permit. Although the Permittees point out that other regulatory actions (NRC, etc.) are referenced, in this context NMED is being asked to accept specific technical requirements of other regulations which could be modified after issuance of the permit. Because of this and to respond to public comment, NMED has revised the PMR to include a specific edition date be associated with the referenced regulations. While this does not mitigate the complexities associated with integration of non-RCRA regulations, this explicitly establishes a specific set of regulations at a specific time so that any future modification to these requirements that impact WIPP activities would require notification to the NMED via permit modification request. Also see response to comment 4.2.
5.10	Don Hancock, SRIC	Sealed Sources	E	The modification request conflicts with NMED's pending permit modification. Sealed sources were not included in the Transuranic Waste Baseline Inventory Report (TWBIR), so they were not to be disposed of at the time the permit was issued.	The term "sources" is mentioned in the BIR in association with INEEL (e.g., IN-W358.854), but it is not clear whether this terminology is used consistently with respect to the current definition of "sealed sources" or whether these would be collected as sealed sources under the Offsite Recovery Program (the BIR implies that, for example, some INEEL "sources" are part of other wastes streams) and hence would be considered part of the waste stream(s) of question in this PMR. Also, the DOE's defense determination in the PMR makes specific mention of sealed sources being generated at Savannah River and Hanford, not INEEL. The agency initiated permit modification is addressed under a separate action. See response to comment 6.9.

Comments Received By NMED on the WIPP Class 2 Permit Modification Request for Sealed Sources

Comment Number	Commenter/Affiliation	Topic Area	commenter Identifier	Comment Summary [Original comment, DOE response to the comment]	Response
6.1	Lloyd Piper/ Steve Warren, CBFOWTS	Sealed Sources	F	Previous commenters believed that reliance on and inclusion of regulatory requirements from several other Agencies into the permit can complicate the compliance process. This commenter responded by stating that the standards referenced in the sealed sources PMR are the source of the sealed sources technical specifications only. NMED has already agreed that other regulations are acceptable as technical standards within the WIPP permit.	NMED agrees that other regulations are mentioned in the WIPP permit, but NMED also understands that in so doing any changes to these requirements may significantly complicate the determination and assurance of continued compliance. That is, the expectation by referencing another regulation is that the contents of these regulations remain unchanged from those present at the time of incorporation into the permit; if this is not specified, then further changes outside of the permit could modify the basis and conditions upon which the reference were made. To avoid this, NMED has required specific dates be included in the permit in association with referenced regulations; should changes be made outside of the permit applicable to these sections, DOE would seek a PMR to change permit language accordingly.
6.2	Lloyd Piper/ Steve Warren, CBFOWTS	Sealed Sources	F	EEG states that NMED should obtain some assurances that VOC generation from a loaded drum would be no greater than VOC generation from packaging materials alone. The commenter responded by stating that the assurance for this are implicit in the basic understanding that it is physically impossible for a sealed source to be a VOC generator or a source for radiolysis of the source is sealed.	NMED agrees that the physical configuration of a sealed source does appear to support DOE's contention that VOCs could not be released from a non-leaking unit. However, DOE did not provide the assurances sought by the commenter, so NMED extracted the information from the WIPP Waste Information System (WWIS) database pertaining to the sealed sources currently disposed of at WIPP for which headspace gas samples were collected. To date, only two containers of sealed sources (Waste Stream Profile LA-OS-00-01) have been disposed of at WIPP - Container Numbers LA00000058565 and LA00000058567. WWIS Waste Container Data Reports for these containers show that all headspace gas analyses are undetected. These data reports have been placed in the NMED administrative record in a memo to file by Steve Zappe dated March 15, 2004.
6.3	Lloyd Piper/ Steve Warren, CBFOWTS	Sealed Sources	F	EEG states that the Permittees should address any non-radioactive constituents of the sources that have the potential to exhibit characteristics of reactivity, toxicity, corrosivity, etc. The commenter responded by stating that the sealed source waste stream destined for disposal at WIPP is a non-mixed, non-hazardous waste stream that will not be considered reactive.	The proposed PMR does not mitigate the Permittees obligation to identify, by AK/VE and consistent with all other debris waste streams, the presence/absence of all prohibited items. Wastes that are prohibited by permit (i.e., corrosive, reactive, etc) cannot be disposed of at WIPP. The PMR only applies to the sampling of headspace gas for organic compounds.

Comments Received By NMED on the WIPP Class 2 Permit Modification Request for Sealed Sources

Comment Number	Commenter/ Affiliation	Topic Area	commenter Identifier	Comment Summary [Original comment, DOE response to the comment]	Response
6.4	Lloyd Piper/ Steve Warren, CBFO/WTS	Sealed Sources	F	EEG states that the PMR must address hazardous constituents in waste, not packaging material. The commenter responded by stating that the current sealed source waste stream destined for disposal at WIPP is a non-mixed, non-hazardous waste streams that will not be considered reactive. This PMR is solely intended to remove the requirement for headspace gas sampling and analysis of non-VOC bearing sealed sources. Any other form of hazardous waste would still have to be identified and characterized by the generator site in accordance with the WIPP permit.	See response to comments 6.2 and 6.3. NMED agrees that the proposed headspace gas sampling by the Permittees applies only to packaging materials, and does not believe that this type of sampling in and of itself is a direct substitute for headspace gas sampling of non-hazardous wastes. Instead, NMED has also made its determination based on the information presented outside of this sampling activity as provided in the PMR.
6.5	Lloyd Piper/ Steve Warren, CBFO/WTS	Sealed Sources	F	Other commenters state that DOE states, in part that the PMR itself is too complex to be considered a Class 2 PMR. The commenter stated that the DOE considers this a very simple modification because there is no source of VOCs in the waste.	See response to comment 3.1.
6.6	Lloyd Piper/ Steve Warren, CBFO/WTS	Sealed Sources	F	Others state that although DOE addresses the detection of leaking sealed sources, DOE does not specify what shall be done with those sealed sources. The commenter replies by stating that any leaking sealed source will be contained in a special form capsule to meet DOT and NRC requirements.	See response to comment 5.9.
6.7	Lloyd Piper/ Steve Warren, CBFO/WTS	Sealed Sources	F	The commenter requested that NMED add the word "change" after the word "significant" in the last bullet of Section B-3a(1)(iii).	NMED agrees with this comment.
6.8	Lloyd Piper/ Steve Warren, CBFO/WTS	Sealed Sources	F	NMAG commented that the Permittees list of acceptable knowledge documentation does not include integrity test data. Testing should be current and not historical. The commenter responded that sealed sources are checked for leakage at the time of packaging. Attachment E, Appendix 6 of the PMR entitled "Swipe Data on Sources" shows that these sources are not leaking.	NMED agrees that the Acceptable Knowledge record include this information, and has included, in a PMR, this requirement.

Comments Received By NMED on the WIPP Class 2 Permit Modification Request for Sealed Sources

Comment Number	Commenter/ Affiliation	Topic Area	commenter Identifier	Comment Summary [Original comment, DOE response to the comment]	Response
6.9	Lloyd Piper/ Steve Warren, CBFO/WTS	Sealed Sources	F	NMAG commented that the waste stream to which this modification relates was not identified as part of the waste inventory at the time the permit was issued and this PMR will conflict with the agency-initiated modification now underway and this PMR should be denied. The commenter responded, stating that NMED's proposed modification has not yet been approved, nor has NMED had an opportunity to consider comments regarding the proposal from the Permittees and the public. Therefore, the Permittees believe that it cannot and should not serve as a basis for rejection of the modification regarding sealed sources.	NMED agrees with this comment, and notes that the agency initiated modification is being addressed under a separate venue.
7.1	Joni Arends, CCNS	Sealed Sources	G	The commenter strongly opposes the proposed Class 2 permit modification request because it is inaccurate, incomplete and does not provide an adequate basis that public health and the environment would be protected.	See response to comments 7.2- 7.6.
7.2	Joni Arends, CCNS	Sealed Sources	G	The PMR should be denied because it is not properly a class 2 modification as it totally eliminates headspace gas sampling and analysis for all sealed sources, despite the fact that the need for such sampling and analysis was required as a result of a five-year permitting process.	See response to comment 3.1.
7.3	Joni Arends, CCNS	Sealed Sources	G	During the permit hearing process it was conclusively demonstrated that AK can be faulty. Thus, NMED may not rely on AK to demonstrate that sealed sources contain no volatile organic compounds, are not leaking and are otherwise adequately characterized.	See response to comment 4.2.
7.4	Joni Arends, CCNS	Sealed Sources	G	The GAO report points out that many sealed sources are not defense waste and are thereby prohibited from disposal at WIPP, Id., p. 26. The report also said that DOE must develop new storage and disposal sites for those sealed sources and criticized DOE for not doing so even though it was given such a mandate 17 years ago. Id., p. 28. Thus, there is no need for the modification.	See response to comments 3.3 and 5.7.

Comments Received By NMED on the WIPP Class 2 Permit Modification Request for Sealed Sources

Comment Number	Commenter/ Affiliation	Topic Area	commenter Identifier	Comment Summary [Original comment, DOE response to the comment]	Response
7.5	Joni Arends, CCNS	Sealed Sources	G	The sealed sources were not included in the Transuranic Waste Baseline Inventory Report (TWBIR). At the same time that NMED is considering a modification that would prohibit any waste that was not included in the TWBIR, it should not approve a modification that would allow for the sealed sources, which were not included the TWBIR, to come to WIPP.	See response to comment 6.9.
7.6	Joni Arends, CCNS	Sealed Sources	G	The question remains whether the sealed sources are defense waste and prohibited from WIPP.	See response to comment 3.3.
8.1	Ben Walker, Citizen	Sealed Sources	H	In this modification request the DOE presents a good case for the reduction of headspace gas sampling requirements, in that reliable data showing that the LANL sealed sources planned for shipment to the WIPP do not contain hazardous wastes is very likely to be available. However, the request may need to undergo additional modification to be acceptable at the WIPP.	NMED concurs with this comment.
8.2	Ben Walker, Citizen	Sealed Sources	H	The definition of sealed sources, and what a sealed source waste stream will consist of, does not appear to be sufficiently clear. The definitions do not provide sufficient detail to distinguish sealed sources that are to be shipped to the WIPP without headspace gas sampling from other wastes that do require the sampling. A sufficient correction might be to amend the text to be added to the WIPP permit to indicate that sealed sources are those that have been licensed under the provisions of these two sections of the federal code. The sealed source definition in 10 CFR 835, Radioactive Waste Management, also could be used, because it includes a clause that indicates that the material has to have been used for the radiation emitted from it in order to be considered a sealed source.	NMED concurs with this comment and has included changes to the PMR to ensure that the sealed sources are appropriately defined.
8.3	Ben Walker, Citizen	Sealed Sources	H	This request includes a process to provide headspace gas sampling data for packaging, rather than for the waste. The LANL should not use packaging materials that are hazardous wastes. Any sampling should be of the waste, not of the packaging.	See response to comment 6.4

Comments Received By NMED on the WIPP Class 2 Permit Modification Request for Seated Sources

Comment Number	Commenter/Affiliation	Topic Area	commenter Identifier	Comment Summary [Original comment, DOE response to the comment]	Response
8.4	Ben Walker, Citizen	Sealed Sources	H	There does not appear to be any method or criteria in the draft WIPP permit text provided in this request which would prevent other sealed sources in the LANL sealed source program, including those which do not contain transuranic components, from being bundled into pipe-overpack containers with high-Curie transuranic sealed sources. The NMED should consider whether these non-TRU sealed sources can be received at the WIPP under the WIPP permit.	NMED agrees that given DOE's use of TDOPs to combine individual containers of low-level and TRU waste, it is very possible that DOE will use this same strategy to "blend" various wastes in containers in the future. It might be possible that waste, for example, that does not meet the definition of TRU could be combined with TRU sources inside a single container, thus making that container "TRU" waste. However, NMED does not regulate the radioactive portion of WIPP waste, and NMED recommends that the commenter address these serious concerns with EPA ORIA, who does regulate the radioactive portion of the waste.
8.5	Ben Walker, Citizen	Sealed Sources	H	The DOE was instructed by Congress many years ago to establish a disposal facility for greater-than-Class C low-level wastes, within which classification the LANL sealed sources apparently fall. WIPP may be an acceptable repository for part or all of these wastes, but the initial allowances shouldn't be allowed through a back-door process such as this.	NMED agrees that waste which meets all regulatory requirements, including those of the WIPP permit, would be eligible for disposal in the WIPP. NMED also notes that DOE is focusing on WIPP for waste disposal because, for example, 1) the WIPP is the single facility open to DOE for disposal of TRU wastes; 2) DOE has apparently not yet identified or created the "greater than Class C" low level waste disposal facilities discussed in the GAO report; and 3) issues may be associated with future disposal of low level waste at sites such as Envirocare. NMED agrees that WIPP may regulatorily and technically serve as a logical and defensible option for many defense related transuranic wastes, but NMED also appreciates disclosure of this intent in a straightforward and regulatorily consistent approach wherein DOE's full intentions are brought forth in a clear and open manner. This approach would mitigate the commenter's concern that "back door" processes are being used by DOE to dispose of waste.

Comments Received By NMED on the WIPP Class 2 Permit Modification Request for Seated Sources

Comment Number	Commenter/ Affiliation	Topic Area	commenter Identifier	Comment Summary [Original comment, DOE response to the comment]	Response
9.1	Lindsay Lovejoy, N MAGO	Sealed Sources	I	The current proposal uses the same approach disapproved by NMED previously, namely: incorporating by reference the definitions of sealed sources contained in 10 CFR sec. 30.4, 10 CFR sec. 70.4, 49 CFR sec. 173.403, and 10 CFR sec. 34.27. It would be far better to state in the permit exactly what requirements apply. Such approach would simplify determinations of compliance and would avoid issues such as a question of the applicable regulation in case one of the cited rules is amended in the future.	NMED agrees with the commenter. See response to comment number 5.9.
9.2	Lindsay Lovejoy, N MAGO	Sealed Sources	I	There appears to be an error in the last bullet in proposed sec. B-3a(1)(iii); the word "change" or the equivalent is omitted after "significant".	NMED agrees with the commenter.
9.3	Lindsay Lovejoy, N MAGO	Sealed Sources	I	The requirement regarding determination of sealed source integrity should be stated quantitatively, so that it is clear how "integrity" is determined. It is appropriate to state specifically that visual examination (VE) is accompanied by a swipe test to determine radioactivity present on the item and that a stated level of radioactivity is deemed to indicate leakage. Further, the permit should state how sealed sources that do not meet the integrity test are managed. At a meeting with DOE representatives, the commenters were shown a miniature overpack device that serves this purpose. The permit should direct use of such device. The commenter believes that container integrity must be established by testing in the characterization process rather than based on documents. The Permittees' list of available acceptable knowledge documentation does not include integrity test data (App. C). Further, integrity testing results should be current, not historical.	NMED agrees with the commenter. See response to comments 6.6, 6.8, and 8.2.

Comments Received By NMED on the WIPP Class 2 Permit Modification Request for Sealed Sources

Comment Number	Commenter/ Affiliation	Topic Area	commenter Identifier	Comment Summary [Original comment, DOE response to the comment]	Response
9.4	Lindsay Lovejoy, NMAGO	Sealed Sources	i	The waste stream to which this modification relates was not identified as part of the waste inventory at the time the permit was issued. The commenter suggests that the sealed source proposal be denied for reasons stated above and that the Permittees may submit a renewed proposal with respect to sealed sources after NMED acts upon the agency-initiated modifications and in light of the nature of NMED's action.	See response to comment 6.9.

Attachment 3
General Response to Comments

**NMED GENERAL RESPONSE TO COMMENTS ON CLASS 2 PERMIT MODIFICATION TO WIPP
HAZARDOUS WASTE FACILITY PERMIT (WIPP PERMIT)
SUBMITTED NOVEMBER 2003**

Item 1. LANL Sealed Sources Waste Streams Headspace Gas Sampling and Analysis Requirements

Background: The Permittees revised and resubmitted a permit modification request (PMR) regarding “sealed sources.” Congress has directed the Department of Energy (DOE) to collect sealed sources from around the country at Los Alamos National Laboratory (LANL) under the Off-Site Source Recovery Project (OSRP). Sealed sources are nuclear materials encased in metal capsules designed to prevent leakage or escape of nuclear contents and used in applications that require high surface dose rates. DOE and other entities (commercial, academic, medical, etc.) use sealed sources to calibrate radiological equipment and to provide standards in the laboratory for analytical samples that are being tested for radiation. This PMR as proposed would eliminate existing permit requirements for headspace gas (HSG) sampling and analysis for sealed sources waste streams at LANL. In its place it would substitute HSG sampling of surrogate drums (i.e., drums with packaging materials but no waste) and assign the analytical volatile organic compound (VOC) results to all containers in the waste stream. As before, the PMR proposed additional acceptable knowledge (AK) and visual examination (VE) requirements to ensure continued compliance with the permit. This revised PMR also included actual AK information for a sample sealed source used to demonstrate the lack of VOCs in this and other sealed sources. Under the existing permit, these sealed sources are required to undergo the same characterization activities as other contact handled transuranic mixed waste, including HSG sampling for every waste container. To date, two containers from a sealed sources waste stream at LANL have been disposed of at WIPP under the existing permit.

Comments: Several commenters believe that this Class 2 PMR was not properly classified, and should instead be processed as a Class 3 modification because it eliminates, rather than reduces, HSG sampling and analysis. Commenters believe that reliance upon AK alone for characterization is unacceptable, and recall the original permit hearing of 1999 where LANL AK was deemed questionable. Other commenters cited a 2003 General Accounting Office (GAO) report critical of DOE’s failure for the past 17 years to develop a congressionally mandated disposal facility suitable for all discarded sealed sources. These same commenters expressed concern that DOE might try to improperly dispose of sealed sources at WIPP that are otherwise not allowed (e.g., non-TRU waste, non-defense generated waste, etc.). Some commenters noted that DOE did not identify sealed sources as a waste type in the original inventory of waste expected for disposal at WIPP, and that approving this PMR was inconsistent with a permit modification currently proposed by NMED that limits waste eligible for disposal to the original inventory. Finally, some commenters pointed out that the practice of including only the citations to non-RCRA regulations in the permit rather than explicitly stating the requirements contained within those regulations could create problems if the regulations change.

Response: NMED approved this PMR with changes that were based upon public comment. NMED believes that processing this PMR as a Class 2 is consistent with previous PMRs in light of the Permittees’ submittal of new information in the revised PMR and the updating of records to include sealed source VOC analytical data. Some of the new information

submitted included detailed manufacturer specifications and records that should be available for each sealed source demonstrating the non-hazardous nature of the source(s). In this approval, NMED imposed an additional requirement to collect the same type of AK information as was provided in the PMR to ensure that adequate data and record collection occurs. NMED stated that the agency has much greater confidence in AK data collected under the current permit process than was presented at the original permit hearing. NMED concurs with the GAO's concern about the lack of disposal capacity for sealed sources, and notes that the report also questions whether all of the sealed sources containing plutonium-239 that the OSRP plans to recover meet the legal and regulatory requirements for disposal at WIPP. NMED shares the commenters' concern about attempts to dispose of sealed sources that are not generated by atomic energy defense activities or are not clearly TRU waste. Furthermore, NMED identified a September 9, 1996 memorandum in the public record from DOE Headquarters General Counsel providing DOE's position regarding the legal and regulatory determination of defense waste. NMED is aware that sealed sources were not identified as part of the waste inventory at the time the permit was issued, but denying this PMR on that basis is premature because the agency has yet to approve the NMED-proposed modification, and NMED believes the issues must be addressed separately. NMED resolved the commenter concern about references to non-RCRA regulations by citing a specific edition date to be associated with the referenced regulation. Any future changes to these regulations that impact WIPP activities will require a new PMR.

Item 2. Class 1* Modification Regarding Change of Operational Control at the WIPP Facility

Background: In February 2003, NMED notified the current management and operating (M&O) contractor of the WIPP facility, Washington TRU Solutions LLC, that they must submit a PMR reflecting a change of operational control in order to satisfy the transfer of permits requirement of the regulations. This was necessary because the M&O contract had been held by several different legal entities following submittal of the original WIPP permit application to NMED and subsequent issuance of the permit, and the regulations require NMED approval whenever there are changes in the ownership or operational control of a permitted hazardous waste facility such as WIPP. NMED received this PMR as a Class 1* modification from the Permittees on February 28, 2003, which under the regulations requires agency approval before implementation, but does not require a public comment period. This PMR provides a chronology of the changes of M&O contractors at WIPP since 1997, and identifies changes that occurred prior to and after issuance of the original WIPP permit.

Comments: Although NMED was not obligated by regulation to establish a specific comment period, the agency accepted comments from interested parties prior to making a final determination. One commenter agreed that the permit needed to discuss the new contract awarded by DOE in 2000, and that the date when operations began at WIPP needed correction. Another commenter stated that any change in equity ownership of a non-public company or partnership (or any change in control of a public company) that operates a major hazardous waste facility such as WIPP should follow the appropriate permit modification procedures.

Response: NMED approved this PMR with changes based upon the comments received and the need to reflect an accurate chronology of M&O contractors in the final permit language. NMED attempted to clearly identify the legal entities, corporate structure, and relationships between parent companies and subsidiaries in the chronology. NMED placed each of the pre-permit notifications in context by noting where in the overall permit issuance process each notification occurred. NMED identified when the notifications of permit modification submitted by the Permittees failed to satisfy the requirement to modify the permit to reflect a change of operational control. In response to a commenter, NMED inserted into the chronology a reference to the new contract awarded by DOE that was announced on December 15, 2000. However, NMED did not change the date when operations began, because the date in the permit reflects the start of operations under the permit, not the initial receipt of waste before the permit was issued. Finally, NMED removed extraneous information from the final permit language related to the prior elimination of the financial assurance requirements from the permit in 2000.