STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF THE ENVIRONMENT

IN THE MATTER OF THE AGENCY
INITIATED MODIFICATION OF THE
HAZARDOUS WASTE FACILITY PERMIT
FOR THE WASTE ISOLATION PILOT PLANT
CARLSBAD, NEW MEXICO
EPA ID NO. NM4890139088

No. HWB 04-01(M)

MOTION TO DISMISS AGENCY INITIATED
PERMIT MODIFICATION AND
MEMORANDUM IN SUPPORT

On November 26, 2003, the New Mexico Environment Department (NMED) issued
Public Notice No. 03-12, which states that NMED intends to approve a modification NMED
proposed to the Waste Isolation Pilot Plant's (WIPP's) Hazardous Waste Facility Permit (HWFP),
EPA I.D. No. NM4890139088. NMED also issued a Fact Sheet setting out its purported basis
for the modification and identified the administrative record that was the basis of the
modification. (Modification Administrative Record). NMED did not file a Notice of Intent to
Present Technical Testimony. Such notice was due on March 8, 2004.

NMED's modification would "limit waste eligible for disposal at WIPP to the inventory
identified when the permit was originally issued." (Public Notice at Page 2). The United States
Department of Energy (DOE) and Washington TRU Solutions, LLC (the Permittees) request that
the modification be dismissed because, based on the Public Notice, the Fact Sheet, and the
Modification Administrative Record, it is outside the jurisdiction of NMED and the Hearing
Officer. Furthermore, even if it were determined that NMED and the Hearing Officer have
jurisdiction, NMED has not met the legal requirements for an agency-initiated permit
modification.
I. STANDARD OF REVIEW

Pursuant to the NMED Permit Procedures, "[a]ny party may file a motion with the Hearing Clerk," for decision by the Hearing Officer. 20.1.4.200.D NMAC. The Permit Procedures also state that the Rules of Civil Procedure "may be used for guidance" by the Hearing Officer. 20.1.4.100 NMAC. The Permittees request that NMED's modification be dismissed because it fails as a matter of law. The motion is similar to a motion for failure to state a claim under Rule 1-012.B(1)(lack of jurisdiction over the subject matter) and 1-012.B(6)(failure to state a claim upon which relief can be granted). A successful motion under Rule 12 allows a cause of action to be dismissed without further proceedings.¹ A motion to dismiss assumes the factual contentions are true and tests the legal sufficiency of the claim. Blea v. City of Espanola, 117 N.M. 217, 218, 870 P.2d 755, 756 (Ct.App. 1994); Environmental Control, Inc. v. City of Santa Fe, 2002-NMCA-003, ¶6, 131 N.M. 450. A review of the applicable law and the Modification Administrative Record demonstrate that NMED has failed to establish sufficient legal basis for its proposed action.²

II. ARGUMENT

A. NMED does not have jurisdiction, pursuant to its RCRA authorization, to regulate the radioactive component of mixed waste.


¹ See also In re BWX Technologies, Inc., 9 EAD 61, flmt 15, stating that, pursuant to 40 CFR § 22.20, the Administrative Consolidated Rules of Practice, "a proceeding may be dismissed without further hearing or upon such limited additional evidence as [the Presiding Officer] requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief."

² The Permittees' Comments to the proposed modification, filed January 30, 2004, also support dismissal.
waste," which contains both radioactive materials and hazardous materials, and "non-mixed waste," which does not contain hazardous wastes.

NMED, pursuant to its authority to implement the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6901 et seq., has authority to regulate the hazardous waste component of mixed waste disposed of at WIPP. (WIPP LWA at §9, stating that WIPP is required to comply with the Solid Waste Disposal Act; 55 Fed.Reg. 28397 (Jan. 11, 1990)). On October 27, 1999, NMED issued the WIPP HWFP. (Fact Sheet at 2). EPA has the sole authority, through the certification and re-certification process, to determine if the WIPP facility complies with EPA's radioactive waste disposal standards set forth in 40 CFR Part 191, Subparts B and C, and Part 194. (WIPP LWA §8).

NMED does not have the authority under its RCRA authorization to regulate the radioactive component of TRU mixed waste or to enforce the provisions of the WIPP LWA. As an authorized state under EPA's 40 CFR Part 271, NMED may only "apply the RCRA regulations to the hazardous component of mixed waste, regardless of the classification of the radioactive component as low-level, high-level, transuranic, or other." (EPA State Authorization Manual, Volume II, Appendix N, U.S. EPA OSWER Directive 9540.00-9A-1, October 1980).

Both EPA and DOE agree that the Atomic Energy Act (AEA) and the WIPP LWA regulate the radioactive component of mixed waste and RCRA regulates the hazardous waste component.

"Under section 1004 of RCRA (42 U.S.C. 6903), the 'hazardous waste' governed by RCRA is a subset of 'solid waste.' The definition of 'solid waste,' however, expressly excludes 'source, special nuclear or byproduct material as defined by the Atomic Energy Act.' Those materials, instead, continue to be regulated under the AEA" by the federal agencies. 52 Fed.Reg. 15937, 15938 (May 1, 1987); see also 51 Fed.Reg. 24504 (July 3, 1986)(EPA concluding that, based on
the language of section 1004(5), "source, special nuclear and byproduct materials' are exempt from the definition of hazardous waste and thus from the Subtitle C [permit] program"; 53 Fed.Reg. 37045, 37046 (Sept. 23, 1988). mixed waste classification?

Faced with assertions of state regulatory authority over radioactive waste, federal courts have concluded that "the AEA, which provides a pervasive scheme for regulating radioactive materials, preempts any state regulation of radiation hazards." Brown v. Kerr-McGee Chemical Corp., 767 F.2d 1234, 1241 (7th Cir. 1985); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 212 (1983)("the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states"); People v. General Electric Co., 683 F.2d 206, 215 (7th Cir. 1982); United States v. Commonwealth of Kentucky, 252 F.3d 816 (6th Cir. 2001); New Mexico ex rel. Madrid v. Richardson, 39 F.Supp.2d 48 (D.D.C. 1999). In the Kentucky decision, the court concluded that permit conditions imposed by the Kentucky Natural Resources and Environmental Protection Cabinet (Cabinet) relating to the disposal of radioactive waste in a landfill operated by DOE were preempted by federal law. Relying on the United States Supreme Court's holding in Pacific Gas & Electric, the Court concluded that "the AEA preempts any state attempt to regulate materials covered by the Act for safety purposes." 252 F.3d at 823. The Court found that the Cabinet was attempting to impose conditions on the disposal of source, special nuclear, and byproduct materials. "The permit conditions therefore represent an attempt by the Cabinet to regulate materials covered by the AEA based on the Cabinet's safety and health concerns, and are thus preempted." Id. The Court also concluded that "[n]either the AEA nor any other federal law waives federal immunity from regulation of DOE facilities by states with respect to materials
covered by the AEA." Id. at 825. Based on both the doctrines of preemption and sovereign
immunity, the Court held that the Cabinet could not impose the challenged permit conditions.

The information contained in the Fact Sheet under the heading "Events Contemporaneous
With or After Permit Issuance," establishes that NMED is seeking, by means of its proposed
modification, to regulate waste that may be sent to WIPP based on the State's opinion of its
radiological classification. The information in the Fact Sheet focuses not on hazardous waste
constituents but on the radiological classification of the waste. (Fact Sheet at 3-4). NMED does
not raise any concerns about the hazardous components of the waste at any of the sites
mentioned in the Fact Sheet. Instead, based solely on the information listed in the Fact Sheet,
NMED proposes a permit modification to address an alleged "danger to public health or the
environment." (Id. at 4). The State of New Mexico has stated that the purpose of the permit
modification is to "amend WIPP's state permit to specifically forbid any reclassified high-level
waste from coming to WIPP." (Press Release, Modification Administrative Record, Doc. 27;
"The Green Gazette Newsletter," Permittee Exhibit 15.3) Although it is couched in the guise of a
permit modification based on the inventory submitted in 1995, the actual goal of the
modification is to regulate the radiological portion of the waste that may be disposed of at
WIPP.4 The stated purpose of the permit modification violates the AEA, the WIPP LWA, and the
State of New Mexico's authorization under RCRA. Like Kentucky, NMED is precluded from
imposing permit conditions regarding AEA materials by the doctrines of preemption and
sovereign immunity. Because the proposed modification is outside NMED's RCRA authority, it
is outside the Hearing Officer's jurisdiction. The proposed permit modification should be
dismissed for lack of jurisdiction over the subject matter.

3 The Permittee exhibits were submitted in support of the Permittees' Comments, January 30, 2004 and in support of
4 The WIPP LWA prohibits the disposal of high-level waste and spent nuclear fuel at WIPP. (WIPP LWA §12).
B. The agency-initiated permit modification does not meet the requirements of 40 CFR Section 270.41

NMED may only modify a hazardous waste facility permit on its own initiative based on the limited circumstances set forth in the Hazardous Waste Act or in 40 CFR §270.41. NMED has stated that it is relying on 20.4.1.900 NMAC (incorporating 40 CFR §270.41) for its authority to modify the WIPP HWFP. (Fact Sheet at 4). NMED may modify the WIPP HWFP on its own initiative only if the Department can show that one or more of the causes for modification listed in Section 270.41 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) or (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 CFR §270.41 (emphasis added). In promulgating Section 270.41, EPA stated that it had "narrowed the circumstances under which a permit may be modified during its fixed term... Normally a permit will not be modified during its term if the facility is in compliance with the conditions of the permit. The list of causes for modifying a permit is narrow; and absent cause from this list, the permit cannot be modified." 45 Fed.Reg.33290, 33314 (May 19, 1980); In the Matter of Waste Technologies Industries, East Liverpool, Ohio, 4 EAD 106 (July 24, 1992)("if the Agency's reasons for wanting to initiate a permit modification do not fit within one of the enumerated categories ... the only available mechanism under the regulations for modifying the permit is a permittee-initiated permit modification, 40 CFR §270.42.")

Limiting the basis on which a permit may be modified is consistent with the "permit as a shield" provision of RCRA, which states that compliance with the permit conditions during the
permit term constitutes compliance for purposes of RCRA. See 40 CFR §270.4. The purpose of this provision is to "provide permittees with maximum certainty during the fixed term of their permits." 45 Fed.Reg. 33290, 33310. For a RCRA permit, "one of the purposes of issuing a permit is to prescribe with specificity the requirements that a facility will have to meet...so that the facility can plan and operate with knowledge of what rules apply..." Id. at 33312. While EPA acknowledged that a permit could be modified by the agency for cause, it specifically chose not to include an agency's "failure to apply any applicable requirements" as a cause for modification. "Thus, if the permit writer makes a mistake and does not include a requirement of the appropriate Act in the permit document, the permittee will neither be enforced against nor have its permit modified or revoked and reissued as a result." Id The permit shield rule, combined with the for cause requirements of Section 270.41, protect the permittee from arbitrary changes to the permit conditions during the term of the permit, such as the one NMED has proposed.

NMED alleges that it received "new information" that justified the proposed modification. (Public Notice at 2). In order to modify the HWFP based on new information, NMED must show (1) "the information was not available at the time of the permit issuance" and (2) the information "would have justified the application of different permit conditions at the time of issuance." §270.41(a)(2). Even if the information in the Fact Sheet were true (and most of it is not), NMED has not met the for cause requirements and therefore may not modify the HWFP as proposed.

a) NMED has not met the first element of Section 270.41(a)(2), which requires that the information that serves as the basis for the permit modification "was not available at the time of permit issuance."

The for cause requirement under Section 270.41(a)(2) requires a showing that the information upon which the permit modification is based "was not available at the time of permit
issuance." NMED must show that the allegedly new information came "to light unexpectedly and changes an erroneous assumption on which the original permit was based, and it leads to the removal or alteration of inappropriate permit terms that were based on the erroneous assumption." In the Matter of General Electric Company, 4 EAD 615, 624 (April 13, 1993). The reason for requiring a showing that information was not available at the time of permit issuance is to prevent the agency from modifying the permit "because a mistake was made at the time of issuance by failing to incorporate applicable requirements into the permit." 45 Fed.Reg. 33290, 33314.

NMED has not met the first requirement of Section 270.41(a)(2). The fact that DOE intends to dispose of waste at WIPP that was not specifically included in the 1995 "Transuranic Waste Baseline Inventory Report (Revision 2)," (TWBIR)(Modification Administrative Record, Doc. 8) is not new information that came "to light unexpectedly." There is no basis in the record for NMED's statement that it was not aware, at the time of permit issuance, that the "inventory did not identify 'all transuranic waste types at all sites from which waste are to be shipped to WIPP.'" (Fact Sheet at 4). At the time the HWFP was issued, NMED had access to information demonstrating that the Permittees fully expected that additional waste streams, not identified in the 1995 TWBIR, would be disposed of at WIPP, consistent with requirements of the HWFP.

DOE's Record of Decision for the WIPP facility, published more than 18 months before the HWFP was issued, identifies a number of on-going activities at DOE sites, including plutonium stabilization and management activities, environmental restoration (including remediation of sites where TRU waste was buried before 1970), decontamination and decommissioning, waste management, and defense testing and research, that are expected to generate additional TRU waste over the 35 year period that WIPP will receive waste. 63
Fed.Reg. 3623, 3624-3625 (January 23, 1998). Both the TWBIR and the HWFP, as issued by NMED, also identify on-going activities expected to generate additional TRU waste. (Permit Attachment B at B-1, Permittee Exhibit 71). The HWFP states that both "retrievably stored waste" and "newly generated waste" will be accepted for disposal at WIPP. The identification of "retrievably stored waste" and "newly generated waste" that will be sent to WIPP are not limited to the waste streams identified in the 1995 TWBIR Revision 2.

Due to on-going activities at the DOE generator/storage sites, including continuing missions and clean up activities, it would have been impossible for DOE, in 1995, to identify all transuranic waste types from all sites that would be shipped to WIPP over the 35 year period that WIPP will receive waste. As NMED states, one of the purposes for developing the baseline inventory was to satisfy the WIPP LWA requirement (which was later withdrawn when the LWA was amended) that DOE identify the "total DOE TRU waste inventory." (Fact Sheet at 2). Read in context, the term "total DOE TRU waste inventory" meant all of the TRU waste that had been identified by the generator sites as of 1995, regardless of whether or not it was eligible for disposal at WIPP. To meet the LWA requirement, DOE collected and reported information on all of the transuranic waste that had, at that time, been identified as TRU waste, regardless of whether it might meet the conditions for disposal at WIPP. (TWBIR Revision 2 at ES-1). The information was reported in the TWBIR and included TRU waste that had been identified for disposal at WIPP and "non-defense, commercial, PCB contaminated, and buried (pre-1970) TRU wastes." (Id.) The Hanford tank waste, discussed in NMED's Fact Sheet, was included as a "possible future waste," as were a number of other waste categories. (Id. at Chapter 5 and Appendix O).

The TWBIR was not meant to be the final word on DOE TRU inventory. The TWBIR is
a snapshot-in-time of the TRU inventory and has always been presented as a document that would be updated as more information about DOE's transuranic waste becomes available. The 1995 TWBIR itself stated that the inventory was based on the best available information and specifically stated that the baseline inventory would be updated as additional waste information was identified. (Id. at 1-24). As of 1995, there were numerous waste streams that, at that time, either had not been or could not be identified as TRU waste for disposal at WIPP. (See e.g., TWBIR at 1-4 to 1-5, Chapter 5).

The fact that TRU waste which was not listed in the TWBIR may be eligible for disposal at WIPP does not "change[] an erroneous assumption on which the original permit was based." The TWBIR was provided to NMED as part of the permit application process and was meant to provide general information about the type of waste DOE expected to dispose of at WIPP. It was not represented or intended as a delineation of "all transuranic waste types at all sites from which wastes are to be shipped to WIPP," as implied by NMED. The HWFP did not condition the acceptance of waste to inclusion in the TWBIR. NMED recognized, during the original permit application process and hearing proceeding, that the WAP process, not the TWBIR information, was the mechanism by which waste is to be determined compatible and acceptable for disposal at WIPP. (RCRA Permit Application, Chapter C at C-8, Modification Administrative Record, Doc. 11; Report of the Hearing Officer, at 91, Conclusion of Law 12, Modification Administrative Record, Doc. 18). The correct assumption on which the original permit was based, was that all prospective waste, whether "directly traceable" to the TWBIR or not, must comply with the specific provisions of the HWFP, the waste analysis plan (WAP) process, and the HWFP waste acceptance criteria (TSDF-WAC) in the HWFP before being accepted for disposal at WIPP. (Modification Administrative Record,Docs. 11, 18; Permittee Exhibits 8, 9, 11-14). The fact that
waste that is not directly traceable to the TWBIR may be accepted for disposal does not change
this basic assumption about the eligibility of waste for disposal at WIPP.

b) NMED has not met the second element of Section 270.41(a)(2), which requires
NMED to show 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 there is "new information" that was not available at the
time the permit was issued, it cannot show that, if the information had been available, it "would
have justified the application of different permit conditions at the time of issuance." 40 CFR
§270.41(a)(2); 45 Fed.Reg. at 33314. NMED has not provided justification that the 1995 TWBIR
incompleteness would have justified the application of different permit conditions at the time of
permit issuance. Tenneco Oil Co. v. New Mexico Water Quality Control Commission, 107 N.M.
469, 471, 760 P.2d 161 (N.M.App. 1987)(burden of proof on Agency as proponent of proposed
action); Duke City Lumber Co. v. New Mexico Environmental Improvement Board, 95 N.M. 401,
622 P.2d 709 (N.M.App. 1980)("The Courts have uniformly imposed on administrative agencies
the customary common-law rule that the moving party has the burden of proof"); *In re BMX
Technologies*, 9 EAD 61, 73 (April 5, 2000)(the burden of persuasion is assigned to the Agency
on its prima facie case).

Pursuant to the terms of the HWFP, waste is acceptable for disposal at WIPP if it meets
the requirements of the TSDF-WAC and the WAP. (Module II, Conditions II.B.1, II.C.1, II.C.3,
II.C.3.d, II.C.4, Permittee Exhibit 70; see also 45 Fed.Reg. at 33312 ("one of the most useful
purposes of issuing a permit is to prescribe with specificity the requirements that a facility will
have to meet..."). The final HWFP did not make acceptance of waste for disposal at WIPP
contingent upon the waste being "directly traceable to the waste streams" in the TWBIR. Nor
was there any reason for such a contingency, since all waste, regardless of whether it is "directly
traceable" to the TWBIR, must meet the criteria identified in the HWFP. The purpose of these criteria and the WAP is to ensure that the waste placed in the WIPP facility meets the performance standards of the repository. The performance standards are based upon an analysis of all the relevant characteristics, including waste compatibility, that needed to be considered for the safe disposal of mixed waste. The relevant parameters are identified in the TSDF-WAC and the analysis required to ensure that the parameters are met is in the WAP. Therefore, any waste that meets the WAP is compatible with waste already in the repository, packaging materials, backfill, and repository seal materials.

NMED contends that the permit modification is needed because the potential additional waste streams have 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." (Fact Sheet at 4). NMED has not provided any support for its contention that the proposed modification would have been justified at the time of permit issuance. Other than compatibility, NMED has not identified the "other characteristics" of concern. The HWFP already requires that all waste be evaluated for compatibility and for other specific characteristics that ensure safe performance of the repository. NMED is not challenging either the original compatibility analysis or the method by which compatibility is determined pursuant to the existing provisions of the HWFP. Nor has NMED identified any compatibility issues that the additional waste streams would have raised at the time of permit issuance. It has not offered any evidence demonstrating that the method used for determining compatibility, as incorporated into the HWFP, would not have been applicable to waste streams that may not be directly traceable to the TWBIR. NMED has also not offered any explanation as to why the TSDF-WAC and the WAP would not ensure the compatibility and acceptability of additional waste streams.
NMED's proposed modification arbitrarily seeks to impose permit conditions that would not have been justified at the time of permit issuance. "An agency's action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand."


NMED has not provided any regulatory or other appropriate basis for prohibiting the acceptance of additional waste streams that may not have been identified at the time of permit issuance. Nor has NMED provided any basis for changing the method by which waste acceptability determinations are made. 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 waste streams that may be identified in the future. The information about the possible disposal of additional waste streams that may not be directly traceable to the 1995 TWBIR was available at the time of permit issuance. NMED has not provided any explanation as to why it did not try to include an inventory based condition at the time of issuance.

NMED has not provided any additional information, other than that contained in the Public Notice, the Fact Sheet and the Modification Administrative Record, in support of the proposed modification. NMED did not file a Notice of Intent to Present Technical Testimony on March 8, 2004 and therefore cannot present technical testimony at the hearing. 20.1.4.300.B.(b). Based on the information provided by NMED, NMED cannot demonstrate that the proposed permit modification would have been justified at the time of permit issuance. NMED has not shown that the proposed modification is needed to remove or alter inappropriate permit terms.
that were based on an erroneous assumption, as required for an agency-initiated permit modification. In the Matter of General Electric Company, FAD at 624.

III. CONCLUSION

NMED has not provided any regulatory or other basis for prohibiting the acceptance of additional waste streams that may not be "directly traceable" to the 1995 TWBIR. Nor has NMED provided any basis for changing the method by which waste is currently accepted for disposal. There is no evidence in the Fact Sheet or the Modification Administrative Record that the current HWFP requirements are not adequate to determine the acceptability of waste for disposal at WIPP. NMED has failed to meet the for cause requirements of Section 270.41 and lacks jurisdiction to regulate the radioactive component of mixed waste.

WHEREFORE, the Permittees respectfully request that NMED's proposed permit modification, as described in Public Notice No. 03-12 and the accompanying Fact Sheet, be dismissed with prejudice.

Respectfully submitted,

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