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. NM 4890139088  

No. HWB 04-01(M)  

MOTION IN LIMINE  
ENVIRONMENT DEPARTMENT'S MOTION  
TO EXCLUDE EVIDENCE ABOUT CHEMICAL AND PHYSICAL  
CHARACTERISTICS OF NEW WASTE STREAMS  
AND SUPPORTING MEMORANDUM  

The Environment Department hereby moves to exclude evidence in this proceeding that relates to the chemical or physical characteristics of new waste streams that were not contemplated, analyzed or reviewed by NMED when the original permit was issued. This evidence is beyond the scope of this proceeding, and is therefore irrelevant, as explained below. The other parties to this proceeding have been contacted. Southwest Research and Information Center, CARD, CCNS and the Attorney General concur in this motion. DOE, CH2M Hill and Washington TRU Solutions, LLC do not concur and will file a response to this motion. EEG takes no position.  

INTRODUCTION  

On November 26, 2003, the New Mexico Environment Department (NMED) issued a Public Notice and Fact Sheet by which it initiated a proposed modification to the current permit issued to the Waste Isolation Pilot Plant in Carlsbad, New Mexico. The permit modification is initiated under 40 CFR §270.41 (adopted by 20.4.1.900 NMAC). The modification is initiated
because it recently came to the attention of NMED that the Department of Energy (DOE) and Westinghouse TRU Solutions, LLC (Permittees) intend to expand the inventory of waste that will be disposed of at WIPP to include waste streams beyond those included in the waste inventory submitted to NMED as part of the permit application, and which were not analyzed or reviewed by NMED when the original HWFP was issued ("new waste streams"). NMED has proposed that the permit be modified to prohibit the disposal at WIPP of new waste streams until the Permittees show, through a permit modification process, that the chemical and physical properties of the new waste streams are such that they can be safely disposed of at WIPP. The Permittees and CH2M Hill may attempt to present evidence in this proceeding about the chemical and physical characteristics of the new waste streams in an attempt to show that these new waste streams are compatible and do not present a health or safety risk, and can be properly disposed of at WIPP. The purpose of this Motion in Limine is to exclude such evidence, for the reasons set forth below.

I. THE SCOPE OF THIS PROCEEDING IS TO DETERMINE WHETHER THE WIPP PERMIT SHOULD BE MODIFIED TO PROHIBIT WASTE NOT INCLUDED IN THE TRANSURANIC WASTE BASE INVENTORY REPORT RELIED UPON IN THE ORIGINAL PERMIT.

WIPP was granted its Hazardous Waste Facility Permit (HWFP or permit) under the Hazardous Waste Act, NMSA 1978 Sections 74-4-1 et seq. for the disposal of mixed waste on October 27th, 1999. The last revision of the permit application (Application, Rev.6)1 submitted by the Permittees for the WIPP permit, in describing the waste that would be transported to and disposed at WIPP, relied upon the "WIPP Transuranic Waste

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¹ Revision 6.0 was submitted on April 12, 1996. Subsequently, DOE made various further minor revisions, up through Revision 6.5, submitted in November of 1997, which did not change any of the references to the WTWBIR.
Baseline Inventory Report (Revision 1)

The WTWBIR was an inventory of all transuranic (TRU) waste that was expected to be disposed of at WIPP, and was in compliance with a provision in the WIPP Land Withdrawal Act, 102 P.L. 579 (1992) that required DOE to complete “a survey identifying all transuranic waste types at all sites from which wastes are to be shipped to WIPP…” It also served the purpose of providing NMED with a description of the inventory of TRU waste that was to be disposed of at WIPP for purposes of any analyses that had to be performed to support the permit, including providing NMED with waste stream descriptions as estimates of anticipated hazardous constituents, in compliance with the Hazardous Waste Act. NMSA 1978 Section 74-4-4.2A(1). The waste analysis plan (WAP) in the permit application (Chapter C) included a complete list of TRU mixed waste streams from the WTWBIR in the form of a waste identifier cross-correlation table (Table C-1) and a table of contact-handled TRU mixed waste characterization information (Table C-2). The WTWBIR was used as a basis to identify potential incompatibilities for all defense generated TRU mixed waste to ensure that WIPP would manage only compatible waste (Appendix C1). In addition, the WTWBIR was used by DOE in its permit application to apply weighting factors to the data accumulated from preliminary headspace gas analyses to reflect the expected proportions of different waste types and to predict the emissions of volatile organic compounds from the emplacement of waste at WIPP (Appendices C2, D9, D13). This point is important, because the

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2 The WTWBIR Rev. 1 was later revised to include non-defense wastes that were not expected to be disposed at WIPP, so the report was renamed to remove the designation of “WIPP TWBIR (WTWBIR) and became the TBIR Rev. 2 (TWBIR). A TWBIR Rev. 3 was also issued, which made minor changes that are not material to this proceeding.
HWFP was based upon the chemical and physical analyses of waste streams identified in
the WTWBIR, and was not based on unidentified new waste streams.3

Prior to the HWFP being issued to WIPP, DOE prepared a revision to the
WTWBIR that included non-defense generated TRU waste. This document is the
“Transuranic Waste Baseline Inventory Report, (Revison 2)” DOE/CAO-95-1121,
December 1995 (TWBIR). While this document was not referenced or relied upon in the
WIPP permit application, DOE prepared it prior to the issuance of the permit in 1999.

The fact that the permit relied upon particular waste streams identified in the
WTWBIR is highlighted by the requirement, in the WIPP Waste Stream Profile Form
that must be filled out for every waste stream disposed of at WIPP, that the generator
provide the description of the waste stream from the WTWBIR. Permit Attachment B,
Figure B-1.

The Permittees have indicated that they now intend to dispose of mixed waste at
WIPP that was not identified in the WTWBIR or in the TWBIR. NMED has not
evaluated these new waste streams and does not currently have the information to do so.

The purpose of the permit modification proposed by NMED in this proceeding is
to prohibit the acceptance of mixed wastes at WIPP that were not included in the TWBIR
or relied upon in the original permit proceeding, unless specifically approved by NMED
in a permit modification. The actual proposed substantive text that would be included in
Module II is as follows:

3 The WTWBIR and the TWBIR did identify future waste streams that were included in the analysis. NMED does
not contend that wastes identified as future waste streams (i.e. waste streams with no stored volumes and only
projected volumes) should be prohibited at WIPP.
“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.

<table>
<thead>
<tr>
<th>Waste Stream Profile</th>
<th>Description</th>
<th>Date Approved</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

As this proposed language and Table shows, NMED’s proposed permit modification would allow for the future approval of permit modifications and listing of additional waste streams that are not in the TWBIR. However, the purpose of this proceeding is not to determine which waste streams should be approved for inclusion in the table (unless they have already been approved by NMED). The purpose of this proceeding is to prohibit new waste streams, but provide a procedure that would allow for new waste streams to be approved (if appropriate) in the future. This is not the proceeding through which approval for new waste streams can or should be granted. NMED does not have the information necessary to make the proper evaluations of new waste streams in this proceeding, and cannot be expected to rely on the information produced in this hearing to make those evaluations. There is no established process in an agency initiated modification for NMED to obtain further information about new waste streams to properly evaluate them. On the other hand, there is an established process for
NMED to evaluate new waste streams as part of a permit modification process initiated by the Permittees. If the Permittees wish to add new waste streams in the future through a permit modification procedure under 40 CFR 270.42, NMED can use Notices of Deficiency or other methods to assure itself that it has all information necessary to make a decision on the permit modification request.

II. THE ISSUE IN THIS PROCEEDING IS WHETHER THE AGENCY INITIATED PERMIT MODIFICATION MEETS THE REQUIREMENTS OF 40 CFR 270.41.

NMED is proposing its permit modification based upon 40 CFR §270.41. That section states in relevant part:

§ 270.41 Modification or revocation and reissuance of permits. When the Director receives any information ... 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 Director may modify or revoke and reissue the permit accordingly, subject to the limitations of paragraph (c) of this section:....

(a) Causes for modification. The following are causes for modification, but not revocation and reissuance, of permits... (2) Information. The Director has received information. Permits may be modified during their terms for this cause only if the information was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance.

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In this case, NMED has received new information. This contention was explicitly set forth in the agency’s Fact Sheet issued on November 26, 2003. The “new information” is information that the DOE intends to dispose of waste at WIPP that was not contemplated by the TWBIR and was not contemplated, analyzed or reviewed by NMED when the original permit was issued. NMED also contends that the information
was not available at the time of the permit issuance and that the information, had it been available, would have justified the application of different permit conditions at the time of issuance. The Permittees, on the other hand contend that the information is not new, and even if it is new, would not justify the application of different permit conditions at the time of issuance.

III. EVIDENCE THAT IS OUTSIDE THE SCOPE OF THIS PROCEEDING AND WHICH IS NOT RELEVANT TO THE LEGAL ISSUES IS IRRELEVANT AND MUST BE EXCLUDED.

The scope of this proceeding is whether the agency initiated modification meets the requirements set forth in point II, above. Nonetheless, the Permittees or other parties may attempt to introduce evidence about the chemical and physical properties of the new waste streams in an attempt to show that those waste streams are compatible and can be safely disposed of at WIPP. However, that evidence is outside the scope of this proceeding, and is irrelevant. Once it is established that a waste stream is not directly traceable to the inventory upon which the original permit was based, it is irrelevant to this proceeding whether the new waste stream is compatible or can be safely disposed at WIPP. Under the proposed permit modification, new waste would be prohibited until the Permittees request a separate permit modification and the modification is approved allowing such waste. Information about the physical and chemical characteristics of new waste can be best considered in a Permittee initiated modification, because that process allows NMED to evaluate the information supplied by the Permittees, allows NMED to require more information if necessary, and allows NMED the ability to examine each
stream of waste proposed. The purpose and scope of this proceeding is only to determine whether NMED may modify the permit based upon new information.

Allowing irrelevant evidence about the physical and chemical characteristics of the new waste streams in this proceeding will only serve to confuse the proceeding, make it unnecessarily complex and lengthy, and will not serve to assist the decision-maker in deciding whether the proposed agency-initiated modification should be granted.

CONCLUSION

Evidence related to the physical or chemical characteristics of new waste should not be allowed in this proceeding. Such evidence is irrelevant and outside the scope of this agency initiated permit modification. NMED requests that the Hearing Officer issue an order excluding this evidence.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPT.

Charles F. Noble
Assistant General Counsel
New Mexico Environment Department
Harold S. Runnels Bldg.
1190 St. Francis Drive
Santa Fe, N.M. 87505