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Via Electronic Transmission and U.S. Mail



Ms. Sally Worthington, Hearing Clerk
New Mexico Environment Department
1190 St. Francis Drive, N-2150
P.O. Box 5469
Santa Fe, NM 87502

Re: In the Matter of the Renewed Hazardous Waste Facility Permit for the Waste Isolation Pilot Plant; Applicants' Comments On The Hearing Officer's Report; HWB 10-26 (P)

Dear Ms. Worthington:

Enclosed with this correspondence are the original and one copy of Applicants' Comments on the Hearing Officer's Report for filing in the above referenced matter on behalf of the U.S. Department of Energy and Washington TRU Solutions LLC. Copies of this document are being sent concurrently to all parties as specified in the attached Certificate of Service.

Thank you for your attention to this matter.

Sincerely,

Michael L. Woodward
Attorney for Applicants

Enclosures

Cc: Service list via electronic transmission and U.S. Mail



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

**IN THE MATTER OF THE RENEWED
HAZARDOUS WASTE FACILITY PERMIT
FOR THE WASTE ISOLATION PILOT PLANT,
CARLSBAD, NEW MEXICO
EPA I.D. NO. NM4890139088**

HWB 10-26(P)

APPLICANTS' COMMENTS ON THE HEARING OFFICER'S REPORT

By and through undersigned counsel of record, the United States Department of Energy ("DOE") and Washington TRU Solutions LLC ("WTS") (collectively referred to as Applicants or Permittees), submit the following Comments on the Hearing Officer's Report in the above-captioned matter to the Secretary of the New Mexico Environment Department ("NMED") pursuant to 20.1.4.500.C(2) NMAC.

I. INTRODUCTION AND EXECUTIVE SUMMARY

Applicants support the Hearing Officer's Report in this matter in its entirety with the exception of certain findings of fact, conclusions of law and recommendations related to concentrations of concern for volatile organic compounds ("VOCs"). With respect to the contested issues, Applicants agree with the Hearing Officer's findings of fact, conclusions of law and recommendations related to Permit Section 1.10.2 and surge storage. Applicants also agree with the Hearing Officer that its request for the renewal of the hazardous waste facility permit for Waste Isolation Pilot Plant ("WIPP") be granted with a correction to the recommendation. Applicants believe the most recent version of

the proposed Permit is dated July 2, 2010, and is in the hearing record as NMED Exhibit 1.¹

Applicants except to and provide comments on specific Findings of Fact and Conclusions of Law contained in the Hearing Officer's Report pertaining to the allocation of risk for the VOCs and assignment of action levels in Table 4.6.2.3 in the Proposed Permit. Applicants do not agree with and except to the recommendation which results in less than all of the allowable risk being assigned to the VOCs in Table 4.6.2.3. The recommended action level for carbon tetrachloride of 412.5 parts per billion by volume ("ppbv") in the referenced table assigns only 75% of the allowable risk by not taking into account that 1,1-Dichloroethylene ("1,1-DCE") is no longer classified by the United States Environmental Protection Agency ("EPA") as a carcinogen, but is still assigned approximately 25% of the allowable risk. Reassignment of the risk from 1,1-DCE to carbon tetrachloride will fully assign the allowable risk and will result in an action level for carbon tetrachloride of approximately 1000 ppbv. Similarly, the proposed action level of 412.5 ppbv does not reallocate the risk among the VOCs to more appropriately reflect the concentrations of the subject VOCs found in the waste streams disposed of in the WIPP repository. A simple reallocation of risk among the VOCs to assign 74% of the total risk to carbon tetrachloride, which more accurately reflects the expected VOC

¹ At Page 30 of the Hearing Officer's Report, in the recommendation to grant renewal of the Hazardous Waste Facility Permit, reference is made to the Draft Permit as Changed, filed as Exhibit 1 to the Stipulation on Permit Language, filed June 30, 2010. Applicants understand that the Proposed Permit found at NMED Exhibit 1 is the version of the draft permit being recommended for issuance by the NMED.

concentration levels in the waste streams, results in an action level for carbon tetrachloride of 1,660 ppbv.

II. APPLICANTS' EXCEPTIONS TO HEARING OFFICER'S REPORT

Applicants except to the Hearing Officer's Conclusion of Law No. 12 that they failed to carry their burden of proof to establish that Table 4.6.2.3 in the Proposed Permit is inadequate, improper or invalid. Table 4.6.2.3 of the Proposed Permit contains enforceable limits for concentrations of VOCs measured at VOC Monitoring Station A in the underground at the WIPP facility. These limits incorporate the environmental performance standards for the WIPP repository which is considered a miscellaneous unit regulated under Subpart X of 40 CFR Part 264. These limits were first established in the Permit issued by the NMED in 1999 to protect non-waste workers on the surface at the WIPP facility from emissions coming out of the exhaust shaft at the facility. The NMED utilized the environmental performance standard for suspected human carcinogens of one excess cancer death in 100,000, commonly expressed as a risk of 1×10^{-5} . To be clear, when NMED issued the Permittees their initial hazardous waste facility permit in 1999, NMED established concentrations of concern for carcinogenic VOCs at an environmental performance standard of allowable risk of 1×10^{-5} . No parties to the proceeding have challenged this protection standard, the NMED has not suggested the standard be revised, nor have Applicants requested any change to the standard. Accordingly, it has been conclusively established in the record of this proceeding that 1×10^{-5} is the appropriate environmental protection standard to be applied to the WIPP hazardous waste disposal

facility, which provides the basis for the appropriate concentration action levels for carcinogenic VOCs contained in Table 4.6.2.3 of the proposed permit.

In the hearing on the renewal of the WIPP hazardous waste facility permit, Applicants' witness Mr. Robert F. Kehrman clearly established in his testimony that Table 4.6.2.3 of the proposed Permit in NMED Exhibit 1 assigns the total risk to carcinogenic VOC constituents at only 75% of the total allowable risk represented by the environmental performance standard of 1×10^{-5} . This is due, in large part, to the NMED's tacit decision not to reapportion any risk to other carcinogenic constituents in the table based upon the EPA reclassifying 1,1- DCE, as a non-carcinogen, when, on July 2, 2010, it acted upon the Permittees' Class 2 permit modification request to modify the current Permit. Table 4.6.2.3 in the Proposed Permit is inadequate, improper, and invalid inasmuch as the evidence established that the Proposed Permit only apportions 75% of the accepted performance standard of 1×10^{-5} risk limit for carcinogenic VOCs. See, Kehrman, TR p. 49, 53, 56; and Proposed Finding of Fact No. 31 in the Hearing Officer's Report. The Applicants have used this risk level as the basis for facility design and operations for eleven years. Applicants assert it is improper and inadequate for the NMED to establish at initial permit issuance a performance standard of 1×10^{-5} and then in this proceeding not to allocate fully that risk in the Proposed Permit.

Applicants except to the statement in Conclusion of Law No. 12 that "based upon the evidence presented, the Department's decision to maintain the concentration of concern for carbon tetrachloride at 412.5 ppbv is sustained on the basis that the value,

and other C of C values in Table 4.6.3.2 [sic], are supported by the rationale underlying the original permit issued in 1999, and no facts have been presented that require a change in those values.” Applicants’ witness Mr. Kehrman testified, and NMED’s witness Mr. Steve Zappe concurred, that the EPA has determined that 1,1-DCE is no longer a carcinogen and thus the NMED should not treat 1,1-DCE as a carcinogen for purposes of allocating carcinogenic VOC risk. NMED witness Mr. Steve Zappe admitted that the Agency originally assigned 25% of the total risk to 1,1-DCE as a carcinogen and that compound no longer is considered a carcinogen by the EPA (TR p. 222, ll. 1 – 10). The fact that 1,1-DCE is no longer considered a carcinogen by the EPA requires a change in the values in Table 4.6.2.3. In fact, NMED witness Mr. Zappe acknowledged it would be reasonable to reapportion the 1,1-DCE risk to any or all of the remaining carcinogens listed in Table 4.6.2.3. (TR p. 223, ll. 7 - 17). Factual testimony was abundant that the risk allocated to 1,1-DCE should be reallocated to carbon tetrachloride. Moreover, there was abundant factual evidence presented by Applicants through the testimony of witness Mr. Kehrman that the concentration of concern for carbon tetrachloride proposed by the Department of 412.5 ppbv is artificially low inasmuch as carbon tetrachloride is the most prevalent VOC in the waste streams scheduled to be disposed of at the WIPP facility and presents the greatest likelihood of being detected at VOC Monitoring Station A at the WIPP facility. In summary, facts were indeed presented at the hearing that demonstrate that Table 4.6.2.3 in NMED Exhibit 1 is improper and inadequate, thus requiring a change in the values to fully allocate the risk.

Applicants except to Conclusion of Law No. 11 in the Hearing Officer's Report. As discussed above, Applicants met their burden showing the existing VOC limits are inadequate, improper or invalid by establishing that Table 4.6.2.3 fails to allocate carcinogenic risks up to 1×10^{-5} , which is the unchallenged performance standard established in the initial Permit. With respect to potential future exceedances of the 412.5 ppbv limit for carbon tetrachloride discussed in Conclusion of Law No. 11, whether the WIPP facility could or would exceed 412.5 ppbv for carbon tetrachloride is not germane to the issue of whether the carcinogenic VOCs are properly allocated. The reference to Mr. Kehrman's testimony that the 412.5 ppbv limit for carbon tetrachloride could be met in Conclusion of Law No. 11 is taken out of context. Mr. Kehrman stated "that limit currently exists in our Permit, and so we have no choice but to meet that limit in terms of the actions we have to take if we exceed it." TR p. 89, ll. 12 – 14. Mr. Kehrman testified that if the running annual average for carbon tetrachloride is exceeded, the WIPP facility would be required to close the current disposal room that it was operating in. If that running annual average remained above the concentration of concern for six months, WIPP will be required to close the panel it was operating in. TR p. 50, ll. 16 – 24. See, also, written testimony of Mr. Kehrman, p. 32 wherein the witness discusses meeting VOC limits by closing disposal rooms. In actuality, the WIPP facility could potentially meet the 412.5 ppbv limit but this might necessitate abandoning very expensive disposal space in the underground repository to meet this artificially low permit requirement. Therefore, the crucial point is not whether the WIPP facility can potentially meet the

412.5 ppbv volume in Table 4.6.2.3 – the point is that the NMED has improperly under-allocated risk. Applicants have conclusively shown that the proposed limit for carcinogenic VOCs and carbon tetrachloride specifically is invalid and inadequate in that it does not fully apportion the accepted environmental performance standard and potentially leads to unnecessary and costly measures, including the premature closing of partially filled disposal rooms.

Applicants except to Finding of Fact No. 42 wherein it is stated “the Department chose to stay with the values in the Proposed Permit, which were derived from the Current Permit, except where changed based on EPA’s change in risk values . . .” While NMED did, in the Permit Modification, change the concentration of concern for carbon tetrachloride from 165 ppbv to 412.5 ppbv, the Department did not change the VOC values based on the EPA’s change in risk values with respect to 1,1-DCE. As noted previously, the EPA determined that 1,1-DCE is no longer considered a carcinogen and Applicants maintain that continuing to assign 25% of the carcinogenic risk to 1,1-DCE is inappropriate. The statement in Finding of Fact No. 42 is misleading to the extent that it could be construed that NMED has taken all of the EPA’s changes in risk value into account in Permit Table 4.6.2.3.

Applicants except to Finding of Fact No. 39 with respect to the statement that “the Department also testified that the administrative record for the permit did not contain an inventory of expected volumes or types of waste that might be disposed of at WIPP in the next ten years . . .” While NMED witness Mr. Zappe did make this statement, the fact of

the matter is that Applicants' Exhibit RK-4, Table 4, did include future waste streams of high organic waste. Therefore, an inventory of future waste was produced by Applicants and Finding of Fact No. 39 is misleading and should be revised.

Applicants except to Finding of Fact No. 40 wherein it is stated "the Department responded that there is no requirement to apportion 100% of the risk." Applicants' position on this point is that the WIPP facility has been operating under a performance standard for VOC risk of 1×10^{-5} for over eleven years and has based facility design, in part, on this standard. 1×10^{-5} is the unchallenged performance standard established for the miscellaneous unit, i.e., the underground repository. Applicants know of no other permittee in New Mexico that is required by a permit condition to operate at a risk level less than the established performance standard. Applicants have proffered a risk allocation which its witness has testified is reasonable and fully allocates the risk to 1×10^{-5} . NMED has not taken, in testimony, the affirmative position that Applicants' approach is not reasonable. Nor has NMED identified any regulatory or policy basis in support of not fully allocating the acceptable risk. Applicants have carried their burden of proof on the reallocation of VOCs it proposes for Table 4.6.2.3.

Applicants' witness, Mr. Kehrman testified that levels of carbon tetrachloride could reach 600 to 650 ppbv during the operating life of the WIPP facility, well above the limit of 412.5 ppbv contained in Table 4.6.2.3 in NMED Exhibit 1. TR. p. 78, ll. 7-25. No parties to the proceeding disputed his testimony, nor provided any contravening evidence. It is true, as stated in Finding of Fact No. 34, that Mr. Kehrman rejected a

concentration of concern limit of 525 ppbv for carbon tetrachloride due to the fact that Applicants' have projected values for carbon tetrachloride to be measured at VOC Monitoring Station A as high as 650 ppbv. Mr. Kehrman further testified that if the risk assigned for 1,1-DCE was solely reallocated to carbon tetrachloride with no change to the limits for the other VOCs listed in Table 4.6.2.3, that risk number would be approximately 1,000 ppbv fully assigning the total risk of the established performance standard of 1×10^{-5} . TR. p. 57, ll. 10-14; TR p. 84, ll. 18 – 25; TR p. 85, ll. 1 – 8; Exhibit RK-4, Table 5 .

Applicants have conclusively shown that proposed Table 4.6.2.3 of Exhibit 1 is inadequate, improper and invalid, and is not supported by the evidence in the record of this proceeding. As set forth in Applicants' comments filed in this proceeding and in the testimony of Mr. Kehrman, the allocation of 100% of the acceptable risk of 1×10^{-5} is based upon the reasoned evaluation from issuance of the initial permit and has remained unchallenged in this proceeding. An increased risk allocation to carbon tetrachloride is supported by the data showing the levels of carbon tetrachloride relative to other carcinogenic VOCs in the historic waste received at the WIPP facility, thus resulting in the increased concentrations of carbon tetrachloride detected at VOC Monitoring Station A, and based upon the projection of VOCs in future waste streams to be managed at the WIPP facility.

The reapportionment proposed in Applicants' Permit Modification Request is reasonable, appropriate, and supported by the evidence in the record of this proceeding.

However, Applicants are willing to accept a reasonable reallocation of the table set forth in 4.6.2.3 that would establish the concentration of concern for carbon tetrachloride at approximately 1000 ppbv, leaving the concentrations of concern for the remaining VOCs the same. Even though it only allocates 42% of the risk to carbon tetrachloride, this concentration of concern for carbon tetrachloride would allocate the un-allocated risk from 1,1-DCE while also assuring the Applicants that they would not face undue expense or premature closure of partially filled disposal rooms in the future due to an artificially low limit. There is sufficient evidence in the record regarding the 1,1-DCE change by the EPA to support a concentration of concern for carbon tetrachloride of approximately 1000 ppbv based on the testimony of both Mr. Kehrman and NMED witness Mr. Zappe.

III. CONCLUSION

Applicants' support the Hearing Officer's recommendation for issuance of the renewed permit, and request the concentration of concern values for carcinogenic VOCs in Table 4.6.2.3 of the Proposed Permit be revised to fully allocate the 1×10^{-5} risk by incorporating the values found in Kehrman Testimony Exhibit RK-4, Table 5, or in the alternative, respectfully request the Secretary of the NMED reallocate the risk assigned to 1,1-DCE and assign that risk to carbon tetrachloride, so that the concentration of concern for carbon tetrachloride be established at approximately 1000 ppbv, which fully allocates the allowable risk of the accepted environmental performance standard but does not require a change to the other concentrations of concern in Table 4.6.2.3.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of Applicants' Comments on the Hearing Officer's Report was served on the following on November 10, 2010:

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