ENTERED

June 10, 2010

Ms. Trais Kliphuis
New Mexico Environment Department
2905 Rodeo Park Drive East, Building 1
Santa Fe, NM 87505

Dear Ms. Kliphuis,

I am writing to express my opposition to the April 8, 2013 Class 2 Permit Modification Request (**PMR**) to the Waste Isolation Pilot Plant (**WIPP**) Permit submitted by the US Department of Energy (**DOE**) Carlsbad Field Office and Nuclear Waste Partnership LLC (collectively **the Permittees**), entitled, "Modify Excluded Waste Prohibition." I have first-hand knowledge of the circumstances that led to the incorporation of the language that the Permittees now wish to modify, and I firmly believe that it would be imprudent for the State of New Mexico to modify this language as proposed in the PMR. I hope my comments provide sufficient background and justification for the New Mexico Environment Department (**NMED**) to deny the Class 2 PMR or, at a minimum, reclassify the PMR as a Class 3 subject to a public hearing.

I am at least thankful that the Permittees did not submit their March 2013 pre-submittal draft PMR unchanged, which proposed the complete removal of the tank waste exclusion in Permit Section 2.3.3.8 and elsewhere. However, as I will explain below, the current proposed modification to replace the existing language with, "*High-level radioactive waste, as defined in the WIPP Land Withdrawal Act, is not acceptable at the WIPP facility*," simply restores the WIPP Permit to the vulnerable condition that existed in 2003, when DOE first proposed to reclassify tank waste from high-level waste (**HLW**) to transuranic (**TRU**) waste so that it could be disposed of at WIPP.

I will not devote more than this paragraph explaining why the classification of this modification as a Class 2 PMR is inappropriate – I will leave it to other commenters to further develop that argument. I only wish to make these two points: *First*, the idea that an action (approve specific tank waste for disposal at WIPP) that currently requires a Class 3 PMR could be supplanted by a single Class 2 PMR that would allow any and all tank waste that DOE reclassifies as TRU to be disposed of at WIPP is myopic at best, and a tragic abrogation of the public trust by NMED at worst. *Second*, the WIPP correspondence files are filled with examples of misclassified PMR submittals by the Permittees. I believe the "Drum Age Criteria (DAC)" PMR from November 13 2000, originally submitted as a Class 1 "informational change," and eventually elevated to a Class 3 PMR complete with hearing, is a classic example of the Permittees attempting to modify the permit with the least amount of public involvement possible. I had hoped they learned their lesson in the early 2000s, but apparently they have not.

I have included an appendix to my comments in which I provide a historical background about how the WIPP permit came to include the tank waste exclusion. I do not seek responses to any statements included in that appendix.

The existing permit language has well served the State of New Mexico for the past nine years, by ensuring that DOE would not reclassify tank waste as TRU waste and ship it to WIPP without

the benefit of a public hearing. The change proposed by the Permittees to replace the existing tank waste exclusion with language from the WIPP Land Withdrawal Act is not as protective to the State's interests as it might appear upon initial reading. On the first page of the Permittees' overview of the PMR, they state:

> "This PMR does **NOT** propose to allow DOE to accept and dispose of high-level waste at the WIPP facility. The WIPP Land Withdrawal Act (**LWA**) Amendment specifically bans the emplacement and disposal of high-level radioactive waste and spent nuclear fuel (**SNF**) at the WIPP facility. Language added by this PMR reiterates the prohibition."

Note that if the current tank waste exclusion is removed and replaced by this language, DOE will be able to reclassify tank waste from HLW to TRU waste and subsequently ship what previously was HLW to WIPP without a public hearing. Thus, while factually correct, the statement above can be misleading if the reader mistakenly interprets "high-level waste" to be synonymous with "tank waste." It would be more truthful if the Permittees had also plainly stated that they fully anticipate that DOE will accept and dispose of reclassified tank waste at WIPP as a result of implementing the PMR. In fact, replacing the tank waste exclusion with the proposed PMR language for WIPP permit provides no additional benefit to the State, because this language simply restates current federal law. It is the removal of the existing tank waste exclusion, and its replacement with language that is unenforceable by NMED, that effectively turns the clock back nearly10 years to the situation that precipitated the original conflict between DOE and the State of New Mexico in 2003.

New Mexico is not the only state interested in the reclassification of tank waste. In the *Final Tank Closure and Waste Management Environmental Impact Statement for the Hanford Site, Richland, Washington,* issued November 2012 (DOE/EIS-0391), the Washington State Department of Ecology (**Ecology**), states:

> "Ecology has legal and technical concerns with any tank waste being classified as mixed TRU waste at this time. DOE must provide peer-reviewed data and a strong, defensible, technically and legally detailed justification for the designation of any tank waste as mixed TRU waste, rather than as HLW.

Ecology raises further issues in this paragraph about ensuring such waste would have a viable disposal pathway and about the cost benefit of sending a relatively minor amount of waste to WIPP, but this particular statement above caught my attention. I posed the following question in an e-mail to staff at Ecology:

> "Does Ecology have an agreement with DOE (preferably in writing) that they will provide the data and justification you seek? Or are you simply hoping they will cooperate?"

I received the following reply from Suzanne Dahl, Tank Waste Treatment Section Manager in Ecology's Nuclear Waste Program:

> "DOE has said they will follow their internal processes and document the decision in a Record of Decision."

Ecology thus will only receive what DOE voluntarily releases in conjunction with issuing a Record of Decision, which generally is documented in the Federal Register and does not include such things as "peer-reviewed data" nor "a strong, defensible, technically and legally detailed justification." To my knowledge, DOE has not publicly released their "internal process" on how they would reclassify HLW as TRU waste. Without the Class 3 PMR process as currently required for tank waste in the WIPP permit, DOE will have no driver to provide the information that the State of Washington – and I can only hope the State of New Mexico as well – believes is in the public interest to fully inform its citizens about any waste historically classified and managed as HLW that would be reclassified as TRU waste and sent to WIPP for disposal.

The Permittees attempt to make the argument in the section explaining why the modification is needed that "the provisions, as stated, are inappropriate and should be modified."

> "The WIPP Permit is developed and approved based on requirements specified in the Hazardous Waste Permit Program of the hazardous waste regulations that implement Subtitle C of the Resource Conservation and Recovery Act (RCRA). The RCRA regulations apply to all aspects pertaining to management of hazardous waste. The radioactive aspects of the waste are not regulated by the RCRA. The excluded waste prohibition requires that the New Mexico Environment Department (NMED) approve the Permittees TRU waste determination through a Class 3 PMR. Because this determination is not RCRA related, the Permittees believe the provisions, as stated, are inappropriate and should be modified."

The Permittees have historically argued that the permit does not apply to non-mixed waste. For example, here is a statement from the Permittees' comments on the second draft permit (dated December 22,1998, in NMED WIPP files) summarizing "significant issues":

> "In several places in the permit, the NMED has imposed conditions on waste that do not contain hazardous waste as defined by 20 NMAC 4.1. and, therefore, are not subject to permitting. For example, in Module IV.B.2.b and in Section B, Introduction, page B-5, starting at line 21, the NMED requires that non-mixed TRU waste meet the requirements of the Waste Analysis Plan prior to being placed in the WIPP facility. Neither the Resource Conservation and Recovery Act (RCRA) nor the New Mexico Hazardous Waste Act (HWA) give NMED authority to regulate radioactive or non-mixed waste. Therefore, this provision exceeds the scope of NMED's regulatory authority and should be deleted." [*see 1.1.1 Scope of the Permit (Modules II and IV and Attachment B)*]

Needless to say, the Permittees eventually conceded that argument and concurred with the general requirement that all TRU waste, mixed and non-mixed alike, must meet the requirements of the Waste Analysis Plan. See "Report of the Hearing Officer, September 9, 1999" (in NMED WIPP files), particularly Findings of Fact 254-272, pages 49-53, and the Hearing Officer's discussion on "TRU Non-Mixed Waste," pages 72-79. This action did not grant NMED any "regulatory authority" over the radioactive component of the waste.

However, it was the Permittees themselves who voluntarily submitted the PMR on July 2, 2004 containing the language they now contest, stating back then:

> "TRU mixed wastes from tanks that has ever been managed as high-level waste is not acceptable at WIPP unless specifically approved through a subsequent Class 3 permit modification."

They now believe the provisions "are inappropriate and should be modified." They didn't believe that when they submitted it in 2004, nor when they submitted the permit renewal application in 2009, nor at the public hearing on the renewal permit in 2010. They didn't believe DOE had granted NMED any inappropriate authority over defense nuclear classification in 2004. It's not clear what has lead to this change of heart by the Permittees, but their arguments today are not much different from those offered in 1998 on the second draft permit, arguments that were subsequently found to have no merit.

The State of New Mexico should retain the existing language in Section 2.3.3.8 by denying the Permittees' PMR because it removes an enforceable requirement and replaces it with a recitation of federal law that NMED is unable to enforce. The PMR should be further denied for failing to fully explain why the modification is needed, in light of the fact that they were the ones who initially proposed the permit condition in 2004 and that they allowed it to remain unchallenged in the permit for nearly nine years.

If NMED chooses not to deny the PMR, they should reclassify it as a Class 3 PMR subject to public hearing.

Thank you for your consideration of my comments.

Sincerely,

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Historical Background on Tank Waste Exclusion in WIPP Permit

The following statements are not comments *per se*, but are offered to provide historical context to why the WIPP permit was modified in 2004 to include the tank waste prohibition in the first place. My narrative can be compared and contrasted with the explanation provided in the PMR by the Permittees. Response by NMED is neither sought nor necessary, unless the department disagrees with factual aspects of my statements.

In July 1999, DOE issued a major revision to their Radioactive Waste Management Order 5820.2A that had been in effect since September 1988. This new set of documents were called Radioactive Waste Management 435.1 (both a revised Order and accompanying detailed Manual and Implementation Guide), and with them DOE granted itself a new option in managing waste – the ability to reclassify HLW as either low-level waste or TRU waste.

Prior to 1999, TRU waste and HLW were each uniquely defined and clearly distinguishable from each other. TRU waste was defined in quantifiable, measurable terms (alpha-emitting transuranic radioisotopes with half-lives > 20 years and at concentrations of >100 nCi/g at the time of assay), while HLW was defined in qualifiable, process-oriented terms (waste material that results from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid waste derived from the liquid, that contains a combination of transuranic waste and fission products in concentrations requiring permanent isolation). After July 1999, DOE created a new scheme for determining whether waste previously managed as HLW could instead be declared "waste incidental to reprocessing" (or "incidental waste") and therefore exempt from disposal at the proposed high-level waste geological repository at Yucca Mountain. This reclassification process provided DOE with a mechanism to manage, treat, and dispose of some portion of its waste previously managed as HLW as either low-level or TRU waste.

To summarize: prior to July 1999, waste in tanks at Hanford, Savannah River, and Idaho National Laboratory was not simply "managed" as HLW. It <u>was</u> HLW – there was no alternative classification available for it. In July 1999, DOE granted itself an escape route to call it something else. However, <u>until</u> tank waste is formally reclassified by DOE, it <u>remains</u> HLW.

Between 2002 and 2003, DOE publicly proclaimed its prerogative to reclassify some waste previously managed as HLW in underground tanks as incidental waste, with the clear intent to ship the reclassified waste to WIPP. On October 28, 2003, then-governor Bill Richardson (who had served as President Clinton's Energy Secretary from August 1998 through January 2001, and was thus familiar with DOE's intent) responded to DOE's rhetoric by directing NMED to amend the WIPP permit to specifically forbid any reclassified HLW from coming to WIPP.

The only problem with this directive by the governor was that NMED has no inherent statutory or regulatory authority over the radioactive component of waste. In order to achieve this goal, NMED developed an agency-initiated modification to prohibit such reclassified waste by asserting that it had never been identified in the original inventory when the permit was being developed, and thus there was a concern that tank waste might be incompatible with other waste already emplaced. Despite what the NMED Fact Sheet dated November 26, 2003 ("Notice of Intent to Approve an Agency-Initiated Modification") states, I can declare without hesitation that the department was never concerned with the chemical compatibility of tank waste – it was only a means whereby NMED could achieve the governor's directive with at least an appearance of statutory authority. I should know, because I wrote the Fact Sheet.

Fortunately for NMED, the agency-initiated modification never went to hearing. The Permittees made compelling arguments in their public comments on the agency-initiated modification about why the basis for the department's position was untenable, including that it would have the unintended effect of prohibiting some mixed TRU waste that was neither formerly managed as HLW nor stored in underground tanks from disposal at WIPP. In order to address DOE concerns regarding these unintended consequences, DOE and NMED together petitioned the hearing officer to postpone the public hearing to allow the Permittees to submit their own PMR that would supplant the agency-initiated modification.

On July 2, 2004, the Permittees submitted a Class 2 PMR titled, "Procedure for Consideration of Tank Waste." In that PMR, the Permittees proposed this language to replace the prohibition in the agency-initiate modification:

> *Tank waste - TRU mixed wastes from tanks that has ever been managed as high-level waste is not acceptable at WIPP unless specifically approved through a subsequent Class 3 permit modification.*

It is extremely clear that it was the Permittees who offered to subject any tank waste reclassification to the rigorous process of a Class 3 modification, which includes a public hearing complete with the filing of technical testimony, swearing in of witnesses, opportunity for cross-examination, and a full public record of the proceedings. DOE did not delegate to NMED any regulatory authority over the actual waste reclassification, but the Class 3 process made sure that any DOE attempt at reclassification would be subject to public scrutiny, something the DOE's 435.1 Manual does not prescribe.

The final approved modification dated November 1, 2004 included changes proposed in public comment, such as identifying on a table the existing inventory of tanks that had been historically classified and managed as HLW. This change was incorporated in case there might be future disagreement over what it meant for waste to have "ever been managed as high-level waste." The level of public interest was very high, reflected in over 1,200 bright green postcards submitted to NMED asking the agency to enforce the prohibition on HLW. The Permittees did not challenge the final approved modification, and it remained in the permit ever since then, even through the 2010 permit renewal process. Nobody questioned it... until this year, almost nine years after Permittees originally submitted it.

It appears as though DOE has a case of "seller's remorse," regretting having given away their absolute authority to unilaterally reclassify tank waste with no public scrutiny. In fact, the April 8, 2013 submittal to "Modify Excluded Waste Prohibition" now clearly reveals their remorse... the language that they themselves originally proposed (and didn't oppose after it was approved) is now "inappropriate and should be modified" because "[t]he Class 3 process associated with the waste exclusion in the Permit puts the NMED in the position of having to make a decision whether or not to modify the Permit regarding the adequacy of a DOE defense nuclear classification and not the hazardous waste characteristics."

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