Q. (BY MR. HANCOCK) All right. One of the things, one of the subjects you did offer testimony on is the section called "Statutory & Regulatory Background"; is that correct?
A. Yes, it is.
Q. And on page 1 of that testimony, you discuss the WIPP Land Withdrawal Act; is that correct?
A. Yes.
Q. That's point (A), in fact.
A. Yes.
Q. And in the second paragraph of that section, the second sentence reads:
"The LW Act - which is the Land Withdrawal Act - requires DOE to:
1) obtain a State ACAA permit prior to management, storage or disposal of radioactive mixed waste at WIPP;"
Is that correct? Is that what your testimony is?
A. Yes, it is.
Q. Is that a direct quote out of the Land Withdrawal Act, or is that your paraphrase?
A. That's my paraphrase.
Q. Do you know what the Land Withdrawal Act, in fact, says?
A. Just a minute. (Witness paused document.) Yes.

Q. (BY MR. HANCOCK) All right. One of the things, one of the subjects you did offer testimony on is the section called "Statutory & Regulatory Background"; is that correct?
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A. Yes, it is.
Q. Is that a direct quote out of the Land Withdrawal Act, or is that your paraphrase?
A. That's my paraphrase.
Q. Do you know what the Land Withdrawal Act, in fact, says?
A. Just a minute. (Witness paused document.) Yes.
Q. And one of the subparagraphs you just read was subparagraph (C) that relates.

A. That's correct.

Q. So your understanding would be that the law clearly says not only to comply with the Solid Waste Disposal Act or RCRA, but to comply with all regulations promulgated and all the permit requirements under that law; is that correct?

A. That's correct.

Q. Further, if I can direct you to Section 9(d) of the Land Withdrawal Act. Would you read that, please?

A. Yes, this is the "Savings Provision," quote:

"The authorities provided to the Administrator and to the State pursuant to this section are in addition to the enforcement authorities available to the State pursuant to the State law and to the Administrator, the State, and any other person, pursuant to the Solid Waste Disposal Act . . . and the Clean Air Act . . . ."

Q. So this is another provision of the Land Withdrawal Act that relates to RCRA and the state's authority; wouldn't you agree?

A. This is ensuring that the state retains its enforcement authorities.

Q. Including under RCRA?

A. Yes, state law.

Q. And directing your attention to Section 14 of the Land Withdrawal Act.

A. Yes.

Q. Section 14(a) is a further savings provision related to Solid Waste Disposal Act or RCRA; is that correct?

A. Yes, the title of the section is "Savings Provisions," and it deals with the Clean Air Act and Solid Waste Disposal Act.

Q. And Section 14(b) of the Land Withdrawal Act again restates that: "No provision of this Act may be construed to limit, or in any manner affect, the Administrator's or the State's authority to enforce, or the Secretary's obligation to comply with-- ."

And then subparagraph (2) is "the Solid Waste Disposal Act"; is that correct?

A. Yes. And subparagraph (3) also includes "any other applicable clean air or hazardous waste law."

Q. So would you say that the repetitive nature of the discussion in the Land Withdrawal Act of this issue makes it clear that -- that DOE needs to comply with RCRA at WIPP?

A. I'd say that's a fair conclusion.

Q. And that's part of the basis, the conclusion that you stated on page 1 of your testimony about complying with RCRA and obtaining a state RCRA permit; is that correct?

A. Yes.

Q. On page 4 of your testimony on "Statutory & Regulatory Background," you describe the test phase application and the draft permit that the NMD issued on August 30, 1993; is that correct?

A. Yes.

Q. And then directly under that, your Section C.2. is entitled, the heading there is, "Withdrawal of Test Phase Application and Secretary's Order"; is that correct?

A. Yes.

Q. Did you mean to say with that title, the Department of Energy withdrew its application for a RCRA permit for the test phase?

A. What's stated in the second paragraph is that -- and I believe the Secretary's September 2, 1994, order is very clear. It is unattached because it is part of the record -- is that they were required -- this order, and I'll quote my testimony here:

"On September 2, 1994, after considering public comments, which ranged from allowing the Applicants to update their application to reflect disposal of mixed waste, to requiring the Applicants to withdraw their application and cease all activities at WIPP, the NMD Secretary issued an order requiring the Applicants to (1) submit a revised application for future WIPP activities; and (2) hold a stakeholders' meeting to explain the expected revised application."

So what stands here is not the title of the Secretary's order requiring them to submit a revised application.

Q. So why in the title in C.2, did you use the word "withdrawal"?

A. I'm sorry if that confused you. It was intended to cover the breadth of the comments that we received.

Q. And so on August 30, 1993, NMD issued a draft permit for the test phase, and less than two months later, DOE changed its policy and dropped the test phase; is that true?
1. That's correct.
2. And after the draft permit was issued, changed its policy?
3. I believe that we've discussed in my testimony
4. that — and that was, in fact, one of the potential options
5. for dealing with the permittees' position that they would
6. like to dispose of nonmixed waste, that that is an option
7. that would also be available at this time.
8. Okay. I guess I have another question about the
9. overall testimony here. It's entitled, "New Mexico
10. Environment Department's Direct Testimony Regarding
11. Regulatory Process and Imposed Conditions," as opposed —
12. and you've described imposed conditions and conditions of
13. the permit; is that correct?
14. Well, the permit itself consists of permit
15. conditions, and then there are those conditions which we
16. have described as being imposed because of the technical
17. deficiencies that remained in the application, and our way
18. of addressing those technical deficiencies, rather than
19. continuing to request more information from the applicants,
20. was to impose conditions to reflect what the department
21. wanted.
22. Is it your understanding that conditions in the
23. final permit have the same effect whether they are
24. conditions or whether they are, quote, "imposed conditions"?
25. Of course.
26. Now, further on in your testimony under "Statutory
27. & Regulatory Background on page 8, you discuss the issuance
28. of a draft permit on May 13, 1998; is that correct?
29. No, it was May 15, 1998.
30. Okay. So the heading that says, "Draft Permit -
31. May 13, 1998," is in error; is that correct?
32. That is correct.
33. And you would like to correct that date for the
34. record?
35. Right now, as we speak, I have replaced 13 with
36. 15.

A. May 13th was a different date.
Q. (BY MR. HANCOCK) I'm easily confused. That's why
I look at these headings.
Now, I guess I want to -- I guess I actually do
want to make sure here, that you state here on page 8 that
the draft permit was published for a 90-day public comment
period; is that correct?
Yes.
Q. And you state that NMED received comments from 30
1. persons during that 90-day comment period; is that correct?
2. Thirty persons or groups, yes.
3. And you list those as Attachment 13.
4. Yes.
5. Were any of those 30 commenters the Defense
6. Nuclear Facilities Safety Board, which has been referred to
7. in this proceeding?
8. No.
9. At any time, to your knowledge, has the Defense
10. Nuclear Facilities Safety Board given comments to the
11. department on the draft permit?
12. I'm unaware of any correspondence that we have
13. ever received from that board.
14. All right. Now, based on the public comments
15. received, those comments from those 30 persons or
16. organizations, the department considered those comments and
17. issued a revised permit on November 13th; is that correct?
18. Yes.
19. Were there any other studies or were there any
20. studies or reports undertaken by the department as the basis
21. for changes in the draft permit, the revised draft permit?
22. Pardon me. Studies or what?
23. Reports.
24. That the department undertook?
25. Uh-huh, yes.

A. Not related to the permit that I'm aware of.
Again, we're required to revise the draft permit in
accordance with the comments that we've received.
Q. So the basis for the changes that were made in the
revised draft permit was the comments received during the
public comment period from May 15th to August 14th?
A. That's correct. They're based upon our
interpretation of the comments that we received.
Q. And what criteria did the department use to weigh
those comments that it received?
A. Could you ask the question a different way,
please?
Q. Well, let's take examples. Did all of the
commenters comment in exactly the same way on each and every
particular issue, or were there differences among the
commenters?
A. There were differences among the commenters.
Q. So presumably, department had some criteria that
it used to weigh why it incorporated a particular comment
that said A, and not the comment on the same subject that
said B; isn't that correct?
Yes. I guess if you want to know a criterion, it
would be first based upon compliance with regulations, and
secondly as to whether it was consistent with the policy of
the department.
Q. And where is the policy of the department related to the WIPP RCRA permit spelled out?  
A. There is no written document other than what we have specified in the fact sheets that we have submitted, and the document itself represents the policy of the department.

Q. And we’re going back to those fact sheets in a little while, but for the time being, would you agree, based upon that description that you just gave, that the public in making comments might not be clear in terms of what the department’s policy is?  
A. That’s a possibility, and it’s also clear from some of the comments we received that people are also unfamiliar with the RCRA regulations, and so many of their comments are inapplicable because they address issues that are outside the scope of the regulations.

Q. But it also is the case, is it not, that on some issues there were comments on a subject under the regulations, but commenters had different positions or suggested different changes or different conditions to the draft permit; isn’t that true?  
A. Yes, it is.

Q. And when we now move from how the department considered comments on the May draft permit, in terms of revising the permit in terms of issuing the revised draft permit, are those the same criteria that you gave me that the department will use in terms of reviewing and weighing comments on this revised draft permit?  
A. Yes. Just a minute. As required by regulation in the hazardous waste management regulations, 20 NMAC 4.1, in Section 901.A.9, it states, and I quote:  
“At the time that any final permit decision is issued, the Secretary shall issue a response to comments. This response shall: A. specify which provisions, if any, of the draft permit have been changed in the final permit decision and the reasons for the change; B. briefly describe and respond to all comments on the draft permit or the permit application raised during the public comment period or during any hearing; and, C. be available to the public.”

So an answer to your question is that that will be clear when there’s a final permit that’s issued, we will respond to all comments and the reasons for our — or the rationale for our evaluation of those will be made public.

Q. Another way — my term — that the department described how it considered the public comments is on page 5 of the Supplemental Fact Sheet dated December 8, 1998. Do you have that?  
A. Yes.

Q. And is it fair to say that you were involved in the drafting of this supplemental fact sheet and are familiar with its contents?  
A. Yes, if you direct me to a particular portion of it.

Q. Okay. Page 5. Left-hand column, down toward the bottom, it says, the heading is: “Draft Permit — May 15, 1998 and Revised Draft Permit — November 13, 1998.” Do you see that?  
A. Yes.

Q. The last sentence of that section states:  
“WDED revised the draft permit to incorporate appropriate public comments and published a revised draft permit on November 13, 1998.” Did I read that correctly?  
A. Yes.

Q. So in this fact sheet, the department states that it revised the draft permit to incorporate appropriate public comments. Would you describe to me what the meaning of “appropriate public comments” is?  
A. Well, I believe I already alluded to the fact that many of the comments we received were not related to RCRA issues. They may have been related to concern over transportation, over radionuclide issues that are more appropriately regulated by EPA, and that’s one way of describing — explaining the word “appropriate,” and the other way is, as I’ve already said, in terms of being in accordance with the requirements of regulation and department policy.

Q. And as a general matter, would you agree that the majority of the changes made in the draft permit of May 15th as compared to the revised draft permit of November 13th, the majority of the changes made were as a result of comments by the applicant?  
MS. McMICHAEL: I’m going to object to the form of the question. I’m not sure where this is leading. The witness has already testified that the department will respond, provide full responses at the close of the public comment period, as provided in the regs. I’d like to know where this is leading.

MR. HANCOCK: It’s a factual question to the permit writer who has testified that he is intimately familiar with the comments made and the draft permit.  
HEARING OFFICER GULIN: This last question I think, is a valid question. You can answer that.

A. I’d be happy to. It’s a reflection both of the
number of comments that we received from —

Hearing Officer Gulin: No. The last

question was simply: Was the majority of the comments . . .

The Witness: Oh, okay.

A. Okay. The majority of the —

Q. (By Mr. Hancock) Changes.

A. — changes reflected the fact that the majority of
the comments received were from the applicant. By sheer
volume, there were more comments that were provided by the
applicant, but it by no means indicates that we viewed them
in any different way than we viewed comments from the
public.

Q. You also provided testimony about audit
requirements; is that correct?

A. Actually, what is in your folder for testimony is
actually going to be the testimony of Connie Walker. I did
discuss the time — proposed time limit that the applicants
had suggested for our review of final audit reports.

Q. But you are not sponsoring the 13 pages of "Audit
Requirement" that are behind the tab in the testimony?

A. That's correct. Connie Walker will provide the
direct testimony on that subject.

Q. And will she also be able to testify related to
Section 4 of that section which is entitled, "Public
comments"?

A. I'm at a loss because my copy does not have that
in there, so . . .

Ms. McMichael: Obviously, for the record —

Mr. Hancock: If counsel can help me, that's
just a straightforward question.

Ms. McMichael: The witness is not testifying
regarding the audit condition. Ms. Connie Walker will
testify regarding — that's the basis of her testimony. So
I would presume, yes, that she can answer your questions
with regard to testimony under that tab.

Mr. Hancock: Okay. That's fine. I just
wanted to be sure.

Q. (By Mr. Hancock) Okay. I referred earlier to the
supplemental fact sheet. I'd now like to refer you to the
fact sheet of November 13, 1998. Do you have that?

A. Yes.

Q. And as with the supplemental fact sheet, is it
correct that you were involved in the drafting and are
familiar with the contents of this fact sheet?

A. That's correct.

Hearing Officer Gulin: Why don't we go ahead
and take our morning break at this time? And come back in
15 minutes. Thank you.

(A at 10:26 a.m. a recess was taken.)

Hearing Officer Gulin: Can we come to order.

Please? All right. We're on the record. While I'm
thinking about it, I wanted to mention another matter. You
will have observed, of course, that during the course of the
hearing, there have been a few documents which have been
admitted or offered into evidence, whether or not they've
been admitted, and I have not been assigning exhibit
numbers, such as Applicants' No. 2 or Ms. Bonneau No. 3.
What we've been doing is simply logging them in in
chronological order. I thought that would be more efficient
in this type of proceeding where we have a lot of pre-filed
documents.

But while I'm thinking about it, at the conclusion
of the hearing, it may be wise for you to obtain a copy of
the — I guess it's called — the pleading log, and it will
contain all of the exhibits, whether or not admitted, if
they were offered into evidence. And for your convenience,
in your proposed findings of fact and conclusions of law,
you may cite to the log number, rather than write out the
entire document.

Now, there are a few logs where there are a rather
voluminous amount of documents within a particular log, and
there you may have to be more specific, but I just wanted to
mention that that would be a wise way to proceed.

All right. We'll continue, then, with
cross-examination by Mr. Hancock.
Q. Related specifically — the state's authority relating specifically to identification of transportation routes?
A. Yes.
Q. Would you consider the TRUACT-II to be related to transportation of waste to WIPP?
A. Yes, it’s related to transportation. It’s the transportation container which will be used.
Q. And what is the agency, in your understanding, that has regulatory authority over the TRUACT-II?
A. My understanding is it’s the Nuclear Regulatory Commission which certifies transportation containers for radioactive waste.
Q. And hypothetically, if the Nuclear Regulatory Commission withdrew its certification of the TRUACT-II, what effect would that have on the RCRA permit?
A. I’m not sure.
Q. Okay. Let’s talk about some specifics, then. In Module III of the revised draft permit, there are several mentions of the TRUACT-II. Would you agree with that?
A. Yes.
Q. And among the uses that the revised permit has for the TRUACT-II is as a storage container in the parking area; is that correct?
A. Yes, it is.

Q. Would NRC withdrawing its certification of the TRUACT-II impact on that portion of the final permit, if the final permit contained the same provision that the revised draft permit does?
A. Would you repeat the question?
Q. If — these are hypotheticals now.
A. I understand.
Q. And one hypothetical is: if NRC withdraws or suspends the certification, and another hypothetical is: if the final permit has the same provision as the revised draft permit.
A. Okay.
Q. So the question is: In that hypothetical situation, would the suspension or withdrawal of the NRC certification for TRUACT-II have any effect on the RCRA permit?
A. Again I’ll say: I’m not sure.
Q. And why are you not sure?
A. It’s not clear that our approval of the use of the TRUACT-II as a storage container in the parking area requires that it be certified by the NRC.
Q. So if you are suggesting, then, that it’s quite possible that an NRC action that would suspend the use of the TRUACT-II would have no effect on its ability of those containers to continue to be used as storage containers at WIPP?
A. Yes.
PERMIT FOR DOE/WIPP

1 sentence in your interpretation?
2 MS. MCMICHAEL: I'm going to object. Calls
3 it appears to be calling for a legal conclusion.
4 MR. HANCOCK: No. Mr. Zappe has stated that
5 he is intimately familiar and perhaps was the author of this
6 language, and I'm just trying to clarify what the department
7 felt it meant.
8 HEARING OFFICER GULIN: What is the question
9 again, please?
10 MR. HANCOCK: Let me rephrase.
11 HEARING OFFICER GULIN: All right.
12 Q. (by MR. HANCOCK) Mr. Zappe, you've agreed that
13 EPA's authority is more than just nonmixed TRU waste,
14 correct?
15 A. Yes.
16 Q. Okay. So the question is: Wouldn't it be more
17 accurate for the fact sheet to say something like "disposal
18 of transuranic waste"? And you were saying: No, that
19 wouldn't be the case.
20 A. Because the sentence before says, quote:
21 "There are a number of operational
22 and waste handling activities or issues
23 concerning WIPP which are not within the
24 purview of the permit or that NMED does
25 not have statutory or regulatory

authority under the Hazardous Waste Act
or 20 NMAC 4.1?"
If the language, as you proposed, said "disposal
of all TRU waste," then that would make the first sentence
incorrect, by my reading.
Q. Okay. And so you don't read the entire phrase
7 together when it seems to me it's referring to disposal
under 40 CFR 191 and 194?
A. The second sentence that you're quoting are
10 examples of issues illustrating the operational and
11 waste-handling activities which are not within the purview
12 granted to us under the Hazardous Waste Act or the
13 regulations.
Q. Okay. We've talked about two, and we're going to
15 talk about the third one. Are there other examples that are
16 not listed in the fact sheet of those operational or
17 waste-handling activities that are not within the purview of
18 the permit?
A. The fact sheet states that these are examples. It
19 is not presented as an exhaustive list.
Q. And I'm asking you: Do you have other examples
22 that you can give?
A. There may be, but I can't give them at this time.
Q. Okay. Let's go on then to the third example
23 that's given: "Compliance with regulations enforced by
sufficiently supported to assure
compliance with the applicable portions
of the Land Withdrawal Act which
requires a regular review of roof
support plans and practices by the Mine
Safety and Health Administration.
Support is installed to the requirements
of 30 CFR 57, Subpart B."
Q. So those are the specific regulations that you're
10 referring to; is that correct?
A. Again, yes, that is an example of regulations
enforced by other agencies.
Q. So it's your understanding that MSHA regulations
can cover the ground control system as it relates to WIPP;
15 is that correct?
A. The statement in the fact sheet was that that is
17 an operational and waste-handling activity which is not
18 within the purview of NMED because of - we do not have
19 statutory or regulatory authority under the Land Withdrawal
Act or our regulations.
Q. And the permit, the revised - the draft permit of
22 May 15th, to get our dates right since we've talked about
the dates - the draft permit of May 15, 1998, had a
24 several-page discussion of Ground Control Program in it, and
25 much of that was stricken in what you've just described from
Q. And so that draft permit, in fact, imposed conditions on the nature and type of the supplementary room support system; is that correct?
A. The test phase permit and the requirement for support, as I understand it, was because this was not for disposal. This was for activities that would require that the rooms be maintained for access.
Q. But didn’t MSHA have authority over those rooms, whether they were for tests or disposal?
MS. MCMICHAEL: I object to the form of the question. The witness has testified he’s not familiar with MSHA.

HEARING OFFICER GULN: I will allow him to answer. He can answer that if he knows.
A. The — Repeat the question.
Q. (BY MR. HANCOCK) isn’t it your understanding or is it your understanding, that MSHA regulations — Well, wasn’t MSHA’s — isn’t MSHA’s authority over the facility unrelated to whether there were tests or disposal?
A. MSHA’s authority is unrelated to RCRA and therefore, they had authority, whether we said anything about it or not.
Q. But in the 1993 draft permit, the department proposed specific regulations of the room support system in those rooms; isn’t that correct?

Q. I thought the "Therefore" was the last sentence.
Could you start the sentence before?
A. Okay. Quote:
"The system is discussed further in the Module IV in Permit Attachments III-I, IV-3, and IV-6."
I’m sorry.
The permit application submitted by DOE and WID did not specify that a similar system would be used in Bin Scale Test Room 3. Therefore, the draft permit, under permit conditions IV.B.6 and I.I.1, requires the Permittees to demonstrate to New Mexico that a supplementary support system which can achieve the same degree of safety as the existing Bin Scale Test Room I supplementary system will be in place prior to acceptance of waste in Bin Scale Test Room 3."
Q. So those sentences refer to conditions and requirements of the draft permit related to the supplementary support system in those test rooms; is that correct? Is that your understanding?
A. Yes.