9/23/99

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF THE FINAL PERMIT ISSUED TO THE U.S. DEPARTMENT OF ENERGY (DOE) AND THE WESTINGHOUSE ELECTRIC COMPANY WASTE ISOLATION DIVISION (WID) FOR THE WASTE ISOLATION PILOT PLANT (WIPP) U.S. EPA No. NM4890139088	)))))))	**HRM 98-04(P)**

THE UNITED STATES DEPARTMENT OF ENERGY'S AND THE WESTINGHOUSE WASTE ISOLATION DIVISION'S COMMENTS ON THE REPORT OF THE HEARING OFFICER

Pursuant to the Legal Notice issued November 13, 1998, which adopts 20 NMAC 1.4.503.B, the United States Department of Energy ("DOE") and the Westinghouse Waste Isolation Division ("WID") (collectively "the Permittees") respectfully submit their Comments on the Report of the Hearing Officer ("HO Report") on the final hazardous waste facility permit for the Waste Isolation Pilot Plant ("WIPP").

I. EXECUTIVE SUMMARY

In these comments, the Permittees emphasize four major issues and their potential to adversely affect the operation of WIPP. These issues arise from permit conditions in the June 25 Proposed Final Permit ("Proposed Permit") recommended by the Hearing Officer that lack both sufficient technical merit and legal basis and do not provide additional protection of human health and the environment. These four conditions are:

- **Module IV.B.2.b,** which prohibits the disposal of non-mixed TRU waste or use of areas containing non-mixed TRU waste unless the waste was characterized "in accordance with the WAP." Depending on how this provision is interpreted, it may force the Permittees to cease all waste emplacement in Panel 1 and suspend waste shipments for

months while Panel 2 is mined. This module does not increase protection of human health or the environment and is not in accordance with law. The Secretary should delete Module IV.B.2.b or the module should only be applied to Room 7 of Panel 1, which would then be excluded from the permit and closed with an omega block wall. Alternatively, Module IV.B.2.b should be modified so that it only applies prospectively.

- **Modules II.N, II.O, II.P, II.Q**, which would require WID to provide financial assurances for closure and post-closure of WIPP, ignore state legislative mandates and would cause unnecessary expenditures of taxpayer money on an insurance policy that is not needed and will not be used. The Secretary should delete these modules from the final permit.

- **Module II.C.1**, which contains Waste Analysis Plan ("WAP") provisions concerning miscertification rates and core sampling, would expose New Mexico workers to unnecessary radiation exposure in contravention of the New Mexico Hazardous Waste Act ("HWA") and federal policies which mandate that DOE maintain such exposures As-Low-As-Reasonably-Achievable (ALARA). This would also cause the needless expense of taxpayer money. The Secretary should establish a 2% initial miscertification rate, delete the per-waste stream requirement for miscertification, and allow the use of SW-846 methods to sample homogeneous wastes.

- **Module V.D, Table V.D**, which requires groundwater monitoring for gross alpha and beta, would duplicate current monitoring, would not improve detection of hazardous waste releases and would represent a step backward in a mature monitoring program. The Secretary should delete this requirement from the final permit.

The Permittees respectfully request that the Secretary issue a final hazardous waste permit for WIPP with the modifications discussed in these comments in order to accomplish the goals of the HWA and the Resource Conservation and Recovery Act ("RCRA").

II. LEGAL STANDARD OF REVIEW

Pursuant to the HWA, the Secretary's final decision on the WIPP hazardous waste facility permit can be set aside if it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law. NMSA 1978 § 74-4-14.C (Repl. Pamp.1993). In determining whether Section 74-4-14.C is satisfied, "whole record" review is the appropriate standard of review. Duke City Lumber v. New Mexico Environmental

Improvement Board, 101 N.M. 291, 293-94, 681 P.2d 717, 719-20 (1984); Tenneco Oil Co. v. New Mexico Water Quality Control Commission, 107 N.M. 469, 477, 760 P.2d 161, 163 (Ct. App. 1987), cert. denied, Navajo Refining Co. v. New Mexico Water Quality Control Commission, 106 N.M. 714, 749 P.2d 99 (1988). Whole record review requires a reviewing court to examine all of the evidence, not just the evidence most favorable to the agency, and then decide whether the agency's decision was supported by substantial evidence. Duke City Lumber, 101 N.M. at 293, 681 P.2d at 791. If the record fails to contain a reasonable basis supporting the Secretary's decision, it is arbitrary, capricious, and an abuse of discretion.

III. SPECIFIC COMMENTS ON THE HO REPORT[1]

A. Including Module IV.B.2.b in the Final Permit Could Interfere with Continued Disposal Operations, Would Not be in Accordance with Law and Is Unnecessary to Ensure Compliance with the Permit

1. Module IV.B.2.b Could Interfere with Continued Disposal Operations

The Proposed Permit contains the following version of Module IV.B.2.b:

> Specific prohibition – the Permittees shall not dispose non-mixed TRU waste in any Underground HWDU [Hazardous Waste Disposal Unit] unless such waste is characterized in accordance with the requirements of the WAP [Waste Analysis Plan] specified in Permit Condition II.C.1. The Permittees shall not dispose TRU mixed waste in any Underground HWDU if the Underground HWDU contains non-mixed waste not characterized in accordance with the WAP.

Each sentence of this provision poses significant problems which could impact current disposal operations at WIPP.

[1] The Permittees previously submitted comments on the May 15 Draft Permit and November 13 Revised Draft Permit (collectively "Draft Permits") and provided written and oral testimony in the public hearing. All of these submittals are part of the record, and Permittees do not waive any positions taken therein.

Problems Posed by the First Sentence of Module IV.B.2.b

Depending on how the NMED interprets the phrase "in accordance with the requirements of the WAP," the first sentence of Module IV.B.2.b could expose the Permittees to an enforcement action because non-mixed TRU waste has been disposed of in Panel 1, Room 7 at WIPP. That waste was legally disposed of pursuant to Judge Penn's decision, in compliance with all applicable laws including the Atomic Energy Act, and while WIPP had interim status under RCRA and the HWA.[2] However, according to the NMED's testimony, that non-mixed waste could never have been characterized "in accordance with the WAP" because the WAP will not be final until the permit is effective and, therefore, an enforcement action is a distinct possibility.[3] The only way that the Permittees could have complied with this first sentence would have been to forego disposal of non-mixed TRU waste at WIPP until the permit became effective, despite the facts that WIPP has interim status and Judge Penn found that DOE was authorized to dispose of non-mixed waste. RP No. 154: March 22, 1999 Opinion by Judge Penn in New Mexico ex rel Madrid v. Richardson at p. 9 (also found at 39 F. Supp. 2d 48). Not only would this course of action have delayed the commencement of operations at WIPP for six months (and counting), it would have placed DOE in violation of its consent order and settlement agreement with the state of Idaho, which required DOE to begin

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[2] All of the non-mixed TRU waste currently in WIPP was characterized and disposed of in accordance with all applicable requirements at the time of its disposal. The Secretary of NMED has generally endorsed non-mixed TRU waste disposal at WIPP prior to issuance of permit. In the Fact Sheet issued with the November 13 Draft Permit, the NMED specifically stated that the disposal of non-mixed TRU waste was one of a number of issues which are "not within the purview of the Permit or that NMED does not have statutory or regulatory authority under the HWA or 20 NMAC 4.1." In a letter dated October 14, 1997, the former Secretary of NMED stated that "the WIPP [facility] can open for disposal of non-mixed TRU waste without a RCRA Part B Permit." RP No. 96: Permittees' Memorandum in Opposition to SRIC/CENS Motion for Summary Denial, Exhibit 4. Throughout these comments, the Permittes adopt the record citation format used in the HO Report.

[3] Tr. p. 2483, line 7 through p. 2484, line 15 (S. Zappe).

shipments of TRU waste from Idaho National Engineering and Environmental Laboratory ("INEEL") by April 30, 1999.

Problems Posed by the Second Sentence of Module IV.B.2.b

Depending on how the NMED interprets the phrase "in accordance with the WAP," the second sentence of Module IV.B.2.b could jeopardize the further use of Panel 1. If any of the non-mixed TRU waste in Room 7 of Panel 1 is found to have not been characterized in accordance with the final WAP, then the second sentence prohibits the use of Panel 1 for TRU mixed waste disposal. This would produce one of three results: (1) the Permittees would suspend disposal operations at WIPP until Panel 2 is ready for waste (which will be months from now); (2) the Permittees would remove the waste from Room 7 so that Panel 1 could be used for TRU mixed waste disposal; or (3) Panel 1 would be used for non-mixed TRU waste disposal only and, not meeting the definition of a "hazardous waste disposal unit" because it contains no hazardous waste, the panel would no longer be subject to the HWA requirements. None of these results is desirable. Suspension of operations would penalize the Permittees for having engaged in lawful disposal and would waste almost all of the currently-existing disposal capacity at WIPP. Removal would forfeit all expenditures incurred and would expose workers to additional radiation risks solely to satisfy duplicative requirements of the WAP, a truly arbitrary and capricious result given that, under WIPP's interim status, mixed waste could have legally been sent to WIPP without any compliance with the final WAP.

The Permittees continue to believe that the most appropriate solution is to remove Module IV.B.2.b from the permit, which will avoid the practical and legal problems which the module otherwise creates. An alternative solution which is acceptable to the Permittees would be to remove Room 7 of Panel 1 from the first underground hazardous waste disposal unit ("HWDU") and

redefine the Panel 1 HWDU to include Rooms 1 through 6. The Permittees would close Room 7 with an omega block wall, thereby allowing the non-mixed waste emplaced in Panel 1 to remain. Waste emplaced in Rooms 1 - 6 of Panel 1, and all other Panels, whether mixed or non-mixed, would be characterized in accordance with the final WAP. Such a compromise would preserve most of the disposal capacity of Panel 1 and allow disposal operations to continue without significant delay. A third possibility, which is the least satisfactory to the Permittees but still sufficient, would be to modify the language of Module IV.B.2.b to make it clear that both sentences apply only prospectively.

2. Module IV.B.2.b Exceeds NMED's Legal Authority

The record definitively establishes that the NMED has no legal authority over non-mixed TRU waste, and the Hearing Officer concurred in that determination. HO Report at p. 75. With respect to the first sentence of Module IV.B.2.b, the Hearing Officer incorrectly concluded that this sentence does not regulate non-mixed waste because it only requires the Permittees to characterize non-mixed waste in order to ensure that only permitted hazardous waste is disposed at WIPP. HO Report at p. 77. He reached this conclusion by the "*thinnest of threads*" (emphasis in original) and "with serious reservations" based solely on his interpretation of United States v. New Mexico, 32 F.3d 494 (10th Cir. 1994). Id. Correctly interpreted, that decision does not justify the imposition of the conditions in Module IV.B.2.b.

The decision in United States v. New Mexico involved a hazardous waste permit for an incinerator at Los Alamos National Laboratory ("LANL") that would have separately burned radioactive wastes and hazardous wastes in segregated batches or "burns." As the Hearing Officer notes, United States v. New Mexico does not address the issue of whether the permit conditions New

Mexico sought to impose on the incinerator "regulated" radioactive waste. HO Report at p. 77 (citing 32 F.3d at 498, n.4). The only issue resolved in that decision was whether sovereign immunity barred the imposition of any conditions regarding radioactivity *while the incinerator was burning hazardous waste.* See 32 F.3d at 496-97 (emphasis added). Thus, United States v. New Mexico cannot be read as allowing control of radioactive waste under the guise of regulating hazardous wastes but instead is, as the Hearing Officer suggests, mere dicta.

Further, the hazardous waste operations at issue in United States v. New Mexico are so factually distinct that the legal analysis of that case cannot extend to Module IV.B.2.b. The incinerator at issue in United States v. New Mexico proposed two distinct types of "burns" -- one for radioactive waste, which the permit did not regulate, and one for hazardous waste, which the permit did regulate. The radioactivity monitoring conditions at issue applied only to hazardous waste burns, and arose out of the concern that the permitted activity would result in radiation releases because of radioactive materials left behind from non-regulated burns. See 32 F.3d at 498 (the permit conditions "merely recognize the particular circumstances at LANL and operate to ensure that only permitted hazardous waste is being burned"). In contrast, the first sentence of Module IV.B.2.b clearly regulates radioactive, non-mixed waste at WIPP by imposing a direct requirement on how that waste is to be handled -- the equivalent of NMED dictating how the radioactive burns in LANL's incinerator should be conducted. The holding in United States v. New Mexico would not permit such a result, as Module IV.B.2.b goes far beyond mere monitoring of hazardous waste activities.

The second sentence of Module IV.B.2.b is equally defective because it links control of mixed hazardous waste (over which NMED has regulatory control) to the substantive requirement that non-mixed radioactive waste (over which NMED admits it has no regulatory control) be

characterized in a specified manner. Thus, Module IV.B.2.b not only prevents the Permittees from disposing of radioactive waste that is not regulated under the HWA or RCRA unless it is characterized according to permit provisions that do not yet exist, but also prevents the disposal of HWA and RCRA-regulated waste if the Permittees do not comply with this inappropriate requirement for characterizing non-mixed waste. Simply stated, Module IV.B.2.b regulates non-hazardous radioactive waste by presenting the Permittees with the Hobson's choice of either characterizing non-hazardous waste according to the hazardous waste permit or abandoning all of the disposal capacity that currently exists at WIPP (Panel 1), the only repository certified by USEPA for disposal of TRU wastes.

The Hearing Officer recognized the Permittees' "legitimate concerns" that Module IV.B.2.b would *ex post facto* expose them to civil and criminal liability[4] for having placed non-mixed waste in WIPP prior to the issuance of the final permit. To avoid that, the Hearing Officer recommended that the phrase "after this permit becomes effective" be inserted at the beginning of the first sentence. This recommendation, however, fails to remedy the same defect in the second sentence of Module

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[4] The *ex post facto* provision of the Constitution, Article I, § 9, clause 3, forbids enactment of any law which imposes a punishment for an action that was not punishable when committed. See Dehainaut v. Pena, 32 F.3d 1066, 1073 (7th Cir. 1994). Regulations may have the force and effect of law for the purposes of an *ex post facto* analysis. See id. The United States Court of Appeals for the First Circuit has noted that:

> [A]lthough the Supreme Court has not addressed the question of whether an administrative policy or regulation can be an ex post facto law, a number of courts have held that binding administrative regulations, as opposed to those that serve merely as guidelines for discretionary decision making, are laws subject to ex post facto analysis.

Hamm v. Latessa, 72 F.3d 947, 956-57, n.14 (1st Cir. 1995). The NMED drafted Module IV.B.2.b. to ensure that *no waste* could legally be disposed of at WIPP prior to the issuance of the final HWA permit. Tr. p. 2424, lines 10-15 (S. Zappe) ("The general intent of the permit condition is to ensure that there is no prohibited or non-permitted waste ... disposed in a RCRA-regulated unit, which has not been characterized in accordance with the ... Waste Analysis Plan."). Even if the NMED had the authority to extend the HWA to include non-hazardous TRU waste, which it does not, Module IV.B.2.b makes punishable actions that were legal when committed--specifically, the emplacement of non-mixed TRU waste at WIPP before issuance of the final permit. Moreover, regulatory requirements such as permit provisions generally may not be construed as applying retroactively if they impose a significant burden on the regulated party. See Farmers Telephone Co., Inc. v. FCC, 184 F.3d 1241, 1251 (10th Cir. 1999); Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988).

IV.B.2.b. Pursuant to this sentence, the Permittees could be cited for a permit violation and be held civilly or criminally liable for disposal of mixed waste in Panel 1 solely because Permittees disposed of non-mixed waste prior to issuance of the final permit – which they did pursuant to court rulings, in compliance with all applicable laws including the Atomic Energy Act, and under interim status. In order for Module IV.B.2.b to avoid violating the *ex post facto* provision of the Constitution, it should be deleted. In the alternative, the first sentence of Module IV.B.2.b should be modified as recommended by the Hearing Officer and the second sentence should read as follows: "The Permittees shall not dispose TRU mixed waste in any Underground HWDU if the Underground HWDU contains non-mixed TRU waste *which was disposed of after this permit becomes effective and was* not characterized in accordance with the requirements of the WAP." (italics show language added). Such a revision would avoid this *ex post facto* violation and the loss of more than 95 percent of the disposal capacity in Panel 1.

3. Module IV.B.2.b is Not Necessary to Ensure Compliance with the Permit

The HO Report attempts to justify Module IV.B.2.b on the grounds that NMED needs information about non-mixed waste in order to ensure that specific permit conditions will be satisfied and enforced. The record establishes, however, that the Permittees have provided sufficient information about the non-mixed waste currently in WIPP to ensure compliance with the permit, and that not every requirement of the WAP is relevant to determining compliance with these conditions. The HO Report disregards the evidence in the record and the HWA.

All waste that has been disposed of at WIPP to date meets the requirements of the WIPP Waste Acceptance Criteria (WAC). AR No. X: Permit Application, Chapter C, pp. C-2, C-15; Tr. P. 221, lines 5-10 (R. Kehrman). The WAP is simply a mechanism to ensure compliance with the WAC

and there is no evidence in the record that compliance with the WAP is the *only* way to protect human health and the environment or to ensure compliance with the permit. In fact, the waste parameters in the WAC have been shown through safety analysis and other forms of risk assessment to assure that wastes placed in WIPP are shipped, managed, and disposed of in a manner that protects human health and the environment. Therefore, both the WIPP WAC and the WAP achieve the same goals of ensuring compliance with the permit and protecting human health and the environment.

The HO Report states that specific WAP characterization requirements, such as radiography, visual examination, and solids sampling and analyses for Summary Waste Categories Groups S3000 and S4000, are necessary to allow NMED "to confirm that the waste is not 'hazardous' or otherwise prohibited in violation of the permit." HO Report Finding No. 263. This finding is simply contrary to law. The HWA and RCRA obligate waste generators to make a hazardous waste determination. 20 NMAC 4.1.300 § 262.11 (incorporating 40 C.F.R. § 262.11). Neither the HWA nor RCRA require confirmation of a hazardous waste determination.[5] Only waste determined to be hazardous must be characterized in accordance with 20 NMAC 4.1.500 § 264.13 (incorporating 40 C.F.R. § 264.13). Non-hazardous waste is not subject to the requirements set forth in 20 NMAC 4.1.500 Part 264 (incorporating 40 C.F.R. Part 264). As for prohibited wastes, the WIPP WAC specifies the criteria necessary to ensure that prohibited wastes are not accepted at WIPP. AR No. X: Permit Application, Chapter C, pp. C-12 to C-13; Tr. p. 427, lines 11-25 to p. 428, lines 1-5.

Both the NMED and the Hearing Officer focused on the need to have specific headspace gas information concerning non-mixed waste containers in order to ensure compliance with the permit's

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[5] Nevertheless, the Permittees have confirmed these determinations using the procedures set forth in the WIPP WAC, and by submitting additional data about these non-mixed wastes to the NMED for its review.

conditions related to concentrations of volatile organic compounds (VOCs). HO Report Finding Nos. 265-271. The Proposed Permit, however, does not impose any VOC limits on individual containers of waste; it sets limits on the VOC concentrations in the ambient air in the disposal rooms and other parts of the underground repository. In addition, the Proposed Permit requires the Permittees to conduct a VOC monitoring program to ensure compliance with these VOC limits. If the VOC concentrations exceed a permit limit or a concentration of concern, the Proposed Permit requires the Permittees to address these concentrations regardless of whether the VOCs were released from TRU mixed or non-mixed waste containers. Therefore, it is incorrect and illogical to assert that the failure to collect headspace gas samples from every container of waste in an underground HWDU would prevent the NMED from enforcing the VOC limits in the permit. This flawed assertion does not justify Module IV.B.2.b.

The HO Report also asserts that Module IV.B.2.b is necessary to enforce requirements related to record keeping and inspection as to non-mixed waste. HO Report Conclusion No. 53. The evidence simply contradicts this assertion. The Permittees have repeatedly stated that all waste placed in the underground will be physically managed and accounted for regardless of whether it was mixed or non-mixed. AR No. X: Permit Application, Chapter A, p. A-5; Tr. p. 38, lines 1-3; p. 216, line 25 to p. 217, lines 1-4 (R. Kehrman). In other words, once the permit is in place, there is one set of operational procedures in effect at the WIPP facility; there are no distinct record keeping or inspection procedures for mixed waste and non-mixed waste. The NMED can inspect the facility and the records and data for all waste containers at WIPP, and Module IV.B.2.b adds nothing to NMED's enforcement authority in this regard.

B. The Financial Responsibility Requirements in Modules II.N Through II.Q Would Cause Unnecessary Expenditures of Taxpayer Money, are Arbitrary, Capricious and Not in Accordance With Law

The Secretary should not include Proposed Permit Modules II.N, II.O, II.P and II.Q, which require WID to comply with the financial assurance and liability insurance requirements set forth in 20 NMAC 4.1.500 §§ 264.142, 264.143, 264.144, 264.145 and 264.147 (incorporating 40 C.F.R. §§ 264.142, 264.143, 264.144, 264.145 and 264.147). As set forth in Proposed Permit Attachment K, the total estimated cost of closure and post closure is $99,064,279.00 and the liability insurance requirements are $1 million per occurrence/$2 million aggregate for sudden accidental occurrences and $3 million per occurrence/$6 million aggregate for non-sudden accidental occurrences. Requiring WID to provide financial assurance and liability insurance in these amounts will result in an enormous waste of taxpayer money because DOE must ultimately pay for closure and post-closure of WIPP. Whatever funds WID spends to obtain financial assurance, such as bonds or insurance premiums, must be reimbursed by DOE. Thus, any financial assurance mechanism provided by WID will require payment from current funding each year, effectively drawing federal money from other necessary activities even though the closure of WIPP is decades away. Robbing current programs to bond or insure WID for the future payment of DOE's closure responsibilities simply makes no sense. Further, the imposition of financial assurance requirements on WID would be arbitrary and capricious and not in accordance with law for two compelling reasons. First, inclusion of the financial assurance requirements violates the HWA. Second, NMED cannot change its historic interpretation and application of the exemption contained in 20 NMAC 4.1.500 §264.140(c) without prior notice.

1. Requiring Financial Assurance From WID Would Violate the HWA

The HWA clearly defines the limitations on all regulations issued by the Environmental Improvement Board ("EIB") under the HWA. Section 74-4-4.A of the HWA mandates that the EIB

> shall adopt regulations for the management of hazardous waste as may be necessary to protect public health and the environment that are equivalent to and no more stringent than federal regulations adopted by the federal environmental protection agency pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended . . . .

To carry out this mandate, the HWA allows the EIB to adopt regulations that "are identical with regulations adopted by an agency of the federal government . . . by reference to the federal regulations without setting forth the provisions of the regulations." NMSA 1978 § 74-4-4.E (Repl. Pamp. 1993). Section 74-4-4.D of the HWA then specifies the only process by which more stringent regulations may be adopted:

> the board may adopt regulations for the management of hazardous waste... that are more stringent than the federal regulations adopted by the federal environmental protection agency pursuant to the federal Resource Conservation and Recovery Act of 1976, as amended, if the board determines, after notice and a public hearing, that such federal regulations are not sufficient to protect human health and the environment.

By specifically tying New Mexico's regulations to the federal regulations and prohibiting more stringent state regulations absent a public hearing, the HWA creates a statutory limit on the hazardous waste management regulations ("HWMR"). The financial assurance requirements of Modules II.N through II.Q violate this statutory limit and are therefore not in accordance with law.

In 1989, the EIB chose to incorporate by reference the exact language contained in USEPA's 40 C.F.R. § 264.140(c) for New Mexico's financial assurance regulations. Thus, under Section 74-

4-4.E, the New Mexico regulation must be "identical" to the federal regulation.[6] From 1980 until the present, USEPA has consistently interpreted 40 C.F.R. § 264.140(c) as exempting private contractors at federally-owned facilities. See AR No. 971013; Tr. p. 2508, line 20 through p. 2511, line 24 (S. Zappe) (NMED admits that USEPA had interpreted the federal regulation as not applying to a contractor at a federal facility). In order for 20 NMAC 4.1.500 § 264.140(c) to be "equivalent to and no more stringent than the federal regulations," as required by Section 74-4-4.A, and "identical to the federal regulations," as required by Section 74-4-4.E, it must have the same meaning as the federal version of the regulation. In the last ten years, the EIB has amended and updated the HWMR, but never altered or amended the language of the state regulation, nor indicated a different interpretation from USEPA's. Therefore, the only way the New Mexico regulation satisfies the HWA is by applying the long-standing federal interpretation of the federal regulation, which exempts contractors at federal facilities.

The financial assurance requirements cannot be explained as the NMED simply interpreting an EIB regulation to be more stringent than the federal regulation. See HO Report at p. 70.[7] The

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[6] The NMED spent considerable time testifying that the New Mexico financial assurance regulations were found by USEPA to be "equivalent to" the federal regulations, Tr. p. 2393, line 10 through p. 2396, line 12 (Zappe), and stating that the regulations are in fact "identical to" the federal regulations. Tr. p. 2397, lines 2-5 (S. Zappe).

[7] The cases cited by the Hearing Officer do not support the proposition that interpretation of state regulations adopted verbatim from federal regulations is purely a matter of state law. Rabar v. E.I. duPont deNemours, Inc., 415 A.2d 499, 502 (Del. 1980) is easily distinguished because the state of Delaware had chosen not to adopt the relevant portion of the federal statute which meant that the federal statute relied upon by the defendant did not have a counterpart at the state level. In Rabar, the defendant employer contended that violations of state occupational safety and health regulations adopted verbatim from the federal Occupational Safety and Health Act ("OSHA") could not constitute negligence *per se* because federal law specifically forbid use of any alleged violations of OSHA standards for purposes of establishing negligence *per se*. 415 A.2d at 503. However, the Court noted that Delaware had chosen not to adopt this portion of the federal statute. Id. ("the Delaware statutory authority . . . is completely distinguishable from the federal statutory authority and contains no language persuasively similar to that found in [the federal statute]"). The Hearing Officer also cites to Carroll v. Getty Oil Co., 498 F. Supp. 409, 413 (D. Del. 1980) for the same proposition, but the federal district court in Carroll applied Delaware law and based its holding on Rabar. Further, Rabar and Carroll were subsequently overruled by the United States Supreme Court in Gade v. National Solid Wastes Management Association, 505 U.S. 88 (1992), where the Court held that OSHA preempts state laws regulating occupational safety

NMED cannot simply claim that if the words of the state regulation are the same as the federal regulation, the HWA will allow a different interpretation for the simple reason that the HWA's "equivalency" and "identical to" requirements cannot be met by applying a different meaning to the same words. Indeed, both the promulgation and the interpretation of the HWMR must meet the substantive limits of Section 74-4-4, or else NMED's unfettered discretion to "interpret" a regulation could negate the limits which the New Mexico legislature has imposed on the regulatory process. NMED interpretations which conflict with the HWA's express requirements must violate the HWA. To the extent Modules II.N through II.Q of the Proposed Permit are merely NMED "interpretations"[8] of the EIB's regulations, they are inconsistent with the federal interpretation that contractors at federal facilities are exempt, and therefore the NMED's "interpretations" are not "equivalent to," "no more stringent than," or "identical to" the federal regulations, as required by Section 74-4-4. As such, adoption of NMED's "interpretation" in the final permit would not be in accordance with law because it violates the HWA.

2. The NMED Cannot Change Its Historic Interpretation and Application of the Financial Assurance Exemption Without Prior Notice

The NMED cannot impose upon WID an interpretation of the financial assurance exemption which is materially different from the interpretation it has historically applied. There is no evidence

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and health issues. See Figgs v. Bellevue Holding Co., 652 A.2d 1084 (Del. 1994).

[8] Given the breadth of Modules II.N through II.Q, it appears that they are not mere "interpretations" but are tantamount to the NMED promulgating a regulation, which the NMED has no statutory authority to do. See NMSA 1978 § 74-1-6.E (Repl. Pamp. 1993). Even if the NMED could enact hazardous waste management regulations, it cannot promulgate a regulation which is more stringent than the federal regulations without adhering to the process set forth in NMSA 1978 § 74-4-4.D. Gallegos v. State Bd. of Educ., 123 N.M. 362, 369, 940 P.2d 468, 475 (when statute and regulation conflict, statute prevails), *cert. denied*, 937 P.2d 76 (1997); see New Mexico Pharmaceutical Ass'n. v. State, 106 N.M. 73, 75, 738 P.2d 1318, 1320 (1987) (Board cannot adopt a rule or regulation which is not in harmony with its statutory authority); Rivas v. Board of Cosmetologists, 101 N.M. 592, 593, 686 P.2d 934, 935 (1984) (administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority).

in the record that NMED has ever previously required financial assurance from a private contractor at a federally-owned facility in New Mexico. When specifically asked to provide that evidence, the NMED did not. Tr. p. 2415, lines 8-18 (S. Zappe).[9] In fact, the evidence in the record demonstrates that the NMED allowed the Permittees to proceed for years without requiring financial assurance from WID. In 1991, the Permittees specifically stated in the test phase application that WID was exempt from the financial assurance requirements. The NMED never stated otherwise. The same interpretation is stated in Chapter I of the Permit Application and was endorsed by the NMED's June 27, 1996 completeness determination, which did not require financial assurance from WID. Contrary to the Hearing Officer's Finding No. 22, NMED's September 26, 1997 letter revoking the completeness determination *never mentioned* financial assurance. AR No. 970939. Instead, the NMED rescinded the completeness determination based on disclosure of compliance history information and the groundwater monitoring plan. The first time the NMED actually requested financial assurance from the Permittees was in September 1997. AR No. 970930. Thus, the record clearly shows that the NMED has changed its interpretation.

Such inconsistent regulatory treatment is improper. [10] If the NMED wants to change the

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[9] Although the Hearing Officer contends that the Permittees have "drawn sweeping conclusions" from the NMED's failure to provide a single example where the NMED required financial assurance from a private contractor at a federal hazardous waste facility in New Mexico, HO Report at p. 75, the fact remains that there is no evidence in the record that the NMED has ever required financial assurance from a private contractor at a federally-owned hazardous waste facility in New Mexico.

[10] See New Mexico Envtl. Improvement Div. v. Thomas, 789 F.2d 825, 831-2 (10th Cir. 1986) (court would defer to "the agency's interpretation when an agency is charged with enforcing a statute, when such an interpretation is not contrary to clear statutory intent or the plain language of the statute, when the interpretation is contemporaneous with the legislation's enactment, and when such interpretation *has been consistently adhered to by the agency over time.*" Hobbs Gas Co. v. New Mexico Public Service Comm'n, 115 N.M. 678, 681, 858 P.2d 54, 57 (1993))(emphasis added) (quoting General Tel. Co. v. Corporation Comm'n, 98 N.M. 749, 755-56, 652 P.2d 1200, 1206-07 (1982).

current interpretation of the EIB's financial assurance requirements in order to impose them on contractors at federal hazardous waste facilities, due process considerations mandate that the EIB give notice of this proposed change in interpretation and allow the public and regulated entities to comment on it. Cf. Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 586-87 (D.C. Cir. 1997); National Family Planning v. Sullivan, 979 F.2d 227, 240-41 (D.C. Cir. 1992). Such notice has never been provided and, therefore, NMED's new interpretation is improper.[11] Moreover, regulatory requirements such as permit provisions generally may not be construed as applying retroactively if they impose a significant burden on the regulated party, the party relied on a prior interpretation of the requirement, and the new interpretation is an abrupt departure from the prior one. See Farmers Telephone Co., Inc. v. FCC, 184 F.3d 1241, 1251 (10th Cir. 1999); Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988). All three factors apply here.

The Secretary should not include Modules II.N through II.Q in the final permit because to do so would be arbitrary, capricious, an abuse of discretion and not in accordance with law.

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[11] To justify Modules II.N through II.Q, the HO Report erroneously adopts the NMED's assertion that New Mexico will give "substantial deference to an agency's interpretation of its own regulations." HO Report at p. 71. However, the NMED is not entitled to any deference in this context because it is not interpreting its "own" regulations. The case cited by the NMED in support of this proposition, High Ridge Hinkle Joint Venture v. City of Albuquerque, 119 N.M. 29, 888 P.2d 484 (Ct. App. 1994), merely stands for the proposition that, in a zoning case, the court will usually accord substantial deference to the City Council's interpretation of the zoning regulation because the City Council is the body that enacted the zoning code. Id. at 38, 888 P.2d at 493. High Ridge actually supports the Permittees' assertion that USEPA's interpretation is the one entitled to substantial deference because USEPA promulgated Section 264.140(c), not NMED. At best, an interpretation by EIB, as the enacting body, might be accorded that same type of deference. Further, the Court in High Ridge did not accord substantial deference to the City Council's interpretation of the zoning code provision because the Court recognized that little deference will be accorded to an agency's interpretation of its own regulation when the interpretation is an unexplained reversal of a previous interpretation or consistent practice. Id. at 42, 888 P.2d at 497. After remand to a District Court and a second decision by the Court of Appeals, the Supreme Court considered the matter in High Ridge Joint Venture v. City of Albuquerque, 1998 NMSC 050 ¶¶ 9,13, 970 P.2d 599 (1998) and the Court again refused to accord substantial deference to the City Council's interpretation of the zoning code provision in light of prior inconsistent interpretations by zoning officials which were never corrected by the City Council. Therefore, this case does not support the HO Report or the NMED's position.

C. The Proposed Permit's Waste Analysis Plan Provisions Concerning Miscertification and VOC Sampling are Arbitrary and Capricious, not Supported by Substantial Evidence in the Record, or not in Accordance With Law

The WAP in Module II.C and Attachments B - B6 of the Proposed Permit contains two specific provisions which, if adopted, will have significant adverse consequences for the citizens of New Mexico. The first -- the application of an 11% initial miscertification rate on a per waste stream basis for determining the frequency of visual examination as a check on radiography[12] -- will result in a significant increased risk of radiation exposure for New Mexico citizens working at LANL. The second -- the requirement to take three sub-samples from cores of homogeneous wastes when testing for Volatile Organic Compounds ("VOCs")[13] -- will result in a waste of taxpayer dollars if previously-characterized waste must be re-characterized to meet this requirement. These consequences are doubly unjustified because neither provision is supported by substantial evidence in the record and the increased risk resulting from the higher miscertification rate violates both the letter and the spirit of the HWA. A decision to adopt a WAP containing these specific provisions is arbitrary, capricious and an abuse of discretion because these provisions are not supported by substantial evidence in the record and are not in accordance with law. The Permittees request that the miscertification rate be reset to the original 2% rate in the Permit Application and the Draft

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[12] See Permit Attachment B2, Section B2-1, pages B2-1, line 22 through B2-2, line 6, made applicable by Permit Module II.C.1.c. Radiography – a standard x-ray technique which allows trained operators to look inside a waste container to determine its contents – is a method the Permittees require generator sites to use in order to determine if prohibited items are present without having to open the drum Tr. p. 442, lines 7-20, p. 447, line 9-19 (E. Hunter). Visual Examination – the opening and removal of all contents of a waste container to look at every single item in the container, id. at p. 448, lines 1-12 – is used by the Permittees as a quality control check upon radiography performed. When Visual Examination determines that radiography has incorrectly certified the absence of prohibited items in the waste container, a "miscertification" is said to occur. Id. p. 677, lines 11-15. By comparing the number of miscertifications against the total number of drums, a "miscertification rate" can be calculated. Tr. p. 2730, lines 5-9 (C. Walker).

[13] See Permit Attachment B1, Section B1-2a (2), page B1-15, lines 24-30, made applicable by Permit Module II.C.1.b.

Permits and that the three sub-sample requirement be modified to allow sampling pursuant to SW-846 methods.

1. The Proposed Permit's Miscertification Rate Provision is not Supported by Substantial Evidence and Should be Changed Back to 2%

The Permit Application and the Draft Permits contemplated that generator sites would initially apply a 2% miscertification rate to a total population of containers subjected to radiography in order to determine the number of containers which must be visually examined to verify the results of radiography.[14] The Proposed Permit raises the initial miscertification rate from 2% to 11% and requires that this miscertification rate be applied to each waste stream instead of to the totality of containers examined by radiography during the year.[15] These changes have a very real impact on New Mexico citizens working at LANL and workers at other generator sites throughout the United States: increased risk of radiation exposure. Given that there is no substantial evidence in the record to justify the adoption of either of these miscertification requirements, such adoption would result in permit conditions which are contrary to law.

The record contains uncontroverted evidence that the new miscertification rate provisions could impose significant health risks on workers at generator sites in New Mexico and throughout the United States. As the HO Report correctly found (see Finding No. 205), the higher the

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[14] Tr. p. 546, lines 2-5 (E. Hunter); AR No. AS (May 15, 1998 Draft Permit), Permit Attachment B2 at p. B2-1; AR No. BC (November 13, 1998 Revised Draft Permit), Permit Attachment B2 at p. B2-1, lines 19-24.

[15] Additionally, the Proposed Permit changes the scope of miscertification. The Draft Permits defined miscertification to be a failure to detect an item prohibited by the Treatment, Storage, and Disposal Facility Waste Acceptance Criteria set forth in Module II.C.3. The Proposed Permit uses the DOE's more general Waste Acceptance Criteria, which prohibits numerous items that have nothing to do with RCRA or HWA regulations. Compare Module II.C.3 with AR No. AH -- Waste Acceptance Criteria for WIPP, Rev. 5 (citing radionuclide and transportation-related prohibitions). There is no evidence in the record to support this changed scope in the Proposed Permit.

miscertification rate, the more waste containers must be visually examined. Tr. p. 536, line 14 through p. 538, line 17 (E. Hunter). Further, the unrefuted evidence in the record is that opening waste containers increases the health and safety risks to the public and workers. Tr. p. 436, lines 8-17 (E. Hunter); Tr. p. 1947, line 16 through page 1948, line 22 (B. Franke), and will generate additional radioactive waste. The 11% rate requires that anywhere from 2.27 to 16.33 times more containers must be visually examined than under the original 2% rate, see Proposed Permit Table B2-1, which means that the New Mexico workers at LANL will be subjected to a significantly increased risk of radiation exposure in contravention of the HWA's purpose "to confer optimum health, safety, [and] comfort . . . on its inhabitants." NMSA 1978 § 74-4-2 (Repl. Pamp. 1993). The Proposed Permit compounds this increased radiation exposure risk by requiring that a miscertification rate be applied to each waste stream. Table B2-1 of the Proposed Permit reveals that the result of requiring that each waste stream be visually examined pursuant to any miscertification rate will be to increase exponentially the number of visual examinations (and hence risk to the citizens of New Mexico).[16]

The increased risk of radiation exposure caused by the 11% miscertification rate and per waste stream requirement is wholly indefensible because the record does not provide any support for either requirement. The HO Report contains eight specific Findings of Fact concerning

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[16] As an example, a generator site which conducted radiography on 10 waste streams each containing 100 waste containers (1,000 total) would be required, under the Permit Application and the provisions in the Draft Permits to visually examine 27 total drums. However, under the Proposed Permit, each of the 10 waste streams, utilizing the 11% miscertification rate, would require 87 drums be examined, or a total of 870 out of 1,000 drums -- 32 times as many drums as originally required. Even under a 2% miscertification rate, the 10 waste streams would each require 24 drums be examined, or a total of 240 drums -- nearly 9 times more drums. Mr. Hunter testified that there were more than 500 waste streams. Tr. p. 539, lines 16-20 (E. Hunter). Many waste streams are likely to be less than 50 drums, see AR No. AA - Transuranic Baseline Inventory Report, Rev. 3 (1996) (showing numerous waste streams of less than 10.5m^3, which would be less than 50 drums); under Table B2-1, all drums in each of these waste streams would need to be visually examined.

miscertification (Finding Nos. 205-212), but none of those findings include any citation to oral testimony, written comment, or other evidence in the record which establishes that an 11% initial miscertification rate or a per waste stream application of a miscertification rate is appropriate. The closest evidence supporting 11% is that LANL has an 11% rate, but testimony at the hearing established that the LANL rate was a function of: (1) errors in the training materials for radiography operators, and (2) the interpretation of a 4-liter container to be a 1-gallon (i.e., 3.785 liter) container, a prohibition criteria driven by transportation concerns which have nothing to do with compliance with the HWA. See Tr. p. 554, line 1 through p. 559, line 1 (E. Hunter). No evidence in the record establishes that LANL's unique circumstances are present anywhere else in the DOE complex such that LANL's 11% rate can be appropriately applied to any other generator site.[17] Indeed, NMED failed to meet its burden because its own technical witness, Ms. Connie Walker, did not testify that the miscertification rates from LANL and other DOE sites justified a higher rate in the final permit, despite being asked to do so. See Tr. p. 2731, lines 2-17 (C. Walker). The evidence cited to support the per waste stream requirement is speculative testimony that some waste streams might not have visual examination (Finding No. 211), but there is no evidence that conducting confirmatory visual examination on each waste stream is the only way to prevent the disposal of prohibited items at WIPP or even that the per waste stream approach results in any additional benefit to the public or the

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[17] The other evidence cited in the HO Report does not come close to supporting an 11% miscertification rate. The most recently calculated miscertification rates of 2% at INEEL and 3.6% at Rocky Flats Technology Site ("Rocky Flats") (Finding No. 207) are substantially below 11%. The testimony of Don Hancock and Deborah Reade (Finding Nos. 210, 212)--neither of whom have a technical background in radiography--cannot support 11% because both advocated much higher miscertification rates (RP No. 37: Written Comments of CARD at p. 2 --100% rate; RP No. 34: Written Comments of SRIC/CCNS at p. 7--33% rate), which the Hearing Officer rejected. HO Report at p. 87. The 1994 USEPA Guidance cited in Finding No. 212 merely discusses in general the need for proper waste analysis; it says nothing about miscertification rates, much less that an 11% rate is proper waste analysis or more protective of human

environment.

The Hearing Officer, in rejecting CARD's call for 100% visual examination, specifically stated that one must balance the need for adequate waste characterization against the risk of radiation exposure. HO Report at p. 87.[18] The record shows that the 2% rate in the Permit Application and the Draft Permits is justified by historical and present performance at INEEL, while the proposed 11% initial miscertification rate increases health and safety risks to the public and workers in violation of the HWA without any evidence of an increase in protection of health or the environment. The balance sought by the Hearing Officer is best struck at 2%, and thus the Secretary should set the initial miscertification rate in the final permit at 2%.

2. The Requirement Of Three Sub-Samples from Core Samples of Homogeneous Wastes Should be Changed to Allow Use of Methods Approved by USEPA as Well

The WAP in the Proposed Permit requires the taking of three sub-samples from cores of homogeneous waste when analyzing for VOCs. The record contains unrefuted written comments from INEEL that if the three sub-sample requirement is the only acceptable VOC sampling method for homogeneous wastes, then this requirement would invalidate existing sample results, require at least $7 million in additional sampling costs, and cause delays occasioned by resampling. See RP No. 28: Comments of Idaho National Engineering and Environmental Laboratory at Comment No. 1.[19] Finding No. 224 in the HO Report, echoing NMED's written testimony and proposed findings of

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health and the environment than a 2% rate.

[18] The Permittees note that, according to Table B2-1, an 11% rate requires a waste stream of 50 drums or less to have 50 drums visually examined -- i.e., 100% of the drums. In other words, the 11% rate requires exactly what the Hearing Officer rejected.

[19] Although the HO Report claims that the composite sampling requirement would not impose significant additional costs or sampling delays, see Finding No. 232, it only cites Permit Attachment B1, Section B1-2 (a)(2), which

fact,[20] states generator sites may collect either three sub-samples from a sample core or a representative core sub-section collected pursuant to appropriate USEPA methods as set forth in SW-846. If in fact this second option is available, then the Permittees have no issue concerning the mandated sampling requirements for VOCs. However, the actual language in the Proposed Permit appears to allow only the three sub-sample approach. See Proposed Permit, Permit Attachment B1, page B1-15, lines 24-25.[21] Thus, the finding by the Hearing Officer is not supported by the actual text of the Proposed Permit. A clarification in Permit Attachment B1 of the final permit would resolve this issue. The permit should clearly state that generator sites have a choice between the three sub-samples or SW-846 methods.

The Permittees are concerned that already existing data like that at INEEL, generated pursuant to appropriate USEPA sampling methodologies, would be invalidated by the arbitrary requirement to have three sub-samples taken. The Permittees are willing to require generator sites to meet a requirement to follow USEPA SW-846 sampling methodologies on a going forward basis. A

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contains no discussion of costs. The NMED has claimed no cost effect, see NMED's Proposed Finding of Fact, Section III.A.5.A, Finding No. 19, which in turn quotes the NMED's written testimony, RP No. 130, NMED's Direct Testimony, Sampling Tab at p. 5, but the NMED never presented evidence to rebut INEEL's specific written comment related to cost and delay.

[20] See RP No. 194: NMED Proposed Findings of Fact and Conclusions of Law; RP No. 130: NMED's Direct Testimony, Sampling Tab, at p. 1. Section III.A.5.A, Finding No. 3.

[21] If the NMED intended that the three sub-sample method is the only acceptable VOC sampling technique for cores of homogeneous waste, then there are serious problems in the record in addition to the inconsistency in HO Report Finding No. 224. First, the alleged objective of creating equivalency between VOC and non-VOC core sampling methods, see HO Report Finding No. 227, cannot be realized because the prescribed method for non-VOC analytes is different. See Proposed Permit, Permit Attachment B1 at p. B1-16, lines 7-9 (allowing non-VOC samples from a representative subsection of core). In fact, the Permit Application and the Draft Permits were more "equivalent" because each allowed samples from a representative subsection of core. Thus, if the three-subsample method is the only method available for VOCs, then there is no support in the record for Finding No. 227. The NMED's claim that three sub-samples increases representativeness of the sample confuses the need to get a representative sample within a single drum with the need to get a representative sample from the waste stream. The NRC/EPA Joint Guidance indicates that a waste stream focus is appropriate to reduce radiation exposure concerns. The method in the Permit Application best meets this concern.

final permit which allows the use of already existing core sample data would address the Permittees' serious concerns in this regard.

D. The Requirement to Monitor Groundwater for Gross Alpha and Beta Should be Deleted From the Final Permit Because it Creates Unreliable Data and is not Supported by Substantial Evidence on the Record.

The Secretary should not accept the Hearing Officer's recommendation to require groundwater monitoring for gross alpha and gross beta radionuclides[22] because it forces the Permittees to create duplicative, unreliable data when the Permittees already submit to the NMED specific data for hazardous constituents and radionuclides. The requirement is not supported by substantial evidence in the record, and fails to consider overwhelming evidence against the value of such monitoring, so that it is therefore arbitrary and capricious.

The only evidence in the record on gross alpha and gross beta was offered by the Permittees and establishes by a preponderance of the evidence that monitoring for these parameters is duplicative, unreliable and does not aid in assessing whether a release has occurred.[23] The Permittees monitor groundwater for specific radionuclides related to the waste at the WIPP as part of the Environmental Monitoring Plan. AR No. X: Permit Application Appendix D5 at p. 5-10 and Table 5-2. This monitoring is a better and more reliable diagnostic tool for detecting releases (Tr. p. 227, lines 1-10 (R. Kehrman)) because it relates directly to the radionuclides in the waste and because

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[22] The Hearing Officer's "recommendation" is a single conclusory statement, without any citation to the record, that "monitoring for these constituents does aid in assessing whether a release of waste constituents has occurred." HO Report at p. 63, Footnote 21.

[23] Only the NMED's Response to Written Public Comments Submitted on the November 13, 1998 Revised Draft Permit contains a single, conclusory sentence on the issue, without any analysis. RP No. 194: Respondents Written Comments, (Module V, p. 17 of 20.) Because this was a post-hearing submission, it cannot be viewed as evidence because it was submitted after the hearing record had closed and no party had an opportunity to comment on it. See 20 NMAC 1.4.502 (barring evidence in post-hearing submissions). Even if it could be considered evidence, this conclusory statement fails to meet the NMED's burden.

methods for analysis are more exact.[24] No party presented any evidence to suggest that the existing monitoring for specific radionuclides is somehow inadequate. In fact, monitoring for "gross" alpha or "gross" beta is a screening process. Additional sampling must occur to determine which specific radionuclides make up the "gross" readings. See USEPA Method 9310, ¶ 1.9. Because the Permittees already sample for the specific radionuclides relating to the waste at WIPP, the screening step is completely unnecessary.

Further, although Proposed Permit Module V.D requires that the groundwater detection monitoring program "provide a *reliable* indication of the presence of hazardous constituents in groundwater" (emphasis added), monitoring for gross alpha and beta is unreliable for two reasons. First, monitoring for gross alpha and gross beta is not a reliable indicator for the presence of hazardous constituents because the samples detect naturally occurring radionuclides (e.g., radon) which have no relationship to hazardous constituents in the waste. Tr. p. 224 lines 20-23 (R. Kehrman).[25] Thus, the "gross" monitoring actually takes a step backwards in accuracy. Second, the accepted analytical method for gross alpha or beta is completely unreliable because the groundwater at WIPP is high in total dissolved solids. The difficulty in conducting analyses under such conditions is well established in the record. AR No. AQ, p. 27 (WIPP RCRA Background

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[24] Analytical results of the Permittees' radionuclide sampling are provided in the Annual Site Environmental Report, (Permit Application, Appendix D4, p. 5-4 and App. A5) which will be provided to the NMED. See, e.g., Proposed Permit Module V.J.2.c. If the Secretary deems it advisable for the NMED to receive the radionuclide data on a more frequent basis, the permit could require that the Permittees provide this data as part of the Detection Monitoring Program, rather than the Environmental Monitoring Plan.

[25] The NMED failed in its attempt to connect monitoring gross alpha and beta in groundwater to detecting releases of hazardous constituents through the concept of "co-detection." The record reflects that it is "an over-extension of the principle of co-detection" to suggest that monitoring for gross alpha and gross beta in groundwater is an indicator of the presence of hazardous constituents. Tr. p. 225, lines 8-22, p. 226, lines 3-10, p. 227, lines 15-25 (R. Kehrman). No analysis has been done to assess whether co-detection in groundwater would be a valid technique. Id. at p. 226, lines 8-10, 13-15. Further, because the DMP requires monitoring for the specific hazardous constituents that would be present from a release to groundwater, the principle of co-detection is not necessary to determine if a release has occurred.

Groundwater Quality Baseline Report); Permit Application Appendix D17, p. 2-18, and Appendix D18, p. D18-29. The high levels of total dissolved solids requires that samples for gross alpha and beta be highly diluted and the result multiplied by the dilution factor. USEPA Analysis Method 9310. The effect is a sample result with such a high detection limit that the results provide no useful information. This problem only occurs when analyzing for gross alpha and beta, not specific radionuclides.

Without any evidence in the record or any analysis of the Permittees' positions against monitoring for gross alpha and gross beta, the NMED never met its burden on this contested issue. The monitoring requirement is unreliable and has no basis in the record. Thus, "gross alpha and gross beta" should be deleted from the list of analytes in Tables L-3 and V.D, and Module V.D of the Permit.

III. PROPOSED PERMIT INCONSISTENCIES

The Permittees have reviewed the Proposed Permit and identified examples of some of the internal inconsistencies, which are briefly described below. Before the final permit is issued or becomes effective pursuant to 20 NMAC 4.1.901.A.10, the NMED should carefully review the permit to identify and resolve all internal inconsistencies.

- Proposed Permit, Attachment B1, Figure B1-2 states that the gauge is optional and refers to the text. The text (page B1-3) indicates that the pressure gauge is required.
- Proposed Permit, Attachment B, page B-37 requires a field reference standard (FRS) for every headspace sampling batch, but Table B1-2 indicated only one FRS is required for the direct sampling method.
- Proposed Permit, Attachment B3, pages B3-6 and B3-12 do not indicate a need for a GC/MS comparison sample, but Table 3-3 lists the GC/MS comparison sample.

- Proposed Permit, Attachment B3, pages B3-12 indicates that GS/MS tunes, initial calibrations and continuing calibration will be performed and evaluated using the procedures and criteria specified in Table B3-3, but Table B3-3 does not list criteria for these calibrations.

- Proposed Permit, Attachment B, page B-17, Section B-3d(2) indicates that repackaged waste should be characterized as newly generated if the sampling requirements are greater. For retrievable stored homogeneous waste that is repackaged, it is impossible to go back and control the process that generated the waste as described in Section B-3d(1)\(a), lines 5-13.

IV. CONCLUSION

For the reasons set forth above, the Permittees respectfully request that the Secretary of the NMED issue the Proposed Permit for WIPP with the following modifications:[26] (1) delete Module IV.B.2.b or Room 7 should be deleted from Panel 1, and closed with an omega block wall. (alternatively, adopt the language proposed by the Permittees herein at p. 9; (2) delete Modules II.N through II.Q concerning financial assurance; (3) approve an initial miscertification rate of 2% and delete the per waste stream requirement in Module II.C.1.c, Permit Attachment B2, Section B2-1, pages B2-1 in 22 through B2-2 line 6; (4) clarify Module II.C.1.c, Permit Attachment B1, pages B1-15, lines 24-25 to allow a choice between three sub-samples or SW-846 methods; and (5) delete

[26] In addition, the final permit should not require that active room ventilation rates be measured and recorded on an hourly basis. The HO Report Finding No. 300 is contrary to the record and should not be adopted by the Secretary. The Proposed Permit does not contain this requirement. At the hearing, the NMED first suggested this requirement as part of the Ventilation Rate Monitoring Plan, which was a new proposal not previously contained in prior draft permits. On cross examination, NMED technical expert Mr. David Walker from TechLaw concluded that recording the rates whenever the exhaust rate or the ventilation rate changed would be sufficient in lieu of an hourly log. Tr. p. 2988, lines 3-6 (D. Walker).

Module V.D, Table V.D and Table L-3 groundwater monitoring requirements for gross alpha and beta.

Dated: September 28, 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September 1999, a copy of the foregoing **THE UNITED STATES DEPARTMENT OF ENERGY'S AND THE WESTINGHOUSE WASTE ISOLATION DIVISION'S COMMENTS ON THE REPORT OF THE HEARING OFFICER** was mailed by first-class mail, postage prepaid to the following:

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