

KAFB 91

ENTERED

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO

FILED

JAN 28 1991

Patricia C. Morgan

UNITED STATES OF AMERICA,
DEPARTMENT OF THE AIR FORCE,
Appellant

vs.

No. 12,550

STATE OF NEW MEXICO,
ENVIRONMENTAL IMPROVEMENT DIVISION
OF THE HEALTH AND ENVIRONMENT DEPARTMENT,
Appellee.

EID'S RESPONSE TO KAFB'S
REQUEST FOR RECONSIDERATION

The Environmental Improvement Division ("EID") of the Health and Environment Department opposes Kirtland Air Force Base's ("KAFB") request for reconsideration of the Order Denying Stay entered January 16, 1991, as follows:

1. Tenneco Oil Company v. NMWOCC, 105 N.M. 708, 736 P.2d 986 (Ct.App.1986) is applicable to this appeal. The Court's opinion in Tenneco applies to administrative orders and regulations. The permit is a "regulation" tailored specifically for at this hazardous waste storage facility. 40 C.F.R. §270.4(a) states that "[c]ompliance with an [sic] RCRA permit during its term constitutes compliance for purpose of enforcement, with Subtitle C of RCRA...." Compliance with the permit is compliance with the regulations.

2. KAFB has not requested a stay from the EID. There is no administrative filing for a stay and there is no record of

KAFB1081



administrative action. There is nothing for this Court to review.¹
The burden for seeking administrative action is KAFB's.

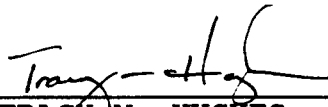
3. There is nothing new in KAFB's request for reconsideration. KAFB does not meet its burden under Tenneco.

Respectfully submitted,

TOM UDALL, Attorney General

HEALTH AND ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL

By:



TRACY M. HUGHES

Assistant General Counsel
Special Assistant Attorney General
1190 St. Francis Drive, Room N4050
Santa Fe, New Mexico 87503

(505) 827-2990

Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing EID's Response to KAFB's Request for Reconsideration was mailed on this 28th day of January, 1991, to the following:

John W. Zavitz
Assistant U.S. Attorney
P.O. Box 607
Albuquerque, New Mexico 87103

William D. Benton, Lt. Col. USAF
Staff Judge Advocate
HQ 1606 ABW/JA
Kirtland AFB, New Mexico 87117-5000



Tracy M. Hughes

¹ Counsel acknowledges a telephone conversation regarding the effectiveness of the permit. Counsel was not asked to stay the permit. Counsel does not have the authority to stay or to deny a stay of the permit.