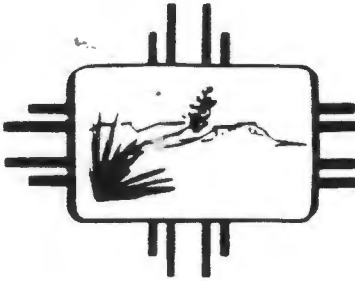


KAFB 91

ENTERED

New Mexico Health and Environment Department



February 6, 1991

Richard Lopez  
Land and Water Fund of the Rockies  
1405 Arapahoe, Suite 200  
Boulder, Colorado 80302

Re: Kirtland Air Force Base  
Hazardous Waste Storage Permit

Dear Rich:

Enclosed are the court filings that will bring you up-to-date. Kirtland requested from the Court of Appeals a stay of the entire permit. EID opposed the stay. The Court said that Kirtland has to request a stay from the agency first. Kirtland filed their Brief-In-Chief and EID's Answer Brief will be due March 11, 1991. If you file an amicus, it will be due then too.

Thank you for the invitation to the reception held in Santa Fe. I enjoyed it, but was sorry I could not find you in the mass of people.

I you need any further information, please contact me.

Sincerely,

  
TRACY M. HUGHES  
Assistant General Counsel

Enclosure(s)



IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

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

COURT OF APPEALS OF NEW MEXICO  
**FILED**

JAN 23 1991

vs.

No. 12,550

STATE OF NEW MEXICO,  
ENVIRONMENTAL IMPROVEMENT DEPARTMENT,  
Appellee

*Patricia C. Mangano*

APPELLANT'S REQUEST FOR RECONSIDERATION OF COURT ORDER  
AND MEMORANDUM IN REPLY TO APPELLEE'S BRIEF  
OPPOSING STAY OF ADMINISTRATIVE ORDER

INTRODUCTION

Appellee's brief opposing Appellant's motion for stay of permit contains both factual and legal inaccuracies. This memorandum in reply is intended to provide the Court with additional information to support Appellant's motion for a stay and request the Court reconsider its Order, dated 16 Jan 1991, denying the Motion for a Stay. Although the SCRA do not specifically address reconsideration of a Motion or Appellant's option to reply to Appellee's response, it is not specifically excluded. This reply is filed within 10 days of Appellee's Brief Opposing Stay.

I. FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Appellee's reliance on Tenneco Oil Co. v. New Mexico Water Quality Control Commission, 105 N.M. 702, is misplaced. Tenneco involved an appeal of regulations by the Water Quality Control Commission, not an administrative permit. By NMSA 74-4-4.2, appeals are made directly to the Court of Appeals without specifically providing for a stay of the permit pending appeal. The Administrative Procedures Act, NMSA 12-6-1, et seq. states in Section 12-8-23 that the Act applies to agencies made subject to its coverage by law, agency rule or regulation. There is nothing in the New Mexico Hazardous Waste Act

REQUEST FOR RECONSIDERATION DENIED.

DABD: JAN. 28, 1991. *TJ/M*, Judge

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

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

vs.

No. 12,550

STATE OF NEW MEXICO,  
ENVIRONMENTAL IMPROVEMENT DEPARTMENT,  
Appellee

APPELLANT'S REQUEST FOR RECONSIDERATION OF COURT ORDER  
AND MEMORANDUM IN REPLY TO APPELLEE'S BRIEF  
OPPOSING STAY OF ADMINISTRATIVE ORDER

INTRODUCTION

Appellee's brief opposing Appellant's motion for stay of permit contains both factual and legal inaccuracies. This memorandum in reply is intended to provide the Court with additional information to support Appellant's motion for a stay and request the Court reconsider its Order, dated 16 Jan 1991, denying the Motion for a Stay. Although the SCRA do not specifically address reconsideration of a Motion or Appellant's option to reply to Appellee's response, it is not specifically excluded. This reply is filed within 10 days of Appellee's Brief Opposing Stay.

I. FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Appellee's reliance on Tenneco Oil Col v. New Mexico Water Quality Control Commission, 105 N.M. 708, is misplaced. Tenneco involved an appeal of regulations by the Water Quality Control Commission, not an administrative permit. By NMSA 74-4-4.2, appeals are made directly to the Court of Appeals without specifically providing for a stay of the permit pending appeal. The Administrative Procedures Act, NMSA 12-8-1, et seq, states in Section 12-8-23 that the Act applies to agencies made subject to its coverage by law, agency rule or regulation. There is nothing in the New Mexico Hazardous Waste Act

that makes the Division's permitting decisions subject to the Administrative Procedures Act and as such does not apply and was not required. Even if it was subject to the Act, Section 12-6-18 states that the agency may grant, or the court of appeals may order a stay.

Appellee is correct that there is no administrative record concerning the stay. However, counsel for Appellant discussed the issue of a stay with counsel for Appellee prior to the September 1990 inspection and was advised that it may be premature to discuss the need for a stay until the outcome of the inspection determined what deficiencies were noted, but in any event, the Division would not voluntarily grant a stay, that Appellant would have to petition the Court of Appeals. Appellant relied on this statement and did not request the Agency to reduce this to writing. Therefore, if the Court decides that Tenneco or the Administrative Procedures Act applies as to exhaustion of remedies, Appellant has met this criterion.

## II. FOUR-PRONGED TENNECO TEST

### A. Prevailing on the Merits and Lack of Irreparable Harm

Although Appellant believes that Tenneco is not controlling, appellant believes that in any event the criteria are sufficiently met to grant a stay. Appellant believes there is a sufficient showing in the docketing statement that it will prevail on the merits of the five remaining issues on appeal, which will be further supported by the Appellant's Brief-in-Chief, due 6 Feb 1991, and which Appellant is further attempting to resolve by means of an administrative permit modification in accordance with 40 CFR 270.42. Secondly, the irreparable harm to Appellant goes beyond the ability to use the new hazardous waste facility that is currently not in use. Waste has already been characterized in accordance with 40 CFR 264.13. The 28 September 1990

Division inspection report, which Appellant did not receive until 4 Jan 91, noted no deficiencies with regard to the existing hazardous waste facilities. However, the testing being challenged by Appellant requires significant expenditure of taxpayer dollars annually even though no deficiencies were noted in the previous inspections that would be corrected by annual testing rather than testing based on user knowledge of change in process as required by 40 CFR 264.13. Over-regulation by a regulatory agency based on speculative harm without regard to costs involved results in irreparable harm to Appellant. The arbitrary 90-day reclassification of material to waste results in significant unnecessary disposal costs for Appellant and unnecessary generation of hazardous waste. By allowing for sufficient time to find a large quantity buyer, materials will be recycled and never become waste, thus lowering the amount of hazardous waste needing disposal.

B. Lack of Substantial Harm to the Division or the Public Interest

It is unsubstantiated that substantial harm will result to either the Division or the Public Interest because Appellant will continue to use the same two buildings for storage of hazardous waste that have been adequate for the past 11 years. Appellant cannot use the new facility if the stay is granted because it will be unpermitted and because Appellant has elected not to use the new facility during the pendency of the appeal to avoid any further confusion in issues in litigation. The greater harm is to not expeditiously resolve the issues on appeal because the new facility is state of the art and is the better facility for storing hazardous waste.

III. LACK OF PERMIT

Appellee states on p.1, , paragraph 1, INTRODUCTION, that:

"Prior to the issuance of the permit, buildings 28009 and 615 stored hazardous waste without a permit from the Division under interim status. Interim status is the minimum national standard acceptable for the management of hazardous waste until facility is permitted or closed."

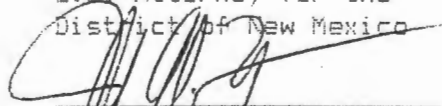
All facilities in operation when the Resource Conservation and Recovery Act (RCRA) became effective in 1980 were granted an Interim Status Permit under Part A by adoption of 40 CFR 265.1 (1988). It is not accurate to state that these facilities are without permit under Part A. Appellant was not operating unlawfully and received annual inspections by the Environmental Improvement Division, correcting any deficiencies needed to protect human health and the environment. This interim status permit was sufficient from 1980 and during the entire permitting process which began in 1984 and ended in 1990.

#### CONCLUSION AND REQUEST FOR RECONSIDERATION

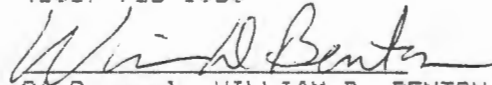
Although Appellant does not believe it was required to follow exhaustion of administrative remedies as Appellee contends, if the Court disagrees, a voluntary stay was denied by Appellee. Further, Appellant restates its request that the entire permit should be stayed during the pendency of the appeal. If the Court should determine otherwise, then Appellant petitions the Court to stay those portions of the permit effected by the five remaining issues during the pendency of the appeal.

Respectfully submitted,

WILLIAM L. LUTZ  
U.S. Attorney for the  
District of New Mexico



By JOHN W. ZAVITZ  
Assistant U.S. Attorney  
PO Box 607  
Albuquerque, NM 87103  
(505) 766-1060



Of Counsel: WILLIAM D. BENTON,  
Lt Col, USAF  
Staff Judge Advocate  
HQ 1606 ABW/JA  
Kirtland AFB, NM 87117-5000  
(505) 846-4217

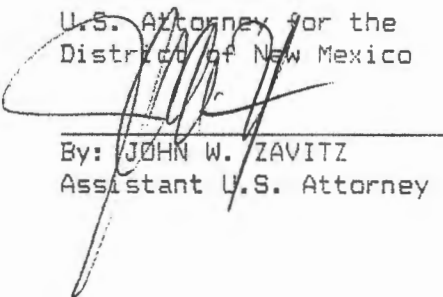
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Memorandum in Reply to Appellee's Brief Opposing Stay of Administrative Order was mailed to the following counsel of record this 23rd day of January, 1991:

For the Appellee:

Tracy M. Hughes  
Special Assistant Attorney General  
Assistant General Counsel  
Health and Environment Department  
1190 St. Francis Dr.  
Santa Fe, NM 87503

WILLIAM L. LUTZ  
U.S. Attorney for the  
District of New Mexico

  
By: JOHN W. ZAVITZ  
Assistant U.S. Attorney