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April 20, 1995

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Enforcement

Larry D. Kirkman
Acting Area Manager
Department of Energy
Field Office, Albuquerque
Los Alamos Area Office
Los Alamos, NM 87544

Dear Mr. Kirkman:

This letter is in response to the submittal of the March 2, 1995 draft copy of the Proposed Site Treatment Plan (PSTP) by Los Alamos National Laboratory (LANL) to the New Mexico Environment Department (NMED). We have discussed these comments with the Department of Energy (DOE) and understand that some of our comments have been considered, and may be reflected in the final Site Treatment Plan (STP) to be provided to NMED in early April, 1995.

Although the March 2, 1995 draft copy of the PSTP includes more complete information, several problem areas remain. It is our position that these issues and other issues addressed in the draft copy of the PSTP will be resolved in a continuing spirit of cooperation prior to October 1995.

Generally, NMED maintains its prior position regarding problems in the Draft Site Treatment Plan addressed in written comments by NMED to you on November 8, 1994. The March 2, 1995 draft PSTP did not adequately address these problems. In addition, a number of new issues have been raised that pose potential problems for NMED as the regulatory agency and are identified below in varying degrees of specificity.

Section 1.0: Purpose and Scope

The State issued order referred to in this section will be issued pursuant to the FFCAct. However, treatment standards, implementation, compliance and enforcement is pursuant to state law. This should be addressed and appropriate state law references included.

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Section 2.0: Implementation

The purpose of the order is to implement the STPs. Therefore, this entire section should be deleted from the STP. If this section is not deleted prior to public review, DOE should notify the public that this section is not a substitute for the order and the State has not agreed to these provisions.

Section 2.1: Covered wastes

This section is ambiguous and not consistent with the FFCAct. The STP does not apply to all mixed waste; rather, the STP applies to all mixed waste at the site, regardless of time generated, which are in violation of LDR standards involving the storage of mixed waste prohibited from land disposal unless storage is soley for the purpose of acccumulation of quantities necessary to facilitate the recovery, treatment or disposal of such wastes. Further, the applicable state law citations are not included. The same comment applies throughout.

Section 2.2. 2.6: Compliance Schedules/Revisions

The organization and process set up under this section, particulary for milestones, is inconsistent with the FFCAct and internally inconsistent. Pursuant to the FFCAct, the State (not DOE) has the authority to approve, enforce and extend milestones. This fact should be set forth in the purpose and scope (Section 1) of the STP. The process established for approval/disapproval and extension of milestones and revisions is inconsistent with the FFCAct is the following manner:

1. The process established by DOE under the STP requires (1) DOE to identify changes and revisions needing State approval; (2) allow only 30 days after receipt of a revision for the State to "conditionally approve" the revision; (3) if the State conditionally approves the revision then the revision is subject to public review; (4) DOE is allowed to invoke a dispute resolution process for any revisions which it does not agree with.

2. DOE's process described above is contrary to, and inconsistent with the FFCAct and the regulatory authority of NMED as follows: (1) Under the FFCAct, the State has 6 months to approve, modify or disapprove a revision, not 30 days for conditional approval only; (2) upon submission of a revision, the State is required under the FFCAct to publish a Notice of

Availability of all revisions, not only those that are modified or "conditionally approved;" (3) the State is authorized to review, approve or disapprove all revisions after publication, not before; and (4) there is no dispute resolution mechanism for approval of revisions; under the FFCAct, the process "shall" be the same as the STP. FFCAct, Sec. 3021(b)(3)(4).

Section 2.3.3: Identification, Review, and Approval of Proposed Changes

DOE has established a two-step process for approvals of "changes" and "revisions" requiring State approval. The FFCAct does not recognize this distinction; if a distinction is drawn, it will be necessary to clearly define "changes" and "revisions". The draft PSTP does not propose any clear definition of changes requiring approval.

Section 2.4.1: Covered Wastes to be Included

This section is inconsistent with 2.1. and appears to address separate concerns (e.g. the process in which waste is generated and what consistitutes mixed waste). The FFCAct applies to all mixed waste, including waste generated through environmental restoration and decontamination activities. This section may be redundant to Section 2.1.

Section 2.5.1: Wastes to be Deleted

There are numerous problems with this section. The STPs address mixed waste; there is no waiver of immunity for hazardous wastes which are stored in violation of LDR standards. Mixed wastes which are determined to be entirely hazardous fall outside the scope of the STP and FFCAct because they are no longer mixed. Also, the appropriate state law citations are not noted.

Section 2.6.2.3.: Revisions and Changes

The definition of a "revision" is extremely narrow and as such, inconsistent with the FFCAct. The State has the authority to determine what constitutes revisions. There may be circumstances where the addition or deletion of waste types and changes in waste volume constitute a revision to the STP for which DOE will require State approval.

There are no provisions here for state initiated revisions, as allowed for under the FFCAct. Section 3021(b)(4).

Sections 2.7.3.4- 11:

NMED will issue an order addressing these provisions, and other provisions in Section 2.0., as noted above. Nevertheless, there are numerous problems with the provisions as drafted, and several are inconsistent with the FFCAct. For example, under Section 2.9., a process is set up for changes requiring NMED approval. This process recognizes that NMED may approve or disapprove a change "or comment" upon the change. After comment which DOE agrees, DOE may incorporate that change. Once again, the State (not DOE) is required to approve, disapprove or modify any requested changes; not simply those which DOE agrees upon. With regard to funding, federal and state case law are clear that a requirement for the payment or obligation of funds under the STP are not subject to the Anti-Deficiency Act. Finally, not all disputes are subject to dispute resolution under the FFCAct.

What is a delay caused by a planning assumption? Planning assumptions which result in a delay will need to be clearly defined and set forth.

Other Comments

1. The concept of radionuclide separation of mixed wastes, specifically the "storage of mixed waste for the purposes of allowing for radioactive decay", may not be acceptable as a treatment technology.

2. The interdependency of LANL with the remainder of the Albuquerque Operations Office (AL) facilities for treatment technology development poses a problem for LANL as a "specific site". NMED recognizes the intricate nature of the interdependence and officers assistance in solving potential problems that may arise.

3. Mixed wastes that will be shipped off-site for treatment will perhaps be tied to the residuals management issue and therefore should remain within NMED's enforceability initiatives.

4. Schedules for "Mixed Waste Without Existing Technologies", should offer an "enforceable milestone" for identifying the "start of development" of a treatment technology..

5. The concept of "enforceable milestones" covering only a one year period is problematic. An extension of the "enforceable" dates to at least 2 years and preferably a 3 year minimum is recommended.

As stated above, NMED has met with staff at DOE regarding these issues. We received the final PSTP on March 31, 1995, and look forward to continuing to work with you as we move towards October 1995.

Sincerely,

Ed Kelley, Ph.D., Director
Water and Waste Management Division

cc: Jill Lytle