

General



United States Government

Department of Energy
Albuquerque Operations Office
Los Alamos Area Office
Los Alamos, New Mexico 87544

memorandum

DATE: JUN 3 4 1997
REPLY TO:
ATTN OF: LAAMEP:3BK-006
SUBJECT: Water Quality Control Commission (WQCC) Regulations Applied to Environmental Restoration Potential Release Sites (PRS)

to: Lisa Cummings, Office of Counsel, LAAO

Ted Taylor and Jorg Jansen received a letter from Dr. Ed Kelley, New Mexico Environment Department (NMED), dated May 1, 1997, which addressed the definition of release/discharge under the New Mexico WQCC Regulations at 20 NMAC 6.2 and Proposed 40 CFR Subpart S, and associated notification requirements under these regulations. During a meeting with participants from DOE (yourself included) and LANL on May 20, 1997, a decision was made for legal counsel from both organizations to review the applicability of the subject regulations to Environmental Restoration (ER) PRSs, and that legal counsel prepare a point-by-point response to Dr. Kelley's letter. Since several opinions were expressed about both of these items during the May meeting, I am writing this memorandum to provide my view of the regulations and my recommendations for the response. I would like for you and your team to have a clear recommendation for what I think should be communicated to the NMED Surface Water Quality Bureau (SWQB).

The portions of the WQCC regulations which have been routinely questioned for ER PRSs are 20 NMAC 6.2, 1203, "Notification of Discharge -- Removal"; 2201, "Disposal of Refuse"; definitions under 1101 that are referenced in 1203 and 2201; and portions of 20 NMAC 6.1. I will first begin with the 1203 portion of the regulations. At 20 NMAC 6.2, 1203(A),

"With respect to any discharge from any facility of oil or other water contaminant, in such quantity as *may* with reasonable probability injure or be detrimental to human health, animal or plant life, ..."¹

this regulation is used by NMED in combination with 20 NMAC 6.2, 2201:



¹ 20 NMAC 6.1, 1105(A) presents a similar perspective to the use of "*may*": "When a point or non-point source discharge creates a source of water which *could* be used by livestock and wildlife..."



13034

JUN 14 1997

"No person shall dispose of any refuse in a natural watercourse or in a location and manner where there is a reasonable probability that the refuse will be moved into a natural watercourse by leaching or otherwise."

and the definition of refuse at 20 NMAC 6.2, 1101(JJ), which includes "...all unwholesome material." Other parts of 20 NMAC 6.2 used to evaluate notification requirements include 1203(C)(1) and the groundwater standards at 3103(A).

As you will note from the above, I have highlighted the word "*may*" because this is one broadly written portion of the regulations which has allowed NMED to consider the need for notification where only a *potential* for harm, with regard to a discharge, may exist. This means that even process history/archival data that is reported in RFI Work Plans would be capable of triggering the need for notification, although to date, NMED has only required notification at the receipt of actual soil or water sampling results which show constituents of concern in a watercourse. However, it is this concept of *potential*, and other broadly written portions of the WQCC regulations (notably 20 NMAC 6.2 2201)², which has allowed NMED to request that the "668³ PRSs on or near a watercourse" be evaluated as soon as possible. By requesting accelerated evaluations in lieu of notification, which carries 15-day and 30-day corrective action requirements, NMED has actually offered some flexibility to a stringent application of the WQCC regulations.

It is important to note what NMED has required for notification of operational releases at LANL as a means of discussing NMED's authority in using the broad language in the WQCC regulations to require notification. NMED requires that a full range in types of operational releases at LANL be reported under 20 NMAC 6.2,1203. The range includes even releases of potable water above 1,000 gallons, and sewer overflows. The types of releases that have contributed to the definition of a PRS are, of course, much more serious in nature than either of these types of spills. NMED requests notification, in more or less all instances, when an operational discharge occurs so that they themselves may evaluate the *potential* for impact. ER PRSs are legacy in nature as opposed to operational. However, there is no distinction in the WQCC regulations with which to differentiate between these two types of spills. Therefore, if one compares the nature of what NMED requires for notification of operational spills with what NMED provides for notification criteria in the Ed Kelly letter of May 1, 1997, one should conclude that there is no unusual application of the WQCC regulations. The criteria presented in the letter are within

² 20 NMAC 6.2, 2201 allows NMED to require notification due the presence of contaminants which are not indicated in the standards at 20 NMAC 6.2, 3103 (A) or 20 NMAC 6.1, 31031(K&L).

³ The number is now at 684.

Lisa Cummings

2

JUN 04 1987

"No person shall dispose of any refuse in a natural watercourse or in a location and manner where there is a reasonable probability that the refuse will be moved into a natural watercourse by leaching or otherwise."

reason according to the ample nature of the WQCC regulations and the way in which NMED has applied these regulations to LANL discharges.

To draw an analogy to *potential* from what was required at LANL under HSWA, the ER Project was required to notify the Administrative Authority of Solid Waste Management Units (SWMU) ahead of sampling results obtained from potential release sites (PRSSs). The notification took place in the SWMU Report and in RFI Work Plans. The HSWA Module VIII was prepared from these notifications, and corrective action requirements including investigation, potential cleanup, and reporting are specified in the schedule of compliance. These requirements are similar to 20 NMAC 6.2, 1203 requirements, yet they are also based on a *potential*.

As outlined above, the WQCC regulations support notification for all 684 sites. However, because of the administrative problems they would encounter in responding to this large number of sites within the time frames specified in the regulations, NMED has said that they would consider allowing notification for only a subset of sites within the 684 identified⁴. The May 1, 1997 letter from Ed Kelley specifies the criteria for identifying the subset. As explained above, these criteria are within the bounds of the regulations, according to the concept of potential. Therefore, if the ER Project is not prepared to notify based on the presented criteria, the ER Project should request negotiation rather than prepare a response which questions NMED's interpretation of the WQCC regulations.

The ER Project would face administrative problems with the potential of having to notify under 1203 for the 684 sites. In fact, it would be a virtual impossibility to address all sites within the 24-hour, 7-day, 15-day, etc., requirements in 1203(A)(1-7). Therefore, in monthly meetings with NMED SWQB, the project proposed the use of AP-4.5 in combination with RFI Report submittals to meet the intent of the WQCC regulations. The proposal was offered in the good faith that the RCRA RFI process accomplishes the same objectives of assessment and corrective action that are contained within 1203(A)(1-7), albeit at a much more expanded time frame. If after evaluating the criteria for notification presented in the May 1, 1997 letter from Ed Kelley, the ER Project determines that a significant difficulty exists in notifying according to the criteria, negotiation should similarly be sought with the regulator.

I would now like to summarize my recommendations for responding to the May 1, 1997 letter from Ed Kelly. First, instead of presenting a challenge as has been mentioned, the response should acknowledge NMED's authority in their application and interpretation of the WQCC regulations with regard to notification of PRSSs in a

⁴ In a monthly meeting with NMED SWQB, the ER Project proposed a criteria for identification of the subset: 3x SALs for soil and exceedence of a WQCC for water. The May 1, 1997 letter from Ed Kelley modifies this proposed criteria.

watercourse. Second, the letter should also request clarification of the criteria provided in Ed Kelley's letter⁵. Third, the letter should indicate that the ER Project may still need to request negotiation after receiving clarification of the criteria presented in the letter. In regard to clarification, consideration should be given to requesting a meeting to specifically discuss clarification of the criteria and other issues, such as whether to combine operational- and PRS-related releases.

I would be glad to discuss the analysis and recommendations I have presented in this memorandum. Please call me at (505) 665-7202 if you would like to meet.



Bonnie Koch
Team Leader
Water Quality and Hydrology Team
Office of Environment and Projects

cc:

T. Todd, Area Manager, LAAO
H. Le-Doux, Deputy Area Manager, LAAO
J. Laeser, Counsel, LAAO
H. Haynes, Office of Counsel, LAAO
J. Vozella, AAMEP, LAAO
T. Taylor, LAAMEP, LAAO
B. Koch, LAAMEP, LAAO
J. Plum, LAAMEP, LAAO
J. Mose, LAAMEP, LAAO
K. Zamora, AAMFO, LAAO
D. Erickson, ESH-DO, LANL, MS-K491
T. Baca, EM, LANL, MS-J591
J. Jansen, EM/ER, LANL, MS-M992
D. McInroy, EM/ER, LANL, MS-M992
D. Woitte, LC-GEN, LANL, MS-A187
J. Rochelle, LC-GEN, LANL, MS-A187
S. Rae, ESH-18, LANL, MS-K497
M. Saladen, ESH-18, LANL, MS-K497
C. Nylander, ESH-18, LANL, MS-K497
A. Puglisi, ESH-19, LANL, MS-K498
J. White, ESH-19, LANL, MS-K490
D. Griswold, ERD, AL

⁵ For instance, it is not clear from the letter if NMED means for the criteria of 3X SAL to be applied to only sites in a watercourse or to all ER PRSs. Other reporting criteria such as this point require clarification.