

GARREY CARRUTHERS
GOVERNOR
CARLA L. MUTH
Deputy Secretary
MICHAEL J. BURKHART
Deputy Secretary

STATE OF NEW MEXICO

OFFICE OF GENERAL COUNSEL
1190 St. Francis Drive
Santa Fe, New Mexico 87503
(505) 827-2990

June 30, 1989

Joyce Hester Laeser, Esq.
Counsel
U.S. Department of Energy
Albuquerque Operations
Los Alamos Area Office
Los Alamos, New Mexico 87544

ALSO VIA FAX

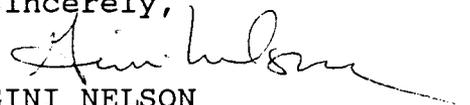
James E. Mitchell, Esq.
Senior Counsel
Office of Laboratory Counsel
Los Alamos National Laboratory
Post Office Box 1663
Mail Stop A187
Los Alamos, New Mexico 87545

ALSO VIA FAX

Re: Docket No. 880801
Docket No. 880801-A

Dear Ms. Laeser and Mr. Mitchell:

EID appreciated receiving DOE's and the University's comments on the proposed Rules Governing Appeals From Compliance Orders Under the NM Hazardous Waste Act. EID has reviewed and considered them and attaches its responses to the comments. Please review the responses and call me with any questions. If DOE or the University concur in the procedures as they will be revised to reflect EID's concurrence in DOE's and the University's comments, please let me know as soon as possible, but by July 6, 1989 at the latest. If DOE and the University have further comments, please get them to me by the end of day, July 6, 1989. Unless they raise many new issues, EID should be able to respond to those comments by July 10, 1989. My goal is to propose the procedures to the hearing officer by motion the week of July 10, 1989.

Sincerely,

GINI NELSON
Assistant General Counsel

Enclosure

cc: Kirkland Jones
Jack Ellvinger
/Boyd Hamilton



EID RESPONSE TO DOE'S AND THE UNIVERSITY OF CALIFORNIA'S JUNE 28, 1989 COMMENTS ON RULES GOVERNING APPEALS FROM COMPLIANCE ORDERS UNDER THE NM HAZARDOUS WASTE ACT

1. EID concurs in this purpose.
2. For this hearing, it is acceptable to EID to note that the Director signed the compliance orders, as a ministerial act. The Director will not be prosecuting the orders, however; that authority has been delegated. The purpose of delegating the indicated authority is to better allow the Director to decide an appeal without direct involvement in the enforcement action below.
3. For this hearing, it is acceptable to EID to define the rules as applying to these two compliance orders.
4. The Director is not a party -- prosecution of the matter has been delegated. The purpose of requiring the Director's approval is to indicate that any consent agreement will be finalized by the Director's order and not by a more informal settlement agreement.
5. As the term is used (in the definition) its inclusion is needed. This is the Hazardous Waste Act's definition of "federal agency".
6. Please see the response at No. 4.
7. The definition needs to stand because these rules do provide for intervention. Intervention is provided for in Rule 101.B., and the New Mexico Rules of Civil Procedure, S.C.R.A. 1986, 1-024.
8. For this hearing, it is acceptable to EID to define the rules as applying to these two respondents.
9. Delegation refers, e.g., to the prosecution of the matter, and the issuance of subpoenas.
10. The HWA was amended in the last legislative session, with an emergency provision. Amendments included deletion of the requirement of Attorney General approval of the hearing officer.
For this hearing, it is acceptable to EID to define the rules as giving the hearing officer the authority to adopt rules for the hearing. EID believes, however, that such authority is inherent in the hearing officers powers.
11. EID concurs.
12. Issuance of subpoenas is a ministerial act: if a party requests it, the subpoena must issue. This is done by district court clerks in judicial proceedings. The validity of any subpoena would be determined by a motion to quash and/or protective order, ruled on by the hearing officer.

13. I understand your comment to request that a party be able to move for the disqualification of the hearing officer or Director at any time it had reason to believe that disqualification was appropriate. For this hearing, it is acceptable to EID to revise this rule to provide for a party to request the hearing officer or Director, before the filing of their decisions, to withdraw on disqualification grounds, by filing promptly upon the discovery of the alleged facts an affidavit setting forth in detail the matters alleged to constitute grounds for disqualification.

Regarding the Attorney General's role, see response at No. 10 above.

14. The need for this provision is to assure that any settlement reached is enforceable. A settlement is not enforceable if the agency does not have the jurisdiction to adopt it. If a settlement included a payment of money not called a penalty or fine, the settlement agreement would not necessarily require the admission of EID's authority to penalize.

15. Please see response at No. 4. Parties are defined as the complainant, respondents and intervenors. Where the Director has delegated the prosecution of the enforcement action, the Director is not the complainant. EID is the complainant. Under the HWA, the final decision is made by the Director.

An employee of EID does have the authority to sign a consent agreement without the Director's approval, if the Director has delegated that authority.

16. For this hearing, it is acceptable to EID to define the rules to have EID file the original request for hearing, and to have the respondents file their original answers.

17. EID concurs that rules need to reflect the facts. I do not understand your statement that the compliance orders do not meet these requirements. How do DOE and the University see them as deficient?

18. EID concurs that the requests for hearing have already been made.

19. EID concurs that this provision needs to be revised to provide for the filing of the answers. Given the length of time that DOE and the University have had the compliance orders, EID believes DOE and the University will not need a long time in order to complete their answers. EID proposes that DOE and the University answer within 15 days from their concurrence on the rules governing the hearing. Alternatively, EID will propose that DOE and the University answer within 15 days of the hearing officer's adoption of the rules for the hearing.

Amendment of an answer is provided for by Rule 101.B. and the New Mexico Rules of Civil Procedure, S.C.R.A. 1986, 1-015.

20. EID concurs.

21. EID concurs.

22. EID concurs.

23. Please see response at No. 2 above.

24. The hearing officer has the authority to recommend to the Director what the final order should be. The penalty is part of the ultimate final order. The hearing officer, therefore, has the authority to recommend the penalty that he or she determines is appropriate. The final decision is made by the Director upon the Director's independent review of the record compiled by the hearing officer, and on the hearing officer's recommendations.

25. The Director has the authority under the statute to assess the penalty that he determines is appropriate under the law. Just as he has the authority to finally assess a penalty lower than that proposed by EID, he has the authority to finally assess a penalty higher than that proposed. In analogous situations, the courts recognize that imposing larger penalties is lawful so long as the imposition is supportable. See, e.g., Clarkson Construction Co. v. OSHRC, 531 F.2d 451 (10 Cir. 1976).

26. EID concurs.

27. For this hearing, EID concurs.

[lanlhrq.jl]