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ENVIRONMENTAL IMPROVEMENT DIVISION

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Michael Burkhart  
Deputy Secretary

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

April 28, 1989

Mr. Harold E. Valencia  
Area Manager  
U.S. Department of Energy Area Office  
Los Alamos, New Mexico 87544

Re: NM 0890010515

Dear Mr. Valencia:

This letter responds to your letter dated March 13, 1989 requesting clarification of my letter dated November 16, 1988 regarding Environmental Improvement Division ("EID") regulation of mixed waste. You contrast my letter with Mr. Burkhart's September 9, 1987 letter and Jack Ellvinger's April 22, 1987 letter as demonstrating "EID's arbitrary reversal of its position and the lack of consistency that such actions represent."

Your recent letter continues to address RCRA regulation of mixed waste, and not the applicable State law regulation of mixed waste prior to authorization to administer and enforce a RCRA program in lieu of the federal government. It is obvious that if the State did not already have independent authority, it could not be eligible for authorization for the federal RCRA program. As part of the application process, the State must submit to EPA an Attorney General's statement certifying that the State has the necessary authority to regulate the hazardous components of mixed waste as hazardous waste. See, for example, EPA's State Program Advisory #2 enclosed with your letter of May 20, 1988, and referred to again in your letter of March 13, 1989, at the bottom of page 2, where it articulates program revision requirements. While EID will shortly apply for authorization to regulate mixed waste pursuant to the federal RCRA program, in the interim EID has State authority to enforce all provisions of the Hazardous Waste Act ("HWA").

Mr. Burkhart's and Mr. Ellvinger's letters referred to the State's federally-authorized RCRA program and not to the



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independent State authority to regulate mixed waste. EID's evaluation of available enforcement resources and priorities at the time of Mr. Burkhart's and Mr. Ellvinger's letters, coupled with the substantial confusion and uncertainty regarding RCRA regulation of mixed waste at the time, resulted in an administrative decision not to enforce that State authority independent of the federally-authorized program. EID's current evaluation is that EID will enforce the independent State authority. This decision, while reflecting a change, is not arbitrary. It is, in fact, necessary to protect public health, safety and the environment. If the State does not regulate the hazardous waste component of mixed waste, nobody will, because EPA is not authorized to regulate mixed waste in a base program-authorized State, such as New Mexico. Mixed wastes are not currently subject to EPA authority in New Mexico.

Your allegation that EID is seeking to "impose unwritten requirements for which no notice or an opportunity for comment has been provided," is totally incorrect. My letter states that "State requirements for mixed waste are, however, equivalent to RCRA mixed waste requirements," not that "the New Mexico requirements for mixed waste are equivalent to RCRA promulgated regulations specific to mixed waste," as you state in your March 13th letter. No mixed waste specific regulations will be adopted under either the State or the federal hazardous waste programs. Legal authority to regulate is statutory, and EID's state authority is the HWA.

July 3, 1986 is the required date under State law by which mixed waste facilities must have been in existence in order to qualify for interim status. Effective April 7, 1989, HWA, Section 74-4-9 states:

Any person owning or operating a hazardous waste facility who has met the requirements for interim status under 42 U.S.C. 6925 shall be deemed to have interim status under the Hazardous Waste Act.

Thus, if a facility would have interim status under federal law, it will have interim status under State law. EPA has established July 3, 1986 as the applicable date for mixed waste facilities. See the September 23, 1988 Federal Register Clarification of Interim Status Qualification Requirements for the Hazardous Components of Radioactive Mixed Waste, at page 37046. Thus, regarding EPA's State Program Advisory #2, if LANL, after compliance with applicable State law, has a mixed waste facility under construction or in operation at the time the State gets authorization for the federal RCRA program, that facility may qualify for RCRA interim status. The critical point is that the prior construction and/or operation of that facility must have been pursuant to State law.

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Regarding your question in the second to last paragraph of your letter, I refer to the first paragraph of my November 16, 1988 letter; and page 2 of your letter to Michael Burkhart dated May 20, 1988 where you discuss options for permitting LANL's proposed mixed waste facility, i.e., "[t]he first option is to treat the mixed waste in the same manner as hazardous waste and apply for an operating permit later on for treatment of mixed waste." Emphasis added.

In closing, I would like to emphasize that my discussion has been limited to the the Hazardous Waste Act and the regulations promulgated thereunder. There may be separate issues under the Clean Air Act and the regulations which would need to be addressed should LANL proceed with construction of the subject incinerator.

I trust this further clarification is helpful. EID appreciates your assurance that DOE will comply with all applicable state and federal requirements. If you have any further questions, please write or call Mr. C. Kelley Crossman on my staff at 827-2923.

Sincerely,

  
RICHARD MITZELFELT  
Director

cc: Janie Hernandez, EPA (6H-HS)  
C. Kelley Crossman, EID, HWB  
Gini Nelson, OGC, HED  
Dr. Kirkland L. Jones, EID Deputy Director  
Jack Ellvinger, EID Hazardous Waste Bureau Chief  
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