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BEFORE THE
ENVIRONMENTAL IMPROVEMENT BOARD

NO. 098890890

In Re: HAZARDOUS WASTE FACILITY)
PERMIT NO: N.M. 0890010515-1)
ISSUED BY THE ENVIRONMENTAL)
IMPROVEMENT DIVISION, New Mexico)
Health and Environment)
Department.)
)

PERMITTEES' PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW

The United States Department of Energy ("DOE") and the The Regents of the University of California ("University"), as owner and operator respectively of the Los Alamos National Laboratory (hereinafter referred to as "LANL"), have petitioned the Environmental Improvement Board (the "Board") in accordance with § 902.G(1) of the New Mexico Hazardous Waste Management Regulations as amended (hereafter "HWMR-5" or "the Regulations") for limited review of a decision of the Director of the Environmental Improvement Division "EID"), New Mexico Health and Environment Department, placing certain conditions upon the Hazardous Waste Facility Permit No. N.M. 0890010515-1 granted to LANL. The permit was issued to both DOE and the University (hereinafter "Permittees").

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The Permittees hereby submit their proposed Findings of Facts and Conclusions of Law in support of their Petition for Limited Review filed December 20, 1989 ("the Petition"):

PROPOSED FINDINGS OF FACT

1.0 PROCEDURAL BACKGROUND

1.1 In May of 1985, the Permittees submitted an application for a Hazardous Waste Facility Permit pursuant to Section 74-4-2 NMSA 1978 (1989 Repl.).

1.2 On May 10, 1989, EID made available for public comment Draft Permit No. 0890010515 ("the Draft Permit").

1.3 Following public hearings held on July 18-19, 1989 pursuant to HWMR-5 the EID issued a corrected copy of the Hazardous Waste Facility Permit 0890010515-1 (the "Permit") on November 20, 1989.

1.4 In their Petition, the DOE and the University seek limited review of these three conditions placed in the permit:

A. Module V, Section E.10 (Permit Page 38) which provides:

> V.E. MONITORING
>
> For each hazardous waste burn, the continuous monitoring and/or recording devices below shall be observed hourly by an operator during waste feed operation and the observation recorded in the operating record
> ...

10. Radioactivity from the exhaust stack. (Emphasis added.)

B. Module V, Section F.9 (Permit Page 40)

which provides:

V.F. OPERATION

During hazardous waste feed operations the following operational limits shall be observed:...

9. Radioactivity

a. The exhaust gas radioactivity measured during operation under this permit shall not exceed the background by ten percent (10%) for more than one minute.

b. The exhaust gas radioactivity measured during operation under this permit shall not exceed the background by fifty percent (50%).

c. Background is defined as that level of radiation read when the incinerator is operating at the parameters required for hazardous waste treatment but no waste feed occurring measured prior to hazardous waste treatment. (Emphasis added.)

C. Module V, Section C.3 (Permit Page 37)

requires a survey to determine the radionuclide content of each batch of waste to be incinerated.

1.5 The Permittees' Petition does not seek review of any other portion of the Permit.

1.5.1 Permittees are not petitioning the Board to conduct an evidentiary hearing. There is no need to conduct an additional hearing concerning the three conditions referred to in Finding No. 1.4 because there is no evidence to be considered.

1.5.2 There is no need to conduct an evidentiary hearing concerning the three conditions referred to in Finding 1.4, since EID and the Board have no jurisdiction over the treatment of radioactive waste under the Resource Conservation and Recovery Act (RCRA), as amended, 42 USC 6901 et seq. or the New Mexico Hazardous Waste Act (the "Hazardous Waste Act"), Section 74-4-1 et seq. NMSA 1978 (1989 Comp.).

1.5.3 Section 902.G(2) of HWMR-5 allows a hearing before the Board only if a petitioner requests a hearing on the basis of new evidence.

1.5.4 The Permittees' Petition did not raise or introduce new evidence and did not request a hearing. Section II of the Petition was solely intended to refute the conditions placed in the permit.

1.6 The Draft Permit referred to in Finding No. 1.2 did not contain the three conditions referred to in Finding of Fact 1.4. The University and DOE were, therefore, denied the opportunity at the public hearing or

prior to the issuance of the Permit to challenge the jurisdiction of EID to impose the conditions included in the Permit referred to in Finding of Fact 1.4 above.

1.7 In reliance on the content of Module V in Draft Permit, the Permittees made no comment concerning Module V (See Exhibit D to the Petition).

1.8 Attachment J to the Draft Permit, however, made reference to radioactive waste.

1.8.1 DOE and the University challenged the references contained in Attachment J. In comments to EID concerning the Draft Permit, DOE and the University stated:

> Attachment J, in its present form, covers matters which are outside the jurisdiction of EID and should be deleted from the permit.
> Section 74-4-3H NMSA 1978 states that source, special nuclear or by-product material as defined in the Atomic Energy Act are not solid wastes and therefore cannot be hazardous waste. Such materials may not be regulated by EID under the Hazardous Waste Act. Throughout Attachment J there are references to procedures, equipment, and personnel which are specifically and solely related to the proper control and management of radioactive materials. Clearly, these matters are improperly included in the hazardous waste permit and should be deleted. In lieu of the present Attachment J, the Laboratory has prepared a substitute

> Attachment, (Exhibit 4) which addresses incinerator operational safety with regard to hazardous wastes. LANL requests that this document be substituted for Attachment J in the draft permit.

1.8.2 As indicated above, Permittees submitted with their comments a revised Attachment J with all references to radioactivity deleted therefrom.

1.8.3 In response to the Permittees comments on Attachment J, EID concurred with the Permittees position and adopted as its' own the revised Attachment J proposed by the Permittees.

1.9 On November 20, 1989 in a letter provided to DOE, EID stated that the transmittal of the corrected copy of the permit would trigger the thirty day time period for appeal under Section 902.G. The letter stated that the 30-day period would expire at 5:00 p.m. on December 20, 1989.

1.10 On December 20, 1989, prior to 5:00 p.m., DOE and the University, filed their Petition for Limited Review.

1.11 Section 902.F of the Regulations provides that the Director's November 20, 1989, decision to issue the corrected permit is not final until the Board "renders its decision ... either sustaining or reversing the Director." Section 902.F further provides:

> Immediately upon receiving the Board's decision the Director shall enter the Director's decision in accord with the Board's decision, which shall be considered the Director's decision for purposes of appeal to the Court of Appeals.

1.12 Pursuant to Section 902.G(2) of the Regulations, the Board's decision is due within sixty days of December 20, 1989, or not later than February 19, 1990.

1.13 Section 902.F of the Regulations has established as the date for appeal of the Director's decision to the Court of Appeals pursuant to Section 74-4-4.2(G) of the Hazardous Waste Act to be 30 days after the date on which the Board renders its decision concerning the Permittees' Petition.

1.14 Section 902 of the Regulations does not permit an extension of the sixty day period in which the Board must act on Permittees' Petition.

1.15 Over 500 individuals received notice that the Director had mailed the permit to DOE and the University. Only two individuals, other than the Permittees, allegedly submitted documentation to the Board within the thirty day period required by Section 902 of the Regulations.

1.16 The Board may modify or reverse the Director's decision if the decision is found to be:

a. arbitrary, capricious or an abuse of discretion;

b. not supported by substantial evidence; or,

c. otherwise not in accordance with law.

1.17 The Board must review the entire record to determine whether there is substantial evidence to support the Director's decision to impose conditions upon the permit concerning radioactive waste.

1.18 Pursuant to Module I Section 1.B of the Permit, the Permit can be revoked for cause as specified in the Regulations.

1.19 Module I, Section 1.D.1 imposes a duty on the Permittees to comply with <u>all</u> conditions of the Permit. A failure to comply constitutes a violation of the Hazardous Waste Act and is grounds for enforcement action, including the revocation or termination of the Permit.

1.20 Module I, Section 1.C provides that the provisions of the Permit are severable. If any provision is invalid, the remainder of the Permit is not affected.

2.0 THE PETITION IS PROPERTY BEFORE THE BOARD

2.1 In her November 20, 1989 transmittal letter to DOE, A. Elizabeth Gordon, Permitting Supervisor of EID's Hazardous Waste Bureau, of EID stated:

> ... the 30-day time period for petitioning the Environmental Improvement Board by the public begins today, November 20, 1989, ...

Thus, EID acknowledged that the Board had jurisdiction to accept an appeal.

2.2 On November 8, 1989, in a letter to DOE the Director stated:

> You have the right to appeal this decision to the Environmental Improvement Board in accordance with .... (HWMR-5), as amended 1989, Section 902.G. Otherwise, the permit will become effective in accordance with HWMR-5, Part IX, Sections 902.F and 902.G. Briefly, the effective date will be 30 days from your receipt of this permit unless the decision is appealed to the Environmental Improvement Board.

2.3 The Director's November 8, 1989, letter referred to in Finding 2.1 constitutes his admission that the Director's decision is not effective if an appeal is taken to the Board. The Director further acknowledges that the proper appeal procedure is for an appeal to be taken to the Board, and that the Board has jurisdiction under HWMR-5 to review the Director's decision.

2.4 The Hazardous Waste Facility Permit signed by the Director contains the following language.

> ....This permit shall become effective in accordance with HWMR-5, Part IX, Sections 902.F and 902.G and shall run for a period of ten years.
>
> This permit is based on the provisions of HWMR-5.

The permit itself details the Board's review procedures.

2.5 Repeatedly throughout the public hearings on the Permit, EID officials informed the public and the Permittees that the proper avenue of appeal was to the Board. At pages 66, 198, 269, 325 and 326, EID informed the public that anyone adversely affected by the decision on the permit had a right under the Regulations to appeal to the Board:

2.5.1 At page 65 Mr. Crossman stated:

> If you wish to address the Regulations, then comments should be directed to the Environmental Improvement Board, which is our governing board.

2.5.2 At Page 66 Mr. Crossman stated:

> In the hazardous waste management regulations, section nine, there is a -- the procedure is outlined as to what we are doing here today. One of those steps is once the director makes a decision, that decision may be appealed to the Environmental Improvement Board for cause and under the procedures spelled out in the regulations.

2.5.3 At Page 198 Ms. Nelson stated:

> The regulations provide that after the director's final decision, any -- this is quoted from the regulations -- any person adversely affected by the decision may petition the Board. That means that if any person adversely affected does petition to the Board it will start an appeal process where the Board hears it -- the Board is the court of appeal on the permit decision. ...
>
> It [the Board] is not the final court. The final decision by the Board could then be appealed to the real courts, the judicial courts.

2.5.4 At Page 269 Mr. Crossman stated:

> Once a permit, any permit, is issued that permit becomes the specific operating rules for that facility, whether it's this laboratory or any other facility that we grant a permit to. Anyone under the laws or regulations -- as Ms. Nelson read to us all yesterday, anyone who is adversely affected by the decision on the permit may appeal that to the Environmental Improvement Board.
>
> That's spelled out in the Hazardous Waste Management Regulations, section nine. Anyone who would like a copy of that, contact our office at any time, 827-2929, and we can make arrangements for you to get a copy of the regulations.

2.5.5 In response to a question concerning the procedure for a concerned citizen to file an appeal of the Director's decision to grant the LANL permit, Mr. Crossman at Pages 325-326 stated:

> ... -- this is right out of Part IX of the state Hazardous Waste Management Regulations.
>
> Paragraph ninety-two G one. And I read, "Any person adversely affected by the decision of the director concerning the issuance, suspension, modification, or revocation of a permit may submit a petition for review of the director's decision by the Environmental Improvement Board."
>
> So in answer to your question, yes, you have the right under the regulations to appeal a permit decision.
>
> Any appeal should be directed to the Environmental Improvement Board, 1190 St. Francis Drive, Santa Fe, 87350. [sic]

2.6 On information and belief EID has acknowledged the Board's jurisdiction to handle appeals in the Hazardous Waste permit proceeding involving the Navajo Refinery.

2.7 The EID has historically acted in a manner consistent with the provisions and procedures in Sections 902.F and 902.G of HWMR-5.

EID HAS ACKNOWLEDGED IT LACKS JURISDICTION TO REGULATE RADIOACTIVE WASTE

3.0 During the public hearings held on July 18 and 19, 1989, EID publicly recognized that it lacked jurisdiction over both radioactive materials and "mixed waste."

3.1 In EID's July 18, 1989 Statement Responding To Particular Concern Expressed By Members Of The Public Regarding The LANL Mixed Waste Incinerator, ("July 18, 1989 Statement") at Page 1, in its discussion of the issue of "mixed waste," EID admitted:

> ...The Hazardous Waste Act does not apply to the radioactive part [of mixed waste]. DOE regulates the radioactive part, pursuant to the Atomic Energy Act.

3.2 In its July 18, 1989 Statement at Page 2, the EID recognized its limited authority.

> STATE AUTHORITY TO ENFORCE THE FEDERAL STATUTE, RCRA ...
>
> New Mexico is an "authorized state," that is, New Mexico is authorized by EPA to enforce certain parts of RCRA in New Mexico instead of EPA. This draft permit is a RCRA permit, prepared by EID's Hazardous Waste Program staff to address only those specific parts of RCRA that EPA has authorized New Mexico to enforce.

3.3 EID's July 18, 1989 Statement contains a summary at Page 3:

SUMMARY

> Thus, this draft permit does not authorize LANL to incinerate mixed waste, that is, chemically hazardous waste that is mixed with radioactive waste. The draft permit only proposes to authorize the incineration of strictly chemical hazardous waste, and then only under the permit's specified conditions. EID will at a later date propose a draft hazardous waste Permit to regulate the incineration of the chemical part of mixed waste. No RCRA hazardous waste permit can regulate radioactive waste. (Emphasis added.)

3.4 During public hearings held in accordance with HWMR-5, EID attorneys and officials continually recognized the fact that EID lacked jurisdiction or authority to control or regulate emissions from the incineration of radioactive waste under RCRA and the Hazardous Waste Act:

3.4.1 Ms. Gini Nelson, attorney for EID, speaking in Volume I at Pages 124-125 of the transcript of hearing ("the Transcript") stated that Mr. Crossman, author of the public notice of the hearings and Director of the Hazardous Waste Bureau, was qualified to speak concerning the permit for the Hazardous Waste Bureau.

3.4.2 Mr. Crossman directed the public to examine the July 18, 1989 Statement in an attempt to

inform the public about EID's lack of jurisdiction over radioactive waste. Mr. Crossman speaking for EID at Volume I at Page 37 of the Transcript admitted:

> This draft permit can only regulate the chemical waste. It cannot regulate -- let me repeat, it cannot regulate radioactive waste.
>
> The federal Atomic Energy Act of 1954 authorized the United States Department of Energy, DOE to all of us, to develop and effectuate its own regulations controlling DOE's management of its own radioactive waste. Other statutes may impose additional requirements on radioactive material handling. (Emphasis added.)

3.4.3 Mr. Crossman speaking on behalf of EID in Volume 1 at Page 38 of the Transcript conceded:

> The Hazardous Waste Act cannot be applied to source, special nuclear or byproduct radioactive wastes. Thus, EID does not have the authority through its hazardous waste program, and through this or any other hazardous waste management permit, to regulate radioactive waste. This draft permit is a permit that only regulates chemical hazardous waste. It does not and cannot regulate radioactive waste.
>
> Let me digress a moment from the prepared letter. My concern -- part of the concern is hazardous waste is a specific term defined in the act. It goes beyond your and my understanding of the English language. To you, of course, radioactivity is hazardous. I understand that, but in the context of the act it has a legal specific definition and that's a point that is confusing to a lot of people. (Emphasis added.)

3.4.4 Mr. Crossman speaking for EID in Volume I at Page 42 of the Transcript stated:

> The temporary permission to burn the chemical part of mixed waste will end when EID takes final action on an [sic] RCRA permit addressing that waste, which EID will not do until after EPA authorizes EID to do so. Then, burning of the chemical part of the mixed waste will be allowed only pursuant to that permit.
>
> If I may summarize, thus, this draft permit does not authorize LANL to incinerate mixed waste, that is, chemically hazardous waste that is mixed with radioactive waste. The draft permit only proposes to authorize the incineration of strictly chemical hazardous waste, and then only under the permit's specified conditions.

3.4.5 Mr. Crossman speaking for EID in Volume I at Page 43 of the Transcript admitted:

> No RCRA Hazardous Waste Permit can regulate radioactive waste.

3.4.6 Mr. Crossman, speaking for EID, in Volume I at Page 47 of the Transcript again admitted:

> [N]o RCRA permit could regulate the radioactive part of the mixed waste.

3.4.7 Mr. Crossman speaking on behalf of EID in Volume I at Page 51 of the Transcript stated that only waste that are strictly chemical, without contamination by radionuclides, are addressed by the Permit.

3.4.8 Mr. Crossman speaking on behalf of EID in Volume I at Page 60-61 of the Transcript admitted:

> Under the law that authorizes my activities and our monitoring, we do not address radioactivity. Its [sic] source special nuclear and byproduct materials are specifically excluded and are outside the realm of this permit.

3.4.9 Mr. Crossman speaking on behalf of EID in Volume 1 at Pages 62-63 of the Transcript stated:

> What we are trying to convey is that there are several laws and regulations that govern mixed waste. Mixed waste is subject to the Atomic Energy Act, the federal law, and the regulations that flow from that, as well as the hazardous waste Resource Conservation Recovery Act and the regulations that flow from that, as well as the state act and the regulations that flow from that law. So in this case it is subject to three laws and three sets of regulations.
>
> It must meet the requirements of all, therefore, it is understandably a complex issue and I can understand your confusion.

3.4.10 Mr. Crossman speaking on behalf of EID in Volume I at Page 68 stated that radioactivity is outside of his authorization.

3.4.11 Mr. Crossman speaking on behalf of EID in Volume I at Page 70 of the Transcript stated:

> DOE is authorized ... to develop regulations governing the management of radioactive waste. It [the DOE] has developed regulations that cover how it regulates radioactive waste.

3.4.12 Mr. Crossman speaking on behalf of EID in Volume I at Page 119 of the Transcript conceded that Regulations concerning radiation are beyond his scope of authority.

3.4.13 Mr. Crossman speaking on behalf of EID in Volume I at Page 122 of the Transcript acknowledged:

> The subject of monitoring for radioactivity was what we have been discussing this morning. It is outside the purview of this particular permit and, therefore, it's not in the permit. (Emphasis added.)

3.4.14 Mr. Crossman speaking on behalf of EID in Volume I at Page 13 of the Transcript stated that radionuclide emission standards are unregulated under the Hazardous Waste laws but are regulated under the Clean Air Act.

3.4.15 Mr. Crossman speaking on behalf of EID in Volume I at Page 171 of the Transcript informed a cross examiner that the effect of nuclear waste on various chemical waste and mixed waste "... is outside the scope of this permit."

3.4.16 Ms. Nelson speaking on behalf of EID in Volume I at Pages 175-176 of the Transcript stated:

> This document [EID's July 18, 1989 Statement] was developed for the Hazardous Waste Bureau for this permit hearing. It has, however, been reviewed by the director's office and been approved by them as a statement of EID.... This is EID's statement. This is its' best statement. It's [sic] truest, clearest, fullest statement as coming out of the Hazardous Waste Bureau, as it is under the situation at this time.

3.4.17 Ms. Nelson speaking on behalf of EID in Volume 1 at Page 179 of the Transcript stated:

> I would like to make a point that this permit does not in any way deal with radioactive incineration.

3.4.18 Ms. Nelson speaking on behalf of EID in Volume I at Page 206 of the Transcript stated that EID's written statement is the best statement of EID's understanding of its lawful authority and restrictions imposed on EID as of July 18, 1989.

3.4.19 Mr. Walt Youngblood, Hearing Officer and Deputy Director, Public Health Division of the New Mexico Health and Environment Department, at Volume 1 at Page 212 of the Transcript states that a question relating to background radiation levels and the incinerator's operation would be allowed to stand on the record but the question and any answer was not a portion of the hearing.

3.5 There is no reference in the Record of Hearing which indicates a change in the statutory or regulatory authority of the Director of EID or the Board with respect to the regulation of radioactive waste, after the Public Hearing and before the publication of the corrected copy of the Permit.

THERE IS NO STATUTORY AUTHORITY FOR
EID TO IMPOSE CONDITIONS ON RADIOACTIVE WASTE ACT

4.0 RCRA and the Hazardous Waste Act place the regulation of radioactivity and radioactive waste outside the jurisdiction and authority of either the EID or the Board under these Acts.

4.1 Pursuant to RCRA, New Mexico is authorized to issue and enforce hazardous waste facility permits.

4.2 The definition of hazardous waste is limited to types of "solid waste" that have certain attributes. The definition of "solid waste" includes numerous categories of waste but expressly excludes "... source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923)" [42 U.S.C. 8 2011, as amended]. Section 74-4-3M NMSA 1978 Comp.) (1989 Repl.); 42 U.S.C. 6903(27); also HWMR-5 as amended 1989 Part 2; and 40 C.F.R. 261.4(a)(4) and 42 U.S.C. 2201 b.

4.3 Radiation regulated by the three conditions referred to in the Permit (See Finding No. 1.4) fall within the definitions used by the Atomic Energy Act of 1954.

4.4 The Director of EID is authorized to issue hazardous waste facility permits in accordance with Section 74-4-4.2.C NMSA 1978 (1989 Repl.) of the Hazardous Waste Act.

4.5 The Board has authority to adopt regulations for the management of hazardous waste equivalent to and no more stringent than federal regulations adopted by the federal Environmental Protective Agency pursuant to RCRA. Section 74-4-4A NMSA 1978 (1989 Repl.).

4.6 The Regulations promulgated by the Board as amended July 9, 1989, were in effect when the Permittees application for a hazardous waste facility permit was submitted to the Board. The Board adopted federal regulations found at 40 C.F.R. Parts 260, 261, 262, 263, 264, 265, 266, 268, and 270. See EIB/HWMR-5 Regulations 101, 102, 201, 301, 401 et seq. 501 et seq., 601 et seq., 701 et seq., 801, and 901 et seq.

4.7 The federal regulations, adopted by the Board, exclude source, special nuclear or byproduct material as defined the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.), from the definition of solid waste. See 40 C.F.R. Section 261.4(a)(4).

4.8 There is nothing in the Record of the Hearing which supports the conclusion that radioactivity contained in the incinerator's exhaust gases or waste feed is not a byproduct, source, or special nuclear material as defined by the Atomic Energy Act of 1954.

4.9 On November 16, 1989, EID made public its' "Response to Comments on Draft Hazardous Waste Permit for Los Alamos National Laboratory" ("November Response"). In its November Response EID noted that changes were made in the draft permit due to public comments. Comments 14 and 27 involve the monitoring of radioactivity.

4.10 In Comment 14, EID's response states:

> The permit requires continuous monitoring of carbon monoxide in the exhaust gas, temperatures and oxygen levels in the combustion chambers and pressure drops and flow rates in the exhaust scrubber system (Permit Module 1.E.1-8.). These parameters were monitored and demonstrated in the trial burn as those ensuring the required destruction and removal efficiency (DRE). Permit Modification: EID has added a requirement for monitoring of total

> hydrocarbons and radioactivity in the exhaust (Permit Module V.E.9 and 10.) and radioactivity in the waste feed (Permit Module V.C.3.) to address the public concern over these parameters. The present information available through EPA indicates that, at levels of 100 parts per million or less of carbon monoxide, there is negligible formation of noxious products of incomplete combustion. The addition of a hydrocarbon monitor will confirm this information. All these parameters will be continuously recorded on charts and these charts will be retained by LANL for inspection by the EID and EPA. (Emphasis added.)

4.11 The insertion of this modification is inconsistent with the law and the position previously taken by EID at the public hearings.

4.12 In comment 27, EID noted that the separation of radioactive issues from the permit was questioned by the majority of those at the hearing. For its' response, the EID stated:

> Radioactive wastes are not subject to the regulations (HWMR-5, Part II, 40 CFR, Section 261.4(a)(4). EID's situation regarding mixed wastes is outlined in the EID July 18, 1989 Statement. The EID does recognize public concern over the potential release of radioactive materials and has added additional monitoring to the permit. Permit modification: Monitoring for radioactivity was added to the operating requirements for the incinerator Permit Module V.F.9. (Emphasis added.)

4.13 Adding additional radioactivity monitoring requirements to the permit is inconsistent with the law and EID's recognition that "radioactive wastes are not subject to the regulations ...."

THERE ARE NO OTHER VALID APPEALS BEFORE THE BOARD

5.0 On December 1, 1989, Ms. Joan Berde wrote a letter to the Director of EID. Ms. Berde did not request a hearing concerning her letter.

5.1 Ms. Berde's letter is stamped as received on December 8, 1989. The copy of the letter provided to counsel for the Permittees does not show a date stamp by either the EID or the Board. The record does not establish that Ms. Berde's letter was received by the Board within 30 days of November 20, 1989.

5.2 Ms. Berde's letter acknowledges that "DOE has the authority to regulate its' [sic] radioactive waste ...." She did not challenge the permit, but expressed her concern that "... EPA cannot regulate mixed waste or radioactive waste ...."

5.3 Ms. Berde's letter is not a petition for review, but rather a request that EID promulgate additional regulations.

5.4 On December 12, 1989, Ms. Barbara Jaramillo wrote a letter to EID. The letter was received by the Board on December 15, 1989. In her letter she asked for a "moratorium on burning."

5.5 In Ms. Jaramillo's letter she noted her objection to the nomination of a member of the Board and she did not request a hearing on her letter.

PROPOSED CONCLUSIONS OF LAW

1. The Permittees submitted a timely Petition for Limited Review to the Board for review of the decision of the Director of EID to impose conditions concerning the treatment of radioactive waste on the Hazardous Waste Facility Permit mailed to the Permittees on November 20, 1989.

2. Pursuant to Section 902.F and 902.G of HWMR-5, the Board has jurisdiction to review the Director's decision to place these conditions on the Permit.

3. The Board's review of the decision of the EID Director to impose conditions relating to the treatment of radioactive waste on the Permit is limited to a review of the record formed at the public hearing on the Permit and the evidence available to the Director at the time his decision was rendered.

4. The Board is required by law to determine whether the Director's decision to impose permit conditions on radioactive waste was within the jurisdiction and authority of EID. If the Director's decision was not within the jurisdiction and authority of EID, the Board is required by law to reverse the Director's decision and delete the three conditions without further hearings before the Board.

5. The Board is required to render its' decision whether the decision of the Director to impose permit conditions upon radioactive waste will be reversed and those conditions deleted no later than February 19, 1990.

6. As a matter of law, if the Board does not render a decision concerning modification of the permit by February 19, 1990, the lack of decision constitutes a decision to sustain the decision of the Director of the EID to impose conditions upon radioactive waste and the inaction constitutes a final decision for purposes of an appeal to the New Mexico Court of Appeals.

7. The letters submitted by Ms. Berde and Ms. Jaramillo do not constitute petitions for review or a request for hearing based on new evidence. Ms. Berde and Ms. Jaramillo lack standing in this proceeding.

8. Pursuant to RCRA, the State of New Mexico is authorized by the Environmental Protection Agency to issue and enforce hazardous waste facility permits.

9. New Mexico regulations governing the issuance of a hazardous waste facility permit can be no more stringent than federal regulations under RCRA.

10. RCRA and the Hazardous Waste Act apply only to "hazardous waste" as that term is defined by RCRA and the Hazardous Waste Act.

11. The Director of EID is authorized to issue and to place limited conditions upon hazardous waste facility permits only if those conditions are consistent with the Director's authority to enforce the Hazardous Waste Act and HWMR-5.

12. The Hazardous Waste Act and HWMR-5 limit the Director's authority to the regulation of hazardous waste as defined by the Hazardous Waste Act and expressly exclude any authority to regulate source, special nuclear and byproduct material as defined in the Atomic Energy Act of 1954.

13. Substances which are not "hazardous waste" as defined by RCRA or the Hazardous Waste Act are not subject to RCRA or the Hazardous Waste Act.

14. Radioactive waste is not a "hazardous waste" under the Hazardous Waste Act or RCRA.

15. Radioactive waste is regulated by the Nuclear Regulatory Commission ("NRC") and the Department of Energy ("DOE") under the Atomic Energy Act of 1954.

16. The EID Director cannot broaden his regulatory authority through the permit process beyond the jurisdiction of the Hazardous Waste Act and HWMR-5.

17. EID and the Board have no jurisdiction over "radioactive waste".

18. As a matter of law, the provisions of Section 74-4-4.2(C) NMSA 1978 do not extend EID's jurisdiction into areas which are excluded by RCRA and the Hazardous Waste Act or preempted by the Atomic Energy Act of 1954.

19. The Director of EID ignored the jurisdictional limits imposed by RCRA and the Hazardous Waste Act on EID when he included the conditions on the incineration of radioactive waste.

20. Because EID lacks jurisdiction to regulate any aspect of radioactive waste under RCRA or the Hazardous Waste Act, the three conditions referred to in Permittees' Finding No. 1.4 are not in accordance with law and, as matter of law, are void and unenforceable.

21. Because EID's public statements and acknowledgments that EID lacks jurisdiction to impose conditions upon "radioactive waste" are inconsistent with the three conditions imposed on the Permit, the imposition of these conditions is not supported by substantial evidence in the record and is arbitrary and capricious.

22. Because the imposition of conditions on the incineration of radioactive waste was based solely on public pressure, the Director's decision was arbitrary, capricious and an abuse of his discretion.

23. Given the enforcement and sanction provisions of the Permit, the Hazardous Waste Act, and the Regulations, the Permittees will be irreparably harmed if the EID attempts to enforce the three conditions involving radioactive waste.

24. The conditions placed on radioactive waste contained in Module V, Section C.3; Module V, Section E.10; and Module V, Section F.9 of the Permit are illegal, unenforceable, null and void, and should be deleted or severed pursuant to Module I, Section 1.C.

REQUESTED RELIEF

For the reasons set forth in the Proposed Findings of Fact and Conclusions of Law, the University and DOE respectfully request the Board to order the

Director, pursuant to Section 902.F, HWMR-5, to delete the three conditions referred to in Finding of Fact 1.4. Petitioners adopt by reference the arguments of legal authority contained in their petition. Petitioners further request that the Board order the Director, pursuant to Section 902.F of HWMR-5, to enter a decision in accordance with the Board's order deleting the three conditions.

SUTIN, THAYER & BROWNE
A Professional Corporation

By _____
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We hereby certify that we have delivered a copy of the foregoing pleading to counsel for the Environmental Improvement Division on this 29th day of January, 1990.

SUTIN, THAYER & BROWNE
A Professional Corporation

By A. Nathan Chapman