

May 7, 1990
our response to Univ's motion to stay

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Appellant,

v.

No. 12,190

THE ENVIRONMENTAL IMPROVEMENT
DIVISION OF THE NEW MEXICO
HEALTH AND ENVIRONMENT
DEPARTMENT; RICHARD MITZELFELT,
Director, Environmental Improvement
Division, and ENVIRONMENTAL
IMPROVEMENT BOARD,

Appellees.

**APPELLEES' RESPONSE IN OPPOSITION TO
APPELLANT'S MOTION TO STAY PROCEEDING**

Appellees' Environmental Improvement Division of the New Mexico Health and Environment Department, Richard Mitzelfelt, Director; and the Environmental Improvement Board ("State of New Mexico" or "the State") oppose Appellant's Regents of the University of California ("the University") Motion to Stay Proceedings on the general grounds that this matter raises issues of state and not federal law which this Court should decide. More specifically, the State responds as follows:

I. INTRODUCTION AND PROCEDURAL BACKGROUND:

This matter involves the state Hazardous Waste Facility Permit No. NM 0890010515-1 ("the Permit") issued jointly to the University as operator and the United States Department of Energy as owner of



15069

the Los Alamos National Laboratory ("LANL").

The University and the United State Department of Justice for the Department of Energy ("the United States") jointly filed an administrative appeal of the permit to the Environmental Improvement Board. Following dismissal of the administrative appeal, the University timely filed this appeal on March 12, 1990.

After the University filed this appeal, the United States filed on March 19, 1990 in the United States District Court for the District of New Mexico complaint No. Civ. 90-0276-SC ("the federal complaint" or "the federal case"), and on March 20, 1990 its state appeal, No. 12,233 ("the United States' appeal"). All three lawsuits filed by the University and the United States involve the same three permit conditions in the Permit.

The United States filed a Motion to Stay Proceeding in No. 12,233 on or about April 4, 1990. The State filed its Opposition to the United State's Motion to Stay on April 18, 1990. Subsequently, the United States filed on or about April 30, 1990 a Reply to the State's Opposition. The matter is still pending before this Court.

The State filed a Motion to Dismiss No. Civ. 90-0276-SC on April 19, 1990. The United States' Response in Opposition is due to be filed on May 8, 1990. The State's Reply to that Opposition will then be due to be filed on May 25, 1990.

The University filed its Motion to Stay Proceeding in this suit on April 25, 1990. It includes as part of its Memorandum in Support of its Motion to Stay Appellate Proceeding what is in effect a Reply to the State's Opposition to the United State's

Motion to Stay Proceeding filed in No. 12,233.

The State attaches hereto and incorporates by reference: (1) Exhibit A, a copy of Defendants' Motion to Dismiss and Memorandum in Support filed by the State on April 19, 1990 in the federal complaint); (2) Exhibit B, a copy of the United State's Motion to Stay Proceeding (No. 12,233) and Memorandum in Support in the United States' appeal; (3) Exhibit C, a copy of the State's Response In Opposition to the United States' Motion to Stay Proceeding (No. 12,233) in the United States' appeal; and (4) Exhibit D, a copy of the United States' Reply To the State's Opposition to United States' Motion to Stay Proceeding (No. 12,233) in the United States' appeal.

II. THIS COURT'S AUTHORITY AND STANDARDS FOR GRANTING A STAY.

A. GENERAL FACTORS

The State agrees that this Court has the power and discretion to stay this appeal. 1 Am.Jur.2d Actions § 92 at 621 ("The power to grant a stay is inherent in every court by virtue of its right to control disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants," citing Landis v. North American Co., 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936). See also Nelson v. Grooms, 307 F.2d 76 (5th Cir. 1962). The State also agrees that a stay does not dispose of the proceedings stayed. Five Keys, Inc. v. Pizza Inn, Inc., 99 N.M. 39, 653 P.2d 870 (1982).

The State, however, disagrees with the University's assertion, made without cited authority, that "[a] motion to stay [sic] does not . . . operate to the prejudice of any party." Memorandum in

Support of Motion To Stay Appellate Proceeding ("Memorandum in Support") at 13. Stays clearly can operate to the prejudice of parties, and that is part of why the granting or denial of a stay is left to the sound discretion of the court. Cf. Wood v. Millers Nat'l Ins. Co., 96 N.M. 525, 632 P.2d 1163 (1981) (because parties' rights may be substantively impaired by a stay, court expressly declines to hold that judicial economy is the overriding consideration in determining whether it is appropriate to stay proceedings, citing 1 Am.Jur.2d Actions § 97).

State courts asked to stay their proceeding because of another proceeding pending in a federal court consider a variety of factors. Generally, "[i]n determining an application for a stay the court considers whether justice will be done by granting the application, and sets off the benefit and the hardship to ascertain a balance," considering such factors as: (1) which action was filed first; (2) how the outcome of the federal action would affect the outcome of the state action; (3) whether the parties, causes of action, and issues in the two actions are the same; (4) whether it is more convenient for the parties to conduct the litigation in one forum rather than in the other; (5) whether a federal law question is at issue regarding which the federal court would have more knowledge and expertise; (6) the likelihood that the federal court will entertain the action; and (7) whether the federal action was brought in good faith. 1 Am.Jur.2d Actions § 97, at p. 625.

B. APPLICATION OF FACTORS

1. The State Court Appeal Was Filed Before the Federal Complaint. Priority in Filing is An Important Factor in Denying Motions To Stay Proceedings.

Priority in time of commencement of action generally is an important factor in determining whether a court stays a proceeding. 1 Am.Jur.2d Actions § 98, at p. 626. In order to require or warrant a stay of proceedings at the forum, on account of the pendency of another proceeding in the court of another state or country, the foreign proceeding must have been commenced before the commencement of the proceeding to be stayed. Courts generally deny a motion for stay of the earlier filed proceeding. Clearly, however, the question of which of several questions dealing with the same subject matter and parties should have priority is to a large extent controlled by the exercise of the trial court's sound discretion. Minnesota Mining and Manufacturing Co. v. Superior Insulating Tape Co., 284 F.2d 478 (8 Cir. 1960). Here, the University seeks to stay its own case which was filed **before** the action filed by the United States in the federal court. If any action should be stayed, it is the **second** action, not the **first**.

2. The Federal Action May Have No Substantive Effect On the State Action.

The parties disagree from the start as to the primary issues in this appeal. That disagreement creates great uncertainty as to any decision the court may render on this matter. Any decision issued by the federal court is necessarily uncertain because the first task of the court will be to sift through and define what, in fact, the issues are. The federal court may agree with the State and determine that state law issues predominate and are best decided by the state court, which would only result in even more delay in these proceedings. Additionally, the State has filed a

Motion to Dismiss in the federal case arguing no subject matter jurisdiction, failure to state a claim for which relief can be granted, and failure to join a necessary party, see Exhibit A, which may result in dismissal.

3. The Parties, Causes of Action, and Issues Are Not the Same In No. 12,190 and the Federal Case. They Are, However, the Same Between Nos. 12,190 and 12,233 Filed In This Court.

The Court may properly stay a proceeding because of the pendency of another proceeding, especially where the same parties and same issues are in the other court. See, e.g., American Life Ins. Co. v. Stewart, 300 U.S. 203, 57 S.Ct. 377, 81 L.Ed. 605 (1937). The purpose behind granting stays where there is another matter with the same parties or issues pending in another jurisdiction is to prevent multiplicity of actions and avoid vexation and harassment of the defendant. 1 Am.Jur.2d Actions § 95 at p. 623. In such circumstances, the court's discretion is limited only by circumstances showing abuse of discretion, where, if the trial court were to deny the stay, injustice would be perpetrated on the party seeking the stay, "and no hardship, prejudice, or inconvenience would result to the one against whom it is sought." Int'l Nickel Co., Inc. v. Martin J. Barry, Inc., 204 F.2d 583 (4th Cir. 1953).

Here, however, the University (and, separately, the United States), seeks a stay, even though the University and the United States are themselves responsible for the multiplicity of suits. The University has not alleged or shown any injustice to it of going forward, except that "harm" implied in its argument of the time and cost of going forward with this appeal.

More important, however, the state and federal actions do **not have the same parties**, even though the procedural posture and the records in the three proceedings are becoming confusing. The State in fact has moved for dismissal of the federal complaint if the University cannot be joined in that action, because of the necessity of joinder of the University. See Exhibit A. For the reasons stated in that motion and supporting memorandum, the State will be prejudiced in the absence of the University to any proceeding that purports to seek a complete solution.

Similarly, the federal case includes some of the issues in the University's appeal, but there are **additional** issues raised in this case. For example, examination of the case law cited in the University's Docketing Statement indicates that the University apparently intends to make "GOCO"-related arguments (GOCO = government-owned, contractor-operated facilities), e.g., the extension of federal immunities to private contractors; as well as Atomic Energy Act federal preemption arguments. These issues are not involved in the federal complaint. A decision resolving all the issues in the federal court will leave issues in the state court unanswered. Landis v. North American Co., 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936), permitted a stay even in the absence of identical issues if the federal decisions would greatly simplify, **but** "this is a discretion which will be used sparingly and only upon a clear showing by the moving party of hardship or inequity so great as to overbalance all possible inconvenience of the delay to his opponent." 1 Am.Jur.2d Actions § 96, at p. 624. Again, the University has not alleged and has not demonstrated any

such hardship or inequity.

4. Contrary to the University's Assertion, The State Appellate Forum Is More Convenient to the Parties.

The appellate record is already developed and accessible to this Court, and should be shortly before this Court. The only thing left in this proceeding is to develop the legal arguments. In the federal trial court, however, the normal course of events will entail discovery and consequent investment of time, effort and possible delay. The University's argument that this case will be further delayed by an enormous backlog of appellate cases is spurious. This Court controls its own docket and may prioritize cases as it deems appropriate.

5. The Issues To Be Determined Are Not Federal Law Questions of Which the Federal Court Would Have More Knowledge and Expertise.

The primary issues in this matter are not federal questions. Certainly, this Court will refer to the federal courts' interpretations of RCRA in construing the state Hazardous Waste Act. This does not, however, make the action a federal question action. The real questions are definitional, i.e., whether the permit conditions "regulate" "radioactivity." The State asserts that they do not. Alternatively, if the permit does "regulate" radioactivity, then the court must determine the scope of N.M.S.A. 1978 § 74-4-4.2.C., which authorizes the State to issue a permit "subject to any conditions necessary to protect human health and the environment," to determine whether the conditions are permissibly within the scope of that provision. This is a question of interpretation of state law, not federal law.

a. The Real Threshold Question Is Whether the Three Permit

Conditions On the Burning Of Hazardous Waste Constitute
"Regulation Of Radioactive Waste".

The University states that:

EID's Response [to the United State's Motion to Stay, filed in No. 12,233] confuses the question of whether the state is authorized to regulate hazardous waste more stringently than the federal standards imposed under RCRA ... with the altogether distinct question of whether EID has authority to regulate radioactivity associated with hazardous waste. It is the latter question, not the former, which is the critical issue in this appeal and the Federal Lawsuit. The latter question is the central issue in both the University's and DOE's Motions to Stay.

Memorandum in Support at 18.

The real issue here is not, first and foremost, as the University states, whether RCRA **authorizes** the State to regulate radioactive waste. The issue is whether the **permit** in fact **regulates** radioactive waste. The permit by its terms is a hazardous waste permit and its conditions expressly regulate the management of hazardous waste. The State imposed the conditions because of questions the state has about the safety of burning hazardous waste in an incinerator that is also used to burn radioactive waste.

Thus the threshold issue: whether the three conditions that apply when and only when the University and the United States burn hazardous waste in that particular incinerator "regulate radioactivity." The conditions only apply with regard to the batches of waste that the University and the United States have determined to be hazardous waste. If they have determined a batch to be radioactive waste, or to be mixed waste, the permit by its own terms does not apply.

The State's Motion to Dismiss filed in the federal case contains some of the State's arguments and discussion of the

conditions, which the State will not further reiterate at this time in this Opposition to Stay, except to briefly summarize them: (1) test each "hazardous waste" batch to verify that it meets the legal definition of "hazardous waste;" (2) monitor for radioactive releases during the burning of each "hazardous waste" batch to verify that the hazardous waste burn is not unwittingly causing an unanticipated release of radioactivity; and (3) cease the "hazardous waste" burn if the burn is causing an unanticipated release of radioactivity. The permission to incinerate hazardous waste is withdrawn if that incineration releases radioactivity.

The University quotes a dictionary definition of "regulate" and concludes that "[a]n examination of the Permit conditions at issue clearly establishes that EID is regulating radioactivity." Memorandum in Support at 15-16. The State disagrees, but is expressly not responding, however, in this Opposition to Motion to Stay Proceeding, to the University's substantive legal argument on the definition of "regulates." The Court must look at the conditions and consider the legal arguments the parties will make to make that determination.

b. The University Concedes That the State May Regulate Radioactivity.

The University concedes that the federal Clean Air Act and the State Air Quality Control Act authorize the State to regulate radioactive emissions. Memorandum in Support at 20. The University goes on to argue that the State cannot do so under a certain factual situation, which is not relevant to the issue of whether the State has the authority under law to regulate, e.g.,

whether the State can lawfully incorporate compliance with any existing State Air Quality Control Act requirements into a hazardous waste management permit. Without responding to the legal substance of the University's assertion, the State notes that this concession demonstrates that **state** law questions predominate and control this proceeding,

c. The Federal LANL Permit Includes Radionuclide Monitoring.

The State issued only one of LANL's **two** hazardous waste management permits. The EPA issued a separate LANL permit pertaining to corrective action requirements under Hazardous and Solid Waste Amendments of 1984 ("HSWA"), a copy of which is attached hereto as Exhibit E and incorporated by reference. The HSWA permit requires LANL to minimize the commingling of radioactive waste, and includes radionuclide monitoring and reporting requirements. See Exhibit E at Module VIII, pp. 3, , 8, 34, 43-45. The State is expressly not responding to Appellant's substantive legal arguments at this time, but notes that, clearly, the EPA does not consider such requirement as "regulating" radioactivity, or as exceeding its authority under RCRA.

d. The Hazardous Waste Act Has Legal Effect Independent of RCRA.

The University argues:

New Mexico's **sole** authority to issue hazardous waste facility permits is derived from an express statutory provision in RCRA. In addition, the HWA is based upon RCRA statutory language and adopts verbatim many RCRA provisions. Consequently, this Court must construe RCRA and federal law in order to interpret the HWA.

Memorandum in Support at 5.

The University appears to be arguing that the Hazardous Waste Act has no effect or viability in the absence of RCRA. This assertion shows serious ignorance of the federal-state relationship under RCRA. In adopting RCRA, Congress expressly provided for the retention of state authority to regulate hazardous waste. 42 U.S.C. § 6929. The only limitation was that "no State or political subdivision may impose any requirements less stringent than those authorized under this subtitle. ... " Id. The authorization process in RCRA allows a state to carry out its program "in lieu of the Federal program." 42 U.S.C. § 6926(b). Thus, RCRA does not give the states the authority to regulate in the field, but rather creates a scheme to avoid unnecessary duplication of programs and effort.

The "authorization" for the state program rests with state law.

The **New Mexico Legislature** lawfully passed the Hazardous Waste Act. RCRA did not "authorize" the Legislature to adopt the HWA. The HWA has viability and effect totally independent of the existence of RCRA, and of EPA's authorization of the State to implement RCRA instead of EPA in this State.

Moreover, for a state to receive authorization under RCRA to carry out its program in lieu of the federal program, it must first have a program meeting the requirements specified in RCRA. RCRA requires that a state program be authorized unless the Administrator of EPA finds that "(1) such state program is not equivalent to the Federal program under [subtitle C], (2) such program is not consistent with the Federal or state programs in

other states, or (3) such program does not provide adequate enforcement of compliance with the requirements of [subtitle C]."

42 U.S.C. § 6926(b). Moreover:

Any State that seeks to administer a program under this subpart shall submit a statement from the State Attorney General ... that **the laws of the State provide adequate authority** to carry out the [RCRA] program ... and to meet the requirements of this subpart. This statement shall include citations to the specific statutes, administrative regulations and, where appropriate, judicial decision **which demonstrate adequate authority**. State statutes and regulations cited by the State Attorney General ... shall be in the form of lawfully adopted State Statutes [sic] and regulations at the time the statement is signed and **shall be fully effective** by the time the program is approved. ...

40 C.F.R. § 271.7(emphasis added).

Thus, the Hazardous Waste Act was in effect **before** New Mexico was authorized by EPA regarding RCRA. It also is in effect **after** New Mexico was authorized by EPA under RCRA.

- e. "Equivalent Regulations" does not Mandate "Identical" Permit Conditions.

The University argues:

[T]he New Mexico legislature prohibited EID and the Board from imposing or enforcing regulations or standards more stringent than those adopted by EPA pursuant to RCRA. See p. 10, *infra*, and Section 74-4-4.A NMSA 1978 (1989 Repl.). Thus, New Mexico's standards are, and must remain, identical to RCRA's standards until the legislature amends Section 74-4-4.A.

Memorandum in Support at p. 19.

First, the University misstates NMSA 1978, § 74-4-4.A., which in fact states:

The board shall adopt **regulations** for the management of hazardous waste **equivalent to, and no more stringent than, federal regulations** adopted by the federal environmental protection agency pursuant to [RCRA][pertaining to identification of hazardous waste, and regulating generators, transporters, distributors, etc.]. (emphasis added)

By its express terms, this provision limits the Board's authority to promulgate regulations, **not** the Legislature's authority to enact statutory provisions or EID's authority to enforce the statute.

Second, even though the State's civil authority is virtually identical to that of EPA and RCRA, there are significant differences. For example, § 74-4-12.A. provides a \$10,000 civil penalty for violations of the HWA, regulations, and compliance orders; whereas RCRA provides for a penalty of \$25,000, 42 U.S.C. § 6928(g). In fact, the HWA has previously contained and currently contains provisions that may be **less stringent** than RCRA, which jeopardizes the State's authorization by EPA. 42 U.S.C. 6926(b). Currently, pursuant to § 74-4-10.A NMSA 1978, the Director of EID must first issue a notice of violation (NOV) and determine that the violation exists more than thirty (30) days beyond the date of the NOV before he can issue a compliance order to require compliance. RCRA does **not** authorize this mandatory thirty-day notice before enforcement. The HWA previously exempted from regulation mixed waste at the Waste Isolation Pilot Plant (WIPP), in direct contradiction of RCRA requirements.

Third, "equivalent to, and no more stringent than" does not mean **identical**. The State's regulations are, in fact, largely identical because the State recently began adopting the federal regulations by reference. However, the State is not **required** to have identical regulations. Different is not necessarily more stringent, it simply chooses to.

Since RCRA permits authorization of state programs that are

more stringent than RCRA, 42 U.S.C. § 6929, if the State's regulations **are** more stringent, that would violate § 74-4-4.A. of the HWA, **not** RCRA, clearly making this a matter of state, not federal law.

f. "Rule of Law" Is Not What Appellant Says It Is.

The State agrees that resolution of this case will include interpretation of federal law. However, "rule of law" is not what appellant argues. Rule of Law is defined as:

A legal principle, of general application, sanctioned by the recognition of authorities, and usually expressed in the form of a maxim or logical proposition. Called a "rule," because in **doubtful or unforeseen cases it is a guide or norm** for their decision. Toullier, tit. prel. no. 17.

Black's Law Dictionary 1497 (Rev. 4th ed. 1968) (emphasis added).

"Rule of law", as articulated in the LANL's cited cases, properly means that this Court, in construing the Hazardous Waste Act, if it needs to, will look at and be guided by how the federal courts have construed RCRA. This does **not** mean this Court must: (a) look only at and follow blindly any existing federal court's interpretations of RCRA; (b) stay a proceeding before it and defer to a federal court to **construe for the Court** instead of the Court doing its own analysis; and (c) decide that **use of federal law as guide** to interpretation of state law makes the matter a "**federal question**". This is what appellant appears to argue, although the cases they cite do not support these conclusions.

This is not a "federal question" but, instead, a "rule of law"; accordingly, the Court would be abusing its discretion on these facts if it stays this proceeding. It would be abdicating

its responsibility to construe the Hazardous Waste Act and the State's actions pursuant to it, expressly delegated to it by the Legislature, § 74-4-4.2.G, if it chooses not to act because a federal court in a later-filed action might reach the same issues.

6. The Federal Court Is Not Likely to Entertain This Action.

The State has filed a Motion to Dismiss in the federal case arguing no subject matter jurisdiction, failure to state a claim for which relief can be granted, and failure to join a necessary party, see Exhibit __, which may result in dismissal of that action. The Motion is pending.

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The state has found no cases under RCRA determining federal court jurisdiction to review state issued permits. However, the federal courts have uniformly determined that no such jurisdiction exists to review state issued permits under the federal Clean Water Act ("CWA"), 42 U.S.C.A. §1342. Consolidated Edison Co. of New York, Inc. v. New York Department of Environmental Conservation, 726 F.Supp. 1404, 31 E.R.C. District of Columbia v. Schram, 631 F.2d 854 (D.C. Cir. 1980); NRDC v. Outboard Marine Corp, 702 F.Supp. 690 (N.D. Ill. 1988). The federal district court in Consolidated Edison held that it lacked jurisdiction to review the company's CWA challenge to proposed modifications to a state-issued permit, because the Clean Water Act requires challenges to state-issued permits to be brought in state court. Consolidated Edison Co. of New York, Inc. v. New York Department of Environmental Conservation, , 31 E.R.C. 1146 (D.C. S.D. N.Y. 1989). The company filed a declaratory judgment action, alleging federal

question jurisdiction pursuant to 28 U.S.C. § 1331, and alleging that the permit conditions were unauthorized by the federal act and contrary to the state's EPA-approved permitting program under that act. Id. 31 E.R.C. at 1148. The company asserted that the federal court had subject-matter jurisdiction because determination of its claim "necessarily depend[ed] on resolution of a substantial question of federal law." Id. at 1149 (quoting plaintiff's memo in opposition). The Court held that the company had no cause of action under the CWA because that statute did not give a permittee the right to directly challenge the state's permit to the federal court. Thus, its complaint had to be dismissed.

Similarly, in the Outboard Marine case, the court determined that the CWA did not provide direct review of a state issued permit. The court noted, quoting Mianus River Preservation Comm. v. Administrator, 541 F.2d 899, 906 (2d Cir. 1976), that "federal review of a state-issued permit might involve 'review[ing] issues involving only a state agency's application and interpretation of purely state law.'"

The analysis under the CWA is directly applicable here. Once a program is authorized, EPA has no statutory role in the permitting process. 42 U.S.C.A. §6925. RCRA does not provide review of state-issued permit. 42 U.S.C.A. §6976(b). Absent such a provision, the permit is not reviewable in federal court, but may only be reviewed in the state forum. Outboard Marine, 702 F.Supp. at 694.

7. Re: Whether The Federal Action Was Brought In Good Faith.

The State has no reason to question the good faith of the

United States in bringing the federal case. The State notes, however, that: (1) the University and the United States jointly appealed this matter administratively; (2) following dismissal of that administrative appeal, the University timely filed this appeal; (3) subsequently, the United States, with clear knowledge of the University's earlier appeal, filed its two actions, i.e., the federal case and its state appeal, No. 12,233, without joining the University; (4) the federal case was filed one day before the United States' state court appeal was filed; (5) the University has gone so far as to reply to the State's Opposition to Motion to Stay Proceeding filed by the United States in No. 12,233; and (6) the University now "joins the United States in requesting that the appeals taken by the University and DOE be stayed pending determination of the issues" in the federal court. Memorandum in Support at 20-21; The State can only conclude that the University is now trying to bootstrap itself up into the latter-filed federal action to justify a stay.

III. JUDICIAL ECONOMY SUPPORTS CONSOLIDATING NOS. 12,190 AND 12,233 AND GOING FORWARD WITH THIS MATTER, NOT STAYING IT AND DEFERRING TO A FEDERAL COURT TO INTERPRET STATE ACTIONS.

The University argues that judicial economy supports this Court staying this proceeding in favor of the federal case, in order to permit one court to determine "fundamental issues germane to two cases." The University is referring to the federal complaint and this state case, No. 12,190. There are in fact three cases filed against the State challenging the same conditions in the same permit. The University as operator of LANL filed one suit; and the United States as owner of LANL filed two others,

after previously joining with the University on an administrative appeal.

The University now asks this Court to stay this proceeding because of the judicial resource problem that **it and the United States** have caused the Court by their filing three separate challenges to the exact same permit conditions. The University also argues that the three filings have caused resource problems for it and asks the Court to consider the **parties' time and expense** if it must prepare the record for this appeal. Memorandum in Support at 13. The Legislature specifies that Hazardous Waste Act permits are to be appealed to the Court of Appeals, the University in fact properly filed this appeal, and must now bear the normal expenditure of time and money that an appeal entails. The University should not now be permitted to successfully argue the time and expense consequences of its actions.

Both the University and the United States clearly want this matter resolved in the federal court. They apparently do not agree that they should both be **parties** in any **one** case, however. Instead of proposing **consolidation** as a solution, appellant wants this Court to stay this proceeding and defer to a later-filed federal proceeding to which it is not even a party, even though University and the United States: (1) chose to file separate actions in the state and federal courts [with the United States filing alone in federal court **without** joining the university]; (2) have declined to propose consolidation of their state court actions; (3) the University has not tried to join the federal case despite receipt of the state's motion to dismiss the federal case for failure to

join the university; and (4) the University is acting as if it is already joined with No. 12,233.

It is the state's position that judicial economy is best served by consolidation of the two state cases. This would bring all parties, the University, the United States and the State, into one proceeding, addressing all issues raised among the three separate suits.

V. CONCLUSION.

For all of the foregoing reasons, the State respectfully requests that this Court deny appellant's Motion to Stay Proceeding, and assign this matter to the appropriate Calendar for determination on the merits.

Respectfully submitted,



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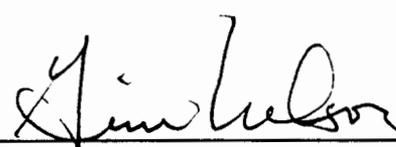
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing APPELLEES' RESPONSE IN OPPOSITION TO APPELLANT'S MOTION TO STAY PROCEEDING was mailed on this 7th day of May, 1990, to the following:

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