

New Mexico Health and Environment Department

LANL
HSWA 90
II

GARREY CARRUTHERS
GOVERNOR
DENNIS BOYD
SECRETARY
MICHAEL J. BURKHART
DEPUTY SECRETARY

May 22, 1990

VIA OVERNIGHT MAIL
ALSO VIA FAX

Allyn M. Davis
Director, Hazardous Waste Management Division
EPA - Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

Re: Los Alamos National Laboratory (NM0890010515)
HSWA hazardous waste permit



Dear Mr. Davis:

The purpose of this letter is to raise the concerns of the New Mexico Health and Environment Department's Environmental Improvement Division ("NMEID") regarding specific language in the HSWA hazardous waste permit transmitted to Los Alamos National Laboratory ("LANL"), owned by the Department of Energy ("DOE") and operated by the Regents of the University of California ("the University"). Additionally, EID is concerned about allegedly DOE-proposed changes to the permit language regarding radionuclide monitoring.

1. "Functionally equivalent" language.

The specific language with which NMEID takes exception appears in the HSWA portion of the permit at Module VIII, Section D., p. 11 (Corrective Action for Continuing Releases):

All work (information, reports, investigations, remediations, etc) required by this Module (VIII) will be deemed as "functionally equivalent" of an Environmental Impact Statement (EIS). Therefore, the requirements of the National Environmental Policy Act will not apply to work required by Module VIII. (Note: See case Alambamians [sic] for a Clean Environment v. Thomas, No. CV87-0797-W (N.D.Ala. December 7, 1987)) [sic].

This language also appears at p. 5 of the "Notice of Permit Decision/ Los Alamos National Laboratory" prepared by EPA-Region 6.

OFFICE OF THE SECRETARY
NM Health and Environment Department
Room N4100
1190 St. Francis Drive
Santa Fe, New Mexico 87503



TR

Allyn M. Davis
May 22, 1990
Page 2

NMEID disagrees with EPA's inclusion in the permit of the blanket statement that the work required by Module VIII will be deemed as "functionally equivalent" of an EIS and that the "requirements of the National Environmental Policy Act ["NEPA"] will not apply to work required by Module VIII." On the contrary, the legal authority cited by EPA, Alabamians, 26 ERC 2116, 18 ELR 20460 (N.D. Ala. 1987), does not support EPA's contention that work required to be performed by LANL, pursuant to Module VIII, is "functionally equivalent" to an EIS. Moreover, Alabamians does not stand for the proposition that EPA has the authority to relieve another federal agency, i.e., DOE, of its legal obligation to perform an EIS, when appropriate, or to otherwise comply with NEPA. While courts recognize an exemption for environmental agencies from complying with NEPA when the agency's environmental and health procedures are "functionally equivalent" to an EIS, no such exemption applies to DOE as the owner of LANL.

NMEID makes no comment on whether or not DOE must perform an EIS; NMEID is merely asserting that nothing in the Alabamians case empowers EPA to broadly excuse DOE from complying with NEPA, including any applicable EIS requirements. It is DOE's responsibility to determine the applicability of NEPA to activities at LANL, not EPA's. For example, DOE recently published [55 Fed. Reg. 13064, 4/6/90] notice of "Compliance with NEPA; Amendments to Guidelines" which proposes additional categorical exclusions from DOE's need, inter alia, to perform an EIS in certain situations. Thus, apparently DOE makes the initial determination as to whether and when it must comply with all or part of NEPA; EPA does not make this determination.

Alternatively, though not expressly cited in the permit, EPA may have considered 40 CFR §124.9 as a basis for maintaining that an EIS is not necessary prior to issuing a permit. EPA is excused by §124.9 from applicable NEPA requirements in making its decision to issue a permit; this is not the same as excusing DOE from applicable NEPA requirements in performing work pursuant to that permit after issuance.

2. Radionuclides Monitoring Language.

NMEID also recently learned and understands that EPA and DOE have been and are continuing to negotiate language changes under the guise of "clarification" in the HSWA permit relating to the permit's radionuclide requirements. As you are aware, DOE and the University have filed for judicial review (in both state and

Allyn M. Davis
May 22, 1990
Page 3

federal court) of the New Mexico Hazardous Waste Act permit issued by NMEID, challenging the State's authority to require, among other things, radionuclide monitoring. Because of this active litigation, NMEID is very concerned about these EPA/DOE negotiations proceeding in the absence of State participation.

With regard to the radionuclide language, NMEID requests that EPA confirm, in writing, that EPA has extended or suspended the effective date of the HSWA permit from April 10, 1990 to May 23, 1990; that such extension or suspension was done by EPA at the request of DOE; and that DOE and EPA have been or presently are engaged in a dialogue or negotiation concerning the meaning of the radionuclide monitoring requirements in the permit. Assuming the truth of the previous sentence, NMEID also requests that EPA state its legal authority for continuing to negotiate with a permittee, i.e., DOE, after final agency action, i.e., the HSWA permit states that its effective date was April 10, 1990.

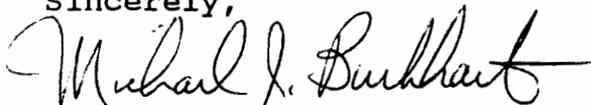
From NMEID's perspective, issuance of the final permit with an effective date constitutes final agency action; therefore, any changes in the permit concerning radionuclide monitoring must comport with the regulations respecting major or minor modifications. Without conceding the propriety of EPA's or DOE's continued negotiations, NMEID requests the right, if appropriate, to participate in all further discussions and comment upon any aspect of the HSWA permit, specifically but not limited to the radionuclide monitoring issue, in light of the active litigation between DOE, the University, and NMEID. Such request is made because of the potential impact that any agreement between DOE and EPA interpreting the HSWA permit may have on this litigation.

In sum, if appropriate legal authority exists to change or "clarify" the final permit in the context of negotiations, then NMEID urges EPA to delete the above-quoted language in the final permit, regarding work performed under the HSWA permit being the "functional equivalent" of an EIS, in order to avoid sending an incorrect message to LANL based upon a misconstruction of the law. Furthermore, NMEID requests EPA to confirm, in writing, the status of the "finality" of the HSWA permit and related negotiations with DOE; to state EPA's legal authority for negotiating with a permittee on the terms of a permit after final agency action; and to allow NMEID to participate in all future discussions between DOE and EPA on the radionuclides issue so that the State may protect its interest in pending litigation.

Allyn M. Davis
May 22, 1990
Page 4

Your prompt response to this letter is kindly requested.

Sincerely,

A handwritten signature in cursive script that reads "Michael J. Burkhart". The signature is written in dark ink and is positioned above the typed name.

Michael J. Burkhart
Deputy Secretary

cc: Richard Mitzelfelt, Director, EID
Louis W. Rose, Deputy General Counsel, EID