



Department of Energy
 Albuquerque Operations
 Los Alamos Area Office
 Los Alamos, New Mexico 87544

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 HAZARDOUS WASTE DIV.
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MAY 23 1990

Mr. William K. Reilly
 Administrator
 United States Environmental Protection Agency
 401 M Street SW
 Washington, DC 20460

Dear Mr. Reilly:

Pursuant to 40 CFR Section 124.19, the Department of Energy is hereby submitting its Petition for Review, on behalf of itself and its managing and operating contractor, the University of California. We request review of Hazardous Waste Permit NM0890010515, for the reasons set forth in the Petition.

The time for appeal of the Permit was extended to May 23, 1990, by facsimile transmission dated April 6, 1990, from Mr. Allyn M. Davis, Director of the Hazardous Waste Management Division of EPA, Region 6. Although DOE is sending this petition via a facsimile transmission pursuant to the instructions of EPA, we note that 40 CFR 124.20(d) provides that when a party has the right or is required to act within a prescribed period after the service of notice or other paper is served by mail, 3 days shall be added to the prescribed time.

Sincerely,

Lisa Cummings for

Joyce Hester Laeser
 Counsel
 Los Alamos Area Office

cc:
 R.E. Layton, Jr.
 Regional Administrator
 U.S. Environmental Protection Agency, Region 6
 1445 Ross Avenue
 Dallas, TX 75202-2733



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PETITION FOR REVIEW

Pursuant to 40 CFR Section 124.19, the United States Department of Energy (DOE) hereby petitions the Administrator (the Administrator) of the United States Environmental Protection Agency (EPA) to review certain conditions of Hazardous Waste Permit NM0890010515 (the Permit) issued to DOE and the University of California, doing business as Los Alamos National Laboratory (the Permittee). The Permit was issued by EPA pursuant to EPA's authority under the Hazardous and Solid Waste Amendments of 1984. DOE requests the Administrator to review those portions of the Permit which require the Permittee to provide EPA with information regarding monitoring of, and sampling for, radionuclides.

Background

On March 8, 1990, Allyn M. Davis, the Director of the Hazardous Waste Management Division of Region 6 of EPA issued Permit No. NM0890010515 to DOE and the University of California. By facsimile transmission dated April 6, 1990, from Mr. Davis, the effective date of the Permit was extended until April 23, 1990, because of delays in sending copies of the Permit to all appropriate parties. The effective date of the Permit was further extended to May 23, 1990, by letter dated April 20, 1990, to allow DOE and EPA to attempt to resolve the issue of EPA's inclusion of radionuclide reporting, monitoring, and sampling in the Permit. DOE and EPA are still working to resolve this issue. This petition for review is being filed in order to preserve DOE's rights pending resolution of the issue through interagency negotiation, or, if necessary, under the inter-agency dispute resolution process provided for in Executive Order 12146.

DOE requests the Administrator to review the following nine conditions of the Permit, as well as any others which may require reporting, sampling, or monitoring for radionuclides:

1. Condition B.1.(a)(10)(f), which requires the Permittee to demonstrate the applicability/inapplicability of a program designed to prevent comingling of radioactive wastes.
2. Condition C.1., which requires the Permittee to sample monitoring wells for Gross Gamma, Gross Alpha, Total U, ³H, ¹³⁷Cs, ²³⁸Pu, and ²⁴⁰Pu.
3. Condition C.6., which requires the Permittee to conduct a subsurface investigation by drilling test holes and analyzing cores recovered from the tuff for ³H, ¹³⁷Cs, Total U, ²³⁸Pu, ²³⁹Pu, ²⁴⁰Pu, ²⁴¹Am, Gross Gamma, and Gross Alpha.
4. Task I.B.1.c., which requires the Permittee to submit a Preliminary Report summarizing all possible areas of contamination including identification of radiochemical constituents to the extent known.

5. Task III.A.1.d., which requires the Permittee to supplement and verify existing information on the environmental setting at the facility and to provide information based on field data and tests, including gamma and neutron logging of existing and new wells.

6. Task III.C.1.d., which requires the Permittee to conduct a groundwater investigation and to provide information concerning the horizontal and vertical concentration profiles of radiochemical constituents in plumes of contamination.

7. Task III.C.3.c., which requires the Permittee to conduct a surface water investigation to characterize contamination in surface water bodies and to include an evaluation of the radiochemical factors influencing contaminant movement.

8. Task III.C.3.e, which requires the Permittee to conduct a surface water investigation to characterize contamination in surface water bodies and to include a description of the radiochemistry of the contaminated surface waters and sediments.

8. Task III.C.4.c., which requires the Permittee to conduct an investigation to characterize particulate and gaseous contaminants released into the atmosphere and to provide information regarding the radiochemical composition of the contaminants released.

9. Task III.D., which requires the Permittee to collect data describing the human populations and environmental systems that are susceptible to contaminant exposures from the facility, possibly requiring radiochemical analysis of biological samples.

Statement of Reasons supporting Review

The attempt by EPA to regulate radionuclides exceeds its authority under the Resource Conservation and Recovery Act, 42 USC Sections 6901 through 6992k. Pursuant to 42 USC Section 6925, the Administrator is authorized to issue permits to facilities for the treatment, storage, or disposal of hazardous waste. "Hazardous waste" is defined as a subset of "solid waste." 42 USC 6903(5). "Solid waste" is defined as garbage, refuse resulting from industrial, commercial, mining, and agricultural operations, but does not include "source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C.A. Section 2011 et seq.]."

Because source, special nuclear, and byproduct material are explicitly excluded from the definition of solid waste, they cannot be hazardous wastes subject to regulation under RCRA. As a result, the nine conditions enumerated above are outside EPA's authority under RCRA and are thereby based on erroneous findings of fact or conclusions of law.

Preservation of Issue

The issue of EPA's authority to regulate radionuclides was raised several times during the public hearing conducted on the Permit on August 7, 1989. Bill Gallagher, representing EPA, Region 6, summarized EPA's position regarding the regulation of radioactive waste, stating that RCRA exempts all wastes covered by the Atomic Energy Act from regulation under RCRA, and that such wastes are "basically radioactive waste or any radionucleis (sic) . . . we cannot regulate the radionucleis (sic) and we cannot regulate wastes that are clearly just radioactive." Transcript of August 7, 1989, hearing, p. 186.

In response to a question from a public citizen regarding EPA's ability to regulate the radioactive component of radioactive waste, Mr. Gallagher reiterated that "[W]e do not have authority over the radioactive portion." Transcript, p. 254. In addition in EPA's Response to Comments, included with the Permit, EPA recognized the numerous comments received from the public regarding radionuclide releases from an incinerator. EPA's responded that "The EPA Region 6 thoroughly researched the possibility of adding a requirement to monitor radionuclides from the incinerator. The Office of Regional Counsel and EPA Headquarters provided the opinion that such a condition is not within the authority of RCRA. If, in the future, Congress expands the scope of RCRA to include radionuclides, this permit may be modified to include such monitoring."

In addition, because the issue of EPA's authority to regulate radionuclides is one of subject matter jurisdiction, this issue may be raised at any time.

Conclusion

For the reasons stated above, DOE requests that the Administrator issue an order granting this petition for review.



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Regional Administrator
Environmental Protection Agency
Region 6
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