

1977
Permit

JUN 01 1990

June 1, 1990

Michael J. Burkhardt
Deputy Secretary
New Mexico Health and
Environment Department
Room N4100
1190 St, Francis Drive
Sante Fe, New Mexico 87503

Dear Mr. Burkhardt:

The purpose of this letter is to respond to your letter dated May 22, 1990 (the "May 22nd letter"), and its various comments on the portion of the permit for Los Alamos National Laboratories (LANL) issued by the Environmental Protection Agency pursuant to the Hazardous and Solid Waste Amendments of 1984 (HSWA) (the "HSWA portion of the LANL permit"). Each of the following enumerated sections of this letter corresponds to the respective enumerated section of the May 22nd letter.

1. "Functional equivalent" language.

The May 22nd letter questions certain language from the HSWA portion of the LANL permit. The language is included in a section of the permit entitled "Corrective Action for Continuing Releases" at Module VIII, Section D., page 11 of the HSWA portion of the LANL permit and is as follows:

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 Alabamians for a Clean Environment v. Thomas, No. CV87-0797-W (N.D.Ala. December 7, 1987).

The language also appears on page 5 of the "Notice of Permit Decision/ Los Alamos National Laboratory."

The National Environmental Policy Act of 1969, 42 U.S.C. Sections 4321 to 4347 (NEPA), requires that Federal agencies prepare an environmental impact statement (EIS), for every major Federal action "significantly affecting the quality of the human environment." 42 U.S.C. Section 4332(2)(C). The statement must address "any adverse effects " of the project and "alternatives to the proposed action." Id. However, the courts have recognized an exemption for the

Environmental Protection Agency (EPA), where its adherence to substantive and procedural standards ensure full and adequate consideration of environmental issues. Alabamians for a Clean Environment v. Thomas, 18 ELR 20460, _____ (N.D. Ala. 1987). The Resource Conservation and Recovery Act (RCRA) permitting process provides the functional equivalent of NEPA's EIS; consequently, EPA is not required to do an EIS when issuing RCRA permits. Furthermore, the RCRA permit process exemption from NEPA's EIS requirements is codified at 40 CFR Section 124.9. It is not EPA's intent that the HSWA portion of the LANL permit make any determination as to the applicability of NEPA to any entity other than EPA. The Department of Energy (DOE) may determine that it is required to complete an EIS for the work that is to be completed under the permit for LANL.

2. Radionuclides Monitoring Language

Under 40 CFR Section 124.15, a final RCRA permit decision becomes effective 30 days after the service of notice of the decision unless a later effective date is specified. In a letter dated April 20, 1990 (the "April 20th letter"), EPA specified that the HSWA portion of the LANL permit would be effective on May 23, 1989. The April 20th letter was sent to all parties who had commented on the LANL draft permit with a copy made available to the public at the library of New Mexico's Environmental Improvement Division (NMEID).

The May 23, 1990, effective date provided in the April 20th letter allowed additional time for discussions between EPA and DOE on the radionuclide monitoring provisions of the LANL permit. However, no LANL permit language was changed. On May 23, 1990, the LANL permittees petitioned the Administrator of EPA for review of those provisions pertaining to monitoring of radionuclides. The contested provisions of the permit are, therefore, stayed, pending resolution of the appeal. 40 CFR Section 124.16.

Thank you for your comments on these matters. If you have any questions, please contact Bill Gallagher at (214) 655-6775.

Sincerely yours,

Allyn M. Davis
Director
Hazardous Waste Management Division (6H)

cc: Bob Vocke (LANL)
Paul Schuman (DOE)