

June 29, 1990

Timothy J. Dowling, Judicial Officer
Office of Chief Judicial Officer
United States Environmental Protection Agency
401 M Street, SW
Mail Code A-101
Washington, DC 20460

ALSO VIA TELEFAX

Re: Los Alamos National Laboratory
RCRA Appeal No. 90-12

Dear Mr. Dowling:

Pursuant to Mary Ann Baker's telephone conversation with you on June 6, 1990, this letter constitutes the Environmental Improvement Division's (EID) of the New Mexico Health and Environment Department Response to the Department of Energy's and the Regents' of the University of California Petition For Review of the above-captioned matter.

This administrative body lacks jurisdiction to hear this Petition because it was filed out of time and as further set forth below:

1. The United States Environmental Protection Agency Region 6 (EPA Region 6) issued the final HSWA Hazardous Waste Permit to Petitioners on March 8, 1990. See Exhibit A at 2.

2. The final permit states on its face that its effective date is April 10, 1990. Id. at 1.

3. EPA Region 6 stated by letter to Jack B. Tillman dated April 6, 1990 that the effective date of the final permit was extended to April 23, 1990 due to delays in timely mailing the Notice of Permit Decision and Response to Comments to citizens. See Exhibit B.

4. The EID by letter from Michael Burkhart to Allyn M. Davis dated May 22, 1990 questioned the authority of EPA Region 6 to be negotiating permit changes after the apparent final effective date of the permit. See Exhibit C at 2-3.

5. The EPA Region 6 Administrator in his June 1, 1990 response to Mr. Burkhart states:



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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 [sic]. 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).

See Exhibit D at 2.

6. EID did not receive notice of this purported extension and did not receive a copy of this letter prior to a request for same on June 25, 1990 following receipt of Mr. Davis' response to Mr. Burkhardt's inquiry.

7. EPA Region 6 telefaxed to Counsel for EID on June 25, 1990 a copy of an undated letter to Jack B. Tillman purporting to extend the effective date specified in the March 8, 1990 Notice of Permit Decision to May 23, 1990. See Exhibit E.

8. 40 C.F.R. § 124.15 (b) states in relevant part:

A final permit decision shall become effective 30 days after the service of notice of the decision under paragraph (a) of this section, unless:

- (1) A later effective date is specified in the **decision**; or
- (2) Review is requested under § 124.19

(Emphasis added).

9. 40 C.F.R. § 124.19(a) states in relevant part:

Within 30 days after a RCRA ... final permit decision has been issued ..., any person who filed comments on that draft permit or participated in the public hearing may petition the Administrator to review any condition of the permit decision. ... The 30-day period within which a person may request review under this section begins with the service of notice of the Regional Administrator's action unless a later date is specified **in that notice.**

(Emphasis added).

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10. Jurisdiction of this administrative body to review permit appeals is restricted by RCRA and its regulations.

11. Timely filing of a Petition for review of a permit is a jurisdictional requirement.

12. Jurisdiction to review a RCRA final permit decision cannot be conferred by waiver or consent of the parties.

13. Anything other than a literal interpretation of the notice requirement would render the provision useless.

Accordingly, EPA Region 6 did not validly extend the effective final date of the permit to May 23, 1990. If EPA Region 6's "April 20, 1990 letter" (Exhibit E) was intended to extend the effective date, that action was contrary to the applicable requirements in 40 C.F.R., and EPA Region 6 violated its own regulations. The DOE's and the University's Petition was filed out of time, and this administrative body does not have jurisdiction to consider the Petition.

Respectfully submitted,


GINI NELSON
Special Assistant Attorney General
Assistant General Counsel
Health and Environment Department
Office of General Counsel
1190 St. Francis Drive
Santa Fe, New Mexico 87503
(505) 827-2990

Attorney for EID

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response
was mailed on this 29th day of June, 1990, to the following:

Joyce Hester Laeser
Counsel
Department of Energy
Albuquerque Operations
Los Alamos Area Office
Los Alamos, NM 87544

George R. Alexander
Regional Counsel
U.S. EPA, Region VI
1445 Ross Avenue, 12th Floor
Suite 1200
Dallas, TX 75202



WELDON L. MERRITT

Under Federal Law, this permit is effective on the date specified above unless a petition to the Administrator of the U.S. Environmental Protection Agency is filed in accordance with the requirements of 40 CFR 124.19.

Issued this 8th day of March, 1990

by Allyn M. Davis
Allyn M. Davis, Director
Hazardous Waste Management Division



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6

1445 ROSS AVENUE, SUITE 1200

DALLAS, TEXAS 75202-2733

March 8, 1990

Mr. Boyd Hamilton
Environmental Supervisor
Environmental Improvement Division
The Health and Environment Department
P.O. Box 968
Santa Fe, New Mexico 87504-0968

Dear Mr. Hamilton:

I have enclosed the "Special Conditions Pursuant to the 1984 Hazardous and Solid Waste Amendments to RCRA" as they apply to the final permit for Los Alamos National Laboratory (NM0890010515). We have transmitted this portion of the final permit directly to the permittee.

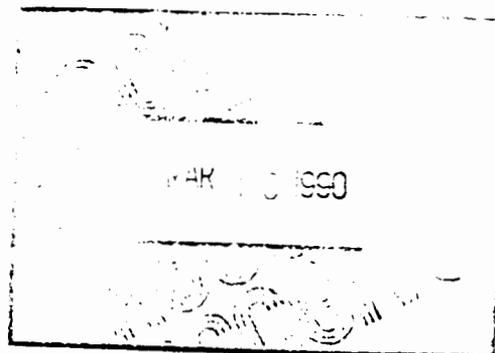
If you need further information in this matter, please call me or contact Bill Gallagher of my staff at (214) 655-6770.

Sincerely yours,

Allyn M. Davis

Allyn M. Davis
Director
Hazardous Waste Management Division

Enclosure



*Document in magazine file; module VII in permit;
04/05/90 notice of permit decision and response to comments
in permitting files.*

LANC red 1990

EWB 04/23/90

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1990

Flavin 1157

APR 6 1990

Jack B. Tillman
Area Manager
Department of Energy
Los Alamos Area Office
Los Alamos, New Mexico 87544

Dear Mr. Tillman:

We have received your letter of March 26, 1990, regarding the effective date of the Module VIII of the Resource Conservation and Recovery Act (RCRA) permit for Los Alamos National Laboratory. Due to delays in making numerous copies of the Notice of Permit decision and Response to Comments for all commenters on the draft permit, these were not mailed to the citizens until March 19, 1990. In order to allow these commenters a full thirty days in which to review the documents, the effective date of the permit will now be April 23, 1990.

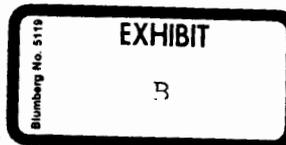
Enclosed is a revised cover page for the permit. If you have any questions, you may call Steve Slaten of my staff at (FTS) 255-5775.

~~Thank you.~~

Sincerely yours,

Allyn M. Davis
Director
Hazardous Waste Management Division

Emel

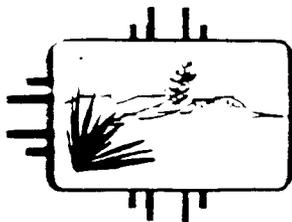


Control #
64-241-90

6H-PS:SLATEN:jb:5-6775:4-3-90:DISK #6:FILE CODE:

CONCURRENCES

SYMBOL	6H-PS	6H-P	6H-P				
SURNAME	GALLAGHER	HONKER	GERSH				
DATE	4/5	4/5	4/5				



New Mexico Health and Environment Department

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.

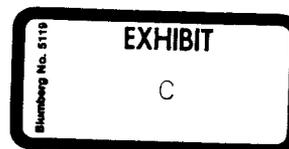
1. "Functional equivalent" language.

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 Alabamians [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



Allyn M. Davis
May 22, 1990
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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
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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.

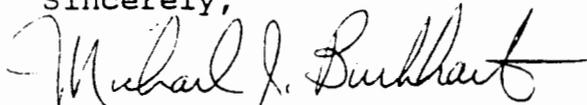
From NMEID's perspective, issuance of the final permit with an effective date constitutes final agency action; therefore, any changes in the permit concerning radionuclide monitoring must comport with the regulations respecting major or minor modifications. Without conceding the propriety of EPA's or 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
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Your prompt response to this letter is kindly requested.

Sincerely,

A handwritten signature in cursive script, reading "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



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 6
145 ROSS AVENUE, SUITE 1200
DALLAS, TEXAS 75202-2703

RECEIVED

JUN 7 1990

OFFICE OF THE SECRETARY

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.

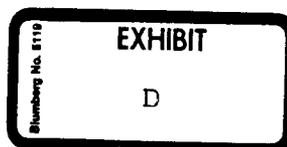
1. "Functional equivalent" language.

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.

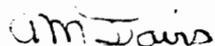
2. Radionuclides Monitoring Language

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)



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 6

1445 ROSS AVENUE, SUITE 1200

DALLAS, TEXAS 75202-2733

VIA MAGNAFAX

Jack B. Tillman
Area Manager
Department of Energy
Los Alamos Area Office
Los Alamos, New Mexico 87544

Re: Change of effective date specified in the Notice of Permit Decision for the HSWA permit for Los Alamos National Laboratory

Dear Mr. Tillman:

The effective date specified in the March 8, 1990 Notice of Permit Decision for the Hazardous and Solid Waste Amendments (HSWA) permit for Los Alamos National Laboratory (the "Notice") is hereby changed to May 23, 1990. The Notice is hereby changed to specify that a person with standing under the provisions of 40 CFR Part 124 may request review of the conditions of the Los Alamos National Laboratory permit decision, under 40 CFR Section 124.19, up to and including May 23, 1990.

Sincerely yours,

A handwritten signature in cursive script that reads "Allyn M. Davis".

Allyn M. Davis
Director
Hazardous Waste Management Division

