THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF NEW MEXICO; and HEALTH AND ENVIRONMENT DEPARTMENT, Environmental Improvement Division, Defendants.	No. CV 90-0276 SC MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56(a), plaintiff United States of America hereby moves for summary judgment on its complaint on the basis that there are no genuine issues with respect to any material facts in this case and the United States, as a matter of law, is entitled to summary judgment. The facts and reasons supporting this motion are set forth in the attached Memorandum in Support of Motion For Summary Judgment and the accompanying Exhibits.

Accordingly, the United States respectfully moves that summary judgment on its complaint be granted.

Dated: October 3, 1990.

Respectfully submitted,

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I hereby certify that one copy of the foregoing "Motion for Summary Judgment" was served this 3rd day of October 1990, by first class mail, postage pre-paid, on the following:

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UNITED STATES OF AMERICA, Plaintiff, v. STATE OF NEW MEXICO; and HEALTH AND ENVIRONMENT DEPARTMENT, Environmental Improvement Division, Defendants.	No. CV 90-0276 SC

MEMORANDUM IN SUPPORT OF UNITED STATES'

MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

By its complaint, the United States, on behalf of the Department of Energy ("DOE"), challenges three conditions imposed in a Hazardous Waste Facility Permit issued by the New Mexico Health and Environment Department, Environmental Improvement Division ("EID"), to the Los Alamos National Laboratory ("LANL").[1] In part, the permit, issued pursuant to the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§ 6901-6992k (1988), and the New Mexico Hazardous Waste Act ("HWA"), N.M. Stat. Ann. 1978, ch. 74, art. 4, §§ 74-4-1 to 74-4-13 (Michie 1989 Repl.) (hereinafter "NMSA 1978 (1989 Repl.)"), imposes three conditions which attempt to regulate the radioactive component of waste burned in an on-site incinerator.

DOE has moved for summary judgment on its complaint. As set forth below, there are no genuine issues of material fact and the United States is entitled to summary judgment as a matter of law. The permit conditions imposed by EID are not within RCRA's limited waiver of sovereign immunity for federal facilities, 42 U.S.C. § 6961, for two reasons, either of which is sufficient to void the permit conditions. First, New Mexico has attempted to regulate the radioactive component of waste, which is not within either RCRA's or HWA's definition of "solid waste." Second, the New Mexico HWA imposes no "requirements" regulating the treatment, storage or disposal of the radioactive component of

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[1] LANL is owned by DOE and operated and managed by The Regents of the University of California pursuant to a contract with DOE.

waste to which the Los Alamos facility is subject. Accordingly, the permit conditions are void and unenforceable.

Although the permit contains approximately 400 pages of conditions and operating procedures for the Los Alamos facility, DOE seeks to challenge only three conditions, identified below, which attempt to regulate the radioactive component of waste. In fact, DOE already conducts an extensive monitoring program at the facility for radioactivity.[2] See Summary Assessment, Environmental Compliance Activity (attached hereto as Exhibit A); Transcript of Proceedings Before Environmental Improvement Division, at p. 48 (July 18, 1989)(attached hereto as Exhibit B). Thus, DOE is not attempting to avoid providing information to the State, but to assure that the state's regulatory authority is asserted in a manner consistent with RCRA and its own Hazardous Waste Act. Accordingly, for the reasons set forth below, the United States' motion for summary judgment should be granted.

I. STATEMENT OF THE CASE

A. Federal Statutory Framework.

Congress enacted RCRA, 42 U.S.C. §§ 6901-6992k, to address the environmental and health dangers arising from solid waste treatment, storage, and disposal. Subtitle C of RCRA, 42 U.S.C.

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[2] Airborne radiation must comply with the requirements of the Clean Air Act, 42 U.S.C. §§ 7401-7642, and is therefore subject to EPA regulation. EPA has set National Emission Standards for Hazardous Pollutants ("NESHAP") for radionuclides which require surveillance for radioactivity and monitoring of emissions. 40 C.F.R. Pt. 61, subpt. H. Further, for those radioactive materials not regulated under the Clean Air Act, DOE has established standards to meet its responsibilities under the Atomic Energy Act. DOE Order 5400.1 (Nov. 9, 1988).

§§ 6921-6939b, requires the Environmental Protection Agency ("EPA") to establish a comprehensive federal regulatory program to assure the proper management of hazardous wastes. The Act directs EPA to identify and list those solid wastes which are hazardous wastes, section 3001, 42 U.S.C. § 6921,[3] and to establish permit requirements applicable to owners and operators of new and existing facilities engaged in the treatment, storage and disposal of hazardous wastes. Section 3005, 42 U.S.C. § 6925.

"Hazardous waste" is defined by statute as a subset of "solid waste." Section 1004(5), 42 U.S.C. § 6903(5). The statute defines "solid waste" as "any garbage, refuse, . . . and other discarded material, . . . resulting from industrial, commercial, mining, and agricultural operations, and from community activities . . . ." Section 1004(27), 42 U.S.C. § 6903(27). However, RCRA specifically exempts "source, special nuclear, or byproduct material," as defined by the Atomic Energy Act ("AEA"), 42 U.S.C. §§ 2011-2296 (1988), from the definition of "solid waste." RCRA section 1004(27), 42 U.S.C. § 6903(27). See also 40 C.F.R. § 261.4(a)(4).[4] As a result of this statutory

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[3] Under section 3001, EPA identifies "hazardous waste" in two ways: (1) by identifying characteristics (specific properties which are generally objectively measured) that render a waste hazardous, i.e., ignitability, corrosivity, reactivity and toxicity, 40 C.F.R. §§ 261.21-.24, or (2) by listing classes or types of wastes as hazardous waste, 40 C.F.R. Pt. 261, subpt. D.

[4] The AEA defines "byproduct material" as:

(1) any radioactive material (except special nuclear

(continued...)

exclusion, such materials are not solid waste and cannot be regulated under RCRA and the Subtitle C program. Rather, they are regulated under the authority of the AEA.

RCRA also contains a limited waiver of sovereign immunity for federal facilities. Section 6001, 42 U.S.C. § 6961, provides, among other things, that any executive agency having jurisdiction over any solid waste management facility or disposal site or engaged in any activity resulting, or which may result, in the disposal or management of solid or hazardous waste "shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural

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[4](...continued)
material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

42 U.S.C.A. § 2014(e). The AEA also defines "source material" as:

> (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

42 U.S.C. § 2014(z). Finally, "special nuclear material" is defined by the AEA as:

> (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

42 U.S.C. § 2014(aa).

(including any requirement for permits or reporting . . .), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements . . . ." (The full text of section 6001 is set out in the Appendix attached hereto).

In addition, RCRA section 1006(a), 42 U.S.C. § 6905(a), specifically provides that RCRA does not "apply to (or . . . authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to . . . the Atomic Energy Act of 1954" except to the extent that such application or regulation is not inconsistent with the requirements of the AEA.

B. Federal Regulatory Background

In 1987, DOE issued a final rule interpreting the AEA definition of "byproduct material" set forth in the AEA. 52 Fed. Reg. 15,937 (May 1, 1987). Under the rule, the RCRA exclusion for "byproduct material" applies to the radioactive component of solid waste. Id. at 15,940; 10 C.F.R. Pt. 962. Thus, "[f]or purposes of determining the applicability of [RCRA] to any radioactive waste substance owned or produced by [DOE] pursuant to . . . its . . . responsibilities under the [AEA], the words 'any radioactive material,' as used in paragraph (a) of this section, refer only to the actual radionuclides[5] dispersed or

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[5] "Radionuclides" is a generic descriptive term referring to all chemical elements which are radioactive, that is, which have unstable nuclei:

> The nuclei of atoms of chemical elements with certain atomic weights are unstable by nature. Such (continued...)

suspended in the waste substance. The nonradioactive hazardous component of the waste substance will be subject to regulation under [RCRA]." 10 C.F.R. § 962.3(b).

C. State Statutory and Regulatory Background

The State of New Mexico is authorized by the United States EPA to issue and enforce RCRA hazardous waste facility permits within the state. 50 Fed. Reg. 1515 (Jan. 11, 1985). New Mexico has implemented this authority through the Hazardous Waste Act, §§ 74-4-1 to 74-4-13 NMSA 1978 (1989 Repl.). This statute adopts RCRA's definition of "hazardous waste" as a subset of "solid waste," § 74-4-3(I) NMSA 1978 (1989 Repl.), and specifically excludes "source, special nuclear, or byproduct material," as defined by the AEA, from the definition of solid waste. § 74-4-3(M) NMSA 1978 (1989 Repl.).

Under the HWA, the Environmental Improvement Board ("the Board") is directed to develop regulations requiring each person owning and operating an existing facility for the treatment, storage or disposal of hazardous waste to have a permit issued pursuant to requirements established by the Board. § 74-4-4(A)(6) NMSA 1978 (1989 Repl.). See also § 74-1-8(A)(13) NMSA 1978 (1990 Repl.). However, the HWA also prohibits the Board

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[5](...continued)
nuclei can disintegrate spontaneously in predictable ways and are said to be radioactive. Atoms with nuclei that disintegrate are called radionuclides.

Proposed Rule and Announcement of Public Hearing, Standards for Radionuclides, 48 Fed. Reg. 15,076, cols. 2 and 3 (Apr. 6, 1983). See also 54 Fed. Reg. 51,655 (Dec. 15, 1989) ("Radionuclide - A type of atom which spontaneously undergoes radioactive decay.")

from adopting regulations for the management of hazardous waste any more stringent than those adopted by EPA pursuant to RCRA. § 74-4-4(A) NMSA 1978 (1989 Repl.).

To execute and administer its Hazardous Waste Act, New Mexico has adopted Hazardous Waste Management Regulations ("HWMR")(1988). With a few exceptions not relevant here, these state regulations incorporate by reference EPA's RCRA regulations at 40 C.F.R. Pts. 260-266, 268, 270. See HWMR §§ 101, 201, 301, 401, 501, 601, 701, 801, 901. Accordingly, they adopt EPA's definition of "hazardous waste," 40 C.F.R. §§ 260.10, 261.3, and "solid waste," 40 C.F.R. §§ 260.10, 261.2(a)(1). Under EPA regulations, "source, special nuclear, or byproduct material" as defined by the AEA are not solid waste subject to RCRA regulation. 40 C.F.R. § 261.4(a)(4). Further, by definition, only solid waste can be a hazardous waste. 40 C.F.R. § 261.3(a). See also 40 C.F.R. Pt. 260, App. I.

The HWA authorizes the Health and Environment Department, Environmental Improvement Division ("EID"), to maintain, develop and enforce regulations concerning hazardous waste as provided in the Hazardous Waste Act. § 74-1-7(A)(13) NMSA 1978 (1990 Repl.). Upon a determination that an applicant has met the requirements adopted pursuant to § 74-4-4 NMSA 1978 (1989 Repl.), the EID Director is authorized to issue a permit. Section 74-4-4.2(C) NMSA 1978 (1989 Repl.).

D. The Los Alamos National Laboratory Permit

In November 1989, the New Mexico EID issued permit number 0890010515-1 for the Los Alamos National Laboratory, pursuant to both RCRA and the New Mexico HWA.[6] The permit allows operation of various units, including an incinerator, for the treatment and storage of hazardous waste at the Los Alamos facility. (The relevant permit conditions are attached hereto as Exhibit C). Among other things, the permit imposes three conditions challenged herein, which attempt to regulate the radioactive component of waste at the facility. Specifically, the permit requires DOE to: (1) survey each batch of waste treated under the permit to determine its radionuclide content (Exh. C-13, permit condition V.C.3); (2) continuously monitor radioactivity from the exhaust stack during any hazardous waste burn (Exh. C-14, permit condition V.E.10); and (3) assure that exhaust gas radioactivity measured during operation under the permit does not exceed the background level[7] by fifty percent at any time or by ten percent for more than one minute (Exh. C-16, permit condition V.F.9).

DOE appealed the permit to the Board, challenging the EID Director's attempt to regulate the radioactive component of the waste stream through the permit. In response, EID filed a motion to dismiss DOE's petition, alleging that New Mexico's HWA

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[6] The permit was issued jointly to DOE and the University of California.

[7] "Background level" is defined as that "level of radiation read when the incinerator is operating at the limits required for hazardous waste treatment but no waste feed occurring measured prior to hazardous waste treatment." Exh. C-16, permit condition V.F.9.c.).

provides that permit decisions should be appealed directly to the New Mexico Court of Appeals and, therefore, the Board had no jurisdiction to hear DOE's Petition for Review.

The Board, on February 9, 1990, ruled that the relevant portion of the Hazardous Waste Management Regulations was ultra vires because the HWA provides that permit decisions by the EID should be appealed directly to the state court of appeals. On February 19, 1990, the Board issued an order dismissing all pending petitions for review before the Board, including DOE's.[8] Order attached hereto as Exhibit D).

On March 19, 1990, the United States, on behalf of DOE, filed the complaint in this matter, pursuant to 28 U.S.C. § 1345, and the federal question statute, 28 U.S.C. § 1331, challenging the three permit conditions. As a purely protective action, one day later, on March 20, 1990, the United States filed a notice of appeal in the Court of Appeals for the State of New Mexico. Subsequently, on April 6, 1990, the United States moved to stay its state court appeal pending resolution of its federal district court complaint.[9] On September 17, 1990, the New Mexico State court granted the United States' motion and stayed the appeal

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[8] DOE does not seek to litigate the Board's finding that the HWMR are ultra vires or the validity of the state appeal procedures.

[9] In its Memorandum in Support of Motion To Stay Proceeding, the United States argued that a stay of its state appeal was appropriate for two reasons: 1) the appeal raises a threshold federal issue more appropriately considered by the federal district court; and 2) comity considerations favor federal adjudication.

pending resolution of this proceeding. (Order attached hereto as Exhibit E).

ARGUMENT

I. STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." While the initial burden is on the moving party to establish the absence of genuine issues of material fact, the Supreme Court has held that the nonmoving party must meet more than a minimal burden in order to prevent entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). Thus, a nonmoving party may "not rest upon the mere allegations or denials of [its] pleading, but [its] response . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288 (1968). Moreover, the existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment. "[T]he requirement is that there be no genuine issue of material fact. Anderson v. Liberty Lobby, 477 U.S. at 248 (emphasis in

original).[10] The proponent's burden is not to negate the opponent's claim, but to show it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Where, as here, there is no genuine issue as to the facts alleged in the complaint, and the United States has demonstrated it is entitled to such relief as a matter of law, summary judgment on the United States' complaint is appropriate.

II. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT IN THIS MATTER

As set forth above, the facts in this case are straightforward and are not in dispute.

1. In November 1989, the New Mexico EID issued Hazardous Waste Facility Permit NM 0890010515-1 for the Los Alamos National Laboratory. (Exh. C).

2. The permit was issued pursuant to both RCRA and the State HWA. (Exh. C-1).

3. The permit, among other things, contained three conditions with respect to an on-site incinerator. (Exh. C-13, C-14, C-16, conditions V.C.3, V.E.10, and V.F.9).

4. Permit condition V.C.3, requires DOE to survey each batch of waste to determine its radionuclide content. (Exh. C-13).

5. Permit condition V.E.10 requires DOE to monitor radioactivity from the incinerator's exhaust stack during any hazardous waste burn. (Exh. C-14).

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[10] The substantive law determines which facts are "material." Id.

6. Finally, permit condition V.F.9 requires DOE to assure that exhaust gas radioactivity measured during operation under the permit does not exceed certain background levels. (Exh. C-16).

7. These conditions, on their face, attempt to regulate the radioactive component of waste treated at the incinerator.

III. THE UNITED STATES IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

In its complaint, the United States alleges that Congress, in RCRA, has not waived sovereign immunity with respect to the state's attempt to regulate the radioactive component of waste at the Los Alamos National Laboratory because: 1) radioactive waste is not "solid waste" as defined by the Act, and therefore is not subject to regulation under RCRA, and 2) the New Mexico HWA and the implementing HWMR impose no "requirements" respecting the treatment, storage and disposal of radioactive waste. Accordingly, as a matter of law, the challenged permit conditions are void and unenforceable.

A. Waivers of Immunity Must Be Strictly Construed In Favor Of The Sovereign

By virtue of the doctrine of sovereign immunity and the Supremacy Clause, U.S. Const. art. VI, cl. 2, federal entities, in the performance of governmental functions, are immune from the requirements of state law unless Congress enacts specific legislation to the contrary. Mayo v. United States, 319 U.S. 441, 448 (1943) (where "governmental action is carried on by the United States itself and Congress does not affirmatively declare

its instrumentalities or property subject to regulation . . ." the federal governmental activity, by virtue of the Supremacy Clause, enjoys sovereign freedom from state regulation); Maun v. United States, 347 F.2d 970, 974 (9th Cir. 1965) ("The general sovereign immunity of the federal Government, its agencies and instrumentalities, from state or local control of its governmental functions, is established under the Supremacy Clause of Article VI of the Constitution."). See also Amalgamated Sugar Co. v. Bergland, 664 F.2d 818, 823 (10th Cir. 1981).

Where Congress has waived sovereign immunity, its waiver is to be "construed strictly in favor of the sovereign." McMahon v. United States, 342 U.S. 25, 27 (1951); Ruckelshaus v. Sierra Club, 463 U.S. 680, 683-85 (1983); United States v. Sherwood, 312 U.S. 584, 590 (1941); Reynolds v. United States, 643 F.2d 707, 713 (10th Cir.), cert. denied, 454 U.S. 817 (1981). A waiver may not be enlarged by implication, Ruckelshaus v. Sierra Club, 463 U.S. at 685-86, and cannot be based on speculation, surmise or conjecture, United States v. King, 395 U.S. 1, 4 (1969). Indeed, "[f]ederal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous." EPA v. California State Water Resources Control Bd., 426 U.S. 200, 211 (1976). See also United States v. Mitchell, 445 U.S. 535, 538 (1980); Keesee v. Orr, 816 F.2d 545, 547 (10th Cir. 1987).

This concept of narrow construction of waivers of sovereign immunity has been strongly reaffirmed by the Supreme Court in

Library of Congress v. Shaw, 478 U.S. 310, 319-20 (1986) ("[S]tatutes placing the United States in the same position as a private party . . . have been read narrowly to preserve certain immunities that the United States has enjoyed historically."). Moreover, this principal applies with equal force to state environmental laws. See Hancock v. Train, 426 U.S. 167, 179-81 (1976); EPA v. California State Water Resources Control Bd., 426 U.S. at 211. Indeed, the United States Court of Appeals for the Tenth Circuit recently affirmed that RCRA's waiver of sovereign immunity is to be strictly construed. See Mitzelfelt v. Department of Air Force, 903 F.2d 1293, 1295-96 (10th Cir. 1990) (holding that RCRA section 6001 does not waive federal sovereign immunity for imposition of state civil penalties).

B. RCRA Has Not Waived Sovereign Immunity For New Mexico To Impose Permit Consitions Regulating the Radioactive Component of Waste In A Federal Facility Permit

1. The Permit Conditions Do Not Regulate "Solid Waste" And Therefore Are Not Within RCRA's Waiver of Sovereign Immunity

Under RCRA section 6001, entitled "Application of Federal, State, and local law to Federal facilities," federal facilities are subject to and must comply with, among other things, all state requirements "respecting control and abatement of solid waste or hazardous waste disposal . . . ." 42 U.S.C. § 6961 (emphasis added). Thus, under section 6001, a federal facility is subject to state regulation where it is, among other things, engaged in the disposal or management of solid or hazardous waste.

Congress has defined what constitutes "solid waste" for purposes of regulation under the Act and determined that it does not include substances regulated under the AEA. 42 U.S.C. § 6903 (27). See supra pages 3-4. Indeed, "[t]he restriction upon the RCRA found in 42 U.S.C. § 6961 merely clarifies the Congressional intent to exclude nuclear wastes from coverage by the RCRA. The AEA still provides exclusive regulation of nuclear wastes." Legal Environmental Assistance Foundation, Inc. v. Hodel, 586 F. Supp. 1163, 1168 (E.D. Tenn. 1984).[11]

Nevertheless, EID has imposed three permit conditions on the Los Alamos incinerator which attempt to regulate the radioactive component of waste. The first challenged condition, V.C.3, requires DOE to survey the radionuclide content of each batch of waste to be incinerated. The second challenged permit condition, V.E.10, requires DOE to monitor any radioactivity which escapes through the incinerator's stack. Finally, EID has required that any radioactive exhaust from the incinerator stack cannot exceed a certain level. Thus, the permit attempts to regulate material which is not "solid waste" under RCRA but which is subject to regulation under the AEA.

In fact, the state has conceded this issue. In a July 18, 1989, "Statement Responding To Particular Concerns Expressed By Members Of The Public Regarding the LANL Mixed Waste Incinerator," (attached hereto as Exhibit F) EID admitted that

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[11] In L.E.A.F., the court held only that the AEA did not prevent regulation of hazardous waste at AEA regulated facilities.

"[t]he State Hazardous Waste Act does not regulate radioactive waste in any way. The Hazardous Waste Act only applies to wastes that meet the legal definition of 'hazardous waste . . . .'" Exh. F-1 (emphasis in original). Since the permit conditions attempt to regulate material which does not meet the statutory definition of hazardous waste, let alone "solid waste," under RCRA, they do not fall within the Act's waiver of sovereign immunity. Accordingly, they are void and unenforceable.

2. The New Mexico Hazardous Waste Act Does Not Impose Any "Requirements" With Respect To The Radioactive Component Of Waste

The limited waiver of sovereign immunity found in RCRA section 6001 subjects federal facilities to state "requirements" with respect to the control and abatement of solid and hazardous waste disposal. 42 U.S.C. § 6961. However, because the State of New Mexico lacks authority to regulate the radioactive component of waste, it can have no "requirements" with respect to the control and abatement of radioactivity associated with the generation, treatment or disposal of any solid or hazardous waste.

Under the New Mexico HWA, EID and its Director have authority to regulate "hazardous waste" within the state and to issue permits governing the treatment, storage, and disposal of such waste. Section 74-4-4.2(C) NMSA 1978 (1989 Repl.). Under the HWA, hazardous waste is a subset of "solid waste." Section 74-4-3(I) NMSA 1978 (1989 Repl.). However, the New Mexico HWA, like RCRA, specifically excludes "source, special nuclear, or

byproduct material" as defined by the AEA from the definition of "solid waste." Section 74-4-3(M) NMSA 1978 (1989 Repl.). Since regulation of the radioactive component of waste is not authorized by either RCRA or the state HWA, the State of New Mexico cannot have any statutory or regulatory "requirements" concerning the treatment, storage or disposal of radioactive waste or radionuclides.[12]

Significantly, as noted above, the State has repeatedly admitted that it has no authority to regulate the radioactive component of waste in a hazardous waste permit. For instance, EID has said that "[t]he Hazardous Waste Act cannot be applied to source, special nuclear or byproduct radioactive wastes. Thus, EID does not have the authority through its Hazardous Waste Program, and through this or any other hazardous waste management permit, to regulate radioactive waste." Exh. F-1, Public Statement.[13] In the same statement, EID further recognized that

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[12] Where, however, such regulation is authorized, courts generally have concluded that "requirements" refer to objective, ascertainable standards and regulations. See Mitzelfelt v. Department of Air Force, 903 F.2d at 1295-96; Florida Dep't of Envtl. Regulation v. Silvex Corp., 606 F. Supp. 159, 163 (M.D. Fla. 1985). See also EPA v. California, 426 U.S. at 215 n.28; Romero-Barcelo v. Brown, 643 F.2d 835, 855 (1st Cir. 1981), rev'd on other grounds, 456 U.S. 305 (1982); New York v. United States, 620 F. Supp. 374, 384 (E.D.N.Y. 1985). Thus, the waivers of sovereign immunity in RCRA and similar environmental statutes "do not allow for the enforcement against federal facilities of state laws that require an ad hoc establishment of standards of conduct by the judiciary." McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1197 (E.D. Cal. 1988).

[13] Moreover, at the EID public hearings on the draft LANL permit, Mr. C. Kelley Crossman, Director of EID's Hazardous Waste Bureau, reaffirmed this view, stating that:

(continued...)

"[n]o RCRA hazardous waste permit can regulate radioactive waste." Exh. F-3.

Since the State's effort to impose conditions regulating the radioactive component of waste is not within its authority, the state HWA does not impose any requirements with respect to the radioactive component of waste to which LANL could be subject. As a result, the State's attempt to impose conditions regulating the radioactive component of waste is outside RCRA's limited waiver of sovereign immunity.

CONCLUSION

As demonstrated above, the Hazardous Waste Facility Permit issued by EID for the Los Alamos National Laboratory imposes three conditions requiring monitoring and controls on the radioactive component of waste burned at the facility. These conditions, by their express language, apply to the treatment of radioactive waste, which is not a "solid waste" under either RCRA

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[13](...continued)

> This permit action is under the state Hazardous Waste Act. The state Hazardous Waste Act does not regulate radioactive waste in any way. The Hazardous Waste Act only applies to wastes that meet the legal definition of hazardous waste. And these are basically chemical wastes.
>
> The Hazardous Waste Act cannot be applied to source, special nuclear or byproduct radioactive wastes. Thus, EID does not have the authority through its hazardous waste program, and through this or any other hazardous waste management permit, to regulate radioactive waste. This draft permit is a permit that only regulates chemical hazardous waste. It does not and cannot regulate radioactive waste.

Exh. B, at pp. 37-38.

or the New Mexico HWA and, therefore, cannot be "hazardous waste" subject to regulation. Moreover, the State HWA has no "requirements" governing the treatment, storage or disposal of the radioactive component of waste. Thus, by imposing conditions on the radioactive component of the waste, EID has attempted to regulate activities which are outside of RCRA's limited waiver of sovereign immunity for federal facilities. As a result, the United States, as a matter of law, is entitled to summary judgment on its complaint and its motion should be granted.

Dated: October 3, 1990.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing Memorandum in Support of Motion for Summary Judgment was served this 3rd day of October 1990, by first class mail, postage pre-paid, on the following:

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Gini Nelson

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

November 2, 1990

NOTICE TO
ALL PERSONS ON THE
LOS ALAMOS NATIONAL LABORATORY
MAILING LIST

Enclosed is a copy of a letter from the Department of Energy (DOE), Los Alamos Area Office, to Region 6 of the Environmental Protection Agency (EPA). As explained in the letter, DOE has modified Resource Conservation and Recovery Act (RCRA) Permit No. NM089001515 (the Permit). The Permit has been modified to include the three paragraphs set forth in the enclosed letter in order to clarify that information regarding radioactive waste required by Module VII of the Permit will be provided pursuant to DOE's responsibilities under the Atomic Energy Act. This language has been added after the first paragraph of page 10 of Module VIII.

As required by 40 CFR Section 270.42, this letter is to notify you of this Class 1 modification to the Permit. Class 1 modifications include informational changes such as this and may be made without the prior approval of EPA. Any person may request the Director of EPA to review this modification, and the Director may reject a Class 1 modification for good cause. Requests for review should be sent to:

Regional Administrator
Environmental Protection Agency, Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

Although Section 270.42 does not establish a time limit for making such a request, EPA has requested DOE to suggest a reasonable time frame during which a person may ask for review of the modification. DOE suggests that any requests for review be made within ninety days of the date of this letter.

Many of the names on the mailing list were gathered from sign-up sheets during the public hearings on the Permit. Some handwriting was difficult to decipher; therefore, your name or address may be incorrect. Please send any corrections to:

Lisa Cummings
Department of Energy
Los Alamos Area Office
Los Alamos NM 87544

DOE appreciates your interest in the Los Alamos National Laboratory. Because your name is on the mailing list, you will be kept informed of certain DOE actions as required by EPA regulations or the Permit.

Sincerely,

Donna C. Koelling
for Jerry L. Bellows
Acting Area Manager

Enclosure

cc:
Allyn M. Davis, Director
Hazardous Waste Management Division
Environmental Protection Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Richard Mitzelfelt, Director
Environment Improvement Division
New Mexico Health and Environment Department
1190 St. Francis Avenue
Santa Fe, NM 87503

RESOURCE CONSERVATION AND RECOVERY ACT OF 1976, Section 6001, 42 U.S.C. § 6961 (1988)

§ 6961. Application of Federal, State, and local law to Federal facilities

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief. The President may exempt any solid waste management facility of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so. No such exemption shall be granted due to lack of appropriation unless the President shall have specifically requested such appropriation as a part of the budgetary process and the Congress shall have failed to make available such requested appropriation. Any exemption shall be for a period not in excess of one year, but additional exemptions may be granted for periods not to exceed one year upon the President's making a new determination. The President shall report each January to the Congress all exemptions from the requirements of this section granted during the preceding calendar year, together with his reason for granting each such exemption.

(Pub. L. 89-272, title II, § 6001, as added Pub. L. 94-580, § 2, Oct. 21, 1976, 90 Stat. 2821, and amended Pub. L. 95-609, § 7(m), Nov. 8, 1978, 92 Stat. 3082.)

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

FEB 1 4 1990

To the Reader:

Enclosed is your copy of the Environmental Surveillance Report for Los Alamos National Laboratory (the Laboratory). This report summarizes the Laboratory's 1988 environmental monitoring and compliance activities. These activities are carried out in order to ensure compliance with environmental standards, to identify at early stages any undesirable environmental trends, and to inform the public about the magnitude of potential health and environmental effects of the Laboratory's operations. This is the latest in a continuing series of environmental surveillance reports published annually by the Laboratory.

The report was prepared by members of the Laboratory's Health, Safety and Environment Division. Since this is an annual report for an ongoing program, we would appreciate your comments or suggestions for improving both the report and the program. If you are not currently on the mailing list for this report, or if personnel changes in your organization have resulted in a need for us to update our mailing list for next year's report, please contact Dr. Paul Schumann of the Environment, Safety and Health Branch at the address provided above, or by telephone at (505) 667-4288. I hope you will find this document useful and informative.

Sincerely,

Jack B. Tillman
Area Manager

Enclosure

SUMMARY ASSESSMENT
ENVIRONMENTAL COMPLIANCE ACTIVITY
U.S. DEPARTMENT OF ENERGY
LOS ALAMOS NATIONAL LABORATORY

BACKGROUND

Los Alamos National Laboratory and the associated residential areas of Los Alamos and White Rock are located in Los Alamos County, northcentral New Mexico, approximately 100 km NNE of Albuquerque and 40 km NW of Santa Fe. Since its inception in 1943, the Laboratory's primary mission has been nuclear weapons research and development. Programs include weapons development, magnetic and inertial fusion, nuclear fission, nuclear safeguards and security, and laser isotope separation. Basic research that supports defense programs includes activities in the areas of physics, chemistry, and engineering. Research on peaceful uses of nuclear energy has included space applications, power reactor programs, radiobiology, and medicine. Major research programs in elementary particle physics are carried out at the Laboratory's linear proton accelerator. Other programs include research in applied photochemistry, astrophysics, earth sciences, energy resources, nuclear fuel safeguards, lasers, computer sciences, solar energy, geothermal energy, biomedical and environmental sciences, and nuclear waste management. The Laboratory is operated for the U.S. Department of Energy (DOE) by the University of California.

It is the Laboratory's policy to provide the highest possible level of protection to the environment from harm that could arise from the Laboratory's operations. To accomplish this policy, line management is responsible for conducting only those operations and activities that can be controlled in a safe and environmentally sound manner. The Laboratory's Health, Safety, and Environment Division maintains a comprehensive program to assist line management and to provide oversight of environmental activities. Laboratory employees are required to observe environmental protection procedures and requirements as specified by their supervisors. In addition, the Laboratory maintains an active program for environmental protection as outlined in the accompanying annual environmental surveillance report.

CURRENT ISSUES AND ACTIONS

- Resource Conservation and Recovery Act

  The Laboratory has 19 hazardous waste management units operating under state and federal regulations promulgated in accordance with the Resource Conservation and Recovery Act (RCRA). These units are located at 8 different sites. In November 1989, the New Mexico Environmental Improvement Division (EID) issued a RCRA permit to the Laboratory that addressed seven of the waste management units. The U.S. Environmental Protection Agency (EPA) is expected to act on its portion of the RCRA permit in early 1990. The remaining 12 units, for the open burning and detonation of explosive wastes, will be addressed in a later permit modification. Closure activities under interim status are occurring at three Solid Waste Management Units (SWMUs), and three more closures are scheduled for implementation in Fiscal Year 1990. The Laboratory negotiated an agreement in principle for two compliance orders with the state of New Mexico, one dating from 1985 and one from 1988.

- Environmental Restoration Program

  The draft RCRA permit will require the Laboratory to follow procedural requirements set forth in the Hazardous and Solid Waste Act Amendments (HSWA) to the original RCRA for assessing and remediating potential release sites that meet the definition of SWMUs. The Laboratory's Environmental Restoration Program (ER) will implement these requirements. The Laboratory's 1989 ER Program consisted of RCRA closure activities; development of a task data base, including archival review, interviews, site reconnaissance, and site mapping; and reconnaissance sampling activities.

  The Laboratory is currently preparing a Laboratory Installation Work Plan, which will be updated annually, to implement assessment and remediation of SWMUs. During this next year, site characterization work plans for 10% of the SWMUs at the Laboratory will be prepared.

- Clean Air Act

  All regulated sources of air pollution are in full compliance with all applicable New Mexico and federal air quality requirements.

Six air quality permits have been issued by the state for existing and planned sources at Los Alamos. Five of these permits are for beryllium processing operations. The sixth permit has been issued for the planned Solid Waste Fired Boiler, however this project may never commence because of unanticipated costs factors. Four of the beryllium sources are operational and in full compliance with all state and federal regulations and the permit conditions. Construction on the other beryllium source has not yet started.

One source of toxic air pollutants, the lithium hydride machine shop, was registered with the state of New Mexico because it exceeded the threshold value requiring registration. No other sources or emissions exceeded the state's threshold levels for registration.

Two existing incinerators belonging to the Laboratory's Design Engineering Division and the Waste Management Group are allowed to operate under the provisions of New Mexico House Bill 59, however only the former is currently operating. Both incinerators comply with all existing state and federal regulations.

Two other operations at Los Alamos are controlled by air quality regulations. The asphalt plant is in compliance with the state regulation controlling particulate matter emissions, and the asbestos demolition and renovation operations meet applicable state and federal regulations.

Radioactive air emissions from DOE facilities are regulated by EPA in accordance with the EPA's National Emission Standards for Hazardous Air Pollutants (NESHAP) program. The Laboratory is in full compliance with EPA's regulations covering these emissions. The maximum individual whole body dose to a member of the public from airborne Laboratory emissions in 1988 (determined by the computer program AIRDOS-EPA as required by EPA) was 9.1 mrem, 37% of EPA's 25mrem/year radiation standard for whole body radiation. The corresponding largest organ dose was 11mrem (testes), 15% of EPA's 75 mrem/year standard for dose to any organ.

Under the NESHAP program, new or modified DOE facilities that will emit radioactivity may need construction approval from the EPA. The Laboratory has applied for and received approval for three such facilities.

- National Environmental Policy Act

The DOE has directed its Operations Offices to review all Memorandums-to-File, based on Action Description Memorandums (ADM), prepared since 1985 in order to ensure procedural compliance with the National Environmental Policy Act (NEPA). The Laboratory participated in the review. The DOE's Albuquerque

Operations Office determined that only one facility needed additional documentation as a result of this evaluation and that Los Alamos' documentation was adequate. After review and approval of an ADM for the proposed Material Science Laboratory at TA-3, DOE requested that the Laboratory prepare an Environmental Assessment (EA). The EA for the Transuranic Waste Work-off Plan has been reviewed by DOE Headquarters; the assessment is currently being revised. The DOE has also requested that the Laboratory provide additional information in the EA for the Weapons Engineering Tritium Facility at TA-16. The DOE Headquarters has determined that the proposed Special Nuclear Materials Laboratory at TA-55 shall be evaluated in an Environmental Impact Statement that will be prepared by the DOE's Albuquerque Operations Office.

- Clean Water Act

The Laboratory has two permits under the Clean Water Act's National Pollutant Discharge Elimination System (NPDES). There were 3 violations of the permit limits reported for the first nine months of 1989 (2 sanitary and 1 industrial). The overall compliance percentage for sanitary and industrial outfalls is 99% and 99.9% respectively. The sanitary waste system is being upgraded to ensure that future violations are minimized.

A NPDES permit compliance inspection was conducted by EPA Region VI during June 14-15, 1989. The inspection resulted in findings of only three minor deficiencies, which were corrected immediately. A similar audit was performed by DOE/AL August 21-25, 1989, and no findings resulted from that inspection.

Spill Prevention Control and Countermeasure (SPCC) Plan activities continued during the first three quarters of 1989, including the completion of designs and the construction of eleven spill control secondary containment facilities at several locations throughout the Laboratory.

- Safe Drinking Water Act

Sampling of water supplies and reporting programs continued throughout the first nine months of 1989. All water supply samples collected and analyzed demonstrated compliance with EPA's National Interim Primary Drinking Water Standards.

- Toxic Substances Control Act

The Laboratory has an EPA permit allowing disposal of polychlorinated biphenyl (PCB) contaminated materials at the TA-54 Area G landfill. This permit requires semiannual reporting of the amounts disposed of. During the period January 1 thru

June 30, 1989, the Laboratory disposed of 5000 kg of PCBs and PCB-contaminated materials at the landfill.

On August 8 and 9, 1989, EPA Region VI and the New Mexico EID jointly conducted an inspection of the Laboratory's PCB program. Deficiencies were found regarding the height of the spill control curbing at the PCB storage facilities and the storage of PCB equipment outside a curbed area. Both deficiencies were immediately corrected.

- Routine Environmental Surveillance

The Laboratory maintains an on-going environmental monitoring program to ensure the protection of the public health and environment as well as environmental compliance. The program samples air, ground and surface waters, foodstuffs, soils, and sediments for all pertinent radionuclides and chemical contaminants. External radiation levels that may result from Laboratory operations are also measured and evaluated. Monitoring stations are located on-site, off-site along the Laboratory perimeter and in surrounding communities, and, to provide background information, in areas distant from the Laboratory. Meteorological and hydrological data are continuously collected in order to evaluate possible transport mechanisms to off-site areas. In 1988, over 25000 chemical and radiochemical analyses were performed in support of the environmental monitoring program. In addition, the Laboratory operates a parallel sampling program that monitors both airborne and waterborne effluents at release points in accordance with regulatory permits and DOE orders.

The effective dose equivalent to the maximally exposed individual from 1988 Laboratory operations from all exposure pathways was estimated to be 6.2 mrem, which is 6% of the DOE's Radiation Protection Standard of 100 mrem/year. The average effective dose to residents of Los Alamos County was estimated to be 0.1 mrem/year, less than 1% of the DOE standard. The doses to the maximally exposed individual and the average Los Alamos resident are less than 2% of the approximately 330 mrem/year that these same individuals are estimated to have received from natural background radiation during 1988.

BEFORE THE

ENVIRONMENTAL IMPROVEMENT DIVISION

STATE OF NEW MEXICO

IN THE MATTER OF:)
)
LOS ALAMOS NATIONAL LABORATORY)
HEARING ON HAZARDOUS WASTE)
PERMIT)

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on to-wit, the eighteenth day of July, 1989, the above-entitled matter came on for hearing before the New Mexico Environmental Improvement Division, taken at the Harold Runnels Building, Santa Fe, New Mexico, at the hour of nine o'clock in the forenoon.

HOWARD W. HENRY & COMPANY
Albuquerque Court Reporters
1300 Central Avenue, S.W.
ALBUQUERQUE, NEW MEXICO 87102
Phone 247-2224

A P P E A R A N C E S

FOR THE DIVISION:

MR. WALT YOUNGBLOOD, Hearing Officer
Deputy Director, Public Health Division
Health and Environment Department
Harold Runnels Building
1190 St. Francis Drive
Santa Fe, New Mexico 87503

MS. GINI NELSON
Assistant General Counsel
Health and Environment Department
Harold Runnels Building
1190 St. Francis Drive
Santa Fe, New Mexico 87503

* * * *

MR. YOUNGBLOOD: If you will please take your seats.

Good morning. My name is Walt Youngblood. I am deputy director of Public Health Division of the Health and Environment Department.

Can everyone hear me?

I have been asked by the director of the Environmental Improvement Division, EID, to be the hearing officer at this hearing this morning. The subject of this public hearing is EID's proposed draft permit, Los Alamos National Laboratory, LANL, Resource Conservation & Recovery Act, RCRA, operating permit NM-00010515-1, to operate a

discuss this statement.

Because there has been much public comment expressing concern and showing some ignorance about what all of the kinds of laws are, we developed a statement which lays out the different laws. You can see which different areas you can go to.

I want to say before I pass this on that I have a back injury. I cannot remain seated for extended periods of time. I will be standing up occasionally. Please do not think that if I stand up it means anything about what anyone is saying at the time. I simply have to move my back.

MR. CROSSMAN: As Ms. Nelson indicated, my name is C. Kelley Crossman and I am the principal writer of this draft permit.

C. KELLEY CROSSMAN

was called as a witness by the EID, and having been first duly sworn, testified upon his oath as follows, to-wit:

MR. YOUNGBLOOD: You may proceed.

MR. CROSSMAN: While people are finding seats I would like to point out that we intend to reprint this particular piece of correspondence and submit it to everyone on our mailing list. I apologize for the quality of the copies this morning. We just got them done and did not have time to proofread them. You will receive a copy printed in a much better manner. Hopefully this week as soon as we can

get our mailing list done.

We have received a lot of comments. We have a copy of the mailing list as it existed on Friday afternoon available at the back of the room. Sometime today please check and see if your name and address is correct or sign the mailing list sign-up sheet and some way indicate to us that you want to be -- to receive a copy of this or any other correspondence -- all future mailings on the Los Alamos permitting process.

With that preliminary statement, I would like to read this. I will try to make this -- I will try to make this as entertaining as possible.

The laws that govern the subject at hand today are complex and difficult to understand. We worked hard trying to reduce it to six pages. Perhaps if we had six hundred pages we could make it a little more understandable. Because of that complexity, please bear with me while I read this. I don't want to inadvertently leave something out that may be important.

With that said, this is the EID July 18th, 1989, statement responding to particular concerns expressed by members of the public regarding the LANL mixed waste incinerator.

EID has received many comments from the public concerning this draft permit. Regrettably, the laws and

regulations that govern a facility as large as LANL are very complex. Several of the comments received by EID reflect that complexity.

As important, the comments reflect concerns some members of the public have regarding operation of the mentioned waste incinerator. In order to better inform the public of the applicable laws and regulations and to better address the public's concern, EID has developed a statement -- this statement -- to explain what this draft permit can and cannot do regarding the mixed waste incinerator.

This is highlighted. You all have it there. This draft permit can only regulate the chemical waste. It cannot regulate -- let me repeat, it cannot regulate radioactive waste.

The federal Atomic Energy Act of 1954 authorized the United States Department of Energy, DOE to all of us, to develop and effectuate its own regulations controlling DOE's management of its own radioactive waste. Other statutes may impose additional requirements on radioactive material handling.

Are you all with me?

This permit action is under the state Hazardous Waste Act. The state Hazardous Waste Act does not regulate radioactive waste in any way. The Hazardous Waste Act only applies to wastes that meet the legal definition of

hazardous waste. And these are basically chemical wastes.

The Hazardous Waste Act cannot be applied to source, special nuclear or byproduct radioactive wastes. Thus, EID does not have the authority through its hazardous waste program, and through this or any other hazardous waste management permit, to regulate radioactive waste. This draft permit is a permit that only regulates chemical hazardous waste. It does not and cannot regulate radioactive waste.

Let me digress a moment from the prepared letter. My concern -- part of the concern is hazardous waste is a specific term defined in the act. It goes beyond your and my understanding of the English language. To you, of course, radioactivity is hazardous. I understand that, but in the context of the act it has a legal specific definition and that's a point that is confusing to a lot of people.

If I may return to the letter, mixed waste regulations:

When a waste has both chemical and radioactive components, it is called a mixed waste. Because of the chemical component of mixed waste, the Hazardous Waste Act does apply to mixed waste. It only applies to the chemical part of the mixed waste, however, okay? The Hazardous Waste Act does not apply to the radioactive part. DOE regulates the radioactive part pursuant to the Atomic Energy Act.

requirements effective December 31, 1988, this incinerator is an existing source and, therefore, is not subject to the new air regulations. Data concerning the incinerator are being collected, however.

EID has the authority under the state Air Quality Control Act to regulate the radioactive emissions from this incinerator, but does not have any implementing regulations to do so at this time.

EPA enforces other air quality programs in the state. The radionuclide emissions from this incinerator have been reviewed by EPA Region VI for compliance with the regulations that govern -- that's 40 CFR part 61, subpart H in technical jargon -- let me repeat that. The radionuclides from this incinerator have been reviewed by EPA Region VI for compliance with the regulations that govern radioactive -- radionuclides at the time under the federal Clean Air Act.

EPA reviewed the emissions from the existing incinerator in November of 1988, as part of reviewing LANL's application for new -- the new proposed mixed waste incinerator.

EID expects to develop new air quality regulations for incineration that will include radionuclide emission limits at the stack as opposed to the fence line. Under EID's current schedule for the development of such

REPORTER'S CERTIFICATE

I, Howard W. Henry, a Certified Shorthand Reporter and Notary Public, DO HEREBY CERTIFY that I did administer the oath to the witnesses herein prior to the taking of this hearing; that I did thereafter report in stenographic shorthand the questions and answers set forth herein, and the foregoing is a true and correct transcription of the proceeding had upon the taking of this hearing.

I FURTHER CERTIFY that I am neither employed by nor related to any of the parties or attorneys in this case, and that I have no interest whatsoever in the final disposition of this case in any court.

WITNESS MY HAND AND SEAL this 25th day of July, 1990, at my offices in Albuquerque, New Mexico.

Certified Shorthand Reporter
and Notary Public
Certificate Number 9

My Commission Expires: March 2, 1993

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I N D E X - (Continued)

E X H I B I T S

HORAN EXHIBITS:	MARKED	ADMITTED
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Hazardous Waste Facility Permit

PERMITTEE: U.S. Department of Energy
University of California Regents
ID NUMBER: NM0890010515

LOCATION: Los Alamos National Laboratory,
Los Alamos, NM 87545
PERMIT NUMBER :
NM 0890010515-1

Pursuant to the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), as amended (42 U.S.C. 6901, *et seq.*), and the New Mexico Hazardous Waste Act (§§ 74-4-1 *et seq.* NMSA 1978), a permit is issued to the U.S. Department of Energy's Los Alamos Area Office and the University of California Regents, doing business as Los Alamos National Laboratory, (hereafter called the Permittee) to operate a hazardous waste incinerator, container storage and tank treatment and storage facility at the location stated above.

The Permittee must comply with all the terms and conditions of this permit. This permit consists of the conditions contained herein including the attachments. Applicable provisions of regulations cited are those which are in effect on the effective date of this permit, New Mexico Hazardous Waste Management Regulations (HWMR-5, as amended 1989). This permit shall become effective in accordance with HWMR-5, Part IX, sections 902.F. and 902.G. and shall run for a period of ten years.

This permit is based on the provisions of HWMR-5. This permit is also based on the assumption that all information contained in the permit application is accurate and that the facility will be operated as specified in the application. The permit application consists of information submitted on March 27, 1986; revised on November 13, 1986 and November 25, 1987; and supplemented on November 8, 1988 and through numerous technical discussions.

Any inaccuracies found in the information may be grounds for the termination or modification of this permit and potential enforcement action.

Signed this 8th day of November, 1989

by _____
Richard Mitzelfelt, Director, N.M.E.I.D.

New Mexico
Health and Environment Department
Environmental Improvement Division

EXHIBIT C-1

CONTENTS

Module VI Storage in Tanks PAGE

FIGURES

TABLES

PERMIT ATTACHMENTS

MODULE V CONTROLLED AIR INCINERATOR OPERATION

V.A. GENERAL CONDITIONS

1. Authorized Unit. The unit is the modified Environmental Control Products model ECP 500-T Controlled Air Incinerator (CAI) located in Technical Area 50, Building 37 and configured as shown in Figure 8.

2. Destruction and Removal Efficiency. The incinerator and associated effluent control system shall be operated to achieve a minimum destruction and removal efficiency (DRE) of 99.99% calculated in accordance with HWMR-5, as amended 1989, Part V, 40 CFR section 264.343(a). A minimum DRE of 99.9999% shall be achieved whenever waste F027 is incinerated.

3. Regulatory Compliance. In accordance with HWMR-5, as amended 1989, Part V, 40 CFR section 264.343(d), compliance with the operating conditions of this permit will be regarded as compliance with HWMR-5, as amended 1989, Part V, 40 CFR section 264.343. Evidence that compliance with these conditions is insufficient to ensure compliance with the performance standards of HWMR-5, as amended 1989, Part V, 40 CFR section 264.343, shall be information justifying permit modification in accordance with HWMR-5, as amended 1989, Part IX, 40 CFR section 270.41 or 270.42 or permit revocation in accordance with HWMR-5, as amended 1989, Part IX, 40 CFR section 270.43.

V.B. WASTE IDENTIFICATION

1. Authorized Wastes.

   a. Only wastes identified in Permit Attachment G. with the process code "T03" in column D.1. "Processes" shall be incinerated at the CAI.

   b. Only wastes generated at the Permittee's facility shall be incinerated. See permit paragraph II.B.2. above.

2. Prohibited Wastes.

   a. The following listed hazardous wastes shall not be incinerated unless chemical analysis shows them to not exceed one hundred micrograms per gram concentration in the waste:

      (i) U121 Trichloromonofluoromethane (Freon 11)

      (ii) U225 Tribromomethane

      (iii) U075 Dichlorodifluoromethane (Freon 12)

   b. Any future listed hazardous waste with a heat of combustion less than 0.24 kilocalories per gram shall not be incinerated unless chemical analysis shows it to not exceed one hundred micrograms per gram concentration in the waste.

c. Wastes generated off-site shall not be incinerated. See permit paragraph II.B.2.above.

3. Physical Form. Wastes in gaseous, liquid, solid, or semi-solid sludge forms may be incinerated.

V.C. WASTE ANALYSIS

1. Waste Analysis Plan. The Permittee shall follow Permit Attachment A. Each knowledge of process determination shall be documented and justified. Each batch of waste shall be analyzed in accordance with Permit Attachment A.4.1.2.

2. Analysis of Waste Blends. Waste blends of previously analyzed materials shall not require reanalysis unless:

a. Physical properties are expected to vary more than five percent (5%) from those of the original feedstock, and

b. Those physical properties cannot be calculated based on previous analytical knowledge of the individual components or blends forming the new mixture.

c. Five percent (5%) of the waste blends not analyzed on an annual basis shall be subject to analysis as a quality control check of the calculated values. Aggreement between analytical data and calculated values of ten percent (10%), based on the analytical data, shall be acceptable. Disagreement shall be investigated for cause and documented in the record, along with appropriate corrective actions. The next waste blend created after a disagreement shall be analyzed to confirm corrective action.

d. Waste blends may not be incinerated prior to receipt of analytical data.

✓ 3. Determination of Radionuclides Content. Each batch of waste treated under this permit shall be surveyed to determine its radionuclide content. Knowledge of Process shall not be used for this survey.

4. Metals Standards. Each batch of liquid waste treated under this permit shall be analyzed to determine its metal content. For each metal, the waste feed rate, in grams/sec, should not exceed that dictated by the emissions screening limits for noncarcinogenic and carcinogenic metals for facilities in complex terrain determined by using the terrain adjusted effective stack height according to the EPA "Guidance on Metals and Hydrogen Chloride Controls for Hazardous Waste Incinerators, Vol. IV, March, 1989," or the succeeding guidance documents. Knowledge of Process analyses may be used on no more than 80% by volume of the wastes treated.

V.D. PRINCIPAL ORGANIC HAZARDOUS CONSTITUENTS

1. Routine Operations. For all hazardous waste burns the following constituents are designated as POHCs unless chemical or physical analysis shows they comprise less than 100 micrograms per gram of the waste:

a. U044 Chloroform

b. U228 Trichloroethylene

c. U226 1,1,1-trichloroethane

d. U211 Tetrachloromethane

2. Bulk-Feed Operations. Whenever the hazardous waste feed contains ten percent by weight or more of any listed hazardous waste, each such constituent is designated a POHC.

V.E. MONITORING

For each hazardous waste burn, the continuous monitoring and/or recording devices below shall be observed hourly by an operator during waste feed operation and the observation recorded in the operating record. For purposes of this requirement, permanent charts which are made a part of the record may be initialed to document such observation. A log identifying the full name associated with the initials shall be included with the record.

1. Flue gas scrubber solution pH, "Process Sump pH Out";

2. Primary Combustion Chamber Temperature, "Lower Chamber Temperature";

3. Secondary Combustion Chamber Temperature, "Upper Chamber Temperature";

4. Waste Feed Rate;

5. Flue gas carbon monoxide content;

6. Secondary combustion chamber oxygen content, "Upper Chamber Oxygen";

7. Combustion air flow rate, "Final Flow Totalizer";

8. Scrubber water recycle flow rate, "Absorber Liquid Flow" and "Quench Liquid Flow".

9. Total hydrocarbon reading from the exhaust stack.

10. Radioactivity from the exhaust stack.

V.F. OPERATION

During hazardous waste feed operations the following operational limits shall be observed:

1. Total Chloride Content. The aggregate chlorine content of the waste plus fuel shall not exceed 99.4 pounds per hour input to the CAI. Each batch of waste shall meet this standard.

2. Waste Feed Rates.

a. Liquid hazardous wastes shall be introduced at a rate not to exceed 1.5 million Btu per hour total thermal input. Total thermal input shall include contributions from auxiliary fuel, hazardous and nonhazardous wastes.

b. Solid hazardous wastes shall be introduced at a rate not to exceed 1.5 million Btu per hour total thermal input. Total thermal input shall include contributions from auxiliary fuel, hazardous and nonhazardous wastes. Of this feed rate, solid hazardous waste mixtures shall not exceed 125 pounds per hour.

3. Venturi Scrubber. The pressure drop across the venturi scrubber shall be a minimum of forty inches W.C.

4. High Efficiency Particulate Air Filters. The pressure drop across both on-line incinerator exhaust gas HEPA filter banks shall be a minimum of one-tenth inch W.C. or alternative equivalent manufacturer's performance specification.

5. Operating Temperatures.

a. The incinerator shall be brought to operating temperature in both the primary and secondary combustion chambers before hazardous wastes are introduced.

b. Primary chamber operating temperature shall be a minimum of 1400 degrees Fahrenheit, measured at the hot duct between the primary and secondary chambers.

c. Secondary chamber operating temperature shall be a minimum of 2000 degrees Fahrenheit, measured at the chamber exit to the high temperature duct.

d. Temperatures shall be maintained above these minimums as long as hazardous wastes remain in the incinerator, except that during an emergency shutdown these temperatures need not be maintained after waste feed is terminated.

6. Effluent Control System Solution.

a. The effluent control system (ECS) scrubber solution shall be recycled to the packed column absorber at a minimum flow rate of 10 gallons per minute.

b. The ECS scrubber solution shall be controlled with either sodium hydroxide or potassium hydroxide to a pH range above 1.0 ± 3%.

7. Combustion Air.

a. Exhaust gas flow shall not exceed :

(i) 3654 pounds per hour during solid or semisolid waste incineration, or

(ii) 3933 pounds per hour during liquid waste incineration.

b. Carbon monoxide concentration, as measured by the continuous recording carbon monoxide analyzer, shall not exceed 100 parts per million by volume, except that for a period not to exceed five minutes, the system may continue to burn waste if the carbon monoxide concentration does not exceed 500 parts per million.

c. Oxygen concentration in the secondary combustion chamber shall be a minimum of seven and one-half percent (7.5%) for solids and six percent (6%) for liquids. Measurement accuracy shall be ± 3%.

8. Total Hydrocarbon.

a. Total hydrocarbon reading in the exhaust gas shall not exceed 20 parts per million corrected to dry stack gas for more than one hour rolling average where the stack gas is sampled at least 4 times per minute.

b. Total hydrocarbon reading in the exhaust gas shall not exceed 100 parts per million for more than one minute.

c. Total hydrocarbon reading in the exhaust gas shall not exceed 500 parts per million for any reading

9. Radioactivity.

a. The exhaust gas radioactivity measured during operation under this permit shall not exceed the background by ten percent (10%) for more than one minute.

b. The exhaust gas radioactivity measured during operation under this permit shall not exceed the background by fifty percent (50%).

c. Background is defined as that level of radiation read when the incinerator is operating at the parameters required for hazardous waste treatment but no waste feed occuring measured prior to hazardous waste treatment.

10. Automatic Shutdown.

a. The Permittee shall install and properly maintain a system of monitors and automatic waste feed cutoff so that hazardous waste feed is shutdown whenever the operating conditions in permit paragraphs V.F.3. through V.F.9. above are not met.

b. Hazardous wastes shall not be reintroduced to the incinerator until the cause of any automatic shutdown is determined and appropriate corrective action is taken.

11. Waste Handling Practices.

a. Wastes to be incinerated shall be stored only at storage areas authorized in permit paragraph III.A. above.

b. Liquid and solid feed preparation operations which take place at the CAI shall be performed in accordance with the provisions of:

(1) Los Alamos National Laboratory Manual, Chapter 1, Health and Safety, Current edition. A copy shall be readily available to the operator.

(2) Permit Attachment J, "Incinerator Operational Safety". A copy shall be readily available to the operator.

(3) The operating manual for the Controlled Air Incinerator. A copy shall be readily available to the operator.

(4) The applicable Operating Instructic n(s), Safe Operating Procedures, and/or Special Work Permit(s) required for the particular operation being conducted. A copy of the applicable document(s) shall be readily available to the operator.

c. Sampling of wastes for analysis in accordance with Permit Attachment A. shall be done at the place of storage or at the incinerator waste feed tanks. Periodic quality control spot sampling may be done elsewhere in the incinerator area at the discretion of the inspector and with the approval of the incinerator supervisor.

V.G. EFFLUENT CONTROL

The incinerator effluent controls shall be operational at all times the incinerator is burning hazardous wastes.

1. Ash Control. Ash resulting from a listed waste burn shall be cemented and disposed of off site as a hazardous waste. Ash resulting from incineration of characteristic wastes or wastes listed solely due to characteristic shall be disposed of as a hazardous waste or analyzed for alternate disposition. If such analysis demonstrates the waste is no longer characteristic as defined in HWMR-5, as amended 1989, Part II, 40 CFR section 261, subpart C, it may be disposed of in accordance with other applicable regulations.

2. Effluent Control System. Effluent control system wastewater and filters shall be disposed of as a hazardous waste in accordance with applicable regulations. "Filters" as used herein applies to both the HEPA filters and the carbon absorber materials. The carbon absorber unit materials shall be replaced at intervals no longer than 2000 operating hours.

V.H. INSPECTION

The Permittee shall inspect the incinerator in accordance with Permit Attachment B. and the requirements below.

1. Spill Kits. The type, presence, location and quantity of spill kits shall be verified and annotated monthly. If spill kits are locked up, the location of access keys shall be verified.

2. Instrumentation. All gauges and instruments shall be inspected for calibration dates prior to incineration of wastes. No instrument or gauge shall be used if it has not been calibrated in accordance with its manufacturers' recommendations.

3. Warning Signs. The legibility and condition of warning signs shall be included in the quarterly inspection. Missing or illegible signs shall be promptly replaced within 24 hours of discovery.

   a. Signs shall be at the entrances to the hazardous waste units. Collocated units may be included within one signed area.

   b. Signs shall say "Danger, Unauthorized Personnel Keep Out" and "Hazardous Waste Storage Area".

   c. Signs shall be in English and Spanish.

   d. Signs on approachable fences shall be spaced no more than 50 feet apart.

4. Automatic Cutoff. The automatic cutoff system shall be tested every 2000 operating hours to demonstrate proper operation.

V.I. RECORDKEEPING

1. Waste History. The incinerator operating record shall include the source, date of receipt, description, quantity and date of incineration for each batch of hazardous waste incinerated.

2. Waste Analysis. Records of waste analysis shall be kept in accordance with permit paragraph II.K.1.a. above.

3. Inspections. Records of inspection shall be kept for three years from the date of the last action taken as a result of the inspection.

4. Automatic Waste Feed Cutoff. Whenever the automatic waste feed cutoff system required by permit paragraph V.F.8. above operates, the cause, time and remedy or repair shall be entered in the operating record. This record shall include the testing or demonstration operations required by permit paragraph V.H.4. above.

5. Effluent Analysis.

   a. Whenever sampling and analysis of the incinerator combustion exhaust or effluent control system scrubber solution are done, the sampling date, individual(s), methods and analytical results shall be entered in the operating record.

   b. The destruction and removal efficiency (DRE) shall be reverified after incinerator modifications affecting the DRE, upon accumulation of eight thousand hours of hazardous waste incineration time or five years after the effective date of this permit, whichever occurs first or if EID determines that new information requires further testing of the incinerator. Subsequent to a modification subject to this paragraph the time calculation shall be restarted.

   c. Results of calculations of the DRE associated with effluent analysis shall be entered in the operating record.

V.J. CLOSURE

The incinerator shall be closed in accordance with HWMR-5, as amended 1989, Part V, Subpart G and Part V, 40 CFR section 264.351, permit paragraphs II.L. and V.J. and Permit Attachment E.

1. Incinerator Components. The waste feed components and combustion chambers, along with interconnecting plumbing, may be steam cleaned with a detergent solution. The spent cleaning solution shall be collected and analyzed for hazardous constituents. If no hazardous constituents are detected, those components may be considered closed. If hazardous constituents are detected, the steam cleaning may be repeated until no detectable hazardous constituents are found.

2. Effluent Control System. The ECS may be drained and flushed with a detergent solution. The spent cleaning solution shall be collected and analyzed for hazardous constituents. If no hazardous constituents are detected, those components may be considered closed. If hazardous constituents are detected, the cleaning may be repeated until no detectable hazardous constituents are found.

3. Waste Storage Tanks. The waste storage tanks may be drained and washed with a detergent solution or steam cleaned. The spent cleaning solution shall be collected and analyzed for hazardous constituents. If no hazardous constituents are detected, those components may be considered closed. If hazardous constituents are detected, the cleaning may be repeated until no detectable hazardous constituents are found.

4. Closure Residues.

   a. All final cleaning solutions used for closure shall be tested for POHCs designated in permit paragraph V.D. above. Solutions showing detectible POHC(s) or hazardous waste characteristics shall be disposed of as hazardous wastes.

   b. Any component not decontaminated in accordance with permit paragraph V.J. above shall be disposed of as hazardous waste.

BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD

STATE OF NEW MEXICO

IN THE MATTER OF
HAZARDOUS WASTE PERMIT
REVIEW PURSUANT TO HAZARDOUS
WASTE MANAGEMENT REGULATION
902(G)

GENERAL ORDER

THIS MATTER came before the New Mexico Environmental Improvement Board (the Board) on February 9, 1990, upon the Board's own motion. On or about July 9, 1989, the Environmental Improvement Board adopted the current Hazardous Waste Management Regulations (HWMR-5). Section 902 of HWMR-5 relates to procedures for granting hazardous waste permits. Section 902(G) is of particular concern to the Board. Section 902(G) provides in relevant part:

> Any person adversely affected by the decision of the Director concerning the issuance, suspension, modification or revocation of a permit may submit a petition for review of the Director's decision by the Environmental Improvement Board.

After hearing the argument of various interested parties and being otherwise fully advised in the matter the board FINDS:

1. That Section 74-4-4(A)(7) NMSA, 1978, requires the Board to adopt regulations establishing procedures for the issuance suspension and revocation of permits, subject to any other provisions of the Hazardous Waste Act.

EXHIBIT D-1

2. That HWMR-5, Section 902(G) was adopted by the Board pursuant to its authority under Section 74-4-4(A)(7) NMSA 1978.

3. That Section 74-4-4.2(G) NMSA 1978 provides in relevant part:

> Any person adversely affected by a decision of the director concerning the issuance, modification suspension on revocation of a permit may appeal the decision by filing a notice of appeal with the court of appeals within thirty days after the date the decision is made....

4. That as an administrative agency, the Board has only those powers and can only act on those matters which are within the scope of the authority granted to it.

5. That the Board may not create a rule or regulation that is not in harmony with its statutory authority nor may it enlarge or modify its authority by enacting rules and/or regulations.

6. That HWMR-5, Section 902(G), is in apparent conflict with Section 74-4-4.2(G) NMSA 1978 Comp.

7. That the enactment of HWMR-5, Section 902(G) was an exercise in excess of the Board's authority pursuant to Section 74-4-4(A)(7) NMSA 1978, and is otherwise ultra vires.

IT IS THEREFORE ORDERED:

1. That all future petitions for review of the Director's decision be commenced in accordance with Section 74-4-4.2(G) NMSA 1978.

2. That all pending petitions for review be and are hereby dismissed by the Board.

3. That this Order of the Board is a final decision of Director, pursuant to HWMR-5, Section 902(F) and for purposes of appealing to the New Mexico Court of Appeals.

Dated: Feb 19th 1990

Travis Dollar
TRAVIS DOLLAR
Chairman

EXHIBIT D-3

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Appellant,

vs. No. 12,190

THE ENVIRONMENTAL IMPROVEMENT DIVISION OF THE NEW MEXICO HEALTH AND ENVIRONMENT DEPT. et al.,

Appellees.

UNITED STATES OF AMERICA,

Appellant,

vs. No. 12,233

THE ENVIRONMENTAL IMPROVEMENT DIVISION OF THE NEW MEXICO HEALTH AND ENVIRONMENT DEPT. et al.,

Appellees.

ORDER

This matter having come before the court on appellants' motions to stay the appeals and this court having considered the memoranda in opposition to the proposed disposition in the calendar notice as well as appellees' responses to the motions to stay and due consideration having been had,

IT IS ORDERED that the motions to stay the appeal are GRANTED until further order of this court. Appellants, the Regents of the University of California and the United States of America, shall file a statement with the clerk of this court by the first Monday of each month, commencing October 1990, to inform this court of the status of the federal proceedings.

The previous order granting the motions to delay filing the record proper continues in effect until further order of this court.

JUDGE

JUDGE

EID JULY 18, 1989 STATEMENT RESPONDING TO PARTICULAR CONCERNS EXPRESSED BY MEMBERS OF THE PUBLIC REGARDING THE [redacted] INCINERATOR

EID has received many comments from the public concerning this draft permit. Regrettably, the laws and regulations that govern a facility as large as LANL are very complex. Several of the comments received by EID reflect that complexity. As important, the comments reflect concerns some members of the public have regarding operation of the mixed waste incinerator. In order to better inform the public of the applicable laws and regulations and to better address the public's concerns, EID has developed a statement to explain what this draft permit can and cannot do regarding the mixed waste incinerator.

THIS DRAFT PERMIT CAN ONLY REGULATE CHEMICAL WASTE IT CANNOT REGULATE RADIOACTIVE WASTE

The federal Atomic Energy Act of 1954 (AEA), authorized the United States Department of Energy ("DOE") to develop and effectuate its own regulations controlling DOE's management of its own radioactive wastes. Other statutes may impose additional requirements on radioactive material handling. This permit action is under the State Hazardous Waste Act. The State Hazardous Waste Act does not regulate radioactive waste in any way. The Hazardous Waste Act only applies to wastes that meet the legal definition of "hazardous waste," and these are basically chemical wastes. The Hazardous Waste Act cannot be applied to source, special nuclear or byproduct radioactive wastes. Thus, EID does not have the authority through its Hazardous Waste Program, and through this or any other hazardous waste management permit, to regulate radioactive waste. This draft permit is a permit that only regulates chemical hazardous waste. It does not and can not regulate radioactive waste.

"MIXED WASTE" REGULATION

When a waste has both chemical and radioactive components, it is called a "mixed waste." Because of the chemical component of mixed waste, the Hazardous Waste Act does apply to mixed waste. It only applies to the chemical part of mixed waste, however. The Hazardous Waste Act does not apply to the radioactive part. DOE regulates the radioactive part, pursuant to the Atomic Energy Act.

STATE AUTHORITY TO ENFORCE THE FEDERAL STATUTE, RCRA

This draft permit is a hazardous waste management permit administered by EID's Hazardous Waste Bureau. EID's legal authority to issue this permit under State law is the Hazardous Waste Act. Ultimately, however, EID's legal authority to issue this permit comes from the federal hazardous waste management statute, named the Resource Conservation and Recovery Act ("RCRA"). Under RCRA, the federal government, through the United States Environmental Protection Agency ("EPA"), gives specific authorizations to a state to enforce certain parts of RCRA. The state then enforces those parts of RCRA in the state instead of EPA.

New Mexico is an "authorized state," that is, New Mexico is authorized by EPA to enforce certain parts of RCRA in New Mexico instead of EPA. This draft permit is a RCRA permit, prepared by EID's Hazardous Waste Program staff to address only those specific parts of RCRA that EPA has authorized New Mexico to enforce. Because Congress has added requirements to RCRA in stages through amendments, EPA is requiring states to submit their requests for authorization in stages. Thus, New Mexico is authorized by EPA to enforce some RCRA provisions, but not other RCRA provisions.

NEW MEXICO DOES NOT HAVE RCRA AUTHORIZATION TO REGULATE THE CHEMICAL PART OF MIXED WASTE

New Mexico is not yet authorized by EPA to regulated the chemical part of mixed waste through its RCRA hazardous waste management program. New Mexico is in the process of applying to EPA for authorization, however.

THIS DRAFT PERMIT IS A RCRA PERMIT

Because New Mexico is not authorized by EPA to regulated the chemical part of mixed waste through its RCRA program, this draft RCRA permit does not authorize LANL to incinerate the chemical part of mixed waste. This draft permit only authorizes the incineration of purely chemical waste in the incinerator.

In order to get a RCRA permit to incinerate mixed waste, LANL will need to develop a mixed waste permit application, and submit it to EID. EID expects LANL to submit this application in the late fall of 1989. The EID Hazardous Waste Program staff will review the

application. After EID has been authorized by EPA to regulate the chemical part of mixed waste under the RCRA hazardous waste program, EID will draft a proposed RCRA permit based on the LANL application, and submit it to the public for public comment, just as this draft permit has been submitted to the public for public comment.

RCRA "INTERIM STATUS"

Interim status" gives temporary authorization to certain facilities to continue their hazardous waste management activities until their applications for final permits can be acted on. RCRA gave this interim status to facilities that were in existence on a certain date and which complied with certain notification requirements. Operations under interim status are regulated by regulations designed for this interim status.

THE LANL INCINERATOR HAS RCRA "INTERIM STATUS"

The LANL incinerator has RCRA "interim status" and is thus authorized to burn chemical waste without a final hazardous waste RCRA permit. This is true for both purely chemical waste and for mixed waste. The temporary permission to burn purely chemical waste will end when EID takes final action on this draft RCRA permit. Then, burning of purely chemical waste will be allowed only pursuant to the permit. The temporary permission to burn the chemical part of mixed waste will end when EID takes final action on a RCRA permit addressing that waste, which EID will not do until after EPA authorizes EID to do so. Then, burning of the chemical part of mixed waste will be allowed only pursuant to that permit.

SUMMARY

Thus, this draft permit does not authorize LANL to incinerate mixed waste, that is, chemically hazardous waste that is mixed with radioactive waste. The draft permit only proposes to authorize the incineration of strictly chemical hazardous waste, and then only under the permit's specified conditions. EID will at a later date propose a draft hazardous waste permit to regulate the incineration of the chemical part of mixed waste. No RCRA hazardous waste permit can regulate radioactive waste.

INDEPENDENT STATE HAZARDOUS WASTE ACT AUTHORITY TO REGULATE RCRA

INTERIM STATUS FACILITIES

EID has two sources of authority under the Hazardous Waste Act. First, EID is authorized to enforce whatever portions of RCRA that EPA has expressly authorized the State to enforce. Second, EID is authorized to enforce all provisions of the Hazardous Waste Act, even if some particular provision has not yet been approved by EPA as part of RCRA authorization. In this second case, EID is acting on solely state authority; it is not acting pursuant to its federal RCRA authority. EID has used this state authority in the past, to deny LANL's request to begin construction of a new mixed waste incinerator until after review and approval of the construction phase.

Interim Status Regulations

Under the Hazardous Waste Act, the incinerator, in so far as it burns mixed waste, has "interim status." It has interim status under both the State's federal RCRA program, and the independent state authority. That means that it has a temporary permit to operate until a final permit, such as this one presently under consideration for purely chemical waste, is considered. In the interim, it is regulated under the regulations designed for the interim period, and not under the regulations designed for final permits.

There are no specific regulations applicable to interim status under either state or federal law addressing the chemical part of mixed waste. EPA intends at this time to regulate all chemical wastes under the same set of regulations.

EID's Hazardous Waste Bureau did not develop any interim regulations independent of those required for the federal RCRA program. EID did not develop interim regulations specifically governing the chemical part of mixed waste under its state authority for several reasons. First, the Hazardous Waste Act prohibits the State from regulating hazardous waste more strictly than RCRA does. EID could not develop regulations covering the chemical part of mixed waste until RCRA covered the chemical part of mixed waste. EPA did not clearly add the chemical part of mixed waste to its RCRA program until July 3, 1986. EID could not have begun the process of promulgating such regulations until after that date.

Second, the process of promulgating regulations is very resource intensive, and EID's Hazardous Waste Program has extremely limited resources. EPA funds 75% of the program and requires that those

monies go only into RCRA-related activities. The remaining 25% is paid out of state monies that are the State's required "match" for getting the EPA grant monies. Thus, the Hazardous Waste Program's budget is restricted to federally-authorized RCRA activities. The program has developed other, extensive regulatory, and statutory, changes in the interim in order to maintain current, and seek new, RCRA authorization. In addition to regulation development, the program must meet inspection, enforcement, and permit commitments to EPA for purposes of maintaining RCRA authorization. There simply have not been enough resources to do everything that EID would like to do, and it chose not to develop interim regulations applying to the chemical part of mixed waste. An important goal of RCRA and the Hazardous Waste Act is to get facilities operating pursuant to permits instead of under interim status. Therefore, developing regulations governing interim status facilities uses the Hazardous Waste Bureau's limited resources less well than developing regulations applying to final permits.

Final Permit Regulations

EPA has indicated that it does not intend to promulgate any final permit regulations specific to the chemical part of mixed waste. EPA has apparently determined that the present regulations governing permits are sufficient to protect the public health and the environment from the chemical part of mixed waste. The State has adopted these regulations.

Thus, EPA will not require EID to develop any additional regulations governing permits specific to the chemical part of mixed waste in order for EID to get and maintain RCRA authorization for the chemical part of mixed waste.

EID is authorized by the Hazardous Waste Act to develop additional regulations applicable to permits dealing with the chemical part of mixed waste. However, under the Hazardous Waste Act prohibition, such regulations could not be stricter than whatever RCRA requires through permits dealing with the chemical part of mixed waste. EID is not presently considering developing any such regulations, but welcomes the public's input on whether EID should.

AIR QUALITY REGULATIONS

Some members of the public have expressed their concern that State or federal air quality requirements may not adequately regulate the incineration of the radioactive part of mixed waste. As previously stated, this draft RCRA permit does not cover any mixed waste

incineration; it is limited to purely chemical waste incineration. Further, no RCRA permit could regulate the radioactive part of mixed waste. The incinerator has interim status that allows it to operate without a final RCRA permit. Operation of the incinerator must also comply with any other applicable laws and regulations, however. Thus, the incinerator will not be allowed to operate if it has failed to satisfy the legal requirements of other relevant state and/or federal programs.

Regarding Air Quality Regulation

EID's Air Quality Bureau reviewed the operation of this incinerator in 1988 and determined that a state air quality permit is not required, because the predicted emissions were below thresholds that require a permit. Under new State toxic air pollutant requirements, effective December, 31, 1988, this incinerator is an "existing source" and therefore is not subject to the new air regulations. Data concerning the incinerator are being collected, however.

EID has the authority under the State Air Quality Control Act to regulate the radioactive emissions from this incinerator, but does not have any implementing regulations to do so at this time. EPA enforces other air quality programs in the State. The radionuclide emissions from this incinerator have been reviewed by EPA Region VI for compliance with the regulations that govern (40 CFR Part 61, Subpart H) radionuclide emissions from DOE facilities, under the federal Clean Air Act. EPA reviewed the emissions from the existing incinerator in November 1988, as part of reviewing LANL's application for a new proposed mixed waste incinerator.

EID expects to develop new air quality regulations for incineration, that will include radionuclide emission limits at the stack as opposed to the fence line. Under EID's current schedule for the development of such regulations, a public hearing on the proposed regulations is expected next spring. In the interim, the Air Quality Bureau will be developing and taking to hearing regulations governing municipal and medical waste incineration.