

LANL red 1991

01 '91 AEA

New Mexico Health and Environment Department

ASWA 91
II

January 30, 1991

ALSO VIA FAX

R.E. Layton, Jr.
Regional Administrator
Environmental Protection Agency, Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

Re: **Permit No. NM 089001515**
Protest by State of New Mexico

Dear Mr. Layton:

By letter dated November 2, 1990, the U.S. Department of Energy ("DOE") and the Regents of the University of California ("UC") as owner and operator, respectively, of the Los Alamos National Laboratory ("LANL"), gave notice pursuant to 40 CFR § 270.42 of a Class I modification of Permit No. 089001515 ("the Permit"). The New Mexico Health and Environment Department ("NMHED") objects to DOE's and UC's characterization of the modification as a Class I change and requests your review and rejection of the modification pursuant to 40 CFR § 270.42(a)(1)(iii). Alternatively, NMHED requests that you require additional language in the Permit to clarify the otherwise substantial confusion and uncertainty created by DOE's and UC's "informational" change, if you are unable to reject the modification entirely.

THE MODIFICATION

DOE and UC have inserted the following into LANL's Permit:

Subsection 1004(27) of RCRA, 42 U.S.C. Subsection 6903(27), excludes source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954 (AEA), as amended, 42 U.S.C. 2011 et seq., from the definition of solid waste as that term is defined in RCRA. **Accordingly, such excluded radioactive wastes are not subject to RCRA and are not regulated in this permit. However, this permit provides for monitoring and reporting of radioactive constituents at Solid Waste Management Units (SWMUs)**

DOE agrees to provide such information pursuant to its health and safety responsibilities under the AEA.

DOE's November 2, 1990 Notice letter, Enclosure at 1-2 (Exhibit



LANL REP '91

AL

A) (**emphasis added**).

DOE's and UC's Characterization of Modification

DOE and UC state:

The Permit has been modified ... 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.**

Exhibit A at 1(**emphasis added**).

This change in the Permit is necessary in order to help explain **why the Permittee will be providing the U.S. Environmental Protection Agency (EPA) with data** regarding radioactive materials at the Los Alamos National Laboratory.

Exhibit A, Enclosure at 2(**emphasis added**).

The Class 1 modification language ... is for informational purposes only and **does not make any changes whatsoever** in the action which the Permittee is required to perform under the permit.

Exhibit A, Enclosure at 2(**emphasis added**).

POINT I: THE MODIFICATION IS SUBSTANTIAL AND MAY NOT BE MADE PURSUANT TO CLASS I PROCEDURES

The modification substantially affects or may affect DOE's and UC's performance of activities under the Permit and the ultimate enforceability of the Permit. It does or may substantially affect pending litigation among DOE, UC and the State of New Mexico on the State-issued portion of LANL's RCRA permit. The modification is not merely "informational" and cannot be made pursuant to Class I procedures.

A. Background: Permit Modification Requirements

In the Preamble to Permit Modifications For Hazardous Waste Management Facilities, Final Rule, EPA defines Class I modifications as follows:

Class 1 modifications cover changes that are necessary to correct minor errors in the permit, to upgrade plans and

records maintained by the facility, or to make routine changes to the facility or its operation. They do not substantially alter the permit conditions or significantly affect the overall operation of the facility. Generally, these modifications include the correction of typographical errors; necessary updating of names, addresses, or phone numbers identified in the permit or its supporting documents; upgrading, replacement, or relocation of emergency equipment; improvements of monitoring, inspection, recordkeeping, or reporting procedures; updating of sampling and analytical methods to conform with revised Agency guidance or regulations; updating of certain types of schedules identified in the permit; replacement of equipment with functionally equivalent equipment; and replacement of damaged ground-water monitoring wells. The specific modifications that fall into Class 1 are enumerated in Appendix I to 40 CFR Part 270.

Preamble to Permit Modifications For Hazardous Waste Management Facilities, Final Rule, 53 Fed. Reg. at 37,914-15 (1988).

EPA established procedures for permittees to use if a specific permit change is **not** included in the enumerated changes. As discussed in the Preamble to the Final Rule:

[A] permittee wishing to make a permit modification not included in Appendix I can submit a Class 3 modification request, or alternatively ask the Agency for a determination that Class 1 or 2 modification procedures should apply. In making this determination, the Agency will consider the similarity of the requested modification to modifications listed in Appendix I, and will also apply the general definitions of Class 1, 2, and 3 modifications.

Preamble to Permit Modifications For Hazardous Waste Management Facilities, Final Rule, 53 Fed. Reg. at 37,919. See also 40 CFR § 270.42.(d).

Under EPA's established standards, the modification does not fit the definition of a Class I "informational" change.

DOE and UC state that the modification is "informational" and that it "does not make any changes whatsoever" in the actions they must perform under the Permit. In fact, it **changes the authority** under which DOE and UC will perform the actions, leaves uncertain future compliance with the Permit, and undercuts the enforceability of the

Permit. Insertion in the Permit of language that ties compliance to statutory authority over which EPA has no control does more than merely provide "information" such as the change of a contact person designation. This is not a routine or administrative matter. DOE and UC are changing the basis of their regulated performance while at the same time they deny RCRA authority over certain of LANL's hazardous waste activities.

B. DOE's and UC's Challenge of the Federal Permit

This modification is explicitly tied to settlement of an administrative appeal of the Permit ("the Federal appeal").¹ DOE and UC have asserted in the Federal appeal that certain permit conditions impermissibly "regulate" radioactive waste and they argue that EPA **may not require the actions under RCRA**. Now, DOE and UC have inserted in the Permit as "informational" the statement that they will perform the challenged permit activities, but that performance will be **pursuant to the Atomic Energy Act ("AEA")**.

Clearly, DOE and UC still reject EPA's authority under RCRA to require the original permit conditions. If they in fact now accede to RCRA's authority, there would be no "need" to insert as "information" the statement that the activities will be performed pursuant to a **different authority, i.e., the AEA**.

The modification masks DOE's and UC's real intent to resist EPA's RCRA authority. That may not be a **practical** problem as regards the Permit **at this time**, but, if it is not a problem, and NMHED does not concede that it is not a problem, it is so for only so long as the AEA requirements meet the minimum requirements of RCRA and for only so long as the RCRA requirements do not conflict with the AEA. If either the AEA or the RCRA requirements change on this issue, there may be substantial conflict over DOE's and UC's performance and EPA's enforcement authority.

Resolution of EPA's authority to require the challenged Permit conditions under RCRA should not be put off nor obscured under the guise of a Class I modification. It is a misuse of the Class I procedures. The misuse will or may lead to later problems with use

¹ DOE and UC dispute the authority of the EPA to require radionuclide monitoring in LANL's Federal-RCRA permit; this purported Class I modification is how they propose to settle their dispute with EPA. See In re: Los Alamos National Laboratory, RCRA Appeal No. 90-12; and Exhibit A, Enclosure.

of the procedures, with this Permit, and with other permits.

C. DOE's and UC's Challenge of the State Permit

DOE and UC are concurrently challenging RCRA's authority to require similar permit conditions in LANL's State-issued RCRA permit.² On October 4, 1990, following DOE's September 7, 1990 letter to EPA-Region VI formalizing DOE's proposal to make this "informational" modification to the Permit in settlement of the Federal appeal, DOE filed for summary judgment in the federal district court case against the State of New Mexico. DOE's motion asserts that RCRA does not authorize New Mexico's requirements that include LANL verifying that there is no radioactive waste mixed with its hazardous waste disposal operations.

DOE and UC with this purported Class I modification have not changed their position. The modification is not "informational;" it is substantive. It can not be accomplished by the Class I modification procedure.

D. There has been no showing that DOE and UC requested or that EPA considered and determined how to classify this modification.

The modification does not meet the definition of a Class I change. Thus, DOE and UC should have submitted the proposal as a Class III modification. They have not done so. They should have requested EPA to make a determination as to the appropriate classification. They have not done so. There is no record of compliance with the § 270.42(d) determination requirements. There are only settlement negotiations between DOE and EPA. Exhibit A, Enclosure. Mr. Davis' apparent decision to accept the Class I designation for settlement purposes is not a § 270.42(d) determination.

POINT II: ALTERNATIVELY, IF EPA IS UNABLE TO REJECT THE CLASS I MODIFICATION, EXPLICIT LANGUAGE SHOULD BE ADDED.

With this modification, DOE and UC are free to assert that RCRA

² Regents of the University of California v. The Environmental Improvement Division of the New Mexico Health and Environment Department, No. 12190 (N.M.Ct.App. filed Mar. 12, 1990); United States of America v. State of New Mexico and the Health and Environment Department, Environmental Improvement Division, No. 12233 (N.M.Ct.App. filed Mar. 20, 1990); and United States v. State of New Mexico and Environmental Improvement Division, No. 90-0276SC (D. N.M. filed Mar. 19, 1990).

January 30, 1991
Page 6

cannot require the activities the Permit is conditioned upon. They do assert this position in the pending litigation over the State-Permit. EPA should not aid DOE's and UC's position. At a minimum, if the modification is not rejected as a Class I "informational" change, EPA should require DOE and UC to add an explicit acknowledgment that EPA may require such actions in the Permit pursuant to RCRA and that they will comply with the Permit requirements as authorized by RCRA.

Respectfully submitted,

HEALTH AND ENVIRONMENT DEPARTMENT
OFFICE OF GENERAL COUNSEL

By:


GINI NELSON
Assistant General Counsel
1190 St. Francis Drive, Room N4050
Santa Fe, New Mexico 87503

(505) 827-2990

ATTORNEY FOR NEW MEXICO HEALTH AND
ENVIRONMENT DEPARTMENT

Attachments

cc: Michael Burkhart, HED Deputy Secretary
Kirkland Jones, EID Deputy Director
Kathy Sisneros, EID Hazardous and Radioactive Waste Bureau
Chief
Boyd Hamilton, EID Hazardous Waste Program Manager
Elizabeth Gordon, EID Hazardous Waste Permit Supervisor
Jerry L. Bellows, DOE, Los Alamos Area Office, Acting Area
Manager