

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

FILED  
UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA and  
REGENTS OF THE UNIVERSITY OF  
CALIFORNIA,

Plaintiffs,

vs.

No. CIV 90-027

STATE OF NEW MEXICO and  
NEW MEXICO ENVIRONMENT  
DEPARTMENT,

Defendants.



ANSWER

Defendants, State of New Mexico and New Mexico Environment Department ("NMED")<sup>1</sup>, answer the Complaint For Declaratory Relief as follows:

NATURE OF CASE

1. Defendants admit the allegations in the first sentence in Paragraph 1. Defendants deny the allegation in the second sentence of Paragraph 1 that the permit conditions "attempt to regulate the radioactive component of waste", and further deny the remainder of that sentence and the third sentence in Paragraph 1.

2. Defendants admit the allegations in Paragraph 2.

JURISDICTION AND VENUE

3. Defendants admit the allegations in Paragraph 3.

4. Defendants admit the allegations in Paragraph 4.

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<sup>1</sup>The New Mexico Environment Department succeeds to the interest of the Environmental Improvement Division of the New Mexico Health and Environment Department pursuant to Laws 1991, Ch. 25, § 4. See Fed. R. Civ. P. 25.



PARTIES

5. Defendants admit the allegations in Paragraph 5.

6. Defendants admit the allegation in Paragraph 6.

7. Defendants admit the allegations in Paragraph 7.

Defendants affirmatively state that the NMED is the successor to the Health and Environment Department, Environmental Improvement Division ("EID"). Laws 1991, Ch. 25, §§ 4 and 29.

STATUTORY AND REGULATORY BACKGROUND

8. Defendants admit the allegations in Paragraph 8 as far as they state general goals and purposes of the Resource Conservation and Recovery Act ("RCRA").

9. Defendants admit the allegations in Paragraph 9.

10. Defendants admit the allegations in Paragraph 10.

11. Defendants admit the allegations in Paragraph 11.

12. Defendants admit that the federal Department of Energy ("DOE") promulgated regulations as stated in Paragraph 12, and that the allegations in Paragraph 12, and that the allegations in that Paragraph accurately reflect the content of DOE's regulations. Defendants deny that DOE's regulations "clarify" the definition of "byproduct material" or DOE's obligations under RCRA as alleged in that Paragraph.

13. Defendants admit the allegations in Paragraph 13.

14. Defendants admit that states may obtain interim authorization to administer all or part of the RCRA hazardous waste program, as alleged in Paragraph 14, but deny Plaintiffs' allegation that such authorization occurs where the state program

is "'substantially equivalent' to the federal regulations." Defendants affirmatively state that interim authorization is granted in accordance with 42 U.S.C. § 6926(c)(1) when the state program is substantially equivalent to the federal program. Defendants admit that a state may receive final authorization to administer and enforce a hazardous waste program under RCRA, but deny that final authorization is based on being "equivalent" and "consistent" with the federal program. Defendants affirmatively state that final authorization is granted unless the Administrator of the federal Environmental Protection Agency ("EPA") makes findings in accordance with 42 U.S.C. § 6926(b).

15. Defendants deny the allegation in Paragraph 15 that EPA promulgated "regulations" governing mixed waste. Defendants state that EPA issued a "notice" on July 3, 1986, expressly stating that "EPA is not promulgating a regulation today." 51 Fed. Reg. 24,504, n.2 (1986). Defendants admit the remaining allegations in the Paragraph.

16. Defendants admit that RCRA contains a waiver of sovereign immunity as alleged in Paragraph 16, but deny that the waiver is "limited".

17. Defendants admit the allegation in Paragraph 17 that they are authorized to issue and enforce RCRA hazardous waste facility permits within the state. Defendants affirmatively state that they are authorized to take actions concerning hazardous waste transport, storage and disposal in addition to issuing and enforcing permits. Defendants deny the allegation in the Paragraph

that the State is not authorized to regulate the hazardous component of "mixed waste". Defendants affirmatively state that EPA granted the State of New Mexico final authorization to regulate the treatment, storage and disposal of "mixed waste" under RCRA. 55 Fed. Reg. 28,397 (1990).

18. Defendants admit the allegations in Paragraph 18.

19. Defendants admit the allegations in Paragraph 19.

20. Defendants admit the allegations in Paragraph 20.

#### FACTS

21. Defendants admit the allegations in the first two sentences in Paragraph 21. Defendants admit that the permit imposes conditions on DOE, but deny Plaintiffs' recitation of the permit conditions. Further, Defendants state that the permit imposes conditions beyond those enumerated in the Complaint.

22. Defendants admit the allegations in Paragraph 22, except that Defendants deny the allegation in the first sentence that the permit conditions "attempt to regulate the radioactive component of the waste stream".

23. Defendants admit the allegations in Paragraph 23.

#### FIRST CAUSE OF ACTION

24. Defendants' responses set forth in Paragraphs 1 through 23 are restated and incorporated herein by reference.

25. Defendants admit the allegations in Paragraph 25.

26. Defendants admit that RCRA contains a waiver of sovereign immunity as alleged in Paragraph 26, but deny that the waiver is "limited".

27. Defendants admit the allegations in Paragraph 27.

28. Defendants admit the allegations in Paragraph 28.

29. Defendants admit the allegations in the first two sentences of Paragraph 29, but deny the allegations in the last two sentences of the Paragraph.

30. Defendants admit the allegations in Paragraph 30.

31. Defendants admit the allegations in the first two sentences of Paragraph 31, but deny the remaining allegations of the Paragraph.

#### SECOND CAUSE OF ACTION

32. Defendants' responses set forth in Paragraphs 1 through 31 are restated and incorporated herein by reference.

33. Defendants deny the allegations in Paragraph 33.

#### DEFENSES

1. Permit conditions V.C.3, V.E.10 and V.F.9. are "requirements. . . respecting control or abatement of solid waste or hazardous waste disposal". Therefore, Congress has waived immunity concerning those conditions in RCRA, 42 U.S.C. § 6961.

2. The activity for which the permit was issued involves the discharge of air pollutants as defined in the federal Clean Air Act ("CAA"), 42 U.S.C. § 7602(g). The permit conditions enumerated in Paragraph 1 above are "requirements [and/or administrative authority] . . . respecting the control and abatement of air pollution" under the CAA. Therefore, Congress has waived immunity for those conditions in the CAA. 42 U.S.C. § 7418(a).

3. To the extent that Paragraph 3 of Plaintiffs' Prayer for

Relief may seek a declaration that the permit conditions exceed the statutory authority granted Defendants by the New Mexico Hazardous Waste Act, Defendants state that the Director of EID issued the permit under the authority § 74-4-4.2.C NMSA 1978. Section 74-4-4.2.C NMSA 1978 is not limited by the provisions of § 74-4-4.A NMSA 1978 that regulations of the Environmental Improvement Board be at least as stringent but no more stringent than the federal regulations under RCRA.

WHEREFORE, Defendants pray that this Court dismiss Plaintiffs' Complaint and grant Defendants their costs in defending this action and such other relief as this Court deems just and proper.

Respectfully submitted,

TOM UDALL  
ATTORNEY GENERAL

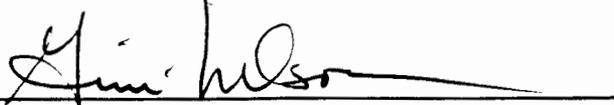
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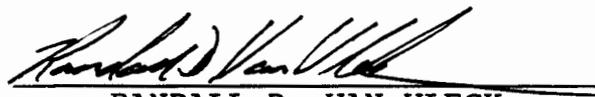
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing ANSWER  
was mailed on this 4th day of April, 1991, to the following:

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RANDALL D. VAN VLECK

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BEFORE THE  
ENVIRONMENTAL IMPROVEMENT DIVISION  
STATE OF NEW MEXICO

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

COPY

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.

EXHIBIT SIX

1 third category in the middle where both are present in the  
2 container.

3 Q And they cannot --

4 A And --

5 Q -- be separated?

6 MS. NELSON: Please --

7 MR. YOUNGBLOOD: Counsel, please give him a chance to  
8 answer.

9 A It would depend on the physical nature of that  
10 material as to whether or not those could be separated. As  
11 a practical matter, the answer may well be, no. As a  
12 scientific matter, given a properly equipped laboratory or  
13 processing plant, it's entirely possible that radioactive  
14 materials could be separated from the chemical constituent.

15 Q Now, sir, in preparing this permit and in  
16 reviewing the application for the permit, did you consider  
17 the effect of nuclear waste on various chemical wastes,  
18 chemical or mixed, on chemical waste?

19 A No, I did not. That is outside the scope of this  
20 permit.

21 Q Sir, is it outside the scope of the permit? Sir,  
22 if those wastes were to affect chemical waste, wouldn't that  
23 be within your authority?

24 A If you refer back to my analogy of separation of  
25 your household trash, once you have separated your household

AFFIDAVIT

State of New Mexico            )  
                                  )        SS  
County of Santa Fe            )

I, A. Elizabeth Gordon, being duly sworn and upon personal knowledge, depose and state:

1. I am currently employed by the New Mexico Environment Department (NMED) as a Water Resource Specialist III and am the Permitting Supervisor in the Hazardous and Radioactive Waste Bureau located at 1190 St. Francis Drive, Santa Fe, Santa Fe County, New Mexico. I have been employed by the NMED for over four years. As part of my employment responsibilities, I supervise the RCRA hazardous waste management permitting section in New Mexico. I am responsible for writing hazardous waste management permits and for evaluating public comments concerning such permits. I make recommendations to the Secretary of the NMED concerning any comments received regarding draft permits, amendments to draft permits and the issuance of permits to facilities.
2. Kelley C. Crossman wrote the draft and final operating Hazardous Waste Management Permit (the "Permit") for Los Alamos National Laboratories (LANL), but left employment at the Environmental Improvement Division (EID) of the New Mexico Health and Environment Department (predecessor to NMED) before the operating Permit was issued. Prior to the issuance of the operating Permit in November 1989, Mr. Crossman and I discussed the operating Permit and the intent of the provisions added to the draft Permit in response to comments received during the public comment period which include the three challenged Permit Conditions.

I familiarized myself with the permitting process, the terms and conditions of the permit and the rationale justifying the permit conditions. After reviewing all the relevant information, I recommended that the Director of EID issue the permit as prepared by Mr. Crossman and edited by me. The Permit was issued to the United States Department of Energy (DOE) and the University of California, which operates LANL, in the same form as I recommended to the Director of EID.

3. The Permit contains approximately 400 pages of requirements concerning LANL's hazardous waste management

operations.

4. LANL is a generator of hazardous waste according to the information provided by LANL in its applications for a Hazardous Waste Management Permit (Exhibit One).
5. Occasionally hazardous waste including, for example, spent solvents, has been mixed with radioactive waste which is not destined for immediate reuse. (Various documents including, but not limited to, the July 1989 brochure "Hazardous Waste Incineration at Los Alamos National Laboratory," Community & Public Affairs brochure LALP-89-30 (Exhibit Two, page one).
6. I know from the same brochure referenced in paragraph five(see page two) and from the DOE letter to Mr. Michael Horan ( Exhibit Three) that the Controlled Air Incinerator (CAI) is used to incinerate other materials than hazardous waste such as purely radioactive waste and PCBs.
7. Permit Condition V.B.1.a. allows the incineration of only hazardous waste under the authority of this Permit.
8. The intent of Permit Condition V.C.3. was to ensure that Permit Condition V.B.1.a. is adhered to; to ensure that only hazardous waste is burned and that no purely radioactive or mixed waste is inadvertently or surreptitiously incinerated as hazardous waste under this Permit.
9. Permit Conditions V.E.10. and V.F.9. were included in order to gather information regarding the incineration process because the CAI is used to incinerate hazardous waste as well as radioactive and mixed waste.
10. Other reasons for including Permit Conditions V.E.10. and V.F.9. are:
  - a. Incineration does not destroy the radioactivity, trace metals, or reduce the rate of radioactivity; it only changes the chemical and physical forms of the radionuclides. (Exhibit Two, page one; Exhibit Four, page 1-27.)
  - b. Incineration can result in a process known as enrichment. This is the process by which volatilized radionuclides will condense onto suspended particles present in the exhaust stream of the incinerator forming radioactive

particulates which may have higher specific activities than the waste itself (Exhibit Four, page 1-28).

- c. Additionally, if the gases containing volatilized radionuclides are cooled, the vapors formed may condense onto surfaces or into components of the incinerator. Likewise, ash may be deposited within various parts of the incinerator system (Exhibit Four, pages 1-28, 1-31, 32). LANL's operating experience has shown that such deposition does occur in the CAI in the secondary chamber, quench, absorber columns and scrubber solutions (Exhibit Five, page five).
  - d. Burning of radioactive and mixed wastes can result in the deposition of radioactive vapors and ash in various parts of the CAI other than the ash collection bin and they remain in the CAI even after the ash collection bin is emptied between burns. They will be present during a hazardous waste burn. It is possible that either the ash or residue could be emitted during a strictly hazardous waste burn. Such a possibility resulted in the public asking, if in preparing the Permit and in reviewing the application for the Permit, EID had considered the effect of nuclear waste on various chemical wastes, chemical or mixed, on chemical waste was considered (Exhibit Six, page 171, lines 15-18). Because of this concern, Permit Condition V.E.10., which requires monitoring for radioactivity from the exhaust stack, was added. This information is needed in order to determine whether or not radioactive ash entrained in the CAI is released during a strictly hazardous waste burn.
- 11. The monitoring of stack emissions for radionuclides was required to determine if any radioactivity is being emitted during a strictly hazardous waste burn.
  - 12. The technical standards for incinerators are codified in the New Mexico Hazardous Waste Management Regulations (HWMR-5, as amended 1989)(Exhibit Seven). Pt. V, 40 CFR section 264.323 requires that an incinerator must be designed, constructed and maintained so that when in operation certain performance standards are

- met. These standards are set based on analyses of potential risks to health or the environment and cover emissions of designated organic compounds, hydrogen chloride and particulate matter (Exhibit Eight, pages 13-14). The destruction and removal efficiency (DRE) is one such performance standard. In order to ensure that the DRE is maintained during a hazardous waste burn, operational limits for incineration parameters are specified in the permit. However, the DRE performance standard is an inappropriate one for radioactive wastes because radiation is not destroyed by the incineration process (Exhibit Four, page 1-30).
13. Permit Conditions V.E.10. and V.F.9. were included to ensure that the operation of the CAI during hazardous waste burns posed no threat to human health or to the environment due to the release of radioactive ash or other residue entrained in the CAI from previous burns.
  14. The Permit requires LANL to monitor for other operating parameters, e.g. flue gas scrubber solution pH, flue gas carbon monoxide content, secondary combustion chamber oxygen content, total hydrocarbon reading from the exhaust stack.
  15. The extensive monitoring program for radioactivity at the facility (Memorandum in Support of United States' Motion for Summary Judgment, page 3 and Exhibits A and B) is that required by the Federal Clean Air Act. In the standards promulgated for emissions of radio-nuclides other than Radon from Department of Energy Facilities, real-time monitoring is not specifically required (Exhibit Nine, pages 51695-51699). Consequently, the information required by Permit Conditions V.E.10 and V.F.9. is not ensured by the Clean Air Act monitoring requirements.
  16. The Permit Conditions apply only with regard to batches of waste LANL determines to be hazardous.
  17. If a batch of waste is radioactive or mixed, the Permit by its terms does not apply.

FURTHER AFFIANT SAYETH NOT.

*A. Elizabeth Gordon, Ph.D.*  
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A. Elizabeth Gordon, Ph.D.

SUBSCRIBED AND SWORN to before me this 26th day of April 1991, by A. Elizabeth Gordon, Affiant.

*Linda M. Romero*  
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NOTARY PUBLIC

My Commission Expires:

*August 26, 1992*  
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