

4-26-91

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

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

Plaintiffs,

vs.

No. CIV 90-02768C

STATE OF NEW MEXICO and
NEW MEXICO ENVIRONMENT
DEPARTMENT,

Defendants.

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT AND IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

A. Background: This action challenges certain conditions in a hazardous waste management permit issued by the State of New Mexico pursuant to the requirements of state law.

Plaintiffs challenge three of many conditions in a permit issued by Defendants pursuant to RCRA and the New Mexico HWA. The permit allows Plaintiffs to legally operate various hazardous waste management units at the Los Alamos National Laboratory ("LANL"), including an incinerator that Plaintiffs will use to dispose of two categories of waste in addition to the purely hazardous waste covered by this permit: radioactive, and mixed (waste which contains both hazardous and radioactive components). Plaintiffs have elected to burn their hazardous waste in this incinerator, creating their current dispute with the State. If Plaintiffs burned their hazardous waste in an incinerator dedicated to solely



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hazardous waste incineration, the conditions would not be necessary.

B. Summary Judgment Standards.

The party submitting a motion for summary judgment bears the initial burden of informing the district court of the basis for its motion, and of identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 516 F.2d 33 (10th Cir. 1975). The party must also demonstrate that it is entitled to judgment as a matter of law. Adickes v. S.H. Kress and Company, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

Unsupported allegations or affidavits setting forth ultimate or conclusory facts and conclusions of law are insufficient to fulfill this obligation to establish the absence of genuine issues of material facts. Galindo v. Precision American Corp., 754 F.2d 1212 (5th Cir. 1985). Nor may a party, including Plaintiffs, rely on bare allegations or statements in its brief. Conclusory allegations do not establish an issue of fact under Rule 56. Bumgarner v. Joe Brown Co., 376 F.2d 749 (10th Cir. 1967). A party may not rest on the mere allegations of a pleading or the bare contentions that a material issue of fact exists. Posey v. Skyline Corp., 702 F.2d 1102 (7th Cir. 1983). The burden on the movant is heavy. The movant must demonstrate entitlement to summary judgment

beyond a reasonable doubt. Florum v. Elliot Manufacturing, 867 F.2d 570 (10th Cir. 1989) (citing Madison v. Desert Livestock Co., 574 F.2d 1027 (10th Cir. 1978)).

The court, in determining whether a genuine issue of material fact exists, must consider all matters in the record, and all reasonable inferences drawn therefrom must be construed liberally in favor of the party opposing the motion. Bruce v. Martin Marietta Corp., 544 F.2d 442 (10th Cir. 1976). The court must resolve all ambiguities in favor of the party against whom summary judgment is sought. Heyman v. Commerce and Industry Insurance Co., 524 F.2d 1317 (2nd Cir. 1975).

For purposes of summary judgment proceedings, a "material issue of fact" is one that might affect the outcome of the litigation under the governing law; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); or that requires a trial to resolve the parties' differing views of the truth. Securities and Exchange Commission v. Seaboard Corp., 677 F.2d 1289 (9th Cir. 1982). The substantive law's identification of the facts that are critical governs the materiality determination. Summary judgment concerns the sufficiency of the evidence, not its weight. The inquiry is "whether the evidence presents a sufficient disagreement to require submission" to the trier of fact "or whether it is so one-sided that one party must prevail as a matter of law. Anderson v. Liberty Lobby, Inc., supra.

Thus, the parties have two hurdles to clear before they are entitled to summary judgment: they must demonstrate the absence of

a genuine issue of material fact and they must show that they are entitled to summary judgment as a matter of law. As specified below, Plaintiffs have cleared neither hurdle and are not entitled to summary judgment. Defendants, on the other hand, have cleared all the hurdles and are entitled to judgment.

Defendants in support of their Motion for Summary Judgment submit the following statement of material facts as to which there is no dispute:

1. In November 1989, the New Mexico Environmental Improvement Division of the New Mexico Health and Environment Department issued Hazardous Waste Facility Permit NM 0890010515-1 to the United States Department of Energy ("DOE") and to the Regents of the University of California ("the Regents") for LANL. The permit included conditions regulating the Controlled Air Incinerator ("CAI") at LANL. (Exhibit A).

2. The permit was issued pursuant to the state's authority under the RCRA and the HWA. (Exhibit A).

3. The permit contains approximately 400 pages of requirements and conditions concerning LANL's hazardous waste management operations. (Exhibit B, Affidavit of A. Elizabeth Gordon).

4. LANL is a generator of hazardous waste. (Exhibit B).

5. Occasionally, LANL mixes hazardous waste with radioactive waste which is not destined for immediate reuse. (Exhibit B).

6. The CAI is used to incinerate hazardous waste and other materials such as purely radioactive wastes and PCBs. (Exhibit B).

7. Permit condition V.B.1.a. permits the incineration of only hazardous waste under the permit. (Exhibit B).

8. DOE and the Regents are challenging only three (3) of the permit numerous requirements. (Plaintiffs' Complaint at 10-11).

9. DOE and the Regents challenge permit condition V.C.3. which requires that each batch of waste treated under the permit shall be surveyed to determine its radionuclide content. The requirement further states that Knowledge of Process shall not be used for this survey. (Exhibit B).

10. The intent of permit condition V.C.3. was to insure that permit condition V.B.1.a is adhered to, to insure that no purely radioactive waste or mixed waste is inadvertently or surreptitiously incinerated as hazardous waste under the permit. (Exhibit B).

11. DOE and the Regents challenge permit condition V.E.10., which requires that continuous monitoring and/or recording devices for ten (10) parameters be observed by an operator during the waste feed operation for each hazardous waste burn. One of the ten parameters enumerated in Condition V.E.10. is radioactivity from the exhaust stack. (Exhibit B).

12. DOE and the Regents challenge permit condition V.F.9., which requires that the exhaust gas radioactivity measured during operation under the permit shall not:

- a. exceed the background by 10% for more than one minute, and
- b. exceed the background by 50% where background is defined in the permit requirements. (Exhibit A).

13. Permit conditions V.E.9. and V.F.9. were included because the incinerator is being used to incinerate radioactive waste; that process does not destroy or reduce the rate of the radioactivity, it only changes the chemical and physical forms of the radionuclides. (Exhibit B).

14. The 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 the residue may remain in the CAI even after the ash collection bin is emptied between burns. (Exhibit B).

15. The monitoring of stack emissions for radionuclides was required to determine if any radioactivity was being emitted during a strictly hazardous waste burn. (Exhibit B).

16. Permit conditions V.E.9. and V.F.9. were included to insure 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. (Exhibit B).

17. The permit requires DOE and the Regents to monitor for other constituents which are not by definition "hazardous waste". (Exhibit A & B).

18. The permit conditions only apply with regard to batches of waste that DOE and the Regents determine to be "hazardous". (Exhibit B).

19. If a batch of waste is radioactive or mixed, the permit by its terms does not apply. (Exhibit B).

II. CONGRESS WAIVED IMMUNITY FOR THE CHALLENGED CONDITIONS IN LANL'S PERMIT, AND, THEREFORE, DEFENDANTS, NOT PLAINTIFFS, ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Following requirements in state law including a public hearing on the draft permit, the State issued Plaintiffs' permit.¹ The permit is conditioned both with standard conditions, and with the challenged conditions relating to the incinerator and its special circumstances.

Plaintiffs object to three of permit's requirements. First, under the permit, Plaintiffs must survey each waste batch prior to the burn to verify that it meets the legal definition of solely hazardous waste. Second, Plaintiffs must monitor air emissions during each hazardous waste burn to verify that the burn is not unwittingly causing or allowing an unanticipated release of radioactivity.² Finally, if the permitted hazardous waste burn is causing the release of radioactivity (above a certain level), Plaintiffs must immediately terminate the incineration process and take corrective action before continuing the hazardous waste burn.

The permit is issued on Plaintiffs' implied representation that there will be no radioactive consequences of these operations under the hazardous waste permit. If radionuclides are burned under the permit, or are released through the course of the hazardous waste burn, the permit will be violated. If that

¹The State was authorized to deny the permit application if Plaintiffs did not comply with the legal requirements for issuance of the permit. See discussion infra.

²Radioactivity is only one of ten (10) parameters that Plaintiffs must monitor during the incineration process.

violation occurs, permission to incinerate hazardous waste in that incinerator and under the permit will be temporarily removed. Plaintiffs will be free to continue the burn after correcting whatever the problem is with the (purportedly) hazardous waste management operation.

Condition one requires Plaintiffs to verify that what they are burning is solely hazardous waste. If the sampling reveals the presence of radionuclides, the waste is not solely hazardous waste, and, accordingly, its incineration is not authorized by this permit. Again, the permit does not prohibit Plaintiffs from burning radioactive waste pursuant to the Atomic Energy Act; it simply prohibits disposing of radioactive waste pursuant to RCRA and the HWA.

It would not be appropriate for Plaintiffs to burn radioactive waste under the hazardous waste permit. Given this situation (that Plaintiffs elected to create), the State imposed the requirements. These requirements are only logical because, if a burn operation is emitting radionuclides, it is not truly a hazardous waste burn by definition and the permission to incinerate hazardous waste is withdrawn until such time as it is a hazardous waste burn.

A. The LANL permit conditions are authorized by RCRA.

1. Congress in RCRA section 6001 has waived sovereign immunity for all State hazardous waste management requirements.

Congress set forth a comprehensive expression of policy concerning the safe management and disposal of hazardous waste and solid waste in RCRA. As part of that policy, Congress expressly

waived the sovereign immunity of the federal government with respect to state hazardous waste laws:

Each department, agency and instrumentality . . . of the federal government . . . shall be subject to, and comply with, all Federal, State, interstate and local requirements, both substantive and procedural (including any requirements 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.

RCRA section 6001, 42 U.S.C. § 6961 ("section 6001").

The legislative history of section 6001 and the caselaw construing it are extensively reviewed in the cases cited by Plaintiffs in their Memorandum at 18, n.12 and will not be repeated here.³ The legal dispute in the cases generally as well as in this case concerns the scope of the "requirements" for which sovereign immunity has been waived by section 6001.

Congress in enacting RCRA did not preempt States from having their own hazardous waste programs, and did not limit any state program's ability to be more stringent than RCRA.⁴ Congress directed EPA to authorize the states to implement the RCRA program in the states in lieu of the federal government even if the state

³ See, e.g., Mitzelfelt v. Department of Air Force, 903 F.2d 1293 (10th Cir. 1990) and the cases and commentary cited therein; Comment, Lawmaker as Lawbreaker: Assessing Civil Penalties Against Federal Facilities Under RCRA, 57 U. Chi. L. Rev. 845, 846-47 (1990).

⁴RCRA section 3009, 42 U.S.C. § 6929.

program was more stringent than the federal program.⁵ If the hazardous waste permit with its conditions is a State hazardous waste management requirement, the United States' sovereign immunity is waived.

Congress wanted federal agencies to comply with both the federal hazardous waste program, RCRA, and each individually-developed state hazardous waste management program. "[T]he controversy surrounding federal compliance with state environmental 'requirements' involved federal agencies' refusal 'to acquire the state permits, to submit to [sic] required reports, conduct the required monitoring and to permit on-site inspections by state inspectors,' as well as their refusal to meet substantive state standards." Parola v. Weinberger, 848 F.2d 956, 961 (9th Cir. 1988) (quoting H.R.Rep. 94-1491, at 45, reprinted in 1976 U.S.Code Cong. & Admin.News at 6283).

The current litigation is merely a continuation of the pattern of litigation by federal agencies seeking to narrow their hazardous waste management obligations and liabilities under state law,⁶ by arguing that a disputed state requirement is not a "requirement" under section 6001.⁷

⁵RCRA section 3006, 42 U.S.C. 6929; CHECK WITH TRACY ON AUTHORIZATION FOR STATUTORY AND/OR CFR CITE.

⁶See, e.g., Comment, supra note 3, at 846-47 (1990).

⁷For example, in State of Colorado v. United States Department of the Army, 707 F.Supp. 1562 (D.Colo. 1989), the U.S. Department of Justice unsuccessfully argued that regulations implementing Colorado's hazardous waste law did not qualify as "requirements" under RCRA's waiver of sovereign immunity.

2. The LANL permit conditions are State hazardous waste management requirement under RCRA section 6001.

Plaintiffs cite various cases construing section 6001 for the proposition that "requirements" are "objective, ascertainable standards and regulations." Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 18, n.12. Plaintiffs do not go far enough in their review of what section 6001 "requirements" are, however.⁸

The Tenth Circuit Court of Appeals recently considered RCRA's sovereign immunity waiver and the scope of section 6001 "requirements." After reviewing the case law and commentators, the court ruled that section 6001 did not waive federal sovereign immunity from a state administratively-assessed civil penalty, because such a penalty is not "requirement" under section 6001. Mitzelfelt v. Department of the Air Force, 903 F.2d 1293 (10th Cir. 1990). In discussing what "requirements" are, the court stated that "[t]he word can reasonably be interpreted as including substantive standards and the means for implementing those

⁸The cases referred to supra construing "requirements" include the ordinary meaning analysis. Basically, "requirements" is neither a technical word nor a term of art, and must be construed according to its ordinary meaning. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668; reh'g denied, 425 U.S. 986, 96 S.Ct. 2194, 48 L.Ed.2d 811 (1976). "Requirement" means something required, something that is wanted or needed, necessity, something called for or demanded, a requisite or essential condition, a required quality, course or kind of training. Webster's Third International Dictionary (unabridged ed. 1981). In the legal context, "require" means to direct, order, demand, instruct, command, claim, compel, request, need or exact. Black's Law Dictionary (6th ed. 1990) (citing State ex. rel. Frohmiller v. Hendrix, 59 Ariz. 184, 124 P.2d 768 (1942)).

standards, but excluding punitive measures." Id. at 1295 (citing Parola v. Weinberger, 848 F.2d 956, 961 (9th Cir. 1988); California v. Walters, 751 F.2d 977, 978 (9th Cir. 1984)).

The Ninth Circuit Court of Appeals in Parola held that local regulations requiring use of an exclusive garbage collection franchise established under California's waste management plan are section 6001 "requirements" respecting control and abatement of solid waste, 848 F.2d at 962, affirming the district court's determination that "the 'usual meaning' of the words 'control' and 'abatement' is sufficiently broad to include 'collection'". Id. at 960.

The Ninth Circuit distinguished its earlier holding in Walters that section 6001 did not waive sovereign immunity as to state criminal sanctions designed to enforce compliance with "state waste disposal standards, permits and reporting duties," 751 F.2d at 978, stating that "[p]ermits and reporting duties are means of implementing environmental standards, and are clearly state 'requirements.' An exclusive garbage collection system is more like a permit requirement than a criminal sanction." 848 F.2d at 962, n.3. Cf. State of Maine v. Department of the Navy, 702 F.Supp. 322 (D. Me 1988) (payments of annual fee and generator fees that go into state Hazardous Waste Fund are section 6001 requirements respecting the control and abatement of solid waste).

The Mitzelfelt court also reviewed McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F.Supp. 1182 (E.D. Cal. 1988). MESS involved among other issues interpretation of the

federal Clean Water Act (CWA) sovereign immunity waiver provision, section 313, which, like RCRA, waives sovereign immunity for "all . . . State . . . requirements" The district court held that "requirements" in the CWA context mean "objective and administratively preestablished water pollution control standards" and that "the only state law requirements that constitute enforceable effluent standards or limitations under [the CWA] are those that have been established administratively through the issuance of NPDES permits." 707 F.Supp. at 1198-99. The concern expressed by the court is of an ad hoc judicial determination of the challenged "requirement" as contrasted with an administratively established determination. Accord Romero-Barcelo v. Brown, 643 F.2d 835,855 (1st Cir. 1981), rev'd on other grounds sub. nom. Weinberger v. Romero-Barcelo, 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982); State of New York v. United States, 620 F.Supp. 374, 384 (E.D. N.Y. 1985); State of Florida v. Silvex Corporation, 606 F.Supp. 159, 163 (M.D. Fla. 1985).

The permit was issued with its conditions following the administrative procedure set out in the HWA. Accordingly, the LANL permit with its conditions is a section 6001 requirement for which sovereign immunity has been waived.

3. Plaintiffs mischaracterize what the permit regulates.

Plaintiffs attempt to avoid compliance with State requirements by characterizing the permit conditions as "regulating radioactive waste." They cite as dispositive the RCRA and HWA exclusions of source, special nuclear, and byproduct material from the definition

of "solid waste" (and hence from the definition of "hazardous waste"), Memorandum in Support of Plaintiffs' Motion For Summary Judgment at 4 and 7, and Legal Environmental Assistance Foundation, Inc. (LEAF) v. Hodel, 586 F.Supp. 1163 (E.D. Tenn. 1984) for the proposition that only the Atomic Energy Act (AEA) regulates source, special nuclear, and byproduct material, Memorandum in Support of Plaintiffs' Motion For Summary Judgment at 16.

The State does not dispute that these nuclear materials are exempted from the definition of solid and hazardous waste, or that the AEA regulates nuclear materials. Plaintiffs mischaracterize LEAF, however -- "In L.E.A.F., the court held only that the AEA did not prevent regulation of hazardous waste at AEA regulated facilities." Memorandum in Support of Plaintiffs' Motion For Summary Judgment at 16, n.11. -- when, in fact, LEAF was a victory for RCRA jurisdiction. It was not a limitation on it. DOE maintained until the 1984 LEAF decision that the AEA precluded application of RCRA to its facilities.⁹ The decision established for DOE that RCRA section 1006(a), 42 U.S.C. § 6905(a), precludes RCRA application only to the extent that it is inconsistent with the AEA; the burden is on DOE to show that an inconsistency will result if both AEA and RCRA requirements are applied -- unsupported conclusory allegations are insufficient --and to apply for a Presidential exemption from RCRA pursuant to 42 U.S.C. § 6961. 586 F.Supp. 1163, 1166-68.

⁹See, e.g., Sierra Club v. United States Department of Energy, 734 F.Supp. 946, 47-47 (D.Colo. 1990); Comment, supra note 3, at 846.

RCRA regulates hazardous waste even if there is radioactivity associated with it. Under the Nuclear Byproduct Exception, 42 U.S.C. § 6903(27), as interpreted by DOE in 10 C.F.R. 962.3(b), "source, special nuclear or byproduct material," is not hazardous waste. However, hazardous waste that is mixed with that material remains subject to RCRA. Thus, "[t]he definitional exclusion and the language of [RCRA] section 1006(a) are correctly understood to provide for the regulation under RCRA of all hazardous waste, including waste that is also radioactive. There is "complementary regulation under both statutes [RCRA and the Atomic Energy Act] of all substances that under prior law might have been regulated exclusively by the AEA." 52 Fed. Reg. 15937, 39-40 (May 1, 1987). See also Sierra Club v. United States Department of Energy, 734 F.Supp. 946 (D.Colo. 1990) (source, special nuclear and byproduct materials, which is ordinarily exempt from categorization as solid waste under RCRA, becomes hazardous waste, as that term is defined under RCRA, when that source, special nuclear, and byproduct material is not destined for immediate reuse, and is mixed with hazardous waste).

4. The requirements in the permit are authorized by the HWA and are a necessary exercise of the State's RCRA and HWA authorities and obligations.

Plaintiffs assert that there are no state "requirements" brought in through section 6001 that the State can require the United States to comply with.¹⁰ To the contrary, there are clear

¹⁰Plaintiffs cite to HWA § 74-4-4.A NMSA 1978, apparently in support of this assertion. Memorandum in Support of Plaintiffs' Motion For Summary Judgement at 7-8. Section 74-4-4.A prohibits

and controlling requirements binding on Plaintiffs, including the obligations of Plaintiffs to have a hazardous waste management permit for their facility, comply with the terms of the permit, otherwise comply with hazardous waste law, and submit to NMED's inspection and information-gathering authority.

The NMED Secretary must establish permit conditions on a case-by-case basis, and may only issue a hazardous waste management permit that achieves compliance with the HWA and regulations, and which otherwise includes all necessary conditions to protect human health and the environment. HWA § 74-4-4.2.C NMSA 1978; HWMR § 901, 40 C.F.R. § 270.32.¹¹ 40 C.F.R. § 270.32(a), for example, requires that permits specify required monitoring including type, intervals, and frequency pursuant to § 270.31. Section 270.32(b)(1) requires permit conditions necessary to achieve compliance with the HWA and HWMR. Section 270.32(b)(2) requires permit conditions as determined necessary to protect human health and the environment. The regulations are adopted pursuant to the HWA § 74-4-4.A NMSA 1978, including subsections (A)(5)(e)-(f). If the Secretary is not satisfied that a permit and any necessary conditions in it are protective enough, the Secretary can, and,

the Environmental Improvement Board (EIB) (not the Director of the Environmental Improvement Division (EID), now the New Mexico Environment Department) from promulgating regulations that are stricter than the regulations promulgated by the EPA. The Legislature did not place that restriction on the NMED Secretary in the HWA permit decision authority.

¹¹Section 74-4-4.2.C NMSA 1978 is the state analog to RCRA section 3005(c); the state regulations, HWMR, incorporate the federal C.F.R. by reference.

indeed must, deny the permit. Cf. State of Oklahoma v. U.S.E.P.A., 908 F.2d 595 (10th Cir. 1990) (concerning agency obligations in analogous federal Clean Water Act permitting decisions); accord Texas Mun. Power Agency v. Adm'r of U.S. E.P.A., 836 F.2d 1482, 1489 (5th Cir. 1988).

In Oklahoma, the Tenth Circuit Court of appeals stated:

This authority to regulate, along with the absence of any right to pollute, necessarily subsumes the authority to deny a requested permit. These powers are essential to the ability to prevent pollution and thereby accomplish the Act's ultimate goal of eliminating pollutant discharges to water.

908 F.2d at 632. The Court added the following footnote:

EPA is never required to issue a discharge permit; rather, under [the CWA] EPA "may . . . issue a permit . . . upon condition that such discharge will meet . . . all applicable requirements." . . . In fact . . . EPA may not permit a discharge if compliance with applicable water quality requirements cannot be insured. . . . Plainly, EPA is empowered to deny a permit under the circumstances of this case.

908 F.2d at 632, n.52 (emphasis in the original).

EPA promulgated 40 C.F.R. § 270.32(b)(2) as required by the 1984 Congressional HSWA amendments to RCRA:

Section 3005(c) [of RCRA] provides that each RCRA permit issued under section 3005 shall contain such terms as the Administrator deems necessary to protect human health and the environment (emphasis added). The Congressional intent underlying this amendment is to authorize the Agency to impose permit conditions beyond those mandated by the regulations, such as new or better technologies or other new requirements. S.Rep.No. 284, 98th Cong., 1st Sess. 31 (1983). The purpose of this amendment is to upgrade facility requirements in order to protect human health and the environment. The Agency believes that the authority to issue permits containing conditions deemed necessary to protect human health and the environment must encompass the authority to deny permits where necessary to afford such protection. To hold otherwise would deprive this statutory amendment of its intended

effect.

50 Fed. Reg. 28702, 28723 (July 15, 1985) (emphasis in the original).

The State of New Mexico is not only authorized by state and federal law to administer its hazardous waste management program, it must enforce the program requirements as well. The State must be able to ascertain whether and to what extent permittees are complying with the requirements of hazardous waste law.

The authority to investigate and request information relating to the regulatory agency's obligations are authorized by RCRA section 3007, 42 U.S.C. § 6927(a):

For purposes of developing or assisting in the development of any regulation or enforcing the provisions of this title, any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous wastes shall, upon request of any officer, employee or representative of the Environmental Protection Agency, duly designated by the Administrator, or upon request of any duly designated officer, employee or representative of a State having an authorized hazardous waste program, furnish information relating to such wastes

42 U.S.C. § 6927(a) (emphasis added).¹²

This information-gathering authority is broadly construed to

¹²The analogous state provision, HWA § 74-4-4.3 NMSA 1978 states in relevant part:

For purposes of developing or assisting in the development of any regulations, conducting any study, taking any corrective action or enforcing the provisions of the [HWA], upon request of the [NMED Secretary] or his authorized representative:

(1) any person who generates, stores, treats, transports, disposes of or otherwise handles or has handled hazardous wastes shall furnish information relating to such hazardous wastes

(Emphasis added).

effectuate the programmatic concerns of RCRA. See, e.g., United States v. Charles George Trucking Company, Inc., 624 F.Supp. 1185, 1187-88 (D. Mass. 1986), aff'd, 823 F.2d 685 (1st Cir. 1987); National Standard Co. v. Adamkus, 685 F.Supp. 1040, 1049-1050 (N.D. Ill. 1988), aff'd, 881 F.2d 352 (7th Cir. 1989); Mobil Oil Corp. v. U.S.E.P.A., 716 F.2d 1187, 1189-90 (7th Cir. 1983), cert. denied; Texas Mun. Power Agency v. Adm'r of U.S. E.P.A., 836 F.2d 1482, 1489 (5th Cir. 1988); New Mexico Environmental Improvement Division v. Climax Chem. Co., 105 N.M. 439, 441, 733 P.2d 1322, 24, (Ct. App. 1986), cert. denied, 105 N.M. 421, 733 P.2d 869 (1987).

As the court suggested in Mobil, "the only interest Mobil could possibly have in preventing EPA officials from sampling its untreated waste water is that Mobil might want to keep EPA in the dark as much as possible about what pollutants are present in the water it dumps . . . and about how efficient its treatment processes are at cleaning its waste water of pollutants." 716 F.2d at 1190. The court went on to note that if EPA is to assess with any reasonable degree of accuracy how efficient Mobil's treatment processes are, it needs to know what pollutants are in the waste water before it is treated as well as after it has been treated. Id.

The authority to inspect and sample includes the authority to require the permittee(s) to inspect and sample the same items.

C. EVEN IF THE LANL PERMIT CONDITIONS ARE NOT AUTHORIZED BY RCRA SECTION 6001, THEY ARE AUTHORIZED BY THE FEDERAL CLEAN AIR ACT.

Even if this Court were to find that the RCRA section 6001

sovereign immunity waiver did not authorize the LANL permit conditions, Congress waived the federal government's sovereign immunity for radioactive air emissions in the federal Clean Air Act (CAA).

States have authority to regulate radioactive air emissions under section 116 of the CAA, 42 U.S.C. § 7416.¹³ This provision also gives states the authority to set air standards that are more protective than the federal EPA standards.

Congress specifically waived sovereign immunity for such State requirements.

Each . . . agency . . . of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants . . . shall be subject to, and comply with, all . . . Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of air pollution in the same manner, and to the same extent as any non-governmental entity. [This requirement] shall apply (A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirements, any requirement respecting permits and any other requirement whatsoever), . . . (C) to the exercise of any . . . State administrative authority, and (D) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies . . . under any law or rule of law.

CAA section 118, 42 U.S.C. § 7418.

Section 302(g) of the CAA, 42 U.S.C. § 7602(g), defines "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct

¹³ This authority remains unchanged in the recently enacted Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

material) substance or matter which is emitted into or otherwise enters the ambient air."

The courts interpret CAA "requirements" similarly as they interpret RCRA "requirements," discussed supra, and that analysis will not be repeated here. Given the meaning of CAA "requirements," even under Plaintiffs' own argument, sovereign immunity has been waived for State requirements regarding radioactive air emissions. Source material, special nuclear material, and byproduct material are by express definition an "air pollutant" under the CAA's sovereign immunity waiver.

III. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment should be granted and Plaintiffs' Motion denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendants' Memorandum In Opposition to Plaintiffs' Motion For Summary Judgment and In Support of Defendants' Motion For Summary Judgment was mailed on this 24 day of April, 1991, to the following:

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