



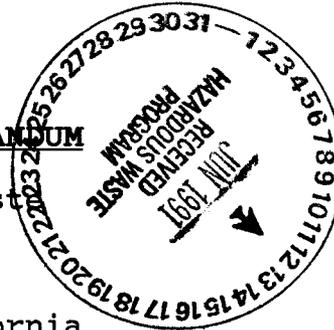
State of New Mexico
ENVIRONMENT DEPARTMENT
 Harold Runnels Building
 1190 St. Francis Drive
 Santa Fe, New Mexico 87503

JUDITH M. ESPINOSA
 SECRETARY

RON CURRY
 DEPUTY SECRETARY

BRUCE KING
 GOVERNOR

TRANSMITTAL MEMORANDUM



TO: Elizabeth Gordon, Hazardous Waste
 DATE: June 12, 1991
 RE: Regents of University of California
 No. CIV 90-0276SC

The following documents are enclosed: (1) Defendants' Reply to University of California's Response to Cross-Motion for Summary Judgment; (2) Defendants' Reply to United States Opposition to Cross-Motion for Summary Judgment

PLEASE:

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| <input type="checkbox"/> File | <input type="checkbox"/> Check for \$ _____ enclosed for proper fee |
| <input type="checkbox"/> Record | |
| <input type="checkbox"/> Serve, complete Return of Service and return to us | <input type="checkbox"/> Self-addressed, stamped envelope(s) enclosed |
| <input type="checkbox"/> Per your request | <input type="checkbox"/> Other: |

For your information
 Reply to U.S. filed 6/10/91; Reply to Regents University of California filed 6/11/91

- Approve, sign and return
 Return conformed copies

Thank you very much,

 GINI NELSON
 Assistant General Counsel

Enclosure(s)

cc: Kathy Sisneros - w/o Exhibits
 Judith Espinosa - w/o Exhibits
 Jim Costello - w/o Exhibits



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filed 6/11/81

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 90-0276SC

STATE OF NEW MEXICO and
NEW MEXICO ENVIRONMENT
DEPARTMENT,

Defendants.

DEFENDANTS' REPLY TO UNIVERSITY OF CALIFORNIA'S RESPONSE
TO CROSS-MOTION FOR SUMMARY JUDGMENT

The United States initiated this action by filing its Complaint for Declaratory Judgment seeking a declaration that the conditions are outside the scope of RCRA's sovereign immunity waiver. This Court by Order joined as Plaintiff the Regents of the University of California ("Plaintiff"). Plaintiff's¹ grounds for seeking this Court's declaration that the conditions are void are that: (1) the conditions "regulate" radionuclides, which are outside the scope of RCRA and the HWA because certain radionuclides

¹The Regents of the University of California "concur" with the United States' complaint and summary judgment motion (Regents' Response at 2); and have not sought to amend the complaint; nor filed an independent motion for summary judgment. They are, accordingly, limited to the grounds raised in the United States' Complaint, and the issues in the Summary Judgment Motion.

are exempted from the legal definitions of "solid waste" and "hazardous waste"; and (2) alternatively, even if the conditions do not "regulate" radionuclides, these conditions are not state law "requirements" for which Congress waived sovereign immunity. Accordingly, this Court must determine first whether the challenged permit conditions "regulate" radionuclides or whether they "regulate" the hazardous waste to which the conditions are directly applied. If the Court determines that the conditions "regulate" radionuclides, the Court must then determine whether the State can "regulate" radionuclides in this Permit through the various statutory grants of authority and waivers of sovereign immunity. If the Court determines that they do not "regulate" radionuclides, the Court must so declare, and address Plaintiffs' alternative ground in this action, i.e., that the conditions are not "requirements" within the scope of RCRA's sovereign immunity waiver.

Defendants assert that the conditions "regulate" only hazardous waste even though they deal with radionuclides because the Permit directly applies only to hazardous waste, the Permit is inapplicable to waste that is known to be radioactive or mixed, and radionuclides are addressed only for use as an indicator that the permit is being complied with. Defendants further assert that the conditions are "requirements" within the RCRA sovereign immunity waiver because they were imposed pursuant to the statutory requirements that the Secretary impose any necessary conditions in

any permit issued², following a full administrative proceeding on the record and are otherwise within the lawful scope of the inspection authority in RCRA and the HWA.

Defendants note that Plaintiff raises numerous issues in its Response which are outside the scope of the Complaint and Summary Judgment Motion.³ Such issues are irrelevant to this action. Accordingly, Defendants are not responding to them, and this Court must not consider them.⁴ This Court succinctly framed the issues to be determined. "The Court agrees . . . that the issue is not

²The Regents incorrectly cite 40 C.F.R. § 720.32(c) for the proposition that RCRA § 3005(c)(3) and HWA § 74-4-4.2.C permit "conditions" must be derived from a statute or regulation which was effective prior to the issuance of the Permit. (Regents' Response at 22-23.) That provision defines the "applicable requirements" for § 270.32(b)(1) requirements, not for § 270.32(b)(2) "terms and conditions".

³These issues include but are not limited to: (1) quality of the State proceedings; (2) inferences and conclusions from actions in those proceedings; and (3) adequacy of other regulatory schemes that may be applicable to the incinerator (e.g., DOE Order 5400.5, attached in part as Regents' Exhibit A] applicable to the management of radioactive waste).

Plaintiff also states that mixed waste incineration is authorized by RCRA but fails to acknowledge the independent requirement of State HWA authorization. Defendants assert the fact of HWA jurisdiction over the hazardous component of mixed waste regardless of EPA's authorization to regulate that hazardous component in lieu of EPA's doing so concurrently in the State. Plaintiff further states that LANL is presently operating mixed waste units "under interim status granted by RCRA". (Plaintiffs' Response at 5 and 6 n.5.) Defendants take no position in this Reply as to whether LANL has RCRA and HWA interim status.

⁴Further, Plaintiff asks this Court in "any order" to declare the conditions void as applied to them (Plaintiff's Response at 2 and 24). This is not appropriate if the basis for the Court's decision is that the conditions are void because they are not "requirements" within the scope of the sovereign immunity waiver, since Plaintiff is not the sovereign, i.e., the United States.

the scope of the conditions imposed by the State, but the scope of RCRA's waiver of sovereign immunity for imposition of those conditions at a federal facility." See Memorandum Opinion and Order at 7-8. The issues of scope of conditions and the integrity of the hearing process are in the New Mexico Court of Appeals, the statutory court of review for hazardous waste permits issued pursuant to the HWA.⁵

Defendants contend that the waivers of sovereign immunity under §6001 of RCRA and §118 of the Clean Air Act waive immunity from suit against the United States for "requirements" respecting the treatment, storage, disposal and abatement of solid waste and air pollutants respectively. Further Defendants contend that the permit conditions are "requirements" under RCRA and the Clean Air Act.

The permit is issued on Plaintiff's implied representation that there will be no radioactive consequences of those operations under the hazardous waste permit. Plaintiff has created the current dispute by electing to burn its hazardous waste in an incinerator currently permitted to burn radioactive and mixed waste. If Plaintiff burned its hazardous waste in an incinerator dedicated solely to hazardous waste incineration, the conditions challenged by Plaintiff would not be necessary.

Because this is a hazardous waste permit if radionuclides

⁵That Court temporarily stayed its action and has required monthly status reports from Plaintiffs concerning this action. That Court's Order is attached as Exhibit 1; it does not, as Plaintiffs have alleged, stay the proceeding pending decision by this Court.

are burned under this permit, or are released through the course of operations under this permit, Plaintiff will be in violation of the permit. If that violation occurs, permission to incinerate under this permit will be suspended until the violation is corrected.

The challenged permit conditions do not "regulate" radioactive waste. The Permit by its terms does not apply to Plaintiff's incineration of radioactive waste at LANL; nor does it apply to incineration of waste known to be mixed waste, i.e., mixed radioactive and hazardous waste. It only applies to the incineration of hazardous waste.

Condition V.C.3 ("Condition 1") requires Plaintiff to sample the waste prior to the hazardous waste burn to confirm that it does not contain radionuclides. Since hazardous waste does not include "source, special nuclear, byproduct materials" it cannot have radionuclides associated with it. At this point, if radionuclides are found in the waste, Plaintiff's obligation is to remove the radionuclides. Under the Permit, Plaintiff is free to handle the radioactive-contaminated waste however and wherever lawfully required of it under the applicable radioactive requirements of other laws. This Condition will ensure that only hazardous waste is burned under this Permit.

Condition V.F.9 ("Condition 2") requires Plaintiff to monitor for radioactive emissions during the hazardous waste burn. The performance standard used for incinerators is the destruction and removal efficiency ("DRE"). In order to ensure that the DRE is maintained during a hazardous waste burn, operational limits for

incineration parameters are specified in the permit and it is these operational parameters that must be continually monitored.⁶ None of these parameters provide, either directly or indirectly, any information on radioactivity, however. Consequently, the NMED has no means of gathering information on the incinerator's efficiency regarding radioactivity except for direct monitoring. Requiring Plaintiff to monitor for, e.g., carbon monoxide, is not "regulating" carbon monoxide. The Permit is using carbon monoxide as an indicator of burn efficiency. Similarly, by requiring Plaintiff to monitor for radionuclides, the Permit is not "regulating" radionuclides.

Condition V.E.10 ("Condition 3") requires Plaintiff to temporarily halt the hazardous waste burn if radionuclides above a certain limit are emitted as a result of the hazardous waste burn. Plaintiff is then further required to correct whatever the problem is (the presence of radionuclides above the permitted condition is evidence that there are, in fact, radionuclide consequences) before resuming the hazardous waste burn. After correcting the problem, Plaintiff may resume the hazardous waste burn.

EPA'S RCRA PERMIT

As discussed in Defendants' Reply to the United States' Opposition to Defendants' Cross-Motion For Summary Judgment

⁶Those in the operating permit for LANL are: pH of the flue gas scrubber solution; temperature of both combustion chambers; feed rate of the waste; carbon monoxide content of the flue gas; oxygen content in the second combustion chamber; combustion air flow rate; flow rate of recycling water in the scrubber and the total hydrocarbon exiting the exhaust stack. These are nonhazardous waste parameters.

("Defendants' Reply to United States"), Plaintiff has already acceded to RCRA authority to require certain monitoring and reporting of radioactive constituents at LANL, i.e., in its EPA-issued RCRA permit.⁷ (Defendants' Reply to United States at 6-9.) As documented in Defendants' Reply to United States, the United States Department of Energy ("DOE") for itself and for Plaintiff (see Defendants' Reply to United States, Exhibit 1) appealed the EPA's RCRA permit, and have made a Class I Modification of that Permit in settlement of that appeal. By this action, and by its agreement to dismiss its administrative appeal of the EPA Permit conditions, Plaintiff accedes to the RCRA jurisdiction of EPA to require the radionuclide sampling and monitoring. Plaintiff cannot in this case successfully argue lack of RCRA jurisdiction for comparable conditions.

OMNIBUS AUTHORITY

Plaintiff acknowledges that "[w]ithout question, [the omnibus provision] delegates broad authority to the [Secretary] to impose Permit conditions." (Plaintiff's Response at 21.) Plaintiff argues RCRA's and the HWA's omnibus authorities are limited to the protection of health and the environment from hazardous waste, and that, in order to impose permit conditions pursuant to that authority, there must be a showing that hazardous waste may endanger human health or the environment. (Plaintiff's Response at

⁷ EPA issued a portion of the LANL hazardous waste permit because the State of New Mexico did not have full RCRA authorization at the time the permit was issued; in such circumstances, a State and EPA issue the RCRA permit jointly.

21-22.)

Defendants reiterate that this action is not a substitute for the challenge already filed in the Court of Appeals. The conditions are state law requirements for which Congress has waived sovereign immunity. Whether they are proper requirements is beyond the scope of the Complaint, the Summary Judgment Motion and this Court's Order. This Court for purposes of this action must assume the validity of the underlying State proceedings.

Respectfully submitted,

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Attorney General

RANDALL D. VAN VLECK
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(505) 827-6000

Attorney for Defendant State of
New Mexico

NEW MEXICO ENVIRONMENT DEPARTMENT

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Assistant General Counsel
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Office of General Counsel
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(505) 827-2990

Attorney for Defendant NMED

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DEFENDANTS' REPLY TO UNIVERSITY OF CALIFORNIA'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT was mailed on this 11 day of June, 1991, to the following:

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Albuquerque, New Mexico 87103



GINI NELSON

9/17/90 *Engl.*

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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.

COURT OF APPEALS
STATE OF NEW MEXICO
P.O. MANZANARES, CLIFK

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FILED

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.

[filed as exhibit]

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


JUDGE


JUDGE

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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

Robert J. ...
CLERK-COURT

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

Plaintiffs,

vs.

No. CIV 90-0276SC

STATE OF NEW MEXICO and
NEW MEXICO ENVIRONMENT
DEPARTMENT,

Defendants.

DEFENDANTS' REPLY TO UNITED STATES OPPOSITION
TO CROSS-MOTION FOR SUMMARY JUDGMENT

The United States filed its Complaint for Declaratory Judgment seeking a declaration that RCRA has not waived sovereign immunity to impose the challenged conditions alleging that the conditions attempt to regulate the radioactive component of the waste. The United States also seeks a declaration that RCRA has not waived sovereign immunity to impose the three conditions enumerated above since the New Mexico HWA imposes no "requirements" with respect to radioactive wastes. Defendants oppose Plaintiff and request this Court to declare the conditions validly within the scope of RCRA.

The controlled air incinerator ("CAI") was designed to incinerate hazardous waste, radioactive waste and mixed (waste which contains both hazardous and radioactive components) waste.

The CAI is currently permitted to incinerate radioactive and mixed wastes pursuant to permits not at issue in this case; Plaintiff now seeks to use the CAI to incinerate hazardous waste. Plaintiff has created the current dispute by electing to burn its hazardous waste in an incinerator currently used to burn radioactive and mixed waste. If Plaintiff burned its hazardous waste in an incinerator dedicated solely to hazardous waste incineration, the conditions challenged by Plaintiff would not be necessary.

Defendants contend that the waivers of sovereign immunity under §6001 of RCRA and §118 of the Clean Air Act waive immunity from suit against the United States for "requirements" respecting the treatment, storage, disposal and abatement of solid waste and air pollutants respectively. Further Defendants contend that the permit conditions are "requirements" under RCRA and the Clean Air Act.

The permit is issued on Plaintiff's implied representation that there will be no radioactive consequences of those operations under the hazardous waste permit. The State has an obligation under RCRA and the HWA to insure that operations under this permit are conducted within the parameters specified in this permit. If radionuclides are burned under this permit, or are released through the course of operations under this permit, Plaintiff will be in violation of the permit. If that violation occurs, permission to incinerate under this permit will be suspended until the violation is corrected.

The United States misses the point by its continuing

insistence that the conditions "regulate" radioactivity, arguing that, because there purportedly cannot be any RCRA authority to "regulate" radioactivity, there is no way the State could have "establish[ed] any objective, ascertainable . . . requirements . . ." for purposes of the RCRA sovereign immunity waiver. (United States' Opposition at 9-10.) NMED established the Permit conditions following the full administrative process required under State law, including a public hearing. The legal adequacy of conditions is not properly before this Court.¹ The United States is not alleging that NMED could not have established such conditions (requirements) if the conditions do regulate hazardous waste.

The challenged permit conditions do not regulate radioactivity in any event. The permit conditions merely regulate the conduct of hazardous waste incineration activities at the site. Defendants seek (through the permit conditions) to verify that the operations conducted under the RCRA permit are truly hazardous waste incineration activities.

The United States continues to mischaracterize what the Permit regulates. The United States seems to be saying that in order to be a requirement, the condition must have its roots and enforcement authority in RCRA. That is not what the waiver of immunity

¹"The Court agrees . . . that the issue is not the scope of the conditions imposed by the State, but the scope of RCRA's waiver of sovereign immunity waiver for imposition of those conditions at a federal facility." See Memorandum Opinion and Order at 7-8. Those issues are pending in the New Mexico Court of Appeals, the statutory court of review for hazardous waste permits issued pursuant to the HWA.

sections in RCRA §6001 and the Clean Air Act §118 say. Defendants have fully briefed the Court on the requirements issue and would refer the Court to its Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment at pages 11-13 which discusses the case law on the "requirements" for which Congress waived sovereign immunity for RCRA. The United States seems to be arguing that sovereign immunity is waived only if the State has "requirements" regulating radioactive waste." (United States' Opposition at 2-3.) (emphasis added). The RCRA and CAA waivers of sovereign immunity are not so strictly drawn. There is nothing in §6001 of RCRA which states that sovereign immunity is waived only for specific requirements.

Defendants have testified, stated, written, acknowledged and conceded that they have no authority under RCRA to regulate radioactive materials. This position has not changed. The conditions do not "regulate" radioactive materials. The Permit by its terms does not apply to Plaintiff's incineration of radioactive waste at LANL; nor does it apply to incineration of waste known to be mixed waste, i.e., mixed radioactive and hazardous waste. It only applies to the incineration of hazardous waste.

With regard, then, to that waste: Condition V.C.3 ("Condition 1") requires Plaintiff to sample the waste prior to the hazardous waste burn to confirm that it does not contain radionuclides. Defendants have the obligation to ensure that incineration operations under this Permit include only hazardous waste. Since hazardous waste does not include "source, special nuclear,

byproduct materials" it cannot have radionuclides associated with it. At this point, if radionuclides are found in the waste, Plaintiff's obligation is to remove the radionuclides. The State does not tell Plaintiff how to handle that waste in taking it away, or where to take it, or what to do with that waste once it is taken to wherever it is taken. Under the Permit, Plaintiff is free to handle the radioactive-contaminated waste however and wherever lawfully required of it under the applicable radioactive requirements of other laws. This Condition will ensure that only hazardous waste is burned under this Permit. This Condition regulates the waste going into the incinerator and nothing more.

Condition V.F.9 ("Condition 2") requires Plaintiff to monitor for radioactive emissions during the hazardous waste burn. Plaintiff also must monitor non-hazardous waste parameters. Under normal circumstances, the NMED is assured that an incinerator is operating as required to protect human health and the environment if it is meeting the required performance standards. The performance standard used for incinerators is the destruction and removal efficiency ("DRE"). In order to ensure that the DRE is maintained during a hazardous waste burn, operational limits for incineration parameters are specified in the permit and it is these operational parameters that must be continually monitored.² None

²Those in the operating permit for LANL are: pH of the flue gas scrubber solution; temperature of both combustion chambers; feed rate of the waste; carbon monoxide content of the flue gas; oxygen content in the second combustion chamber; combustion air flow rate; flow rate of recycling water in the scrubber and the total hydrocarbon exiting the exhaust stack.

of these parameters provide, either directly or indirectly, any information on radioactivity, however. Consequently, the NMED has no means of gathering information on the incinerator's efficiency regarding radioactivity except for direct monitoring. Requiring Plaintiff to monitor for, e.g., carbon monoxide, is not "regulating" carbon monoxide. The Permit is using carbon monoxide as an indicator of burn efficiency. Similarly, by requiring Plaintiff to monitor for radionuclides, the Permit is not "regulating" radionuclides.

Condition V.E.10 ("Condition 3") requires Plaintiff to temporarily halt the hazardous waste burn if radionuclides above a certain limit are emitted as a result of the hazardous waste burn. Plaintiff is then further required to correct whatever the problem is (the presence of radionuclides above the permitted condition is evidence that there are, in fact, radionuclide consequences) before resuming the hazardous waste burn. After correcting the problem, Plaintiff may resume the hazardous waste burn.

EPA'S RCRA PERMIT

The United States admits that DOE has already acceded to RCRA authority to require "certain monitoring and reporting of radioactive constituents" in the EPA-issued portion of LANL's RCRA permit. (Plaintiff's Opposition at 8.) Regardless, the United States implies to the Court that it may in this case maintain its contrary position that such conditions are not authorized by RCRA.³

³Plaintiff does so, citing with approval a statement by the EPA Region VI that "it had 'reviewed the [United States' Motion for Summary Judgment in this action] and [did] not view the positions

EPA's portion of the LANL permit⁴ also contains radionuclide monitoring and reporting requirements, specifically, those that the United States' Exhibit 1 addresses. DOE appealed those requirements (Defendants hereto attach as Exhibits 1 - 7 the documents relating to the appeal).⁵

taken therein to be inconsistent with the position EPA has taken regarding the permit provisions described in [the] modifications. . . ." (Plaintiff's Opposition at 8 n. 6.) Plaintiff fails to explain the context of, or attach the full text of, EPA Region 6's response to NMED's appeal.

⁴EPA issued a portion of the LANL hazardous waste permit because the State of New Mexico did not have full RCRA authorization at the time the permit was issued; in such circumstances, a State and EPA issue the RCRA permit jointly.

⁵This is the history of DOE's appeal: (1) DOE on behalf of itself and the Regents of the University of California on or about May 23, 1990 administratively appealed the radionuclide monitoring portions of the LANL permit to EPA Headquarters by submitting its Petition for Review ("Petition") pursuant to 40 C.F.R. § 124.19 (Petition attached as Exhibit 1);

(2) NMED filed its Response to DOE's Petition (NMED's Response") on or about June 29, 1990 (NMED's Response attached as Exhibit 2);

(3) EPA Region 6 filed its Response of Region 6 In Opposition to Petition For Review ("EPA's Response") on or about August 28, 1990 (EPA's Response without its exhibits attached as Exhibit 3);

(4) DOE by letter dated September 7, 1990 proposed the insertion of certain language in its Permit as a Class I Modification in return for its dismissal of its administrative appeal, and purported to make that Class I Modification pursuant to 40 C.F.R. § 270 ("DOE's Class I Modification Letter")(this letter is attached to the United State's Opposition as its Exhibit 1; Defendants attach it as Defendants' Exhibit 4);

(5) EPA Region 6 by letter dated October 15, 1990 acknowledged receipt of DOE's letter notifying of the purported Class I Modification and confirming that DOE agreed, once the modification is put into effect, to withdraw its Petition For Review ("EPA's Acknowledgment Letter")(EPA's Acknowledgment Letter is attached as Exhibit 5);

(6) NMED by letter dated January 30, 1991 appealed DOE's purported Class I Modification to EPA Region 6 ("NMED's Appeal of Class I Modification") pursuant to 40 C.F.R. § 270 (NMED's Appeal of Class I Modification is attached as Exhibit 6); and

(7) EPA Region 6 by letter dated April 16, 1991 ("EPA's

DOE asserts that the insertion of the language in the Permit is a Class I Modification, "[s]pecifically, an informational change" (Exhibit 4 at 1) that "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." (United States Opposition, Exhibit 1 at 2). By this action, and by its agreement to dismiss its administrative appeal of the EPA Permit conditions, DOE accedes to the RCRA jurisdiction of EPA to require the radionuclide sampling and monitoring.

EPA Region 6's acceptance of DOE's insertion as a Class I Modification and its rejection of NMED's appeal of that modification clearly articulate and demonstrate EPA's position that RCRA authorizes the required radioactive monitoring and sampling, and that the inclusion of the language does not affect the RCRA jurisdiction of the Permit's requirements. (See, e.g., EPA's Response to NMED Appeal Letter, Exhibit 7.)

EPA is the agency charged with knowledge to construe and interpret its own statutory authority, and its construction should be dispositive.

'The power of an administrative agency to administer a congressionally created ... program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.' If Congress has explicitly left a gap for the agency to fill, there in an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such

Response to NMED Appeal Letter") rejected NMED's appeal of the Class I Modification (EPA's Response to NMED Appeal Letter is attached as Exhibit 7).

a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron U.S.A. v. Natural Res. Def. Council, 81 L.Ed. 2d 694, 703 (1984) (citing Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

RCRA INSPECTION AUTHORITY

Plaintiff asserts that allowing the sampling and monitoring requirements of Conditions 1 & 2 pursuant to RCRA's section 3007(a) and HWA's § 74-4-4.3 inspection authority "would effectively obviate the specific exemptions within RCRA for source, special nuclear and byproduct materials." (Plaintiff's Opposition at 10-11.) However: (1) it is EPA's position that RCRA section 3007 gives it the authority to require sampling and monitoring of radioactive materials as demonstrated by EPA's placement of such conditions in EPA's portion of the LANL RCRA permit (see, e.g., Exhibit 7); and (2) DOE has acceded to that RCRA authority (see, e.g., Exhibit 4). Further, such an assertion is on its face untenable -- a requirement to sample and report radioactivity is very different from all the substantive and procedural RCRA requirements that apply to hazardous waste.

CLEAN AIR ACT

In their brief, Defendants asserted that the challenged permit conditions are "requirements [and] administrative authority ... respecting the control and abatement of air pollution ...," and that , as a result, Congress waived immunity for those conditions in section 118 of the federal Clean Air Act, 42 U.S.C. § 7418. Plaintiff responded by asserting, without authority, that "the Los

Alamos facility can ... only be subject to the [challenged] permit conditions if there is a waiver of sovereign immunity in RCRA." (Plaintiff's Opposition at 11.)

The clear language of section 118 of the federal Clean Air Act does not so limit the waiver. "[I]n the absence of 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.'" Burlington Northern Railroad Co. v. Oklahoma Tax Commission, 481 U.S. 454, 461 (1987). Neither section 118 of the Clean Air Act of section 6001 of RCRA specifically limits its application as Plaintiff asserts. Without such limitation, this Court must apply the express language to the conditions at issue here. U.S. South Coast Air Quality Management District, 748 F.Supp. 732, 32 ERC 1308, 1313 (C.D.Cal. 1990).

As the court in South Coast noted, "the language of section 118 is broad. Words highlighting the breadth of the section include 'all'; 'any'; 'any requirements whatsoever'; and 'and this subsection shall apply notwithstanding any immunity . . . under any law or rule of law' . . . The plain language of the statute reveals its expansiveness." Id. In this case, as Defendants explained, the challenged permit conditions are within the waiver contained in section 118. Therefore, the conditions must be upheld.

Respectfully submitted,

TOM UDALL

Attorney General



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Attorney for Defendant State of

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NEW MEXICO ENVIRONMENT DEPARTMENT



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Attorney for Defendant NMED

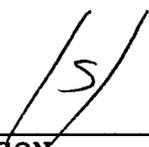
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DEFENDANTS' REPLY TO UNITED STATE'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT was mailed on this 10 day of June, 1991, to the following:

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GINI NELSON