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MEMORANDUM

TO: Gini Nelson

FROM: Elizabeth Gordon EG

DATE: July 2, 1991

RE: Memorandum from Attorney General's Office regarding permit and interim status questions

New Mexico received authorization for mixed waste on July 25, 1990. The announcement of the final authorization was published in the Federal Register on July 11, 1990 (A copy is attached.).

LANL has not been sent a letter requesting a mixed waste Part B application. In a meeting last week, they indicated that they planned to have the Part B to NMED by July 25, 1991. I assume they are filing the Part B by that date due to the statutory requirement (RCRA section 3005(e)(3)) that land disposal facilities submit the Part B permit application within one year of a State's authorization for a newly listed waste. A copy of page 37047 from the September 23, 1988 Federal Register discussing this for mixed waste is attached.

cc: Benito Garcia

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Clean Air Act, as amended (42 U.S.C. 1857, *et seq.*).

Dated: June 14, 1990.

Daniel McGovern,

Regional Administrator.

[FR Doc. 90-15802 Filed 7-10-90; 8:45 am]

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40 CFR Part 271

[FRL—3808-6]

State of New Mexico: Final Authorization of State Hazardous Waste Management Program

AGENCY: Environmental Protection Agency.

ACTION: Final rule on New Mexico program revision application.

SUMMARY: The State of New Mexico has applied for final authorization of revisions to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). Environmental Protection Agency (EPA) has reviewed New Mexico's application and has reached a decision that New Mexico's hazardous waste program revision satisfies all of the requirements necessary to qualify for final authorization. Thus, EPA is granting final authorization to New Mexico to operate its expanded program, subject to the authority retained by EPA in accordance with the Hazardous and Solid Waste Amendments of 1984.

EFFECTIVE DATE: Final authorization for New Mexico shall be effective at 1 p.m. on July 25, 1990.

FOR FURTHER INFORMATION CONTACT: RCRA Regional Authorization Coordinator, Attention: Ms. Lynn Prince, RCRA Programs Branch (6H-HS), U.S. EPA Region 6, First Interstate Bank Tower at Fountain Place, 1445 Ross Avenue, Dallas, Texas 75202, phone (214) 655-6760.

SUPPLEMENTARY INFORMATION:

A. Background

Revisions to State hazardous waste programs are necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, State program revisions are necessitated by changes to EPA's regulations in 40 CFR parts 260, 266 and 124 and 270.

B. New Mexico

The State of New Mexico initially received final authorization effective January 25, 1985 (50 FR 1515), published on January 11, 1985. The State program was later revised with those revisions approved by EPA on April 10, 1990 (55 FR 4604). On July 25, 1989, New Mexico submitted a program revision application for additional program approvals. On March 19, 1990, EPA published a proposal to approve New Mexico's application for program revision in accordance with 40 CFR 271.21(b)(4).

EPA has reviewed New Mexico's application, and has made a final decision that New Mexico's hazardous waste program revision satisfies all of the requirements necessary to qualify for final authorization for the additional program modifications to New Mexico.

The public was given the opportunity to provide comments on the proposal to approve the State application. To date, no comments have been received concerning the proposal to approve the New Mexico revision application.

The following chart lists the State rules that have been changed and that are being recognized as equivalent to the analogous Federal rules, as they have been changed.

Federal citation	State analog
1. Radioactive mixed waste requirements, as published in the Federal Register on July 3, 1986.	1. New Mexico Hazardous Waste Act, §§ 74-4-1 to 74-4-13 NMSA 1978.
2. Hazardous waste miscellaneous units, as published in the Federal Register on December 10, 1987.	2. New Mexico Hazardous Waste Act and Hazardous Waste Management Regulations (HWMR)—5, Parts I, V, and IX.
3. Research, Development and Demonstration Permits, as published in the Federal Register on July 15, 1985.	3. HWMR-5, Part IX.
4. Closure, post-closure and financial responsibility requirements, as published in the Federal Register on May 2, 1986.	4. HWMR-5, Parts I, V, VI, and IX.
5. Standards for hazardous waste storage and treatment tank systems, as published in the Federal Register on July 14, 1986.	5. HWMR-5, Parts I, II, III, V, VI, and IX.
6. Amendments to Part B information requirements, as published in the Federal Register on June 22, 1987.	6. HWMR-5, Part IX.
7. Permit rules—Settlement Agreement, as published in the Federal Register on April 24, 1984.	7. HWMR-5, Part IX.

The State also submitted revisions to the Program Description, Attorney General's Statement, and the Memorandum of Agreement between the State of New Mexico and EPA Region 6.

One State hazardous waste permit will need to be modified to reflect the mixed waste component as a result of the State receiving this additional authority.

The State of New Mexico is not seeking authority over activities on Indian lands.

C. Decision

I conclude that New Mexico's application for program revision meets all of the statutory and regulatory requirements established by RCRA. Accordingly, the State of New Mexico is granted final authorization to operate its hazardous waste program as revised. New Mexico now has responsibility for permitting treatment, storage, and disposal facilities within its borders and carrying out other aspects of the RCRA program, subject to the limitation of its program revision application and previously approved authorities. New Mexico also has primary enforcement responsibilities, although EPA retains the right to conduct inspections under section 3007 of RCRA and to take enforcement actions under sections 3008, 3013 and 7003 of RCRA.

D. Codification in Part 272

EPA uses part 272 for codification of the decision to authorize State programs and for incorporation by reference of those provisions of a State's statutes and regulations that EPA will enforce under sections 3008, 3013, and 7003 of RCRA. Therefore, EPA will be amending part 272, subpart G under a separate Federal Register notice, that will be published at a later date.

Compliance with Executive Order 12291

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Certification Under the Regulatory Flexibility Act

Pursuant to the provisions of 4 U.S.C. 605(b), I hereby certify that this authorization will not have a significant economic impact on a substantial number of small entities. This authorization effectively suspends the applicability of certain Federal regulations in favor of New Mexico's program, thereby eliminating duplicative requirements for handlers of hazardous waste in the State. It does not impose any new burdens on small entities. This

on that date may qualify for interim status if other applicable requirements are met.

Facilities treating, storing, or disposing of radioactive mixed waste but not other hazardous waste in a State with base program authorization are not subject to RCRA regulation until the State program is revised and authorized to issue RCRA permits for radioactive mixed waste. The effective date of the State's receipt of radioactive mixed waste regulatory authorization from EPA will therefore be the regulatory change that subjects these TSDF's to RCRA permitting requirements. Any facility treating, storing, or disposing of radioactive mixed waste, or any such facility at which construction commenced by the effective date of authorization for the State's radioactive mixed waste program revision may qualify for interim status if the other requirements described below are met. However, owners and operators of TSDF's in authorized States are subject to all applicable State laws. A State can establish its own date for qualifying for interim status but, in order to be no less stringent than the Federal program, that date *may not* be after the effective date of EPA's authorization to the State to regulate radioactive mixed waste.

Some facilities in States with base program authorization as of July 3, 1986 may already have interim status under RCRA because they handle other RCRA hazardous wastes. These facilities should submit a revised Part A permit application reflecting their radioactive mixed waste activities within six months of the State's receipt of authorization for radioactive mixed waste.

2. Requirements to File a Permit Application

To qualify for interim status under RCRA section 3005(e) (1), the owner or operator of an "existing" facility must submit a Part A permit application. Under 40 CFR 270.10(e), existing facilities in *unauthorized* States must submit Part A of their permit application no later than six months after the date of "publication or regulations" which first require them to comply with technical standards, or thirty days after they first become subject to the technical standards, whichever is first. Although the July 3, 1986 notice clarified RCRA jurisdiction over radioactive mixed waste, it specifically addressed only the issue of State authorization. Application of the time periods specified in 40 CFR 270.10(e) to facilities located in unauthorized States was not addressed. Furthermore, the July 3, 1986 notice was technically not a regulation, which is the trigger for § 270.10(e) in normal circumstances. As a result, owners and operators in unauthorized States could legitimately have been confused as to whether (and when) they were required to submit a Part A permit application. Under § 270.10(e)(2), EPA finds that the confusion is substantial and is attributable primarily to (1) ambiguities surrounding the 40 CFR parts 260–265 regulatory status of mixed waste, (2) the narrow scope of the July 3, 1986 notice and (3) uncertainty regarding DOE's final definition of byproduct material which had direct bearing on RCRA applicability to Federally-owned radioactive mixed wastes and indirect bearing on commercial radioactive mixed wastes.

EPA, therefore, is exercising its authority today under § 270.10(e)(2) to extend the Part A permit application filing dates for owners and operators of facilities handling radioactive mixed waste in unauthorized States. Owners and operators of radioactive mixed waste facilities in operation or under construction as of July 3, 1986 (See 45 FR 33066, May 19, 1980) in unauthorized States must submit RCRA Part A permit applications or modifications within six months of the date of publication of today's notice to qualify for interim status. This is predicated on the Agency's determination that the time periods specified in § 270.10(e) are triggered as of the date of publication of this notice given the circumstances presented herein. It should be noted, however, that radioactive mixed waste land disposal facilities must also submit a final (Part B) permit application and certification of compliance with applicable ground-water monitoring and financial assurance requirements within twelve months from the date of this notice pursuant to section 3005(e)(3) of RCRA. Failure to do so may result in loss of interim status for the affected units and possibly for the facility. Facilities other than land disposal must submit Part B of the permit application in accordance with deadlines established by the EPA Regional Office.

Mixed waste TSDF's in States with base program authorization must comply with applicable State requirements and deadlines for obtaining interim status as prescribed in authorized State law. Radioactive mixed waste land disposal facilities obtaining interim status in authorized States are nevertheless subject to the section 3005(e)(3) one-year provision on loss of interim status for newly-listed wastes. Thus, the owners or operators of such facilities must submit the State analogue of the Part B permit application and the required certifications within twelve months of the effective date of the State's authorization to regulate radioactive mixed waste. Failure to submit the Part B permit application or the required certifications will result in loss of interim status for the affected units and possibly for the facility. Facilities other than land disposal must submit the Part B permit application in accordance with deadlines established by the authorized State program.

3. Requirement to Comply with Section 3010 Notification

The final condition for obtaining interim status under section 3005(e) of RCRA is notification of hazardous waste activity under section 3010(a) of RCRA. Section 3010(a) requires persons handling hazardous wastes at the time of publication of EPA's initial hazardous waste regulations (on May 19, 1980) to notify EPA of their hazardous waste activity within 90 days (i.e., by August 18, 1980). Section 3010(a) also allows the Administrator discretion on whether to require persons to provide such notification not later than 90 days after promulgation or regulations identifying a substance they handle as hazardous waste thereby providing EPA with a current picture of the hazardous waste universe.

Although many facilities currently treating, storing, or disposing of radioactive mixed waste were doing so in May 1980, EPA believes that the status of radioactive mixed waste was sufficiently unclear that no notification under section 3010(a) was required by August 18, 1980 for facilities handling such waste (See 45 FR 78631–32, November 19, 1980). Nor has notification subsequently been required as part of EPA promulgation of additional RCRA regulations. Therefore, EPA has determined that it is unreasonable to penalize owners and operators of facilities currently handling radioactive mixed waste for any failure to file notification under Section 3010.

Further, EPA finds that TSDF's have "complied with the requirements of section 3010(a)" for purposes of section 3005(e) interim status under 40 CFR 270.70(a)(1). This finding is predicated largely on the fact that radioactive mixed waste will not be subject to hazardous waste regulations in the vast majority of States until they revise their programs to include such authority. These program revisions could take until July 3, 1989 for States needing a statutory amendment. Because notification would be linked to radioactive mixed waste authorization for these States, receipt of this

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M E M O R A N D U M

TO: Elizabeth Gordon

FROM: Gini Nelson

DATE: July 2, 1991

RE: Permit Questions

Re: LANL

Attached please find a memorandum from the Attorney General's Office with two questions. Kathleen Sisneros believes the answer is that NMED has not by letter requested the Part B, but expects it to come in. Could you please confirm this, and, if NMED expects the Part B to come in, why is this so?

Re: WIPP

Karen Griffith, an attorney for DOE, called Lindsay Lovejoy on July 1, 1991 with a question about NMED's June 10th Notice of Deficiency letter, specifically about the certification issue. I will return her call to him and let you know what further questions she has.

MEMORANDUM

DATE: June 28, 1991

FROM: Lindsay A. Lovejoy, Jr.

TO: Gini Nelson

Re: Interim Status Issues

On the interim status issues that we have been discussing, can you tell me whether the EID sent a letter requesting submission of a mixed waste Part B application for LANL, after receiving EPA authorization on July 11, 1990?

Alternatively, does NMED now anticipate that LANL will file such an application by the one-year deadline, i.e., July 11, 1991?

If not, why not?