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GOVERNOR

State of New Mexico
ENVIRONMENT DEPARTMENT
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Santa Fe, New Mexico 87502
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Permit

JUDITH M. ESPINOSA
SECRETARY

RON CURRY
DEPUTY SECRETARY

November 18, 1991

Mr. Jim White (HSE-8)
Los Alamos National Laboratory
P.O. Box 1663
Los Alamos, NM 87544-5000

Dear Mr. White:

This is in response to your inquiry regarding the additional on-site generation-points component of the basic permit fees in the New Mexico Hazardous Fee Regulations, Table 2.1. At the time these regulations were being promulgated, it was thought that generation sites had to be included in the permit. Otherwise, if these sites were not included, the permit could be used as a shield due to the broad language in the New Mexico Hazardous Waste Management Regulations (HWMR-6), Part IX, 40 CFR section 270.4(a). However, further legal review indicated that this "permit shield" provision could not be used to exempt a permitted facility from the generator requirements. Please see the attached memorandum, dated November 13, 1987, from the Office of Solid Waste, Environmental Protection Agency. Consequently, generation sites are not included in permits and these fees are not assessed.

If you have further questions, please contact me at (505) 827-4300.

Yours truly,

Ed Horst, RCRA Program Manager
Hazardous and Radioactive Materials Bureau

EH/aeg

cc: Steve Slaten, DOE



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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

RECEIVED
MAR 16 1989
HAZARDOUS WASTE SECTION
OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

NOV 13 1987

MEMORANDUM

SUBJECT: Region X's Recommended Revision of 40 C.F.R. §§270.4(a) and 270.32(b)(1)

FROM: Gene Lucero, Director
Office of Waste Programs Enforcement

Marcia Williams, Director
Office of Solid Waste

TO: Charles E. Findley, Director
Hazardous Waste Division
Region X

In your memorandum dated June 26, 1987, you identify several potential enforcement problems in the RCRA permitting regulations and in the corresponding language in the Agency's model permits. In addition, you present alternative language that Region X intends to incorporate into permits to prevent these enforcement problems. Specifically, you express concerns with the language of §270.4(a) (and similar language in §270.32(b)(1)) which states:

Compliance with a RCRA permit during its term constitutes compliance, for purposes of enforcement, with Subtitle C of RCRA.

Several issues are involved in the consideration of this "permit shield" provision. First, we agree that this language may be overly broad for some of the reasons you cited in your memorandum. However, we do not believe that it presents a serious impediment to enforcing the RCRA Subtitle C requirements that are outside the permit's scope. Although an argument can be made that §270.4(a) limits the enforceability of any RCRA Subtitle C requirements not addressed by the permit, such an interpretation would conflict with the intent of other RCRA provisions. Many of the Subtitle C requirements are not designed for, and are not appropriate for inclusion as permit conditions, namely Parts 260, 261, 262, and 263. An illustration of the Agency's intent to implement these Part 260-263 standards outside

of the permit is §262.10(f) which applies the Subtitle C Part 262 generator standards to permitted facilities that generate hazardous wastes.

Second, the regulations at §270.32(b)(1) indicate that a permit should include conditions that incorporate the standards specified in Parts 264, 266, 267, and 268. (Note, however, that the applicability of Part 267 has expired.) The purpose of §270.32(b)(1) and the "permit as a shield" provision of §270.4(a) is to assure the permittee that by complying with the permit, he or she is in compliance with the RCRA facility standards. Thus, given §270.32(b)(1), the permit shield applies in all cases to the facility standards of Parts 264 and 266.

The relation of the permit shield provision to Part 268 is more complex. As a result of HSWA, the self-implementing facility standards imposed by statute and the Part 268 land disposal restrictions apply to all permitted facilities despite the shield provision of §270.4(a), except in those cases where the self-implementing requirements have been incorporated into the permit. (See the March 28, 1986 proposed amendment to §270.4, 51 FR 10715.) Consequently, if the self-implementing RCRA provisions are incorporated into the permit, the permit will act as a shield from these self-implementing requirements. EPA maintains its position that it is generally preferable to incorporate the Part 268 and related statutory standards into new permits whenever possible. At the same time, the Agency must assure that the permittee is obligated to comply with new or amended self-implementing provisions that occur after permit issuance. Sample permit language is provided below to achieve that effect.

Based on the two points discussed above, we believe that §270.4(a) is not as serious an impediment as you suggest. However, we agree with your concern that there is a potential for confusion, and concur with your approach to modifying the permit language to clarify the effect of the permit for enforcement purposes. We recommend a few changes to your suggested alternative language to indicate more clearly which 40 C.F.R. Parts are shielded by the permit and those that are not shielded. Thus, the boilerplate language should read as follows:

Compliance with this permit during its term constitutes compliance, for purposes of enforcement, with 40 C.F.R. Parts 264 and 266 only for those management practices specifically authorized by this permit. The permittee is also required to comply with Parts 260, 261, 262, and 263 to the extent the requirements of those Parts are applicable.

In addition, one of the following conditions should be used to reflect the applicability of the statutory and Part 268 self-implementing provisions:

1. For permits that do not incorporate self-implementing requirements:

The permittee must also comply with all applicable self-implementing provisions imposed by the RCRA statute or the Part 268 regulations.

2. For permits that incorporate self-implementing requirements:

Compliance with this permit constitutes compliance, for purposes of enforcement, with Part 268 only for those management practices and related standards specifically authorized by this permit. The permittee must also comply with all applicable self-implementing provisions that take effect after issuance of this permit, whether they are imposed by the RCRA statute or the Part 268 regulations (including amendments).

You may also add a general provision which states that compliance with the permit does not constitute a defense against any action brought under law to protect human health or the environment, including other requirements not necessarily included in the permit.

Thank you for bringing this matter to our attention. We will continue to reexamine the entire permit shield issue to determine whether further changes to §270.4(a) are warranted. If you have additional questions or observations on this subject please contact Frank McAlister of the Office of Solid Waste (FTS 382-2223) or Susan Hodges of the Office of Waste Programs Enforcement (FTS 475-9315).

cc: Waste Management Division Directors, Regions I-IX
RCRA Branch Chiefs, Regions I-X
Regional Counsels, Regions I-X

5. Closure Plans required by HWMR-5, as amended 1989, Part V, 40 CFR section 264.112(a) and this permit;
6. Operating record required by HWMR-5, as amended 1989, Part V, 40 CFR section 264.73 and this permit; and
7. Inspection schedules required by HWMR-5, as amended 1989, Part V, 40 CFR section 264.15 and this permit.

I.H. PERMIT CONSTRUCTION

1. **Citing.** Whenever paragraphs of this permit or of the Hazardous Waste Management Regulations are cited, such cite includes all subordinate 40 CFR sections of the cited paragraph. When subordinate 40 CFR sections are cited, such cite includes all 40 CFR subsections of the cited subparagraph. All such cites shall be considered an inclusion by reference in accordance with HWMR-5, as amended 1989, Part IX, 40 CFR section 270.30.
2. **Gender.** Whenever the pronoun "he" is used in reference to the Director of the Environmental Improvement Division or the Permittee, it is to be read as "she" in any instance where the object of the reference is female.
3. **Definitions.** For purposes of this Permit, terms used herein shall have the same meaning as those in HWMR-5, Parts I, V, VIII, and IX, unless this permit specifically provides otherwise; where terms are not defined in the regulations or the permit, the meaning associated with such terms shall be defined by a standard dictionary reference or the generally accepted scientific or industrial meaning of the term. "Regional Administrator" means the Regional Administrator of EPA Region VI, or his designee or authorized representative. "Director" means the Director of the New Mexico Environmental Improvement Division, or this designee or authorized representative.
 - a. References to "Wastes" in this permit mean "Hazardous Wastes" as regulated under RCRA unless specifically designated otherwise at the time of use.
 - b. The term "Knowledge of Process" means a written description of the waste, certified as true and correct by an individual familiar with the process that generated the waste. Such description shall specify the waste constituents and estimate their concentration or quantity.
 - c. The term "On-site" as used in permit paragraph II.B.2. means facilities under the operational control of the Permittee and located within the external perimeter of the Permittee's property. This includes Technical Areas 0, 2, 3, 6, 8, 9, 11, 14, 15, 16, 18, 21, 22, 26, 33, 35, 36, 37, 39, 40, 41, 43, 46, 48, 49, 50, 51, 52, 53, 54, 55, 58, and 59. See permit Figure I-1 and Table I-1.
 - d. Technical Area Zero (TA-0), includes only the detached sites listed in Table I-1.
 - e. The term "Analysis" includes physical analysis, chemical analysis and knowledge of process determinations.

MODULE II GENERAL FACILITY CONDITIONS

II.A. DESIGN AND OPERATION OF THE FACILITY

The Permittee shall maintain and operate the facility to minimize the possibility of a fire, explosion, or any unplanned sudden or non-sudden release to air, soil, or surface water of hazardous waste constituents which could threaten human health or the environment.

II.B. REQUIRED NOTICE

1. **Foreign Wastes**. This permit does not allow the Permittee to accept wastes from a foreign source. If the Permittee is to receive hazardous waste from a foreign source, he shall apply for and receive a permit modification in accordance with HWMR-5, as amended 1989, Part IX, 40 CFR section 270.41 or 270.42, if appropriate, prior to accepting such waste.
2. **Off-Site Wastes**. This permit does not allow the Permittee to accept wastes from an off-site source. "Offsite source" refers to wastes generated by sources other than the Permittee or its contractor(s) operating onsite. For the purposes of this permit, wastes generated by the Permittee at Technical Area 57, the Fenton Hill site, may be accepted for storage or treatment if all such waste is properly manifested in accordance with permit paragraph II.J. below. If the Permittee is to receive hazardous waste from an off-site source, he shall apply for and receive a permit modification in accordance with HWMR-5, as amended 1989, Part IX, 40 CFR section 270.41 or 270.42, if appropriate, prior to accepting such waste.

II.C. WASTE ANALYSIS

1. **Waste Analysis Plan**. The Permittee shall follow the procedures described in Permit Attachment A.
2. **Quality Assurance**. The Permittee shall verify its waste analysis as part of a written quality assurance program. The quality assurance program shall be in accordance with current accepted practices such as specified in Test Methods for Evaluating Solid Waste: Physical/Chemical Methods SW-846, 1986, as revised, or equivalent methods approved by the Director; and at a minimum ensure that the Permittee maintains proper functional instruments, uses approved sampling and analytical methods, verifies the validity of sampling and analytical procedures, and performs correct calculations. The Permittee will notify any contract laboratory of the requirements of this section and permit.
3. **Waste Segregation**. The Permittee shall keep available at each place where waste storage for more than ninety days occurs, a copy of EPA-600/2-80-076, *A Method of Determining the Compatability of Hazardous Waste*.

training documents and records, as required by HWMR-5, as amended 1989, Part V, 40 CFR section 264.16(d) and (e).

//G. REQUIREMENTS FOR IGNITABLE, REACTIVE, OR INCOMPATIBLE WASTE

The Permittee shall comply with the requirements of HWMR-5, as amended 1989, Part V, 40 CFR section 264.17.

//H. PREPAREDNESS AND PREVENTION

1. Required Equipment. At a minimum, the Permittee shall equip the facility with the equipment set forth in Permit Attachments B. and D.
2. Testing and Maintenance of Equipment. The Permittee shall test and maintain the equipment specified in permit paragraph II.H.1. above annually or more often if necessary to assure its proper operation in time of emergency.
3. Access to Communications or Alarm System. The Permittee shall maintain access to the communications or alarm system(s) as required by HWMR-5, as amended 1989, Part V, 40 CFR section 264.34.
4. Required Aisle Space. The Permittee shall maintain aisle space as required by HWMR-5, as amended 1989, Part V, 40 CFR section 264.35. The minimum aisle shall be twenty four inches. All containers in storage shall be accessible for inspection.

//I. CONTINGENCY PLAN

1. Implementation of Plan. The Permittee shall immediately carry out the provisions of Permit Attachment D. whenever there is an unplanned fire, explosion, or unpermitted release of hazardous waste or hazardous constituents which threatens or could threaten human health or the environment.
2. Amendment of the Plan. The Permittee shall review, as required by HWMR-5, as amended 1989, Part V, 40 CFR section 264.54., and immediately amend if necessary, the Contingency Plan.
3. Copies of the Plan. The Permittee shall comply with the requirements of HWMR-5, as amended 1989, Part V, 40 CFR section 264.53. A dated copy of any amended Contingency Plan will be submitted to the Director for the permit files and permit modification in accordance with HWMR-5, as amended 1989, Part IX, 40 CFR section 270.42 prior to its implementation.
4. Emergency Coordinator. The Permittee shall comply with the requirements of HWMR-5, as amended 1989, Part V, 40 CFR section 264.55 concerning the emergency coordinator.

//J. MANIFEST SYSTEM

The Permittee shall comply with the manifest requirements of HWMR-5, as amended 1989, Part V, 40 CFR sections 264.71 and 264.72 for any hazardous

wastes received from or shipped off-site by the Permittee for treatment, storage or disposal.

II.K. RECORDKEEPING AND REPORTING

1. Facility Operating Record. The Facility Operating Record maintained pursuant to HWMR-5, as amended 1989, Part V, 40 CFR section 264.73 shall be maintained in such manner that any information required to be in the record shall be readily available to an inspector. Readily available means that, upon request by an inspector, the Permittee can provide the requested information within 24 hours or before the end of the inspection, whichever is less; or upon a schedule designated by the inspector.

a. In accordance with HWMR-5, as amended 1989, Part IX, 40 CFR section 270.30(j), the Permittee shall maintain at the facility until the end of the last closure period, a written record of waste, effluent, water and decontamination wash-water analyses. The following information shall be recorded:

- (i) The dates, exact place, and times of sampling or measurements;
- (ii) The individual who performed the sampling or measurements;
- (iii) The dates analyses were performed;
- (iv) The individuals or off-site laboratory who performed the analyses;
- (v) The analytical techniques or methods used; and
- (vi) The results of such analyses. The results shall include range, mean, standard deviation and detection limits as applicable to facilitate data analysis.

b. The Permittee shall maintain pursuant to HWMR-5, as amended 1989, Part V, 40 CFR section 264.73(b) at the facility until the end of the last closure period, a written record of waste disposal activities. Current EPA approved nomenclature and codes shall be used where appropriate. The following information shall be recorded:

- (i) Waste Source
- (ii) Waste Description
- (iii) Waste Quantity
- (iv) Current Storage Location
- (v) Disposal. Properly completed hazardous waste manifests will suffice for wastes shipped off-site.

c. The Permittee shall maintain at the facility a written record of Contingency Plan implementation reports. The record shall contain at least the information required in permit paragraph II K.2.b. below. These records shall be kept until the end of the last closure period.

N. ED/DOE/LANL *meeting*
November 6, 1991

| <u>INDIVIDUAL</u> | <u>Organization</u> | <u>Telephone</u> |
|-------------------------|---------------------|------------------|
| Jim White | LANL / EM-8 | 665-0677 |
| Marc Sides | NMED / EPA | 827-4300 |
| LEE WINN | NMED / DOE | 827-4300 |
| Herb Greener | NMED / HRMB | " " |
| Larry Maassen | LANL / EM-13 | 667-1691 |
| David Englert | NMED / Mixed Waste | 827-4300 |
| EDWARD HORST | " / HRMB | 827-4300 |
| Rebecca Redeker | DOE / LAAO | 665-7203 |
| Tony Grieggs | LANL / EM-8 | 665-0451 |
| Jack Ellinger | LAAO | 665-5042 |
| Dave McInroy | LANL / EM-8 | 667-0819 |
| Steve Slaten | LANL / EM-8 | 667-0820 |
| Steve Slaten | DOE / LAAO | 665-5050 |

all relevant facts and information in obtaining the permit;

(3) violation of any provision of the Hazardous Waste Act or any regulation promulgated pursuant to it; or

(4) in the case of research, development and demonstration permits, upon the determination that termination is necessary to protect human health and the environment.

F. No ruling shall be made on permit issuance, modification, suspension or revocation without an opportunity for a public hearing at which all interested persons shall be given a reasonable chance to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing; provided however that the division may, pursuant to Section 74-4-10 NMSA 1978, order the immediate termination of a research development and demonstration permit whenever it is determined that such termination is necessary to protect human health and the environment and may order the immediate suspension or revocation of a permit for a facility which has been ordered to take corrective action or other response measures for releases of hazardous waste into the environment.

F. The board shall provide a schedule of fees for businesses generating hazardous waste or seeking a permit for the management of hazardous waste, to be deposited to the credit of the hazardous waste fund, including but not limited to:

(1) a hazardous waste business fee applicable to any business engaged in a regulated hazardous waste activity, which shall be an annual flat fee based on the type of activity;

(2) a hazardous waste generation fee applicable to any business generating hazardous waste, which shall be based on the quantity of hazardous waste generated annually; however, when any material listed in Paragraph (2) of Subsection 1 of Section 74-4-3 NMSA 1978 is determined by the board to be subject to regulation under Subtitle C of the Federal Resource Conservation and Recovery Act, the board may set a generation fee under this paragraph for that waste based on its volume, toxicity, mobility and economic impact on the regulated entity; and

(3) a hazardous waste permit application fee, not exceeding the estimated cost of investigating the application and issuing the permit, to be paid at the time the director notifies the applicant by certified mail that the application has been deemed administratively complete and a technical review is scheduled.

G. Any person adversely affected by a decision of the director concerning the issuance, modification, suspension or revocation of a permit may appeal the decision by filing a notice of appeal with the court of appeals within thirty days after the date the decision is made. The appeal shall be on the record made at the hearing. The appellant shall certify in his notice of appeal that arrangements have been made with the division for a sufficient number of transcripts of the record of the hearing on which the appeal depends to support his appeal to the court, at the expense of the appellant, including one copy which he shall furnish to the division.

H. Upon appeal, the court of appeals shall set aside the