



BRUCE KING
GOVERNOR

State of New Mexico

ENVIRONMENT DEPARTMENT

JUDITH M. ESPINOSA
SECRETARY

RON CURRY
DEPUTY SECRETARY



TRANSMITTAL MEMORANDUM

TO: Elizabeth Gordon, Hazardous Waste
Ed Horst, RCRA Programs Manager

DATE: November 25, 1991

RE: United States of America and The Regents of the
University of California v. State of New Mexico, et al.;
United States District Court, Cause No. CIV 90-0276SC

The following documents are enclosed: Copy of 11/22/91 letter to Gini Nelson and copy of Stipulation and Complaint for declaratory Relief.

PLEASE:

- File
- Record
- Serve, complete Return of Service and return to us
- Per your request
- For your information
- Approve, sign and return
- Return conformed copies
- Check for \$ _____ enclosed for proper fee
- Self-addressed, stamped envelope(s) enclosed
- Other: Please review and call me to discuss.

Thank you very much,

GINI NELSON
Assistant General Counsel

Enclosure(s)

/clt



72

COPY

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

UNITED STATES OF AMERICA)
and THE REGENTS OF THE)
UNIVERSITY OF CALIFORNIA,)
)
Plaintiffs,)
)
v.)
)
STATE OF NEW MEXICO; and)
NEW MEXICO ENVIRONMENT)
DEPARTMENT,)
)
Defendants.)
_____)

NO. CIV 90-0276SC

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff, The Regents of the University of California (the "Regents" or "University") for its Complaint alleges as follows:

NATURE OF THE CASE

1. Pursuant to a motion by the State of New Mexico, the University was involuntarily joined by order of Court dated March 21, 1991, as a plaintiff to this action brought by the United States of America, on behalf of the United States Department of Energy ("DOE").

2. The University has previously concurred with the pleadings and motion for summary judgment filed by plaintiff United States of America in this action.

3. This is a civil action for declaratory relief by the University challenging action by the New Mexico Department of Environment ("NMED"), formerly the

New Mexico Health and Environment Department,
Environmental Improvement Division ("EID"), and NMED's
Secretary, formerly entitled the "Director" of EID,
imposing three illegal conditions in a Hazardous Waste
Facility Permit No. NM 0890010515-1 ("the Permit") for the
Los Alamos National Laboratory, issued pursuant to the
Resource Conservation and Recovery Act ("RCRA" or "the
Act"), 42 U.S.C. §§ 6901-6911i, and the New Mexico
Hazardous Waste Act ("HWA"), N.M. Stat. Ann. 1978,
Ch. 74, art. 4, §§ 74-4-1 to 74-4-13 (1989 Repl.)
(hereinafter "NMSA 1978 (1989 Repl.)"). The University
challenges the three illegal permit conditions because
they attempt to regulate radioactive materials which are
neither "solid waste" nor "hazardous waste" under RCRA and
the New Mexico HWA.

JURISDICTION AND VENUE

4. This Court has jurisdiction over the subject
matter of this action pursuant to 28 U.S.C. §§ 1331 and
1367, as well as 28 U.S.C. §§ 2201 and 2202.

5. Venue is proper in the United States
District Court for the District of New Mexico pursuant to
28 U.S.C. § 1391(b).

PARTIES

6. The University is a public corporation
organized and existing under the constitution of the State

of California, and manages and operates the Los Alamos National Laboratory ("LANL") facility pursuant to a contract with DOE.

7. Defendant NMED is the authorized hazardous waste control agency for the State of New Mexico for purposes of RCRA as it pertains to state programs and for purposes of the New Mexico HWA. Sections 74-1-3(A)(13) NMSA 1978 (1989 Repl.).

STATUTORY AND REGULATORY BACKGROUND

8. Congress enacted the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C §§ 6901-6992k, to address the serious environmental and health dangers arising from waste treatment, storage, and disposal. Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939b, requires United States Environmental Protection Agency ("EPA") to establish a comprehensive federal regulatory program to assure the proper management of hazardous wastes. The Act directs EPA to identify and list those solid wastes which are hazardous wastes, Section 3001, 42 U.S.C. § 6921, and to establish permit requirements applicable to owners and operators of new and existing facilities engaged in the treatment, storage and disposal of hazardous wastes. Section 3005, 42 U.S.C. § 6925.

9. "Hazardous waste" is defined by statute to mean a subset of "solid waste." 42 U.S.C. § 6903(5). The

statute defines "solid waste" as "any garbage, refuse, ... and other discarded material, ... resulting from industrial, commercial, mining, and agricultural operations, and from community activities" Section 1004(27), 42 U.S.C § 6903(27).

10. The Act specifically provides that the term "solid waste" does not include source, special nuclear, or byproduct material as defined by the Atomic Energy Act ("AEA"), 42 U.S.C. § 2011-2296. RCRA section 1004(27), 42 U.S.C § 6903(27).

11. The AEA defines "source material" as "(1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of Section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time." 42 U.S.C. § 2014(z) (1982). "Special nuclear material" is defined as: "(1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of Section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material." 42 U.S.C. § 2014(aa)

(1982). "Byproduct material" is defined as: "(1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material; or (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C.A. § 2014(e) (West Supp. 1989).

12. In 1987, DOE promulgated regulations clarifying its obligations under RCRA and to interpret the definition "byproduct material" as defined in the AEA. 52 Fed. Reg. 15,937 (May 1, 1987); 10 C.F.R. Pt 962. Under the regulation, "byproduct material" is defined as any radioactive material (except for special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or using special nuclear material. 10 C.F.R. § 962.3(a). The regulation further provides that

[f]or purposes of determining the applicability of [RCRA] to any radioactive waste substance owned or produced by [DOE] pursuant to the exercise of its ... responsibilities under the [AEA], the words 'any radioactive material,' as used in paragraph (a) of this section, refer only to the actual radionuclides dispersed or suspended in the waste substance. The nonradioactive

hazardous component of the waste substance will be subject to regulation under [RCRA].

10 C.F.R. § 962.3(b).

13. In addition, RCRA section 1006(a), 42 U.S.C. § 6905(a), specifically provides that the Act does not "apply to (or authorize any State, interstate, or local authority to regulate) any activity or substance which is subject to ... the Atomic Energy Act of 1954" except to the extent that such application or regulation is not inconsistent with the requirements of the Act.

14. Under RCRA section 3006(c), states may obtain interim authorization from the United States EPA to administer all or part of the RCRA hazardous waste program, where the state program is "substantially equivalent" to the federal regulations. 42 U.S.C. § 6926(c). A state may receive final authorization to administer and enforce a hazardous waste program which is "equivalent" and "consistent" with the federal program. 42 U.S.C. § 6926(b).

15. On or about the date on which NMED issued the Permit, the State of New Mexico was authorized by the United States EPA to issue and enforce RCRA hazardous waste facility permits within the state. It was not, however, authorized by EPA to regulate mixed wastes, which

are solid wastes which are both hazardous and which contain special nuclear source material, or byproduct material.

16. Judith Espinosa is currently the Secretary of the NMED. Richard Mitzelfelt is an official of the State of New Mexico and is the person who issued the Permit.

17. The New Mexico HWA authorizes the Environmental Improvement Board ("the Board") to adopt regulations for the management of hazardous waste no more stringent than those adopted by the United States EPA pursuant to RCRA. Section 74-4-4.A NMSA 1978 (1989 Repl.). Among other things, the Board is directed to develop regulations requiring each person owning and operating an existing facility for the treatment, storage or disposal of hazardous waste to have a permit issued pursuant to requirements established by the Board. Section 74-4-4.A.6 NMSA 1978 (1989 Repl.). Under the New Mexico HWA, the Director of EID (now the Secretary of NMED) is authorized to issue permits for the treatment, storage or disposal of hazardous waste subject to certain conditions. Section 74-4-4.2.C NMSA 1978 (1989 Repl.).

18. The New Mexico HWA adopts RCRA's definition of "hazardous waste" as a subset of "solid waste." Section 74-4-3.I NMSA 1978 (1989 Repl.). The New Mexico

HWA also adopts RCRA's definition of "solid waste," thus exempting from the definition of solid waste "source, special nuclear, or byproduct material" as defined by the AEA. Section 74-4-3.M NMSA 1978 (1989 Repl.).

19. To execute and administer its statute, the State of New Mexico has adopted Hazardous Waste Management Regulations ("HWMR"). With a few exceptions not pertinent here, these state regulations incorporate by reference United States EPA's RCRA regulations at 40 C.F.R. Pts. 260-266, 268, 270. HWMR 101, 201, 301, 401, 501, 601, 701, 801, 901.

FACTS

20. In November 1989, Richard Mitzelfelt in his capacity as Director of EID issued the Permit to DOE and the University as the Permittee for the LANL facility. The Permit was issued pursuant to both RCRA and the New Mexico HWA and allows operation of various units at the LANL facility, including an incinerator, for the treatment and storage of hazardous waste. The Permit imposes three conditions requiring DOE and the University to:

(1) survey each batch of waste treated under the Permit to determine its radionuclide content (Permit Condition V.C.3); (2) continuously monitor radioactivity from the exhaust stack during any hazardous waste burn (Permit Condition V.E.10); and (3) stop incineration of hazardous

waste if the exhaust gas radioactivity measured during operation under the Permit exceeds the background level by fifty percent at any time or by ten percent for more than one minute (Permit Condition V.F.9).

21. In addition to establishing emission limitations for radioactivity within the incinerator's exhaust gas, Permit Condition V.F.9 establishes a definition of "background" radiation.

22. Pursuant to relevant state procedures, the University and DOE challenged the attempt to regulate the radioactive component of the waste stream through the Permit by petitioning the Board for review of the EID Director's decision to impose the three contested permit conditions. In response, EID filed a motion to dismiss the University's and DOE's petition, alleging that the New Mexico HWA provides that permit decisions should be appealed to the New Mexico Court of Appeals and, therefore, the Board had no jurisdiction to hear the University's and DOE's petition for review.

23. The Board, on February 9, 1990, ruled that the relevant portion of the state regulations was ultra vires because the New Mexico HWA provides that permit decisions by the EID should be appealed to the New Mexico Court of Appeals. On February 19, 1990, the Board issued an order, among other things, dismissing all pending petitions for review.

24. On March 12, 1990, the University filed an appeal in the New Mexico Court of Appeals seeking judicial review of the EID Director's decision imposing the contested permit conditions. The University's appeal was consolidated with a similar appeal filed by the United States of America. On September 17, 1990 at the request of the United States of America and the State of New Mexico, the New Mexico Court of Appeals stayed the appeal until further order by the court.

FIRST CAUSE OF ACTION

25. The allegations set forth in paragraphs 1 through 24 are realleged and incorporated by reference herein.

26. The Declaratory Judgment Act, 28 U.S.C. §§ 2201(a), 2202, authorizes the Court to declare the rights or other legal relations of any interested party seeking such a declaration. An actual controversy exists between the University and the defendants concerning the State of New Mexico's authority to impose and to enforce Permit Conditions V.C.3, V.E.10, and V.F.9. Any necessary or proper relief based on a declaratory judgment may be granted against any adverse party whose rights have been determined by such judgment.

27. In accordance with Section 3006 of RCRA, the United States EPA has authorized the State of New Mexico to issue and enforce RCRA hazardous waste facility permits

within the state for the treatment, storage, or disposal of "hazardous waste," 42 U.S.C. § 6926(b).

28. The New Mexico HWA authorizes the Director of EID to issue permits governing the storage, treatment and disposal of "hazardous waste" § 74-4-4.2.C NMSA 1978 (1989 Repl.).

29. Section 1004(27) of RCRA defines "solid waste" to exclude source, special nuclear or byproduct material as defined by the Atomic Energy Act, 42 U.S.C. § 6903(27), and "hazardous waste" as a subset of solid waste, 42 U.S.C. § 6903(5).

30. The New Mexico HWA adopts RCRA's definition of "hazardous waste" as a subset of "solid waste." Section 74-4-3.I NMSA 1978 (1989 Repl.). The New Mexico HWA also adopts RCRA's definition of "solid waste," thus excepting from the definition of solid waste "source, special nuclear, or byproduct material" as defined by the AEA. Section 74-4-3.M NMSA 1978 (1989 Repl.).

31. The Atomic Energy Act, 42 U.S.C. § 2014(e), defines byproduct materials to be any "radioactive materials" yielded in ore made radioactive by exposure to the radiation incident to the process of producing or using special nuclear material. By regulation, DOE has defined "any radioactive material" to refer only to the

actual radionuclides dispersed or suspended in the waste streams. 10 C.F.R. § 962.3(b).

32. Permit Condition V.C.3 seeks to require the University and DOE to survey each batch of waste treated under the Permit to determine its radionuclide content. Permit Conditions V.E.10 and V.F.9, respectively, seek to require the University and DOE to continuously monitor radioactivity from the exhaust stack during any hazardous waste burn and to stop incineration of hazardous waste if the exhaust gas radioactivity measured during operation under the Permit exceeds proscribed limits. Permit Condition V.F.9 also arbitrarily creates a definition of "background" radiation which is not based upon any statute, or any duly authorized regulation and which has no scientific basis. Thus, the Permit attempts to regulate radionuclides which are not "solid waste" within the definition of RCRA and the New Mexico HWA. Accordingly, the contested permit conditions attempt to regulate materials expressly excluded from regulation under RCRA and the New Mexico HWA and are void and unenforceable as a matter of federal law.

SECOND CAUSE OF ACTION

33. The allegations set forth in paragraphs 1 through 32 are realleged and incorporated herein by reference, and the following causes of action are stated in the alternative.

34. The EID Director's authority to impose permit conditions is limited to the regulation of hazardous waste by the statutory definitions of "solid" and "hazardous" waste and the exclusion of radioactive materials from regulation under RCRA and the New Mexico HWA. Because the contested permit conditions attempt to regulate or govern the radioactive component of waste treated in the on-site LANL incinerator and establish a definition for background level radiation, the decision of the Director of EID to impose the contested conditions in the Permit is not in accordance with law. Accordingly, Permit Conditions V.C.3, V.E.10 and V.F.9 are void and unenforceable as a matter of New Mexico law.

THIRD CAUSE OF ACTION

35. The allegations set forth in paragraphs 1 through 34 are realleged and incorporated herein by reference.

36. In 1985, the University and DOE submitted an application for the hazardous waste facility permit issued for the LANL facility. In accordance with the New Mexico HWA and state hazardous waste management regulations, the Director of EID held public hearings prior to the issuance of the Permit. Throughout the four-year application procedure and at public hearings, EID acknowledged that radioactive wastes could not be regulated under the Permit issued to the University and DOE.

37. EID never requested technical evidence or information from the University, DOE or the public concerning background level radiation or the imposed conditions which regulate radioactivity. Consequently, no meaningful technical evidence was presented during the hearing process, and the administrative record lacks substantial evidence upon which the Director of EID could reasonably or rationally base the contested conditions imposed in the Permit. Accordingly, Permit Conditions V.C.3, V.E.10 and V.F.9 are void and unenforceable as a matter of law.

FOURTH CAUSE OF ACTION

38. The allegations set forth in paragraphs 1 through 37 are realleged and incorporated herein by reference.

39. The Director of EID has no authority under RCRA or the New Mexico HWA to impose the contested conditions in the Permit. Accordingly, the decision to impose Permit Conditions V.C.3, V.E.10 and V.F.9 was unreasonable, has no rational basis and was arbitrary, capricious and an abuse of discretion.

40. Since the administrative record lacks substantial evidence upon which the Director of EID could reasonably or rationally base the contested conditions imposed in the Permit, the decision to impose Permit

Conditions V.C.3, V.E.10 and V.F.9 was arbitrary, capricious and an abuse of discretion.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, The Regents of the University of California, prays that this Court enter a judgment:

- (1) declaring that conditions governing radioactive materials or wastes may not be imposed in the Los Alamos National Laboratory Hazardous Waste Facility Permit;
- (2) declaring that the decision by the Director of EID to impose Permit Conditions V.C.3, V.E.10 and V.F.9 was not in accordance with law;
- (3) declaring that the decision by the Director of EID to impose Permit Conditions V.C.3, V.E.10 and V.F.9 was not supported by substantial evidence in the administrative record;
- (4) declaring that the decision by the Director of EID to impose Permit Conditions V.C.3, V.E.10 and V.F.9 was arbitrary, capricious and an abuse of discretion;
- (5) declaring Permit Conditions V.C.3, V.E.10 and V.F.9 in the Los Alamos National

Laboratory Hazardous Waste Facility Permit
void and unenforceable; and

- (6) granting the University such other relief as
may be just and proper.

Respectfully submitted,

SUTIN, THAYER & BROWNE
A Professional Corporation

By _____
John A. Bannerman
A. Michael Chapman
Attorneys for Plaintiff The
Regents of the University
of California
P. O. Box 32500
Albuquerque, New Mexico 87190
(505) 883-2500
493SFONET/1188JAB

We hereby certify that we have
mailed a copy of the foregoing
pleading to opposing counsel of
record this _____ day of
_____, 1991.

Gini Nelson, Esq.
Special Assistant Attorney General
Assistant General Counsel
New Mexico Environment Department
P. O. Box 26110
Santa Fe, New Mexico 87502

Randall D. Van Vleck, Esq.
Assistant Attorney General
P. O. Drawer 1508
Santa Fe, New Mexico 87504-1508

Karen L. Egbert, Esq.
U.S. Department of Justice
Environmental and Natural
Resources Division
Environmental Defense Section
P. O. Box 23986
Washington, D.C. 20026-3986

SUTIN, THAYER & BROWNE
A Professional Corporation

By _____

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

UNITED STATES OF AMERICA)
and THE REGENTS OF THE)
UNIVERSITY OF CALIFORNIA,)
)
Plaintiffs,)
)
v.)
)
STATE OF NEW MEXICO; and)
NEW MEXICO ENVIRONMENT)
DEPARTMENT,)
)
Defendants.)
_____)

NO. CIV 90-0276SC

STIPULATION

The Regents of the University of California ("University") and the State of New Mexico ("State") and New Mexico Environment Department ("NMED") hereby agree and stipulate as follows:

1. Upon request by the State and NMED, the court has ordered that the University be joined as a plaintiff in this action.
2. The University must file a Complaint to preserve its rights.
3. The United States of America ("United States") and the State have filed motions for summary

judgment which are pending before the court. These motions address questions of federal law. A ruling on these motions may be dispositive.

4. The parties have jointly moved the court to extend all pre-trial deadlines until ninety (90) days following a ruling on the pending motions.

5. The Second, Third and Fourth Causes of Action in the University's Complaint raise issues which involve questions of state law, and it may or may not be necessary to litigate the state law claims once the court rules on the pending motions for summary judgment.

6. In order to reduce the time and expense involved in complying with D.N.M.R.-Cv 7.4, the University hereby stipulates and agrees that the State and NMED may have an extension of time to answer the Second, Third and Fourth Causes of Action, until twenty (20) days following the ruling by the court on the pending motions for summary judgment. If the court's ruling leaves unresolved issues raised in the First Cause of Action of the University's Complaint, the State and NMED shall answer or otherwise respond to the Second, Third and Fourth Causes of Action.

7. The State and NMED agree and stipulate that they will accept service of the University's complaint and answer or otherwise respond to the First Cause of Action

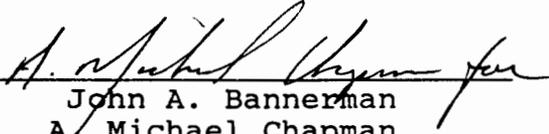
in accordance with the Federal Rules of Civil Procedure and the rules of the United States District Court for the District of New Mexico.

8. The University, the State and NMED agree, if necessary, to jointly request that the court approve the extension of time agreed upon in this Stipulation.

Entered this _____ day of _____, 1991.

STIPULATED AND AGREED TO:

SUTIN, THAYER & BROWNE
A Professional Corporation

By 
John A. Bannerman
A. Michael Chapman
Attorneys for Plaintiff The
Regents of the University of
California
P. O. Box 1945
Albuquerque, New Mexico 87103
(505) 883-2500
494SFONET/1222JAB

NEW MEXICO ENVIRONMENT DEPARTMENT

By _____
Gini Nelson
Attorney for the State of New
Mexico and New Mexico
Department of Environment
Office of General Counsel
P. O. Box 26110
Santa Fe, New Mexico 87502
(505) 827-2990

We hereby certify that we have
mailed a copy of the foregoing
pleading to the following counsel
of record this _____ day of
_____, 1991:

Karen L. Egbert, Esq.
U.S. Department of Justice
Environmental and Natural
Resources Division
P. O. Box 23986
Washington, D.C. 20026-3986

SUTIN, THAYER & BROWNE
A Professional Corporation

By _____