



BILL RICHARDSON
GOVERNOR

Permit
State of New Mexico
ENVIRONMENT DEPARTMENT

Hazardous Waste Bureau
2905 Rodeo Park Drive East, Building 1
Santa Fe, New Mexico 87505-6303
Telephone (505) 428-2500
Fax (505) 428-2567
www.nmenv.state.nm.us



RON CURRY
SECRETARY

DERRITH WATCHMAN-MOORE
DEPUTY SECRETARY

MEMORANDUM

TO: Bret Lucas, NMED-SWQB

THROUGH: David Cobrain, NMED-HWB

THROUGH: Charles de Saillan, NMED-OGC

FROM: John Young, NMED-HWB *JY*

**SUBJECT: REVIEW OF DRAFT FEDERAL FACILITY COMPLIANCE AGREEMENT
PURSUANT TO THE CLEAN WATER ACT**

DATE: January 6, 2004

1. The New Mexico Environment Department (Department) does not agree that the Federal Facility Compliance Agreement (Agreement) entered into by the Environmental Protection Agency-Region 6 (EPA) and the Department of Energy (DOE) can serve to replace the surface/storm water monitoring and erosion control requirements outlined in the November 26, 2002 Corrective Action Order (Order) issued by the Department. Given the Department's Order, we believe the proposed Agreement is unnecessary. In any event, the Department retains its legal regulatory authority under the N.M. Hazardous Waste Act to regulate contaminant migration and enforce compliance via the Order. As described in the draft Agreement, the Department may only provide "input" into the process, which EPA may choose to ignore or not act upon. In addition, although the Department may enforce the provisions of the proposed Order under a CWA citizen suit, that remedy is limited and inadequate. Such an approach is unacceptable to the Department as it limits the State's ability to protect human health and it's natural resources. The following comments provided by the Department regarding the Agreement should not be construed as Department concurrence with the Agreement.
2. There are little if any substantive penalties for "Violation" of the Agreement. As written corrective action taken to address violations of water quality standards are to be "reported" to EPA annually. Under the Order, the Department may mandate appropriate action including but not limited to source removal and control as well as remediation of the impacted environmental media. In addition, failure to comply allows stipulated penalties or other enforcement mechanisms. As the Agreement stands, DOE and UC may notify EPA up to a year later of any corrective action(s) that may or may not be protective of human health and the environment.



3. Discussion of “violations” should not have to be mutually agreed upon. A violation is a violation and must not be treated under “Conflict Resolution.”
4. In addition to the DOE, the Regents of the University of California (UC) are co-permittees and must also be included in the Agreement.
5. In order for the Agreement to be protective, areas of concern (AOCs) must be addressed by the Agreement in addition to solid waste management units (SWMUs).
6. The Agreement only addresses “inactive” SWMUs. All SWMUs, AOCs and firing sites must be included in the final Agreement between EPA, DOE and UC.
7. The Agreement is unclear if it regulates contaminants that are not hazardous waste, hazardous constituents or contaminants not covered by the Clean Water Act (e.g. perchlorate and high explosive compounds and high explosive degradation products).
8. Paragraph 10 indicates that the purpose of the storm water monitoring is to “determine the release or transport of hazardous waste...” Whether DOE is voluntarily sharing radionuclide data with EPA and the Department or not, the reporting and monitoring of radionuclides in storm water is also necessary. Radionuclides should be added to paragraph 10.
9. The Agreement should allow more flexibility for choosing analytical methods than limiting the analytical methods to those set forth in 40 CFR Part 136, the Water Quality Control Commission regulations or SW-846. As new methodologies are developed, the EPA must mandate the DOE and UC to be protective of human health and the environment. For example, the current method for determination of PCBs in environmental media can’t achieve the detection limit to adequately quantify standards for wildlife habitat set forth by the WQCC for PCBs. In addition, the current methodology for perchlorate analyses is not sensitive enough to detect the contaminant in water at levels to indicate a release below 4 ppb. If 4 ppb is an action level, a more sensitive methodology must be utilized.
10. EPA must require DOE and UC to collect storm water samples from 100 SWMUs/AOCs scoring greater than 40 (SOP 2.01) per year rather than the laughable “no more than 20” proposed in the draft Agreement. The LANL facility currently has over 320 sites that scored higher than 40 based on the SOP 2.01 assessment. At the proposed rate, DOE and UC will take over 15 years to evaluate SWMUs and AOCs scoring greater than 40. The Order requires that all sites scoring greater than 40 be evaluated within 3 years bringing DOE and UC into “compliance” much more quickly.
11. The Agreement must utilize groundwater regulations in addition to citing Interstate and Intrastate Surface Waters (20.6.1 NMAC). Effluent discharges are shown (by DOE and UC) to impact alluvial, intermediate and regional groundwater at the LANL Facility as these zones are interconnected to the surface water system.
12. The Agreement identifies a “dispute resolution committee” consisting of one DOE and one EPA representative. The Agreement requires the committee of two to resolve the dispute “unanimously.” The Department must be represented on the committee.
13. The Department must be, at a minimum, consulted prior to any modification of the Agreement.
14. Modification of the Agreement must be public noticed. As it stands, the Agreement has little if any public participation requirements.
15. Section VIII must define “force majeure” and other instances that constitute “good cause” for modifications to the Agreement. Paragraph 44 indicates that the parties must “mutually agree” to the modifications. EPA must be able to modify the Agreement without mutual agreement between the parties.
16. Lack of funding must not be an excuse for not being able to comply with the Agreement.
17. EPA must use “action level(s)” rather than “standard(s)” when describing contaminant levels that trigger and action. Action levels may be lower than applicable standards (e.g., MCLs or WQCC).

18. Radionuclides must be added to the Analytical Suite Column identified in Table 1.