



New Mexico Health and Environment Department

September 28, 1989

MARALYN BUDKE  
Acting Secretary

CARLA L. MUTH  
Deputy Secretary

MICHAEL J. BURKHART  
Deputy Secretary

RICHARD MITZELFELT  
Director

Mr. Troy E. Wade II  
Acting Assistant Secretary  
For Defense Programs  
U.S. Department of Energy  
Washington, D.C. 20585

Dear Mr. Wade:

In your undated response to a March 28, 1989 inquiry from Senator Jeff Bingaman, you stated that 1) Los Alamos National Laboratory (LANL) has decided to dedicate the Controlled Air Incinerator (CAI) to the incineration of transuranic wastes only and 2) an environmental assessment (EA) of the operation of the CAI was in final review.

This information conflicts with information the State of New Mexico has received from LANL. LANL has applied for a RCRA hazardous waste permit for the CAI and indicates they intend to incinerate hazardous waste if such a permit is issued. If your information is correct no RCRA permit will be required and the State may deny the RCRA application.

In response to a specific inquiry by EID, LANL responded that there is no EA for the CAI and that only the older Environmental Impact Statement (EIS) was prepared. LANL has not yet provided, to the State, a copy of the EIS or an EA which your referred to in your letter.

The State is concerned that incorrect information is circulating about the future of the CAI at LANL and that perhaps incomplete or inaccurate information has been provided by DOE to the State. It is imperative that accurate information be used when evaluating RCRA permits. Therefore, we wish your response to the following questions. What wastes does DOE/LANL intend to incinerate in the controlled air incinerator in Building 37 of Technical Area 50 at LANL? Is there an Environmental Impact Statement or Environmental Assessment, prepared since 1980, for the CAI? Please provide a copy of any such document.

The New Mexico Hazardous Waste Regulations, Part IX, 40 CFR sections 270.11(b) and 270.11(d) require that information submitted in support of a RCRA application be duly certified. Please certify the accuracy of your response in accordance with the above cited regulations.



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As the State is endeavoring to arrive at a permit decision for the LANL CAI by the November 7, 1989 deadline imposed by the 1984 Hazardous and Solid Waste Amendments to RCRA, we request your response by October 20, 1989. If you have any questions, please call Dr. A.E. Gordon on my staff at (505) 827-2934.

Sincerely,



Kirkland L. Jones, Ph.D.  
Deputy Director

CKC:KJ:vga

cc: Senator Jeff Bingaman  
Senator Pete Dominici

E. Hearings.

1. Public notice of any public hearing shall be given at least thirty (30) days prior to the scheduled date of the hearing.
2. Hearings shall be held in Santa Fe or within any area of the state substantially affected by the proceedings as specified by the Director.
3. The Director may designate a hearing officer to take evidence at the hearing.
4. All hearings shall be recorded by a certified court reporter. A transcript will be furnished to all persons for review at the Division's main office. Costs of a copy of a transcript will be borne by those requesting such copies.
5. In hearings, the rules of civil procedures and the technical rules of evidence shall not apply, but the hearings shall be conducted so that all relevant views, arguments, and testimony are amply and fairly received without undue repetition.
6. Any person heard or represented at the hearing shall be given written notice of the action of the Director.
7. The Director shall notify the applicant or permittee of his decision and the reasons, therefore, by certified mail.

F. Director's Decision.

For purposes of these regulations, the Director's decision is not made until it becomes final under Section 902.G. or until the Board renders its decision under 902.F. either sustaining or reversing the Director. Immediately upon receiving the Board's decision the Director shall enter the Director's decision in accord with the Board's decision, which shall be considered the Director's decision for purposes of appeal to the Court of Appeals.

G. Review and Hearings Before Board.

1. Any person adversely affected by the decision of the Director concerning the issuance, suspension, modification or revocation of a permit may submit a petition for review of the Director's decision by the Environmental Improvement Board. For purposes of this regulation, an applicant for permit, permittee or an alleged violator of a permit or regulation shall be the "appellant". A petition for review must be made in writing to the Board within thirty (30) days after notice of the Director's action or decision has been received by the appellant and must include a statement of issues and supporting

arguments. Unless a timely request for review and hearing is made, the decision of the Director shall be final.

2. Any new evidence becoming available after the tentative decision by, or the hearing before the Director, may be presented at a hearing before the Board if such hearing is requested along with the request for review of the Director's decision. Otherwise, the Board shall consider only the evidence admitted in the record formed at the hearing before the Director or the evidence available to the Director at the time of his or her tentative decision. All parties who participated in the hearing before the Director may submit to the Board, within thirty days of the appellant's request for review, proposed findings and reasons based upon the hearing record.

In reviewing the Director's decision, the Board may modify or reverse the Director's decision if the decision is found to be:

- (a) arbitrary, capricious or an abuse of discretion;
- (b) not supported by substantial evidence; or,
- (c) otherwise not in accordance with law.

If the appellant requests only that the Board review the Director's decision without requesting a hearing to consider new evidence, the Board shall render a decision denying, modifying or sustaining the Director's decision, along with findings and reasons, within sixty (60) days of the appellant's request, and by certified mail shall notify the appellant and shall make a reasonable effort to notify all participants in the hearing before the Director of its decision, findings and reasons. If a hearing to consider new evidence is held, the Board's decision on the Director's decision shall be deferred until the hearing is held in accordance with the sub-sections 3 through 6.

3. If a timely request for hearing is made, the Board shall hold a hearing within sixty (60) days after receipt of the request, and at least twenty (20) days prior to the hearing date shall notify the appellant by certified mail and shall make a reasonable effort to notify all who submitted comments on the permit, or who participated in the hearing before the Director of the date, time and place of the hearing. The Board shall also publish notice of the date, time and place of hearing at least twenty (20) days prior to the hearing date in a newspaper of general circulation in the county in which the facility is proposed to be located or is located and a newspaper of general circulation in the state.

4. The Division will arrange for transcript of the hearing by a certified reporter. Copies of the transcript shall be paid for by those requesting them.
5. Hearings shall be before the Board or a hearing officer appointed by the Board. If a hearing officer is designated by the Board he or she shall conduct the hearing and rule on the evidence presented. In hearings, the technical rules of evidence and the rules of civil procedure shall not apply, but the hearings shall be conducted so that all relevant views are amply and fairly presented without undue repetition. The Board may require reasonable substantiation of statements or records tendered and may require any view to be stated in writing when the circumstances justify.
6. The Board shall allow all parties a reasonable opportunity at a hearing to submit written and oral evidence and arguments, to introduce exhibits, and to cross-examine persons who testify. At any hearing accompanying the review of the Director's decision, in which only new evidence becoming available following the hearing before the Director is allowed, all exhibits, evidence and cross-examination shall be restricted to such new evidence.
7. All parties participating in the hearing may submit proposed findings and reasons to the Board within thirty (30) days following the Board's receipt of the transcript.
8. The Board may adopt findings submitted or may make separate findings, but the Board shall:
  - (a) consider and weigh all of the evidence presented in making or adopting any and all of its findings and reasons;
  - (b) adopt or make only findings and reasons that are supported by substantial evidence as presented; and,
  - (c) not adopt or make any findings and reasons which are arbitrary or capricious, or otherwise not in accordance with the law.
9. Within sixty (60) days following the Board's receipt of the transcript, the Board shall render a decision on the basis of the hearing record sustaining, modifying or reversing the Director, along with findings, and shall notify the appellant and all participants in the hearing of its decision and findings.



**Department of Energy**  
Albuquerque Operations  
Los Alamos Area Office  
Los Alamos, New Mexico 87544

**ANSWERS TO QUESTIONS REGARDING THE DEPARTMENT OF ENERGY'S  
REGULATION OF RADIOACTIVE WASTES**

During the public hearing concerning the Department of Energy's draft RCRA operating permit, the public asked several questions regarding DOE's authority to regulate itself regarding radioactive waste, as well as independent oversight of DOE's activities. Although these questions are not relevant to the grant or denial of the permit, DOE is taking this opportunity to answer those questions

EVOLUTION OF THE DEPARTMENT OF ENERGY

The Atomic Energy Act of 1954 (AEA), 42 United States Code (USC) Sections 2011 through 2296, created the Atomic Energy Commission (AEC) and authorized it to produce "special nuclear material." In 1959, Congress amended the AEA to establish programs for controlling radiation hazards. The amendment created the Federal Radiation Council to guide federal agencies in establishing radiation standards. The Federal Radiation Council was abolished in 1970; its functions were transferred to the Environmental Protection Agency.

In 1974, the Energy Organization Act, 42 USC 5801 through 5891, abolished the AEC and delegated its function to the Energy Research and Development Administration (ERDA) and the Nuclear Regulatory Commission (NRC). ERDA took on the non-regulatory function of the AEC, including the weapons program. The NRC was given the AEC's licensing and regulatory authority over commercial uses of atomic energy. The NRC was not authorized to regulate ERDA nuclear weapon activities, except for high-level radioactive waste disposal, 42 USC 5842. The Department of Energy Organization Act, 42 USC 7101 through 7375, transferred the functions of ERDA to the Department of Energy.

REGULATION OF RADIOACTIVE WASTE

RCRA expressly excludes "source, special nuclear, and by-product material" as defined in the AEA from its regulations, 42 USC (27);

such materials are subject only to regulation by DOE or NRC. DOE has several orders dealing with the handling of its radioactive materials or waste, including the following:

DOE Order 1540.2 Hazardous Material Packaging for Transport

DOE Order 1540.3 Base Technology for Radioactive Material Transportation Packaging Systems

DOE Order 5480.2 Radioactive Waste Management

DOE Order 5480.3 Safety Requirements for the Packaging and Transportation of Hazardous Materials, Hazardous Substances, and Hazardous Wastes

#### Independent Oversight of DOE Activities

42 USC 2286 establishes the independent Defense Nuclear Facilities Safety Board. The Board is to be composed of five members appointed from civilian life by the President. The members are to be respected experts in the field of nuclear safety. No member of the Board may be an employee of, or have a significant financial relationship with, the Department of Energy or any of its contractors. President Bush nominated five nuclear energy experts to the Board in July, 1989.

The Board is to review standards relating to the design, construction, operation, and decommissioning of defense nuclear facilities of the DOE. This includes DOE orders, regulations and requirements. The Board is to recommend to the Secretary of Energy specific measures which should be adopted to protect public safety and health. The Board may also investigate events or practices at DOE defense nuclear facilities which the Board has determined may adversely affect public health and safety.

#### Point of contact for questions regarding DOE environmental practices.

If any member of the public has a question regarding activities at the Los Alamos National Laboratory, or regarding general DOE environmental practices, please contact Jim Phoenix at (505)667-5288, or Lisa Cummings at (505)667-4667. If they are unable to answer a specific question, they will be able to obtain the information.

CHAPTER 279

AN ACT

RELATING TO THE ENVIRONMENT; PROVIDING FOR A MORATORIUM ON SOLID WASTE INCINERATION AND INCINERATOR ASH DISPOSAL IN NEW MEXICO.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SOLID WASTE INCINERATION PROHIBITED.--No solid waste shall be disposed by incineration in New Mexico until such time as the environmental improvement board adopts regulations proposed by the environmental improvement division of the health and environment department or by interested persons prescribing allowable methods and standards for solid waste incineration. These regulations shall include stringent emissions discharge limits that protect public health and safety including but limited to establishing emission discharge limits to prevent the violation of any air quality or emission standards adopted by the environmental improvement board.

As used in this section:

A. "solid waste" means any garbage, refuse, septage, sludge from a waste treatment plant, water supply treatment plant or air pollution control facility and other discarded material including solid, liquid, semisolid or contained gaseous material resulting from industrial, commercial, mining and agricultural operations and from community activities; and

B. "incineration" means the process of reducing combustible solid waste designed to achieve complete combustion by means

of a device or chamber.

Section 2. DISPOSAL OF INCINERATOR ASH PROHIBITED.--No bottom, fly or combined ash from any incinerator located inside or outside New Mexico shall be disposed of at any solid waste landfill in New Mexico until such time as the environmental improvement board adopts regulations proposed by the environmental improvement division of the health and environment department. These regulations shall prescribe that incinerator ash be managed as solid, special or hazardous waste.

Section 3. EXEMPTIONS.--

A. For purposes of this act, medical waste incinerators generating less than three tons per day and medical waste incinerators that are in operation as of the effective date of this act are exempt. Utility boilers that do not use solid waste as a primary fuel are exempt.

B. The prohibitions set forth in Sections 1 and 2 of this act shall not apply to incinerators or the disposal of ash from incinerators which have interim status pursuant to the Hazardous Waste Act and for which application B of Section 74-4-4.2 NMSA 1978 has been submitted to the environmental improvement division of the health and environment department prior to January 1, 1989.

Section 4. EFFECTIVE DATE.--The effective date of this act is July 1, 1989.