

GARY E. JOHNSON

GOVERNOR

. LODE CONUC

State of New Mexico NVIRONMENT DEPARTME Hazardous Waste Bureau 2905 Rodeo Park Drive East, Building 1 Santa Fe, New Mexico 87505-6303 Telephone (505) 428-2500 Fax (505) 428-2567



PETER MAGGIORE SECRETARY

CERTIFIED MAIL RETURN RECEIPT REQUESTED

April 23, 2002

APR 2 8 2002

John A. Ferraiuolo Environmental Technical Project Manager Public Service Company of New Mexico Alvarado Square Albuquerque, NM 87158-2104

RE: REQUEST FOR CONCURRENCE – TCLP NOT APPLICABLE TO MGP WASTE

Dear Mr. Ferraiuolo:

This letter is in response to your letter to Debby Brinkerhoff, New Mexico Environment Department (NMED) Hazardous Waste Bureau (HWB) Compliance and Technical Program Manager, dated March 4, 2002, asking if NMED requires Toxicity Characteristic Leaching Procedure (TCLP) testing of a manufactured gas plant (MGP) remediation waste stream to determine whether or not the waste is regulated as a hazardous waste, under the Resource Conservation and Recovery Act (RCRA) and the New Mexico Hazardous Waste Act (HWA), due to the toxicity characteristic as defined at 20.4.1.200 NMAC (incorporating 40 C.F.R. § 261.24).

The United States Environmental Protection Agency (EPA) recently issued a final rule revising 40 C.F.R. § 261.24 to exempt MGP waste from the TCLP testing requirement. (49 FR 11251, effective March 13, 2002). The EPA revision is in response to a decision by the United States Court of Appeals for the District of Columbia Circuit, holding that EPA cannot require that MGP waste be subject to TCLP testing requirements, because EPA did not provide evidence that MGP waste is ever disposed of in landfills. (Association of Battery Recyclers v. EPA, 208 F.3rd 1047 (2000)).

NMED has determined that the MGP TCLP exemption is effective and binding in New Mexico. Therefore, NMED cannot require that the MGP remediation waste stream in question be tested John Ferraiuolo April 23, 2002 Page 2

by TCLP to determine if the waste is regulated under RCRA and the HWA because the waste exhibits the characteristic of toxicity under 20.4.1.200 NMAC (incorporating 40 C.F.R. § 261.24).

The MGP TCLP exemption applies only to the determination of the toxicity characteristic. PNM remains responsible for determining if the MGP waste stream in question is regulated under RCRA and the HWA for any other reason, including as a listed waste or other characteristic waste under 20.4.1.200 NMAC (incorporating 40 C.F.R. Part 261). In order for the MGP waste stream in question to continue to qualify for the MGP TCLP exemption, NMED requires that PNM notify NMED of the final disposition of the waste prior to its final disposition. If the waste is disposed of on land at any time, including after treatment, then the MGP TCLP exemption will not apply, and NMED requires that PNM determine if the waste exhibits the characteristic of toxicity under 20.4.1.200 NMAC (incorporating 40 C.F.R. § 261.24) and is therefore regulated under RCRA and the HWA. PNM must notify NMED of the results of that determination prior to disposal of the waste.

If you have any questions or need additional information please contact me at 505-428-2528.

Sincerely,

Debby Brinkerhoff Program Manager Compliance & Technical Assistance Program

cc: James Bearzi, HWB John Kieling, HWB David Cobrain, HWB L. King, EPA 6PD-N