Department of Energy
Carlsbad Area Office
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May 9, 2000

VIA FACSIMILE AND U.S. MAIL

Peter Maggiore, Secretary
New Mexico Environment Department
Harold Runnels Building
1190 St. Francis Drive
Santa Fe, NM 87505

Dear Secretary Maggiore:

As you are aware, the Department of Energy and Westinghouse recently submitted notice of a Class 1 modification concerning Permit Condition IV.B.2.b. of the Hazardous Waste Act permit for the Waste Isolation Pilot Plant (WIPP). I have received a copy of the letter that Southwest Research and Information Center (SRIC) sent to you on April 24, 2000, that asserts that you should "deny" the modification or classify it as a "major modification." SRIC's letter misstates the facts and law concerning Permit Condition IV.B.2.b. and the Class 1 modification that DOE instituted with respect to this condition of the permit. In addition, SRIC appears to misunderstand fundamental aspects of the permitting process.

I have also received copies of SRIC's notice of appeal in the New Mexico Court of Appeals filed on May 2, 2000. That appeal alleges that the April 25, 2000, letter from John E. Keiling of the New Mexico Environment Department (NMED) to Joe Epstein and Inés Triay is a "final decision . . . on behalf of the Secretary of the New Mexico Environment Department." Notice of Appeal, *Southwest Research and Information Center, Dara Mark and Wayne Gibson v. NMED and Peter Maggiore, Secretary* (May 2, 2000). DOE believes that the Court of Appeals lacks jurisdiction over this Class 1 modification because there has been no final agency action on it and therefore the matter is not yet ripe for judicial review.[1]

As explained in detail below, the record amply demonstrates that DOE's modification of Permit Condition IV.B.2.b. is a Class 1 modification under NMED's regulations. We believe that NMED should therefore deny the request in SRIC's April 24 letter regarding the modification to Permit Condition IV.B.2.b.

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[1] NMED's regulations state that "[a]ny person may request the [Secretary] to review, and the [Secretary] may for cause reject, any Class 1 modification." On April 24, 2000, SRIC filed such a request with you concerning the Class 1 modification to Permit Condition IV.B.2.b. Because you have not yet responded to that request, there has been no final agency action within the meaning of section 74-4-14 of the Hazardous Waste Act.

The Record of the Permitting Process Demonstrates That This Is a Class 1 Modification

1. Overview

SRIC continues to ignore your decisions with respect to Permit Condition IV.B.2.b. In the order granting WIPP its Hazardous Waste Act permit, you decided that "Permit Condition IV.B.2.b applies only after the permit becomes effective." *Final Order of the Secretary of the New Mexico Environment Department* (Oct. 27 ,1999). In the Final Order you revised the permit language to clarify that this permit condition applied only prospectively. NMED recently stated that Permit Condition IV.B.2.b. applies only to waste "that was characterized and disposed of after the HWA Permit became effective on November 26, 1999." Letter to D. Hancock from G. Lewis, *Re: Comments on RFETS Final Audit Report A-00-08,* (Mar. 9, 2000) (emphasis added). This statement simply reiterates your decisions in the Final Order regarding this provision.

SRIC's continuing misinterpretation of Permit Condition IV.B.2.b. is troubling. It views the administrative record selectively, focusing on bits and pieces of it and ignoring other aspects, particularly the parties' comments on the Hearing Officer's Recommended Decision, the material submitted in response to your Amended Order of October 14, 1999, and the Final Order. SRIC focuses exclusively upon the testimony of certain NMED staff members and the Hearing Officer's Recommended Decision, but fails to mention that, in the Final Order, you addressed SRIC's concerns regarding the testimony of NMED staff. You stated:

> NMED testimony on the permit condition [IV.B.2.b] was prior to the ruling in New Mexico ex rel Madrid v. Richardson, 39 F. Supp.2d 48 (D.D.C. 1999) giving interim status to WIPP. With this ruling, WIPP could be used for the treatment, storage and disposal of mixed waste prior to [final] permit issuance. . . .
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> Accordingly, the Secretary will amend the Hearing Officer's Proposed Conclusions of Law 46 through 54 and 56. These amendments should clarify that Permit Condition IV.B.2.b applies only after the permit becomes effective.

Final Order at 3 (emphasis added).

Furthermore, the testimony of NMED staff and the Hearing Officer's recommended decision, while entitled to consideration, are not binding on the Secretary of NMED, who is the decision-maker as to the contents of the final permit. Little weight, if any, should be given to the staff's testimony on Permit Condition IV.B.2.b. and the Hearing Officer's reactions to it in view of your statements in the Final Order and the fact that you reopened the record as to this permit condition on October 14, 1999, more than a month after the Hearing Officer submitted his report.

2. The Relevant Record

What SRIC fails to appreciate is that the intent of Permit Condition IV.B.2.b. and the appropriateness of the Class I modification must be judged on: (1) the record as it existed after the parties submitted comments on the Hearing Officer's Report and additional material pursuant to your Amended Order of October 14, 1999, and (2) the reasoning and conclusions of law set forth in the Final Order. Viewed from this perspective, it is clear that you did not intend the second sentence of Permit Condition IV.B.2.b. as a prohibition against the disposal of mixed waste in Panel 1 after the permit became effective regardless of whether this panel already contained waste that might not have been characterized in complete accordance with the final Waste Analysis Plan (WAP). The modification DOE has made to this permit condition is a Class 1 modification because it does nothing more than clarify the original intent behind this condition.

The staff of NMED submitted additional material for the record in response to your Amended Order, which asked the parties to respond to the following question: "Does the prohibition regarding disposal of TRU mixed waste referenced in the second sentence of Permit Condition IV.B.2.b. apply to waste disposed of prior to permit issuance?" The staff's response was clear: "The prohibition regarding disposal of TRU mixed waste referenced in the second sentence of Permit Condition IV.B.2.b cannot as a matter of law apply to any waste disposed at WIPP prior to permit issuance." *New Mexico Environment Department's Comments on the Secretary's Amended Order* (Oct. 20, 1999) (emphasis in the original). The staff's submission pointed out that they had "never testified that the second clause of Permit Condition IV.B.2.b. should be applied retroactively to prohibit the disposal of TRU mixed waste due to pre-permit disposal."

More importantly, the staff's submission acknowledged that, based on the court's decision in *New Mexico* ex rel. *Madrid v. Richardson,* 39 F. Supp. 2d. 48 (D.D.C. Mar. 29, 1999), DOE was authorized to dispose of mixed waste prior to issuance of the final permit as WIPP had interim status.[2] Thus, the interim status regulations at 40 C.F.R. 265 "are the operative legal standards to measure compliance for mixed waste stored or disposed at WIPP prior to final permit issuance." *New Mexico Environment Department's Comments on the Secretary's Amended Order* at 3 (emphasis in original). In light of the court's decision, NMED had no legal authority at the time the final permit was issued to interpret the second sentence of Permit Condition IV.B.2.b. in way that would prevent DOE from disposing of additional waste in Panel 1 simply because the panel

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[2] Although it was not mentioned in the staff's response to the Amended Order, the court also held that DOE could dispose of non-mixed waste from waste stream TA-55-43 at WIPP prior to issuance of the final permit "even absent interim status for WIPP." 39 F. Supp. 2d at 53. The court's holdings on interim status and the disposal of non-mixed waste are binding on New Mexico, its agencies and SRIC as they were parties to this litigation.

contained non-mixed waste that had been disposed of prior to the permit's effective date.

The Department of Energy and Westinghouse also submitted additional material for the record in response to the Amended Order. *The United States Department of Energy's and the Westinghouse Waste Isolation Division's Response to the Secretary's Question Regarding Permit Condition IV.B.2.b* (Oct. 20, 1999). Their submission identified the very ambiguity that SRIC is trying to transform into a prohibition against the continued use of Panel 1 after the permit's effective date.

> The second sentence as written can be interpreted as requiring that, at the time of TRU-mixed waste disposal, the Permittees must assess whether the non-mixed waste already in the panel was characterized "in accordance with the WAP" whenever that characterization occurred. . . . This interpretation would make Module IV.B.2.b apply to the non-mixed waste disposed of prior to permit issuance.

Id. at 2. (emphasis in the original). DOE and Westinghouse pointed out that such a misinterpretation of this permit condition would penalize them "for waste disposal that was authorized by Judge Penn's ruling, . . . was in compliance with all applicable laws (including the Atomic Energy Act), and occurred while WIPP had interim status."[3] *Id.* They reached the same conclusion as NMED's staff did -- Permit Condition IV.B.2.b should be revised in order to avoid a misinterpretation of the second sentence that would be contrary to all legal authority.

Despite SRIC's assertion to the contrary, it is irrelevant that NMED's staff and the permittees proposed different revisions to permit condition IV.B.2.b., and that you chose to incorporate your staff's revision in the final permit. As you made clear in your Final Order, you intended your revision of the final permit condition to do precisely what both the permittees and your staff had proposed:

> Furthermore, Permit Applicants are concerned that they will not be able to dispose of additional waste in panel 1 after the HWA Permit becomes effective, because there is already waste in panel 1 not characterized in accordance with the WAP.

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[3] As DOE stated during the permitting process and in its challenges to Permit Condition IV.B.2.b., it believes that NMED has no authority under either RCRA or the New Mexico Hazardous Waste Act to regulate the disposal of non-mixed waste either before or after the permit's effective date. *See* First Amended Complaint at 12-15, *United States v. New Mexico,* No. 99-1280M/RLP (D.N.M. Dec. 27, 1999) and Docketing Statement at 4-7, *United States v. New Mexico,* No. 20877 (N.M. Ct. App. Dec. 30, 1999). DOE is not abandoning this position; however, it has agreed to stay its judicial challenges on this issue and others for 120 days while NMED considers several permit modifications.

> These concerns are misplaced. The terms of the HWA permit only apply after the permit becomes effective. The New Mexico Environment Department ("NMED") does not intend that the permit condition apply to the pre-permit period. See NMED Comments to the Hearing Officer's Report at 13-15.

Final Order at 3. The Final Order then went on to modify Conclusions of Law 46, 47, 48, 49, 50, 51, 52 , 53 and 54 and to delete Conclusion of Law 56 and replace it with a new one that set forth the revised language of Permit Condition IV.B.2.b.

NMED has made it clear on several occasions since the permit was issued that Permit Condition IV.B.2.b allows DOE to continue to use Panel 1 after the permit became effective regardless of whether the panel contains waste that was not characterized in accordance with the WAP.[4] Accordingly, the modification DOE put into effect with regard to this permit condition is without question a Class 1 modification as it simply clarifies the Secretary's intent as to this condition when the final permit was issued. It appears that only SRIC remains confused as to the proper interpretation of this provision.

NMED Extensively Reviewed the Characterization Data for Wastes Disposed of Prior to November 26, 1999

As demonstrated above, the modification DOE has put into place is a Class 1 modification that NMED should accept because it does not alter the intent or interpretation of Permit Condition IV.B.2.b. In addition, there is no reason for SRIC to be concerned about the non-mixed waste DOE disposed of prior to November 26, 1999. According to NMED's staff, the purpose of Permit Condition IV.B.2.b. is to ensure that all of the non-mixed wastes disposed of at WIPP are properly characterized and comply with the environmental performance standards. DOE provided NMED with extensive information concerning the wastes from the Los Alamos National Laboratory, the Idaho National Engineering and Environmental Laboratory, and the Rocky Flats Environmental Technology Site that were sent to WIPP prior to the effective date of the permit. The Department believes that this information amply demonstrates that these wastes were properly characterized and that their presence in Panel 1 will not adversely affect its compliance with the performance standards applicable to miscellaneous units. Accordingly,

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[4] *See, e.g.,* Press Release, *WIPP Receives State Permit* (Oct 27, 1999) ("'The permit will not affect the waste that went to WIPP before the permit was issued. There will be no effect on Panel One,' Maggiore said."); Letter to D. Hancock from G. Lewis, *Re: Comments on RFETS Final Audit Report A-00-08,* (Mar. 9, 2000) ("Therefore, NMED recognizes that Permit Condition IV.B.2.b applies to all waste (both mixed and non-mixed TRU) that was characterized and disposed of after the HWA permit became effective on November 26, 1999.").

there is no factual basis for prohibiting DOE from disposing of additional waste in this panel now that the permit is in effect as long as the waste disposed of after November 26, 1999, is characterized in accordance with the WAP.

SRIC Misunderstands Fundamental Aspects of the Permit Modification Process

SRIC erroneously claims that it is entitled to an evidentiary hearing with respect to the Class 1 modification. The regulations assign permit modifications to one of three general categories, each of which requires a different degree of public involvement. SRIC cannot reasonably claim that the modification to Permit Condition IV.B.2.b. is a "major modification" in view of the record and your decisions regarding the intent of this permit condition as set forth above.

Conclusion

The Class 1 modification DOE implemented is correctly categorized and does nothing more than clarify the original intent of Permit Condition IV.B.2.b. Therefore, pursuant to 20 N.M.A.C. § 4.1.900 (40 C.F.R. § 270.42(a)), NMED should not reject this modification for cause.

Thank you for your consideration of the Department of Energy's position on this matter. Please contact me if you have questions regarding the Department's position.

Sincerely,

Stuart E. Hunt
Area Office Counsel

cc: Paul Ritzma, NMED
Susan McMichael, NMED
Steve Zappe, NMED

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