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PETER MAGGIORE  
SECRETARY

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DEPUTY SECRETARY

May 10, 2000



Mr. Don Hancock  
Southwest Research and Information Center  
P.O. Box 4524  
Albuquerque, N.M. 87106

Re: **NMED's Class One Determination - Permit Condition IV.B.2.b.**

Dear Mr. Hancock:

This responds to your letter regarding the notice filed by the Department of Energy and Westinghouse Isolation Division (hereinafter "Permittees") with the Radioactive and Hazardous Material Bureau ("HRMB") of the New Mexico Environment Department ("NMED"). Specifically, the permittees modified the second clause of Permit Condition IV.B.2.b to include the term "after this permit becomes effective" as a class one permit modification to its hazardous waste permit for the Waste Isolation Pilot Plant (WIPP).<sup>1</sup> You have requested that HRMB deny the modification, or, alternatively, determine that it is a major permit modification under 20 NMAC 4.1.900 (incorporating 40 C.F.R. §§ 270.42(b) and (c)).<sup>2</sup> As grounds, you raise two concerns: first, you assert that the second clause of Permit Condition IV.B.2.b currently prohibits the disposal of mixed hazardous and radioactive waste in panel one because that panel contains waste not characterized in accordance with the WAP. It is your position that this permit condition applies "regardless of when the waste is disposed" (e.g. to pre-permit disposal). *Southwest Research and Information Center ("SRIC") Comments to the Secretary's Order*. Second, you assert that the modification substantively changes the permit requirement that permittees characterize mixed and non-mixed waste in accordance with the WAP.<sup>3</sup>

<sup>1</sup> The following modification was made: Specific Prohibition - after this permit becomes effective, ~~(1)~~ the Permittees shall not dispose non-mixed TRU waste in any Underground HWDU unless such waste is characterized in accordance with the requirements of the WAP specified in Permit Condition II.C.1. ~~and (2)~~ The Permittees shall not dispose of TRU mixed waste in any underground HWDU if the Underground HWDU contains non-mixed TRU waste which was disposed of after this permit became effective and was not characterized in accordance with the WAP. (modification shown in strikeout and underline)

<sup>2</sup> HRMB issued a corrected notice of a class determination on May 1, 2000 (attached).

<sup>3</sup> The permittees also submitted a written response to your request by letter dated May 9, 2000.



For the reasons below, NMED does not believe you provided adequate grounds to deny the permit modification or to support the classification of these changes as a major modification. The concerns you raise now do not address the proposed permit modification. Instead, these concerns were previously raised and rejected during the permit proceedings. As stated in my October 27, 1999 final order, I expressly rejected as "misplaced" the interpretation you raise now: that permittees "will not be able to dispose of additional waste in panel one after the HWA permit becomes effective because there is already waste in panel 1 not characterized in accordance with the WAP." *Final Order of the Secretary of the New Mexico Environment Department* (October 27, 1999). Indeed, during the administrative permitting process, I recommended that the permit be modified to clarify that both clauses of Permit Condition IV.B.2.b apply prospectively "after the permit becomes effective" and not to the pre-permit period to prevent usage of panel 1. See id.

The modification of the permit to add the term "after the permit becomes effective" in the second clause of Permit Condition IV.B.2.b is entirely consistent with the current permit, the Hearing Officer's report, my prior order and NMED's intent repeatedly expressed during the administrative hearing process.<sup>4</sup> The modification is plainly minor and simply clarifies the original intent of this permit condition. The modification does not in any manner substantially alter the permit condition, reduce the capacity of the facility to protect human health or the environment, change management practices or allow the disposal of different types of wastes.<sup>5</sup>

For these reasons, NMED has determined that the permittees' notice of its class one permit modification to Permit Condition IV.B.2.b will not be denied and is appropriately classified as a class one modification consistent with the requirements of 20 NMAC 4.1.900 (incorporating 40 C.F.R. § 270.42, Appendix 1, A.1.)

Sincerely,



Peter Maggiore  
NMED Secretary

Cc: Greg Lewis  
James Bearzi

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<sup>4</sup> NMED did not reject the permittees' proposed modification as you suggest. NMED stated this change may be "unnecessary" and "superfluous" because the permit condition cannot apply to the pre-permit period and may only apply "after an effective and final HWA permit." *NMED Comments to the Hearing Officer's Report*, pp. 13 - 15.

<sup>5</sup> The concerns you raise regarding protection of human health and the environment are similarly misplaced. The permit condition in this regard is entirely unaltered. Neither the first nor second clause of Permit Condition IV.B.2.b was intended to apply to waste disposed of prior to the effective date of the permit. *Final Order* at pp. 1 -3.