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PETER MAGGIORE
SECRETARY

PAUL R. RITZMA
DEUPTY SECRETARY

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

December 22, 2000

Dr. Inés Triay, Manager
Carlsbad Field Office
Department of Energy
P.O. Box 3090
Carlsbad, New Mexico 88221-3090

Mr. Joe Epstein, General Manager
Westinghouse Waste Isolation Division
P.O. Box 2078
Carlsbad, New Mexico 88221-5608

RE: RESCISSION OF TEMPORARY AUTHORIZATION REQUEST APPROVAL
WIPP HAZARDOUS WASTE FACILITY PERMIT
EPA I.D. NUMBER NM4890139088

Dear Dr. Triay and Mr. Epstein:

On December 13, 2000, the New Mexico Environment Department (NMED) approved a request from the DOE and Westinghouse (**Permittees**) for a temporary authorization submitted on December 7, 2000. This request was attached to your letter transmitting a Class 2 permit modification request to establish revised drum age criteria (**DAC**) necessary for taking a representative headspace gas sample based on various packaging configurations. In this request, you sought NMED approval of a temporary authorization to allow the Idaho National Engineering and Environmental Laboratory (**INEEL**) to use the revised DAC as indicated in the Class 2 modification request. You asserted this approval would allow them to continue shipping TRU waste to WIPP and would reduce delays in the closure and cleanup of INEEL.

Upon further analysis, NMED has determined that the temporary authorization request submitted pursuant to 20.4.1.900 NMAC (incorporating §270.42(e)(3)) should not have been approved for the reasons identified below. A temporary authorization is a mechanism that allows a permittee to quickly implement, without the benefit of public notice or comment, a proposed modification before NMED takes final action is on the modification request. Temporary authorizations are

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intended to be used in limited circumstances where the permittee can demonstrate to the Secretary that the proposed modification: (a) complies with Part 264 and (b), in this instance, is necessary to "prevent disruption of ongoing waste management activities [at the facility]." The policy supportive of NMED's authority to grant a temporary authorization without prior public notice and comment is "to allow a facility to initiate a necessary activity while its permit modification request is undergoing the Class 2 or 3 review process." See Fed. Reg. 37919 (Vol. 53, No. 188, September 28, 1988) (emphasis added). In other words, the permittee must demonstrate that NMED should approve the proposed modification immediately because the facility cannot wait until action is taken on the modification request at the conclusion of the public comment period. To construe this provision in any other manner would subvert the regulatory process for permit modifications under the HWA and RCRA.

Upon review of both the Permittees' request for temporary authorization and the subsequent public comment received by NMED, it is clear that the Permittees' request failed to demonstrate how disruption at INEEL directly impacted WIPP operations, and why it was imperative for NMED to grant the temporary authorization in this case outside the regulatory process for Class 2 permit modification. Instead, the Permittees' request relies entirely upon arguments regarding INEEL's potential failure to achieve shipment milestones in a negotiated settlement agreement with the State of Idaho. Other than to obtain relief from a reduction in future shipments from INEEL, there is no compelling reason why the Secretary should immediately grant the Permittees a temporary authorization, without notice or comment, as necessary to prevent any disruption with ongoing management operations at WIPP prior to the conclusion of the regulatory process. NMED notes that WIPP continues to receive scheduled TRU waste shipments from all generator/storage sites with approved waste characterization programs.

We cannot approve a temporary authorization without, at a minimum, documentation supportive of the above factors. In the absence of such information, NMED rescinds the December 13, 2000 temporary authorization approval.

If you have any questions regarding this matter, please contact Steve Zappe at (505) 827-1560, x1013.

Sincerely,



Gregory J. Lewis

Director

Water and Waste Management Division

GJL/soz

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cc: Paul Ritzma, NMED
James Bearzi, NMED HWB
John Kieling, NMED HWB
Steve Zappe, NMED HWB
Susan McMichael, NMED OGC
David Neleigh, EPA Region 6
Connie Walker, TechLaw
File: Red WIPP '00