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ENTERED



PETER MAGGIORE  
SECRETARY

April 10, 2002

Nick Stone  
United States Environmental Protection Agency  
Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, Texas 75202

**Re: Tod N. Rockefeller Notification of Noncompliance & Petition  
For a Public Hearing for Withdrawal of New Mexico's Authorized  
State Hazardous Waste Program (the "Petition")**

Dear Mr. Stone:

This letter is written to address the issues raised by Mr. Tod N. Rockefeller's Petition dated April 18, 2001, which was filed with the Environmental Protection Agency (EPA) on June 4, 2001. Mr. Rockefeller worked as an environmental scientist at the Waste Isolation Pilot Plant (WIPP) for the U.S. Department of Energy (DOE) until December 10, 1997.

On March 22, 1999, a U.S. District Court Judge granted the WIPP facility interim status to operate until the New Mexico Environment Department (NMED) issued a final permit. The facility commenced operations with the first receipt of waste on March 26, 1999. NMED held public hearings from February 22 to March 26, 1999 to receive public comments on the draft WIPP Permit. Mr. Rockefeller testified at several of these hearings. NMED issued the final WIPP permit on October 27, 1999.

Mr. Rockefeller challenged issuance of the WIPP permit in the New Mexico Court of Appeals. The Court of Appeals action was dismissed on January 10, 2001, and Mr. Rockefeller's Motion for Rehearing was denied on February 19, 2001. Mr. Rockefeller then filed this Petition with the EPA on June 4, 2001. In the Petition, Mr. Rockefeller requests that EPA conduct a public hearing to determine whether NMED's administration of its state hazardous waste program complies with the requirements of the Solid Waste Disposal Act (SWDA), as amended by the Resource Conservation and Recovery Act (RCRA). Mr. Rockefeller contends that NMED's administration does not comply with the SWDA and therefore authorization of the state program should be

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withdrawn. As will be shown in more detail below, most if not all of Mr. Rockefeller's allegations concern issuance of the permit to the WIPP facility and were previously raised by him in his action in the New Mexico Court of Appeals.

Mr. Rockefeller first alleges in Section II of his Petition that his testimony at the WIPP hearings provided evidence of "DOE's alleged false representations, cover-ups, and threats to human health and the environment." The evidence to which Mr. Rockefeller refers consists of his Memorandum in Opposition to Proposed Summary Disposition in the New Mexico Court of Appeals (Opposition Memorandum) and his Motion by Stipulation between the Parties in the same case. The Opposition Memorandum raises fifteen alleged "Errors of Law" or violations made by the hearing officer and/or the Secretary of Environment in the Secretary's Final Order dated October 27, 1999.

The violations alleged by Mr. Rockefeller were raised by him in the public hearings and/or in the appeal before the New Mexico Court of Appeals. The hearing officer considered all of the oral and written testimony at the public hearings in deciding whether to issue a permit for the WIPP facility. The Court of Appeals reviewed the record that was before the hearing officer and determined that the oral and written testimony supported the Recommended Decision and Proposed Final Order of the hearing officer and the final decision of the Secretary. Therefore, all of the violations alleged by Mr. Rockefeller were previously raised by him and rejected first during the public hearing phase and again in his appeal before the New Mexico Court of Appeals. Both administrative and judicial tribunals considered Mr. Rockefeller's allegations of wrongdoing and rejected them. All of the challenged actions of the hearing officer and the Secretary were determined to be legal and appropriate by the New Mexico Court of Appeals.

One category of issues raised by Mr. Rockefeller includes those over which NMED has no discretion. As an example, Mr. Rockefeller questioned why NMED does not pass on the cost of audit surveillance to regulated entities. Mr. Rockefeller's challenge ignores the fact that NMED's authority to charge regulated facilities is limited by state statutes and regulations. See, e.g., NMSA 1978 § 74-4-4.2; 20.4.2 NMAC; 20.4.3 NMAC.

Another category of issues raised by Mr. Rockefeller in Section II of his Petition are several references to testimony provided by him, such as oral testimony at the public hearings, written testimony submitted by him, and a "Deposition" Mr. Rockefeller submitted to the EPA. Mr. Rockefeller appears to conclude that any changes made in the permit application without his knowledge since his termination from the DOE are "violations", unsafe, and improper. At the NMED hearing on the draft permit, DOE had the burden of proof to demonstrate to the hearing officer that the permit application was complete and in compliance with the hazardous waste regulations. See 20.4.1.901 NMAC. It is the hearing officer's role to receive all of the evidence, to weigh the evidence, and to make a recommendation to the Secretary of the Environment. See 20.4.1.901(A)(7) NMAC. The hearing officer considered the evidence brought forth by Mr. Rockefeller and considered it in the final decision. See Report of the Hearing Officer, Statement of the Case, Issue, Findings of Fact, Discussion, Conclusions of Law, Recommended Decision

and Proposed Final Order, dated September 9, 1999, pages 28-29, Jeffrey S. Gulin, Hearing Officer.

Mr. Rockefeller also assumes that changes in the draft permit made by NMED, to which he does not agree, are violations of RCRA. Again, the hearing officer, the Secretary of Environment, and finally, the New Mexico Court of Appeals, have considered and rejected Mr. Rockefeller's claims of cover-ups, conspiracies and knowingly false statements. For example, NMED testified at the public hearing regarding the amount of financial assurance that would be required for the facility. NMED testified that \$110 million was required because it was concerned that DOE would claim that it had inadequate funding as a defense to clean-up and closure if that amount were not required. Mr. Rockefeller has taken a position that NMED should have, on that basis alone, denied the WIPP permit. It is NMED's position that instead, the testimony simply supported NMED's financial assurance requirements under the permit. Mr. Rockefeller made several more claims of knowingly false statements and perjury against DOE, all of which were rejected by the New Mexico Court of Appeals.

Finally, in Section II of the Petition, Mr. Rockefeller claims that the hearing officer should not have dismissed his "technical testimony" against the DOE, which consisted of claims made before the U.S. Department of Labor. The Department of Labor had issued a Recommended Decision dismissing Mr. Rockefeller's claims. Again, the weight to be given to the evidence at a public hearing is within the discretion of the hearing officer, as long as it is not arbitrary. The fact that the Department of Labor had recommended that these claims be dismissed and the fact that the Court of Appeals did not find error in the hearing officer's actions are evidence that the hearing officer was not acting in an arbitrary manner.

Mr. Rockefeller's claim in Section III of his Petition, that the hearing officer made a knowingly false representation to improperly dispel of his entire written and oral testimony, has no merit. Mr. Rockefeller recognizes in his Petition that the Report of the hearing officer stated that his claims regarding protected whistle-blowing concerning alleged safety problems at WIPP were considered and rejected by the U.S. Merit Systems Protection Board. Nowhere in the hearing officer's Report did it state that all testimony of Mr. Rockefeller was considered and rejected by the U.S. Merit Systems Protection Board. As stated in the Report, the hearing officer was referring only to the claims that were addressed in front of the U.S. Merit Systems Protection Board and the U.S. Department of Labor. Therefore, there were no knowingly false representations made by the hearing officer.

Section IV of Mr. Rockefeller's Petition is frivolous. Mr. Rockefeller claims that it is criminal extortion to require him to pay the cost for production of the record, which is required by regulation. See section 20.1.5.506 NMAC. The "Free Process Order" waives only the docketing fee, and does not waive the cost for production of the record proper. See Rule 12-208(H), New Mexico Rules of Appellate Procedure. Mr. Rockefeller alleges that the New Mexico Court of Appeals is guilty of "possible criminal tampering of evidence" because the court did not allow him to include additional evidence. The record in an appeal of the issuance of a permit is limited to the

evidence that was before the hearing officer and was designated on appeal. Section 20.4.1.901(H)(2) NMAC provides that the record on appeal of a permit issuance "shall include the transcript of the hearing, all related correspondence, any responses to comments, and all other information relied upon by the Secretary in deciding the permit action." Mr. Rockefeller's claims therefore have no merit.

Section V of Mr. Rockefeller's Petition again refers to the same "missing evidence" that he claims should have been considered by the New Mexico Court of Appeals. The violations are all conclusory statements made by Mr. Rockefeller and are at best statements that conflict with the evidence presented by DOE at the WIPP permit hearings. As stated previously, the hearing officer has the discretion to weigh the evidence and to determine whether it was proper to recommend issuance of the permit for the WIPP facility. The hearing officer found that the permit should be issued and did not find that there was an imminent hazard or violation of knowing endangerment regarding the "violations 3 through 6" as alleged by Mr. Rockefeller. The New Mexico Court of Appeals agreed and dismissed Mr. Rockefeller's claims.

NMED respectfully requests that EPA deny Mr. Rockefeller's request for a public hearing regarding withdrawal of New Mexico's authorized hazardous waste program. NMED further asserts that EPA has no grounds to take any of the corrective measures proposed by Mr. Rockefeller in his Prayer for Relief. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,



James P. Bearzi  
Chief  
Hazardous Waste Bureau

cc: P. Ritzma, NMED OGC  
S. Zappe, NMED HWB  
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