

Page 2586

1 CROSS-EXAMINATION
 2 BY MR. HANCOCK:
 3 Q. Good morning, Mr. Zappe.
 4 A. Good morning, Don.
 5 Q. I don't think we need any further introduction, do
 6 we?
 7 A. No.
 8 HEARING OFFICER GULIN: I wonder if I could
 9 just ask either one of you to move both, so I could see you
 10 both at the same time.
 11 THE WITNESS: I'll move back.
 12 HEARING OFFICER GULIN: Thank you.
 13 Q. (BY MR. HANCOCK) would you agree that the purpose
 14 of WIPP is to serve as a disposal facility for transuranic
 15 and transuranic mixed waste?
 16 A. Yes.
 17 Q. And to your knowledge, it's the only such disposal
 18 facility that the Department of Energy is planning for
 19 disposal of transuranic and transuranic mixed waste; is that
 20 correct?
 21 A. To my knowledge, it is. We have only received the
 22 permit application for this particular facility.
 23 Q. And you're aware that, based on DOE's application,
 24 they intend to dispose of any transuranic and transuranic
 25 mixed waste that they bring to WIPP; is that correct?

Page 2587

1 A. Insofar as it complies with -- under our permit,
 2 it complies with the requirements of the permit.
 3 Q. And the permit, when it's finally issued, is
 4 intended to regulate those operations and that management,
 5 storage and disposal of wastes coming to WIPP; is that
 6 correct?
 7 A. That's correct.
 8 Q. Now, you testified -- Well, let me just ask a
 9 clarifying question, before I go to that. One of the issues
 10 in the department's submittal yesterday is a tab that's
 11 called "Remote-Handled TRU Mixed Waste," but I didn't hear
 12 you offer any testimony about it. Are you the person who's
 13 testifying on that subject?
 14 A. No, I'm not.
 15 Q. And who would that be?
 16 MS. MCMICHAEL: For the record?
 17 HEARING OFFICER GULIN: we'll take a proffer.
 18 MS. MCMICHAEL: Sure. At the close, we have
 19 Mr. Zappe, Connie Walker, and we have Dave Walker. At the
 20 close after our three witnesses testify, we will have
 21 witnesses available to answer questions regarding the
 22 remote-handled -- the prohibition on remote-handled waste.
 23 So it will be after Dave Walker's testimony.
 24 MR. HANCOCK: Okay. So I shouldn't ask
 25 Mr. Zappe questions on that subject. Okay. Fine.

Page 2588

1 Q. (BY MR. HANCOCK) All right. One of the things,
 2 one of the subjects you did offer testimony on is the
 3 section called "Statutory & Regulatory Background"; is that
 4 correct?
 5 A. Yes, it is.
 6 Q. And on page 1 of that testimony, you discuss the
 7 WIPP Land Withdrawal Act; is that correct?
 8 A. Yes.
 9 Q. That's point LA., in fact.
 10 A. Yes.
 11 Q. And in the second paragraph of that section, the
 12 second sentence reads:
 13 "The LWA -- which is the Land
 14 Withdrawal Act -- requires DOE to:
 15 (1) obtain a State RCRA permit prior to
 16 management, storage or disposal of
 17 radioactive mixed waste at WIPP."
 18 Is that correct? Is that what your testimony is?
 19 A. Yes, it is.
 20 Q. Is that a direct quote out of the Land Withdrawal
 21 Act, or is that your paraphrase?
 22 A. That's my paraphrase.
 23 Q. Do you know what the Land Withdrawal Act, in fact,
 24 says?
 25 A. Just a minute. (Witness perused document.) Yes.

Page 2589

1 Q. What does the Land Withdrawal Act itself say?
 2 A. In Section 9(a)(1), it's entitled, "Compliance
 3 with Environmental Laws and Regulation." "In General.--"
 4 "Applicability.--" It says, quote:
 5 "Beginning on the date of the
 6 enactment of this Act, the Secretary
 7 shall comply with respect to WIPP,
 8 with--"
 9 And then as I go down to (C), it says:
 10 "the Solid Waste Disposal Act
 11 (42 U.S.C. 6901. . .)" and on.
 12 The Solid Disposal Act includes RCRA, and it's our
 13 interpretation that in order to comply with RCRA, with this
 14 portion of the Land Withdrawal Act, that they have to obtain
 15 a permit before they can dispose of radioactive mixed waste.
 16 (Discussion off the record with reporter.)
 17 Q. Now, that's not an entire reading of the Land
 18 Withdrawal Act discussion of RCRA and the state authority,
 19 however, is it? If I can direct you to 9(a)(1)(H), would
 20 you read that, please?
 21 A. Yes. (Witness perused document.) It also
 22 requires they should comply with, quote:
 23 "All regulations promulgated, and
 24 all permit requirements, under the laws
 25 described in the subparagraphs (B)



1 through (G)."

2 Q. And one of the subparagraphs you just read was

3 subparagraph (C) that relates.

4 A. That's correct.

5 Q. So your understanding would be that the law

6 clearly says not only to comply with the Solid Waste

7 Disposal Act or RCRA, but to comply with all regulations

8 promulgated and all the permit requirements under that law;

9 is that correct?

10 A. That's correct.

11 Q. Further, if I can direct you to Section 9(d) of

12 the Land Withdrawal Act. Would you read that, please?

13 A. Yes, this is the "Savings Provision," quote:

14 "The authorities provided to the

15 Administrator and to the State pursuant

16 to this section are in addition to the

17 enforcement authorities available to the

18 State pursuant to the State law and to

19 the Administrator, the State, and any

20 other person, pursuant to the Solid

21 Waste Disposal Act . . . and the Clean

22 Air Act . . ."

23 Q. So this is another provision of the Land

24 Withdrawal Act that relates to RCRA and the state's

25 authority; wouldn't you agree?

1 Q. So would you say that the repetitive nature of the

2 discussion in the Land Withdrawal Act of this issue makes it

3 clear that -- that DOE needs to comply with RCRA at WIPP?

4 A. I'd say that's a fair conclusion.

5 Q. And that's part of the basis, the conclusion that

6 you stated on page 1 of your testimony about complying with

7 RCRA and obtaining a state RCRA permit; is that correct?

8 A. Yes.

9 Q. On page 4 of your testimony on "Statutory &

10 Regulatory Background," you describe the test phase

11 application and the draft permit that the NMED issued on

12 August 30, 1993; is that correct?

13 A. Yes.

14 Q. And then directly under that, your Section C.2.

15 is entitled, the heading there is, "Withdrawal of Test Phase

16 Application and Secretary's Order"; is that correct?

17 A. Yes.

18 Q. Did you mean to say with that title, the

19 Department of Energy withdrew its application for a RCRA

20 permit for the test phase?

21 A. What's stated in the second paragraph is that --

22 and I believe the Secretary's September 2, 1994, order is

23 very clear. It is unattached because it is part of the

24 record -- is that they were required -- this order, and I'll

25 quote my testimony here:

1 A. This is ensuring that the state retains its

2 enforcement authorities.

3 Q. Including under RCRA?

4 A. Yes, state law.

5 Q. And directing your attention to Section 14 of the

6 Land Withdrawal Act.

7 A. Yes.

8 Q. Section 14(a) is a further savings provision

9 related to Solid Waste Disposal Act or RCRA; is that

10 correct?

11 A. Yes, the title of the section is "Savings

12 Provisions," and it deals with the Clean Air Act and Solid

13 Waste Disposal Act.

14 Q. And Section 14(b) of the Land Withdrawal Act again

15 restates that:

16 "No provision of this Act may be

17 construed to limit, or in any manner

18 affect, the Administrator's or the

19 State's authority to enforce, or the

20 Secretary's obligation to comply

21 with-- "

22 And then subparagraph (2) is "the Solid Waste

23 Disposal Act"; is that correct?

24 A. Yes. And subparagraph (3) also includes "any

25 other applicable clean air or hazardous waste law."

1 "On September 2, 1994, after

2 considering public comments, which

3 ranged from allowing the Applicants to

4 update their application to reflect

5 disposal of mixed waste, to requiring

6 the Applicants to withdraw their

7 application and cease all activities at

8 WIPP, the NMED secretary issued an order

9 requiring the Applicants to (1) submit a

10 revised application for future WIPP

11 activities; and (2) hold a stakeholders'

12 meeting to explain the expected revised

13 application."

14 So what stands here is not the title of the

15 section, "Withdrawal of Test Phase Application," but the

16 Secretary's order requiring them to submit a revised

17 application.

18 Q. So why in the title in C.2. did you use the word

19 "withdrawal"?

20 A. I'm sorry if that confused you. It was intended

21 to cover the breadth of the comments that we received.

22 Q. And so on August 30, 1993, NMED issued a draft

23 permit for the test phase, and less than two months later,

24 DOE changed its policy and dropped the test phase; is that

25 true?

1 A. That's correct.
 2 Q. Is that, to your knowledge, the first time that
 3 DOE applied for a RCRA permit to the environment department,
 4 and after the draft permit was issued, changed its policy?
 5 A. I believe that we've discussed in my testimony
 6 that -- and that was, in fact, one of the potential options
 7 for dealing with the permittees' position that they would
 8 like to dispose of nonmixed waste, that that is an option
 9 that would also be available at this time.
 10 Q. Okay. I guess I have another question about the
 11 overall testimony here. It's entitled, "New Mexico
 12 Environment Department's Direct Testimony Regarding
 13 Regulatory Process and Imposed Conditions," as opposed --
 14 and you've described imposed conditions and conditions of
 15 the permit; is that correct?
 16 A. Well, the permit itself consists of permit
 17 conditions, and then there are those conditions which we
 18 have described as being imposed because of the technical
 19 deficiencies that remained in the application, and our way
 20 of addressing those technical deficiencies, rather than
 21 continuing to request more information from the applicants,
 22 was to impose conditions to reflect what the department
 23 wanted.
 24 Q. Is it your understanding that conditions in the
 25 final permit have the same effect whether they are

1 persons during that 90-day comment period; is that correct?
 2 A. Thirty persons or groups, yes.
 3 Q. And you list those as Attachment 13.
 4 A. Yes.
 5 Q. Were any of those 30 commenters the Defense
 6 Nuclear Facilities Safety Board, which has been referred to
 7 in this proceeding?
 8 A. No.
 9 Q. At any time, to your knowledge, has the Defense
 10 Nuclear Facilities Safety Board given comments to the
 11 department on the draft permit?
 12 A. I'm unaware of any correspondence that we have
 13 ever received from that board.
 14 Q. All right. Now, based on the public comments
 15 received, those comments from those 30 persons or
 16 organizations, the department considered those comments and
 17 issued a revised permit on November 13th; is that correct?
 18 A. Yes.
 19 Q. Were there any other studies or were there any
 20 studies or reports undertaken by the department as the basis
 21 for changes in the draft permit, the revised draft permit?
 22 A. Pardon me. Studies or what?
 23 Q. Reports.
 24 A. That the department undertook?
 25 Q. Uh-huh, yes.

1 conditions or whether they are, quote, "imposed conditions"?
 2 A. Of course.
 3 Q. Now, further on in your testimony under "Statutory
 4 & Regulatory Background on page 8, you discuss the issuance
 5 of a draft permit on May 13, 1998; is that correct?
 6 A. No, it was May 15, 1998.
 7 Q. Okay. So the heading that says, "Draft Permit -
 8 May 13, 1998," is in error; is that correct?
 9 A. That is correct.
 10 Q. And you would like to correct that date for the
 11 record?
 12 A. Right now, as we speak, I have replaced 13 with
 13 15.
 14 HEARING OFFICER GULIN: So ordered.
 15 THE WITNESS: And I would choose everybody
 16 else to do that elsewhere.
 17 A. May 13th was a different date.
 18 Q. (BY MR. HANCOCK) I'm easily confused. That's why
 19 I look at these headings.
 20 Now, I guess I want to -- I guess I actually do
 21 want to make sure here, that you state here on page 8 that
 22 the draft permit was published for a 90-day public comment
 23 period; is that correct?
 24 A. Yes.
 25 Q. And you state that NMED received comments from 30

1 A. Not related to the permit that I'm aware of.
 2 Again, we're required to revise the draft permit in
 3 accordance with the comments that we've received.
 4 Q. So the basis for the changes that were made in the
 5 revised draft permit was the comments received during the
 6 public comment period from May 15th to August 14th?
 7 A. That's correct. They're based upon our
 8 interpretation of the comments that we received.
 9 Q. And what criteria did the department use to weigh
 10 those comments that it received?
 11 A. Could you ask the question a different way,
 12 please?
 13 Q. Well, let's take examples. Did all of the
 14 commenters comment in exactly the same way on each and every
 15 particular issue, or were there differences among the
 16 commenters?
 17 A. There were differences among the commenters.
 18 Q. So presumably, department had some criteria that
 19 it used to weigh why it incorporated a particular comment
 20 that said A, and not the comment on the same subject that
 21 said B; isn't that correct?
 22 A. Yes. I guess if you want to know a criterion, it
 23 would be first based upon compliance with regulations, and
 24 secondly as to whether it was consistent with the policy of
 25 the department.

1 Q. And where is the policy of the department related
 2 to the WIPP RCRA permit spelled out?
 3 A. There is no written document other than what we
 4 have specified in the fact sheets that we have submitted,
 5 and the document itself represents the policy of the
 6 department.
 7 Q. And we're going to come back to those fact sheets
 8 in a little while, but for the time being, would you agree,
 9 based upon that description that you just gave, that the
 10 public in making comments might not be clear in terms of
 11 what the department's policy is?
 12 A. That's a possibility, and it's also clear from
 13 some of the comments we received that people are also
 14 unfamiliar with the RCRA regulations, and so many of their
 15 comments are inapplicable because they address issues that
 16 are outside the scope of the regulations.
 17 Q. But it also is the case, is it not, that on some
 18 issues there were comments on a subject under the
 19 regulations, but commenters had different positions or
 20 suggested different changes or different conditions to the
 21 draft permit; isn't that true?
 22 A. Yes, it is.
 23 Q. And when we now move from how the department
 24 considered comments on the May draft permit, in terms of
 25 revising the -- in terms of issuing the revised draft

1 of the Supplemental Fact Sheet dated December 8, 1998. Do
 2 you have that?
 3 A. Yes.
 4 Q. And is it fair to say that you were involved in
 5 the drafting of this supplemental fact sheet and are
 6 familiar with its contents?
 7 A. Yes, if you direct me to a particular portion of
 8 it.
 9 Q. Okay. Page 5. Left-hand column, down toward the
 10 bottom, it says, the heading is: "Draft Permit - May 15,
 11 1998 and Revised Draft Permit - November 13, 1998." Do you
 12 see that?
 13 A. Yes.
 14 Q. The last sentence of that section states:
 15 "NMED revised the draft permit to
 16 incorporate appropriate public comments
 17 and published a revised draft permit on
 18 November 13, 1998."
 19 Did I read that correctly?
 20 A. Yes.
 21 Q. So in this fact sheet, the department states that
 22 it revised the draft permit to incorporate appropriate
 23 public comments. Would you describe to me what the meaning
 24 of "appropriate public comments" is?
 25 A. Well, I believe I already alluded to the fact that

1 permit, are those the same criteria that you gave me that
 2 the department will use in terms of reviewing and weighing
 3 comments on this revised draft permit?
 4 A. Yes. Just a minute. As required by regulation in
 5 the hazardous waste management regulations, 20 NMAC 4.1, in
 6 Section 901.A.9, it states, and I quote:
 7 "At the time that any final permit
 8 decision is issued, the Secretary shall
 9 issue a response to comments. This
 10 response shall: A, specify which
 11 provisions, if any, of the draft permit
 12 have been changed in the final permit
 13 decision and the reasons for the change;
 14 B, briefly describe and respond to all
 15 comments on the draft permit or the
 16 permit application raised during the
 17 public comment period or during any
 18 hearing; and, C, be available to the
 19 public."
 20 So an answer to your question is that that will be
 21 clear when there's a final permit that's issued, we will
 22 respond to all comments and the reasons for our -- or the
 23 rationale for our evaluation of those will be made public.
 24 Q. Another way -- my term -- that the department
 25 described how it considered the public comments is on page 5

1 many of the comments we received were not related to RCRA
 2 issues. They may have been related to concern over
 3 transportation, over radionuclide issues that are more
 4 appropriately regulated by EPA, and that's one way of
 5 describing -- explaining the word "appropriate," and the
 6 other way is, as I've already said, in terms of being in
 7 accordance with the requirements of regulation and
 8 department policy.
 9 Q. And as a general matter, would you agree that the
 10 majority of the changes made in the draft permit of May 15th
 11 as compared to the revised draft permit of November 13th,
 12 the majority of the changes made were as a result of
 13 comments by the applicant?
 14 MS. McMICHAEL: I'm going to object to the
 15 form of the question. I'm not sure where this is leading.
 16 The witness has already testified that the department will
 17 respond, provide full responses at the close of the public
 18 comment period, as provided in the regs. I'd like to know
 19 where this is leading.
 20 MR. HANCOCK: It's a factual question to the
 21 permit writer who has testified that he is intimately
 22 familiar with the comments made and the draft permit.
 23 HEARING OFFICER GULIN: This last question, I
 24 think, is a valid question. You can answer that.
 25 A. I'd be happy to. It's a reflection both of the

1 number of comments that we received from --
 2 HEARING OFFICER GULIN: No. The last
 3 question was simply: Was the majority of the comments . . .
 4 THE WITNESS: Oh, okay.
 5 A. Okay. The majority of the --
 6 Q. (BY MR. HANCOCK) changes.
 7 A. -- changes reflected the fact that the majority of
 8 the comments received were from the applicant. By sheer
 9 volume, there were more comments that were provided by the
 10 applicant, but it by no means indicates that we viewed them
 11 in any different way than we viewed comments from the
 12 public.
 13 Q. You also provided testimony about audit
 14 requirements; is that correct?
 15 A. Actually, what is in your folder for testimony is
 16 actually going to be the testimony of Connie Walker. I did
 17 discuss the time -- proposed time limit that the applicants
 18 had suggested for our review of final audit reports.
 19 Q. But you are not sponsoring the 13 pages of "Audit
 20 Requirement" that are behind the tab in the testimony?
 21 A. That's correct. Connie Walker will provide the
 22 direct testimony on that subject.
 23 Q. And will she also be able to testify related to
 24 Section 4 of that section which is entitled, "Public
 25 comments"?

1 please? All right. We're on the record. While I'm
 2 thinking about it, I wanted to mention another matter. You
 3 will have observed, of course, that during the course of the
 4 hearing, there have been a few documents which have been
 5 admitted or offered into evidence, whether or not they've
 6 been admitted, and I have not been assigning exhibit
 7 numbers, such as Applicants' No. 2 or Ms. Bonneau No. 3.
 8 What we've been doing is simply logging them in in
 9 chronological order. I thought that would be more efficient
 10 in this type of proceeding where we have a lot of pre-filed
 11 documents.
 12 But while I'm thinking about it, at the conclusion
 13 of the hearing, it may be wise for you to obtain a copy of
 14 the -- I guess it's called -- the pleading log, and it will
 15 contain all of the exhibits, whether or not admitted, if
 16 they were offered into evidence. And for your convenience,
 17 in your proposed findings of fact and conclusions of law,
 18 you may cite to the log number, rather than write out the
 19 entire document.
 20 Now, there are a few logs where there are a rather
 21 voluminous amount of documents within a particular log, and
 22 there you may have to be more specific, but I just wanted to
 23 mention that that would be a wise way to proceed.
 24 All right. We'll continue, then, with
 25 cross-examination by Mr. Hancock.

1 A. I'm at a loss because my copy does not have that
 2 in there, so . . .
 3 MS. MCMICHAEL: Obviously, for the record --
 4 MR. HANCOCK: If counsel can help me, that's
 5 just a straightforward question.
 6 MS. MCMICHAEL: The witness is not testifying
 7 regarding the audit condition. Ms. Connie Walker will
 8 testify regarding -- that's the basis of her testimony. So
 9 I would presume, yes, that she can answer your questions
 10 with regard to testimony under that tab.
 11 MR. HANCOCK: Okay. That's fine. I just
 12 wanted to be sure.
 13 Q. (BY MR. HANCOCK) okay. I referred earlier to the
 14 supplemental fact sheet. I'd now like to refer you to the
 15 fact sheet of November 13, 1998. Do you have that?
 16 A. Yes.
 17 Q. And as with the supplemental fact sheet, is it
 18 correct that you were involved in the drafting and are
 19 familiar with the contents of this fact sheet?
 20 A. That's correct.
 21 HEARING OFFICER GULIN: why don't we go ahead
 22 and take our morning break at this time? And come back in
 23 15 minutes. Thank you.
 24 (At 10:26 a.m. a recess was taken.)
 25 HEARING OFFICER GULIN: Can we come to order,

1 MR. HANCOCK: Thank you, Mr. Hearing Officer.
 2 Q. (BY MR. HANCOCK) Mr. Zappe, we were about to
 3 start talking about the November 13, 1998, WIPP Fact Sheet
 4 issued by the department, and you've already testified
 5 you're familiar with it and that you have it, correct?
 6 A. Yes.
 7 Q. Turning to page 2, down toward the bottom of the
 8 left-hand column, there is a discussion of operational and
 9 waste-handling activity issues that NMED does not have
 10 statutory or regulatory authority. Do you see that?
 11 A. I'm sorry. I was on page 3.
 12 Q. I'm sorry. Page 2, down toward the bottom
 13 left-hand column?
 14 A. "In addition to," that paragraph?
 15 Q. Yes.
 16 A. Yes.
 17 Q. And there are some examples given, then, in that
 18 paragraph, and the first example is transportation of waste
 19 to WIPP, is that correct?
 20 A. Yes.
 21 Q. And what is your understanding of who has the
 22 statutory or regulatory authority over that issue?
 23 A. My understanding is not based upon my expertise,
 24 but generally the Department of Transportation and the State
 25 of New Mexico in terms of the Department of Public Safety.

1 Q. Related specifically – the state's authority
 2 relating specifically to identification of transportation
 3 routes?
 4 A. Yes.
 5 Q. Would you consider the TRUPACT-II to be related to
 6 transportation of waste to WIPP?
 7 A. Yes, it's related to transportation. It's the
 8 transportation container which will be used.
 9 Q. And what is the agency, in your understanding,
 10 that has regulatory authority over the TRUPACT-II?
 11 A. My understanding is it's the Nuclear Regulatory
 12 Commission which certifies transportation containers for
 13 radioactive waste.
 14 Q. And hypothetically, if the Nuclear Regulatory
 15 Commission withdraw its certification of the TRUPACT-II,
 16 what effect would that have on the RCRA permit?
 17 A. I'm not sure.
 18 Q. Okay. Let's talk about some specifics, then. In
 19 Module III of the revised draft permit, there are several
 20 mentions of the TRUPACT-II. Would you agree with that?
 21 A. Yes.
 22 Q. And among the uses that the revised permit has for
 23 the TRUPACT-II is as a storage container in the parking
 24 area; is that correct?
 25 A. Yes, it is.

1 WIPP?
 2 MS. MCMICHAEL: I'm going to object as asked
 3 and answered.
 4 MR. HANCOCK: I don't believe he's answered
 5 that particular question, Mr. Hearing Officer.
 6 MS. MCMICHAEL: The witness has testified
 7 he's not familiar it would impact – NRC license
 8 requirements would impact this permit, as it relates to
 9 Module III.
 10 HEARING OFFICER GULIN: I'll allow you to
 11 answer the question, if you have an opinion. I don't want
 12 you to speculate, though. If you're not sure, just say
 13 you're not sure.
 14 A. Yeah, I'd care not to speculate.
 15 Q. (BY MR. HANCOCK) So if NRC suspended or withdrew
 16 the certification of the TRUPACT because it would not
 17 contain the materials in the container, that would have no
 18 effect on the environment department's permit?
 19 MS. MCMICHAEL: Asked and answered.
 20 HEARING OFFICER: sustained. Next question.
 21 Q. (BY MR. HANCOCK) The second example used in the
 22 fact sheet is disposal of nonmixed TRU waste under
 23 40 CFR 191 and 194; is that correct?
 24 A. Yes.
 25 Q. And who has the authority for disposal of nonmixed

1 Q. Would NRC withdrawing its certification of the
 2 TRUPACT-II impact on that portion of the final permit, if
 3 the final permit contained the same provision that the
 4 revised draft permit does?
 5 A. Would you repeat the question?
 6 Q. If – these are hypotheticals now.
 7 A. I understand.
 8 Q. And one hypothetical is: if NRC withdraws or
 9 suspends the certification, and another hypothetical is: if
 10 the final permit has the same provision as the revised draft
 11 permit.
 12 A. Okay.
 13 Q. So the question is: In that hypothetical
 14 situation, would the suspension or withdrawal of the NRC
 15 certification for TRUPACT-II have any effect on the RCRA
 16 permit?
 17 A. Again I'll say: I'm not sure.
 18 Q. And why are you not sure?
 19 A. It's not clear that our approval of the use of the
 20 TRUPACT-II as a storage container in the parking area
 21 requires that it be certified by the NRC.
 22 Q. So if you are suggesting, then, that it's quite
 23 possible that an NRC action that would suspend the use of
 24 the TRUPACT-II would have no effect on its ability of those
 25 containers to continue to be used as storage containers at

1 TRU waste under 40 CFR 191 and 194?
 2 A. As specified in the Land Withdrawal Act, that
 3 authority has been given to EPA's Office of Radiation and
 4 Indoor Air.
 5 Q. And isn't it the case, however, that the authority
 6 that EPA has is not limited to nonmixed TRU waste, but
 7 relates to all of the waste, all of the transuranic waste
 8 coming to WIPP?
 9 A. I don't have an opinion on that.
 10 Q. Well, let's – EPA's authority to certify
 11 radioactive waste at WIPP relates to all of the radioactive
 12 waste at WIPP, doesn't it, Mr. Zappe? Isn't that your
 13 understanding?
 14 A. Yes, it does.
 15 Q. So EPA's authority is, in fact, not limited to
 16 nonmixed TRU waste?
 17 A. EPA's authority is for TRU waste, mixed and
 18 nonmixed.
 19 Q. Okay. So perhaps it would be more accurate if the
 20 fact sheet would say "disposal of TRU waste." Do you agree
 21 with that? The "nonmixed" seems to be misleading to me.
 22 Would you agree?
 23 A. No. You have to read it in the context of the
 24 entire sentence.
 25 Q. Okay. And so what's the context of the entire

1 sentence in your interpretation?
 2 MS. MCMICHAEL: I'm going to object. Calls
 3 - appears to be calling for a legal conclusion.
 4 MR. HANCOCK: NO. Mr. Zappe has stated that
 5 he is intimately familiar and perhaps was the author of this
 6 language, and I'm just trying to clarify what the department
 7 felt it meant.
 8 HEARING OFFICER GULIN: What is the question
 9 again, please?
 10 MR. HANCOCK: Let me rephrase.
 11 HEARING OFFICER GULIN: All right.
 12 Q. (BY MR. HANCOCK) Mr. Zappe, you've agreed that
 13 EPA's authority is more than just nonmixed TRU waste,
 14 correct?
 15 A. Yes.
 16 Q. Okay. So the question is: Wouldn't it be more
 17 accurate for the fact sheet to say something like "disposal
 18 of transuranic waste"? And you were saying: No, that
 19 wouldn't be the case.
 20 A. Because the sentence before says, quote:
 21 "There are a number of operational
 22 and waste handling activities or issues
 23 concerning WIPP which are not within the
 24 purview of the permit or that NMED does
 25 not have statutory or regulatory

1 other agencies such as the Mine Safety and Health
 2 Administration"; is that what it says?
 3 A. Yes.
 4 Q. And what specific regulations enforced by the Mine
 5 Safety and Health Administration are you referring to?
 6 A. I'm unable to answer that question right now.
 7 Q. And when would you be able to answer the question?
 8 A. If I had the rest of the permit with me.
 9 Q. Ah-hah. Okay. So which part of the permit do you
 10 want to refer to?
 11 A. It would probably be Attachment M2 dealing with
 12 underground.
 13 Q. Okay. Why doesn't your counsel provide that to
 14 you? Because I do want to talk about a couple of other
 15 matters related to it.
 16 (Document presented to witness.)
 17 Okay. Can you now answer the question and would
 18 you tell us what you're referring to?
 19 A. Yes, I can. In Volume IV of the permit, draft
 20 permit, Attachment M2, Section M2-5.A.1 entitled "Ground
 21 Control Program," as revised the permit now reads:
 22 "A Ground Control Program at the
 23 WIPP facility will ensure that any room
 24 in a hazardous waste disposal unit in
 25 which waste will be placed will be

1 authority under the Hazardous Waste Act
 2 or 20 NMAC 4.1."
 3 If the language, as you proposed, said "disposal
 4 of all TRU waste," then that would make the first sentence
 5 incorrect, by my reading.
 6 Q. Okay. And so you don't read the entire phrase
 7 together when it seems to me it's referring to disposal
 8 under 40 CFR 191 and 194?
 9 A. The second sentence that you're quoting are
 10 examples of issues illustrating the operational and
 11 waste-handling activities which are not within the purview
 12 granted to us under the Hazardous Waste Act or the
 13 regulations.
 14 Q. Okay. We've talked about two, and we're going to
 15 talk about the third one. Are there other examples that are
 16 not listed in the fact sheet of those operational or
 17 waste-handling activities that are not within the purview of
 18 the permit?
 19 A. The fact sheet states that these are examples. It
 20 is not presented as an exhaustive list.
 21 Q. And I'm asking you: Do you have other examples
 22 that you can give?
 23 A. There may be, but I can't give them at this time.
 24 Q. Okay. Let's go on then to the third example
 25 that's given: "Compliance with regulations enforced by

1 sufficiently supported to assure
 2 compliance with the applicable portions
 3 of the Land Withdrawal Act which
 4 requires a regular review of roof
 5 support plans and practices by the Mine
 6 Safety and Health Administration.
 7 Support is installed to the requirements
 8 of 30 CFR 57, Subpart B."
 9 Q. So those are the specific regulations that you're
 10 referring to; is that correct?
 11 A. Again, yes, that is an example of regulations
 12 enforced by other agencies.
 13 Q. So it's your understanding that MSHA regulations
 14 can cover the ground control system as it relates to WIPP;
 15 is that correct?
 16 A. The statement in the fact sheet was that that is
 17 an operational and waste-handling activity which is not
 18 within the purview of NMED because of - we do not have
 19 statutory or regulatory authority under the Land Withdrawal
 20 Act or our regulations.
 21 Q. And the permit, the revised - the draft permit of
 22 May 15th, to get our dates right since we've talked about
 23 the dates - the draft permit of May 15, 1998, had a
 24 several-page discussion of Ground Control Program in it, and
 25 much of that was stricken in what you've just described from

1 the revised draft permit; is that correct?
 2 A. Yes.
 3 Q. And the reason that it was stricken was because
 4 the environment department believes that it's under the
 5 authority of MSHA; is that correct?
 6 A. The reason that it was stricken will be provided
 7 in the final response to comments because this modification
 8 to the permit was made in response to a comment.
 9 Q. And specifically which comment?
 10 A. I can't answer that right now.
 11 Q. And why can't you answer it right now?
 12 A. I don't have the information. I don't have the
 13 comment in front of me. If you have it --
 14 Q. Mr. Zappe, I've handed you a document that is
 15 identified as a New Mexico Environment Department Fact Sheet
 16 related to WIPP. It is, in fact, the fact sheet related to
 17 that 1993 draft permit; is that correct?
 18 A. There's no date on the fact sheet, but this
 19 appears to be the fact sheet that was covering the test
 20 phase draft permit.
 21 Q. Okay. And if you'd turn to page 5, bottom of that
 22 page, there is a discussion of the Bin Scale Test Rooms in
 23 the draft, and at the bottom, if you would read in the last
 24 paragraph, the last two sentences.
 25 A. Beginning with "therefore"?

1 Q. And so that draft permit, in fact, imposed
 2 conditions on the nature and type of the supplementary room
 3 support system; is that correct?
 4 A. The test phase permit and the requirement for
 5 support, as I understand it, was because this was not for
 6 disposal. This was for activities that would require that
 7 the rooms be maintained for access.
 8 Q. But didn't MSHA have authority over those rooms,
 9 whether they were for tests or disposal?
 10 MS. MCMICHAEL: I object to the form of the
 11 question. The witness has testified he's not familiar with
 12 MSHA.
 13 HEARING OFFICER GULIN: I will allow him to
 14 answer. He can answer that if he knows.
 15 A. The -- Repeat the question.
 16 Q. (BY MR. HANCOCK) Isn't it your understanding or
 17 is it your understanding, that MSHA regulations -- Well,
 18 wasn't MSHA's -- isn't MSHA's authority over the facility
 19 unrelated to whether there were tests or disposal?
 20 A. MSHA's authority is unrelated to RCRA; and
 21 therefore, they had authority, whether we said anything
 22 about it or not.
 23 Q. But in the 1993 draft permit, the department
 24 proposed specific regulations of the room support system in
 25 those rooms; isn't that correct?

1 Q. I thought the "Therefore" was the last sentence.
 2 Could you start the sentence before?
 3 A. Okay. Quote:
 4 "The system is discussed further in
 5 the Module IV in Permit Attachments
 6 III-1, IV-5, and IV-6."
 7 I'm sorry.
 8 "The permit application submitted
 9 by DOE and WID did not specify that a
 10 similar system would be used in Bin
 11 Scale Test Room 3. Therefore, the draft
 12 permit, under permit conditions IV.B.6
 13 and I.J.1, requires the Permittees to
 14 demonstrate to NMED that a supplementary
 15 support system which can achieve the
 16 same degree of safety as the existing
 17 Bin Scale Test Room I supplementary
 18 system will be in place prior to
 19 acceptance of waste in Bin Scale Test
 20 Room 3."
 21 Q. So those sentences refer to conditions and
 22 requirements of the draft permit related to the
 23 supplementary support system in those test rooms; is that
 24 correct? Is that your understanding?
 25 A. Yes.

1 A. That was for the test phase, which was for a
 2 different purpose than the disposal phase.
 3 Q. And the purpose of the room support system in the
 4 draft permit, the department's concern, the department's
 5 reasons for requiring a supplementary support system related
 6 to RCRA requirements to protect public health and the
 7 environment; isn't that correct?
 8 A. That rationale is not stated here in the fact
 9 sheet that you just gave me.
 10 Q. So it's your understanding that the department's
 11 proposed position in 1993 in a RCRA permit did not relate to
 12 protecting the public health and the environment.
 13 A. I didn't say that either. I'm saying I cannot
 14 draw that conclusion based upon the information you've given
 15 me here.
 16 Q. What other information do you need?
 17 A. As I've already told you, the purpose of
 18 supplemental supports during the test phase were because the
 19 rooms had to remain open and were not being used for
 20 disposal.
 21 Q. And for what period of time, did the rooms have to
 22 stay open during that test phase?
 23 MS. MCMICHAEL: Objection.
 24 A. I don't know. I'm going to answer. I don't know.
 25 I believe, as I testified yesterday, my experience with the