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September 28, 1999

NMED Hearing Clerk
Tamella Gonzales
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Santa Fe, NM 87502

Dear Ms. Gonzales:

Enclosed please find for filing New Mexico Environment Department's Comments to the Hearing Officer's Report.

Please call with any questions.

Sincerely,

Susan McMichael
Lead Counsel

cc: Service list

180914.37V

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT

IN THE MATTER OF THE FINAL PERMIT ISSUED TO THE UNITED STATES DEPARTMENT OF ENERGY AND WESTINGHOUSE ELECTRIC COMPANY WASTE ISOLATION DIVISION FOR A HAZARDOUS WASTE ACT PERMIT FOR THE WASTE ISOLATION PILOT PLANT; US EPA No. NM4890139088	)	HRM 98-04(P)

NEW MEXICO ENVIRONMENT DEPARTMENT'S COMMENTS TO THE HEARING OFFICER'S FINAL ORDER

INTRODUCTION

On September 10, 1999, the Hearing Officer submitted to the Secretary of the New Mexico Environment Department (NMED) a report and proposed final order concluding that the Secretary issue a Final Order granting the Applicants a permit under the New Mexico Hazardous Waste Act (HWA) subject to the conditions specified in NMED's proposed final permit with one exception.[1] Hearing Officer's Report (Report), pp. 102 -103. Further, the Hearing Officer concluded NMED met its burden of proof with respect to all permit conditions and that no party met its burden of proof in challenging NMED-imposed permit conditions. Id at pg. 103 fn. 38 and pg. 8.

NMED believes that the Secretary should adopt the Hearing Officer's report and recommended decision with the exception of the report insofar as it discusses the Secretary's legal

[1] The Hearing Officer proposed to revise Permit Condition IV.B.2.b to include the introductory clause "after this permit becomes effective." Report at pg. 103.

authority to require waste characterization under Permit Condition IV.B.2.b (Report at pp. 75 - 77). For the reasons discussed below, the Secretary should clarify that his authority to impose Permit Condition IV.B.2.b is fully supported under the HWA and regulations. Permit Condition IV.B.2.b does not substantively "regulate" TRU non-mixed waste and does not conflict with the Atomic Energy Act (AEA). Instead, and consistent with United States v. New Mexico, 32 F.3d 494 (10th Cir. 1994), Permit Condition IV.B.2.b regulates operation of the WIPP hazardous waste disposal units (HWDUs) by requiring characterization of all waste destined for disposal at WIPP to protect human health and the environment, and to ensure compliance with the HWA permit, as required by the HWA and the Resource Conservation and Recovery Act (RCRA), 42 USC§ 6901 et seq. Further, the Secretary should find that the Hearing Officer incorrectly stated and analyzed NMED's response to the proposed revision in the final HWA permit of the introductory clause to Permit Condition IV.B.2.b. NMED does not recommend any revisions to the final HWA permit or the Hearing Officer's proposed findings of fact and conclusions of law.

I. PERMIT CONDITION IV.B.2.b

At the public hearing, NMED presented written and oral testimony supporting Permit Condition IV.B.2.b for the following reasons: (1) to protect human health and the environment under the HWA and RCRA; (2) the Applicants' commitment to characterize all TRU waste destined for disposal in a WIPP HWDU in accordance with the waste analysis plan (WAP) in the HWA permit cannot be changed without affecting the "completeness and accuracy" of the permit application under 20 NMAC 4.1.900 (incorporating 40 CFR § 270.10(c) and § 270.11); and (3) the permit condition is fully consistent with United States v. New Mexico, *supra*. See NMED's Proposed Findings Of Fact and Conclusions of Law (Non-Mixed Waste) and Memoranda In

Support at pp. 15 - 25.

The Hearing Officer held that Permit Condition IV.B.2.b protects human health and the environment under the HWA and regulations for three reasons: (1) to ensure that the WIPP facility meets its environmental performance standards under 20 NMAC 4.1.500 (incorporating 40 CFR 264.600); (2) to ensure that no prohibited waste materials are disposed of under the waste acceptance criteria (WAC) of Permit Condition II.C under the HWA permit[2]; and (3) to ensure the enforceability of numerous permit conditions. Report and Findings of Fact ¶¶ 262 - 271 and Conclusions of Law ¶¶ 46 - 55.

In fact, the Hearing Officer concluded that it was "beyond serious dispute" that Permit Condition IV.B.2.b was imposed to protect human health and the environment. Report and Conclusions of Law at pg. 75 and ¶¶ 46 - 53. The Hearing Officer stated:

> That Permit Condition IV.B.2.b, or similar language, is necessary to protect human health and the environment, is beyond serious dispute. (Emphasis added). Absent Permit Condition IV.B.2.b, or similar language, it is unclear how the TRU non-mixed waste will be characterized to ensure that prohibited, incompatible, and non-permitted wastes are not disposed of at WIPP. Moreover, VOCs in TRU non-mixed waste containers may cause unregulated emissions in contravention of environmental performance standards.

Report and Conclusions of Law at pg. 75 and ¶¶ 46 - 53.

Further, the Hearing Officer found that NMED approved the HWA permit based upon the Applicants' express representation in the permit application to characterize all TRU waste as "mixed waste" under the WAP. Report at pg. 73. Indeed, the Hearing Officer concluded that

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[2] The WAC is set forth in Permit Condition II.C and contains the types of wastes that may be managed and disposed at WIPP. This includes for example: liquid wastes; pyrophorics; ignitable, corrosive and reactive wastes; any waste containers which have not undergone headspace gas sampling and analysis to determine concentrations of VOCs; any waste containers which have not undergone either radiographic or visual examination; and remote-handled TRU wastes. See Report ¶¶ 183, 184 and Permit Condition II.C.

"this commitment was a key to all of the assumptions used by NMED in developing a draft permit." Id.

A. The Secretary Has Clear Legal Authority Under the HWA And RCRA To Impose Permit Condition IV.B.2.b

Despite these findings, the Hearing Officer expressed concern regarding whether Permit Condition IV.B.2.b's characterization requirement is supportable under United States v. New Mexico, *supra*. Report at pg. 75. In doing so, the Hearing Officer overlooked a critical point: the Secretary has clear authority and a duty under the HWA and RCRA to require waste characterization to verify that all waste (regardless of type) destined for disposal in a WIPP HWDU has been properly characterized to ensure: (1) the WIPP facility complies with the environmental performance standards under the HWA and regulations; (2) the WIPP facility complies with the WAC set forth in Permit Condition II.C and does not accept materials that are prohibited under the HWA permit; and (3) the enforceability of numerous permit conditions. See Report and Findings of Fact ¶¶ 262 - 271 and Conclusions of Law ¶¶ 46 - 55. In other words, this is the legal basis for the Secretary's authority under state and federal law.

Under the HWA, the "Secretary has authority to issue a permit subject to conditions necessary to protect human health and the environment." NMSA 1978, § 74-4-4.2 (Repl. Pamp. 1993). Further, the hazardous waste management regulations authorize the Secretary to impose conditions necessary to achieve compliance with the HWA permit and, as necessary to protect human health and the environment.[3] See NMED's Memoranda In Support Proposed Findings of

[3] See 20 NMAC 4.1.900 (incorporating 40 CFR § 270.32(b)(1) ("each RCRA permit shall include permit conditions necessary to achieve compliance with the Act and regulations"); 40 CFR § 270.32(b)(2)("each permit issued under Part 264 shall contain all terms and conditions as the [State] determines necessary to protect human health and the environment."); 20 NMAC

Fact and Conclusions of Law at pg 16. For these reasons, NMED urges the Secretary to clarify that his legal basis to impose Permit Condition IV.B.2.b is expressly authorized under the HWA and regulations as necessary to achieve compliance with the HWA permit and regulations and to protect human and the environment.

The Applicants' argument, in a nutshell, is that the Secretary has no legal authority under the HWA or RCRA to require "characterization" to ensure compliance with the very laws he is charged to administer and enforce. Applicants' position cannot be reconciled with the fact that it completely undermines the HWA permit and the Secretary' s authority under the HWA and RCRA. The design, construction and operation of the WIPP facility and HWDUs were approved under the HWA permit to contain waste safely in a manner protective of human health and the environment under the HWA and RCRA on the condition that certain wastes would not be accepted for disposal at WIPP HWDUs. Further, waste characterization is necessary to ensure compliance with the environmental performance standards which are set for the WIPP facility[4] and cannot be enforced without waste characterization. Report at ¶ 46.

Applicants' position is both illogical and misplaced. If the Secretary has no authority to require characterization of all waste destined for disposal at WIPP HWDUs, then, as the Hearing Officer concluded, the HWA permit cannot be enforced. and, the lack of enforcement would result in a direct and adverse threat to human health and the environment. See Report at ¶¶ 46 - 55. Indeed, when taken to its illogical conclusion, Applicants could dispose any prohibited

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4.1.500 (incorporating 40 CFR § 264.601("permits for miscellaneous units [ ] contain such terms and provisions as necessary to protect human health and the environment ...")).

[4] 20 NMAC 4.1.500 (incorporating 40 CFR § 264.600).

wastes under the HWA permit in a HWDU (e.g. 100% liquid radioactive waste) on the novel theory that the Secretary has no legal authority under the HWA or RCRA to require "characterization" of any waste which may be "non-hazardous"even if such disposal directly violates WIPP's environmental performance standards.[5] Obviously, this result is unsupportable and would completely undermine the HWA permit. Permit Condition IV.B.2.b was not imposed as an attempt to regulate any particular waste stream, but to verify that all waste destined for disposal in a HWDU be properly characterized to ensure compliance with the HWA permit and WIPP's environmental performance standards. The fact that the waste may be "non-mixed" is immaterial.

B. Permit Condition IV.B.2.b Is Supportable under United States v. New Mexico, and Does Not Substantively "Regulate" Non-Mixed Waste.

The Hearing Officer concluded that Permit Condition IV.B.2.b does not substantively regulate TRU non-mixed waste under the AEA and that United States v. State of New Mexico, *supra*, was persuasive, but "by the thinnest of threads."[6] Report at pg. 77. The Hearing Officer illustrated his concern by noting that Permit Condition IV.B.2.b appeared to impose substantive requirements that go "beyond monitoring or limiting radioactivity during an incineration burn." Id. For the reasons stated below, NMED disagrees. Permit Condition IV.B.2.b's requirement for waste characterization is fully supported under United States v. New Mexico, and does not substantively regulate "source, special nuclear and byproduct material" in conflict with the AEA.

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[5] The Applicants notably fail to address how (absent waste characterization) the Secretary could possibly determine that waste destined for disposal at WIPP meets the WIPP WAP.

[6] The Hearing Officer analyzed this legal issue without a full briefing (e.g. responses or reply briefs) from the Parties.

The Hearing Officer overlooked several critical facts in United States v. New Mexico, *supra*. First, Permit Condition IV.B.2.b is identical to LANL's Permit Condition V.C.3 which required DOE to "determine" - or characterize - "each batch of waste" (including radioactive waste) destined for incineration under the HWA permit. See 32 F.3d at 496. Permit Condition V.C.3 stated:

> A. V.C.3: Determination of Radionuclides Content. Each batch of waste treated under this permit shall be surveyed to determine its radionuclide content.

Id. (emphasis added). Permit Condition V.C.3 required the "determination" to be accomplished through chemical testing prior to incineration. See United States v. New Mexico, 35 ERC 1693, Slip op. at 9 (D.N.M (August 13, 1992)) (Attachment No. 1). The district court held that the challenged permit condition is a "requirement" under Section 6001 of RCRA and does not substantively regulate radioactive waste:

> [A]s for the first challenged permit condition, which requires Plaintiffs to determine the radionuclide content in each batch of hazardous waste, it seems obvious that it does not regulate radioactive waste in any way. It merely seeks to verify that the operations conducted under the RCRA permit are truly non-radioactive hazardous waste incineration by requiring pre-incineration testing for the presence of radioactivity.

Id. (emphasis added).

On appeal, the Tenth Circuit held that the challenged permit conditions were proper "requirements" under Section 6001 of RCRA in which federal sovereign immunity was waived. Indeed, on appeal, DOE conceded[7] the issue of whether each of the challenged permit conditions (characterization, monitoring and measuring AEA waste) substantively regulate radioactive waste

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[7] The Tenth Circuit noted that "[i]n its reply brief, DOE conceded that it would not challenge the district court's determination that these permit conditions do not 'regulate' radioactive waste, relying instead on its argument that the conditions are not 'requirements' under RCRA." 32 F.3d 494 n.4.

in conflict with the AEA. In upholding the district court, the Tenth Circuit stated:

> Permit Condition V.C.3, requiring LANL to survey waste to determine its radioactive content, [and] permit condition V.E.10 ... all serve to implement the state standard requiring that only permitted hazardous waste is being disposed of under the hazardous waste permit. Ensuring that only permitted waste is being burned also implements other regulatory goals expressed in N.M.Stat.Ann. 74-4-4(a) and 74-4-4.2(c), which provides for hazardous waste permit conditions necessary to protect human health and the environment.

32 F.3d at 498 (emphasis added) (citations omitted).

Permit Condition IV.B.2.b similarly requires the DOE to determine or characterize all TRU waste ("each batch of waste") to be disposed in a HWDU. Unlike LANL Permit Condition V.C.3., WIPP Permit Condition IV.B.2.b does not require chemical testing for all waste, but an alternate characterization method which, as approved by NMED under the WAP, allows Applicants to characterize certain waste streams[8](e.g. debris) by acceptable knowledge in lieu of chemical testing and others by chemical testing.[9] See Permit Condition II.B. As with the LANL incinerator permit condition, the purpose of characterization is not to substantively "regulate" TRU non-mixed waste but to verify that all waste destined for disposal in a HWDU is properly characterized to ensure compliance with the HWA permit's environmental performance standards and the WIPP WAC under Permit Condition II.C. The fact DOE conceded in United States v. New Mexico, *supra*, that each of the challenged permit conditions did not substantively regulate AEA waste merely bolsters the point. When viewed in this context, it is clear that Permit Condition IV.B.2.b does not amount to substantive regulation of TRU non-mixed waste, but was

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[8] The majority of WIPP destined waste is "debris." Permit Module II.B (Attachment B).

[9] 20 NMAC 4.1.500 (incorporating 40 CFR § 262.11) requires any person who generates a solid waste to make a determination, by either testing or applying knowledge in light of the materials or processes used, whether or not the waste is hazardous.

imposed to ensure compliance with the HWA permit. Put another way, NMED is not regulating AEA waste, it is regulating the HWDUs at WIPP under the HWA permit. The requirement is identical to, and supported by, United States v. New Mexico, *supra*.[10]

Second, as with the LANL incinerator permit condition, Permit Condition IV.B.2.b is required by the unique circumstances at WIPP in which DOE proposed to use the same HWDU to commingle TRU mixed and non-mixed waste. Report at ¶ 257. NMED provided extensive testimony that commingling of TRU waste, in the absence of Permit Condition IV.B.2.b, would prevent the State from enforcing the HWA permit and the environmental performance standards.[11] In United States v. New Mexico, *supra*, the district court stated:

> Under normal circumstances, i.e. where nuclear waste is not in danger of being commingled with hazardous waste and where the same incinerator is not used to burn both nuclear waste and hazardous waste, the EID could be safety assured that an incinerator was operating as required to protect human health and the environment by monitoring performance standards having nothing to do with radioactivity.

Slip Op. at pg.10.

The Tenth Circuit also expressly recognized the uniqueness of the LANL incinerator, stating:

> However due to the dual capacity of the LANL incinerator as a hazardous and radioactive waste incinerator, permit condition V.C.3 alone is insufficient to ensure that only permitted waste is being burned. ... [P]ermit conditions V.E.10 and V.F.9 (monitoring and measuring radionuclides), therefore, merely recognize the particular circumstances at LANL and operate to ensure that only permitted waste is being burned.
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> ...

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[10] Indeed, the LANL permit conditions are arguably more challengeable because, unlike here, in addition to waste characterization the LANL permit conditions required monitoring and measuring radionuclides.

[11] For example, VOC emissions may originate from both mixed and non-mixed waste and, once disposed, would be impossible to trace or distinguish the source. Report at Findings of Fact ¶¶ 266-271 and Conclusions of Law ¶¶ 49 - 50, 52.

> It does not appear that the State is attempting to substantively regulate radioactive waste through this condition ... [P]ermit condition V.F.9 (requiring radioactive emissions not to exceed background by 10%) is merely another tool for New Mexico to implement its statutory and regulatory hazardous waste provisions.

32 F.2d at 498.

Permit Condition IV.B.2.b similarly was imposed due to the unique circumstances at WIPP in which commingled waste may be disposed in the same HWDU.[12] The Hearing Officer concluded that, as a matter of law, the Secretary would have no ability to ensure compliance with the HWA permit and regulations and the enforceability of numerous permit conditions without waste characterization of all TRU waste. Report at ¶¶ 47, 49 - 50. Accordingly, Permit Condition IV.B.2.b is an essential tool to achieve compliance with the HWA permit and regulations, not an attempt to substantively regulate AEA waste.

C. Permit Condition IV.B.2.b Does Not Conflict With Federal Regulations Or The AEA

The Secretary's legal authority to impose Permit Condition IV.V.2.b is authorized under RCRA and the HWA for the additional reason that even assuming the condition is construed as substantive regulation - which it is not - it does not conflict with the AEA. The Hearing Officer's legal analysis regarding "substantive regulation" does not address this issue. Indeed, as discussed below, there is no such conflict, and the Applicants' argument that NMED is regulating AEA waste is unfounded.

The Hearing Officer acknowledges that RCRA and the HWA exclude "source, special nuclear and byproduct material" as defined under the AEA. Report at pg. 74. In reliance upon New Mexico v. Watkins, 969 F.2d 1122 , 1128 (D.C. Cir. 1992), he concludes that "[t]he

[12] The permit application proposed commingling of all TRU waste. Report at ¶ 237.

radioactive component of TRU waste is excluded from regulation under RCRA as "byproduct material." Id. at 74 -75. As a result, "TRU non-mixed waste may not be regulated" under RCRA nor the HWA. Id. at 75.

NMED agrees that RCRA and the HWA exclude "source, special nuclear and byproduct material" as defined under the AEA. NMED disagrees, however, that TRU waste containing "byproduct material" is automatically "non-mixed" or excluded from regulation under RCRA. Watkins does not support this interpretation. To the contrary, Watkins upheld EPA's interpretation of RCRA as regulating "source, special nuclear and byproduct material" where those materials are mixed with hazardous wastes.[13] 969 F.2d 1122, 1127, 1131.

The operative legal standard is set forth in Watkins:

> RCRA provides that its prescriptions shall not apply to substances and activities regulated under the AEA, 42 U.S.C.§ 2011 et. seq., unless RCRA regulation is not inconsistent with the AEA. 42 U.S.C. § 6905(a).

969 F.2d at 1128 (emphasis added). See also United States v. New Mexico, 35 ERC 1693, Slip op. at 9 (D.N.M.) (district court, *in dicta*, stated that even if the LANL incinerator permit conditions were construed as regulating radioactive waste the conditions would be proper unless in conflict with the AEA).

Even assuming Permit Condition IV.B.2.b is construed as substantive regulation- which it is not - the Applicants do not argue that waste characterization required by this condition conflicts with the AEA. The Hearing Officer upheld NMED's position that the United States

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[13] See also Sierra Club v. U.S. Department of Energy,734 F.Supp. 946, 948 - 50 (D. Colo. 1990) (the Court held that "source, special nuclear and byproduct material," which is ordinarily exempt from categorization as a solid waste under RCRA, *became a hazardous waste*, as that term is defined under RCRA, when the source, special nuclear and byproduct material is not destined for immediate reuse, and is mixed with hazardous waste. Id. at 949 -50.)

Environmental Protection Agency's (EPA) regulations under 40 CFR Parts 191 or 194 do not impose any regulatory requirements which are duplicative of the HWA or RCRA. See *NMED's Proposed Findings of Fact and Conclusions of Law (Non-Mixed)* at ¶¶ 34 - 39 and ¶ 9. NMED testified:

> EPA inspections do not extend to RCRA issues. EPA does not evaluate headspace gas sampling ... EPA does not evaluate visual examinations or radiography with respect to RCRA items. EPA does not evaluate acceptable knowledge with respect to hazardous waste characterization.

Transcript Vol. XIV at pg. 2709.

The Hearing Officer concluded that "EPA does not regulate VOC emissions from TRU mixed and non-mixed waste containers; EPA does not evaluate acceptable knowledge, headspace gas sampling, solids sampling, visual examinations or radiography." See Report and Conclusions of Law ¶¶ 42 - 44. As shown above, NMED did not testify that no waste characterization occurs, only that there are no waste characterization requirements under federal regulations that are duplicative of the HWA or RCRA.[14] For these reasons, Permit Condition IV.B.2.b not only is clearly authorized under RCRA and the HWA, but also does not conflict with other regulatory requirements for WIPP under the AEA.

II. REVISION TO PERMIT CONDITION IV.B.2.b.

The Hearing Officer's recommended revision to the second clause of Permit Condition IV.B.2.b (e.g. "after this Permit becomes effective") was based upon the Applicants' proposal in written public comments submitted January 19, 1999. See Report at pg. 78 and Record Proper No. 36 (Applicants' Executive Summary No. 1.1.4 regarding Comment No. 155) (filed January

[14] NMED respectfully requests the Secretary to clarify this point in his final decision.

19, 1999) (Attachment 2). NMED does not object to this. However, the Hearing Officer incorrectly stated that the Department argued that this revision "is inappropriate for a final permit and is, on its face, applicable to the pre-permit period." Report at pp. 78 -79. The record shows that NMED did not respond in this manner. Indeed, the response attributed to NMED applied to an entirely different permit proposal that, unlike the proposed revision, applied on its face to pre-permit disposal.

In written public comments, the Applicants - not NMED - suggested revising Permit Condition IV.B.2.b to make three substantive changes that address the circumstances in which "permittees are allowed to dispose of TRU nonmixed waste during the period before the permit becomes final."Id. at ¶ 82 (Emphasis added). Record Proper No. 36 (Applicants' Executive Summary No. 1.1.4 regarding Comment No. 155 (filed January 19, 1999)). NMED stated it cannot recommend this revision because the language "is inappropriate for a final permit and is, on its face, applicable to the pre-permit period." *NMED's Proposed Findings Of Fact and Conclusions of Law (Non-Mixed Waste)* at ¶ 83 and Transcript S. Zappe at pp. 2459 - 60. The Hearing Officer apparantly believed that NMED was responding to the introductory clause "after this permit becomes effective." Report at pp. 78 - 79. Thus, it is easy to understand why the Hearing Officer concluded he was not impressed by NMED's response: Unlike DOE's proposed revisions that expressly applied to the "period before the permit becomes final," the introductory clause "after this permit becomes effective" could not reasonably be construed to apply to the pre-permit phase.

The record shows that NMED responded to the proposed introductory clause as "unnecessary and improper as a permit condition." See *NMED's Proposed Findings Of Fact and*

Conclusions of Law (Non-Mixed Waste) at ¶ 77 (DOE's proposal) and ¶80 (NMED's response). Although NMED does not object to the revision, it believes the proposed introductory phrase is superfluous because the permit condition cannot apply until after an effective and final HWA permit. For the reasons stated above, however, NMED requests the Secretary to clarify the record regarding the Department's response.

NMED would also like to respond to Applicants' erroneous conclusion that NMED posited an "argument" suggesting that DOE cannot dispose of TRU mixed waste at WIPP until a final permit is issued. Specifically, Applicants argue that "NMED drafted Module IV.B.2.b to ensure that no waste could legally be emplaced at WIPP prior to the issuance of the final HWA permit. " See DOE's Legal Brief at pg.39. Applicants reach this conclusion based upon a single response of one NMED witness, on cross-examination. DOE counsel asked Mr. Zappe:

> Q: Is it impossible for any non-mixed waste stream to be characterized in accordance with the [WAP] so as to satisfy [Permit Condition IV.B.2.b.]?
>
> A: I believe my testimony did state numerous times that we propose to prohibit nonmixed waste that is not characterized in accordance with the final [WAP] as approved in a final permit.

Pleading Log #172: Vol. XIII, Mr. S.Zappe, p. 2483.

Mr. Zappe's statement can be best understood in light of the fact that: (1) WIPP did not have interim status on the date of his testimony[15]; and (2) it was fully reasonable for an NMED witness to interpret the term "WAP" to mean the "final WAP" as a condition in a final HWA permit. Notably, DOE counsel did not ask Mr. Zappe if his conclusion would have been the same

[15]Mr. Zappe testified on March 18, 1999. Judge Penn's ruling that WIPP has interim status was on March 22, 1999. See Tr., pg. 2372 and New Mexico v. Richardson, 1999 WL 156344.

if WIPP had interim status.

NMED has never argued that an interim status facility like WIPP cannot dispose of TRU mixed waste prior to permit issuance. To the contrary, as DOE is fully aware, NMED does not take this position and, in fact, has conducted "interim status" inspections at WIPP pursuant to 40 CFR Part 265.

CONCLUSION

NMED urges the Secretary to adopt the Hearing Officer's report and recommended decision with the exception of the report insofar as it discusses the Secretary's *legal* authority to require waste characterization under Permit Condition IV.B.2.b (Report at pp. 75 -77). For the reasons stated above, the Secretary should conclude that he is fully authorized under the HWA and RCRA to require waste characterization to verify that all waste destined for disposal in a WIPP HWDU has been properly characterized, in order to ensure compliance with the HWA permit, the WIPP WAC, and WIPP's environmental performance standards. Further, for the reasons stated above, the Secretary should conclude that Permit Condition IV.B.2.b is consistent with federal law, including United States v. New Mexico, *supra*, does not substantively "regulate" TRU non-mixed waste and does not conflict with the AEA. Finally, for the reasons set forth above, the Secretary should clarify that the Hearing Officer incorrectly stated and analyzed NMED's response to the proposed revision to Permit Condition IV.B.2.b.

Respectfully submitted,

NEW MEXICO ENVIRONMENT
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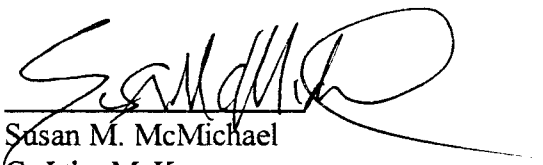

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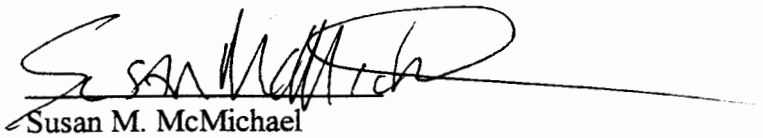
CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 1999, a true and correct copy of NMED's Comments To The Hearing Officer's Final Order was filed and served on all parties and counsel of record via first class U.S. mail on the same date.



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CITIZENS FOR ALTERNATIVES TO RADIOACTIVE DUMPING ("CARD")

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA and
THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA,

Plaintiffs,

vs. CIV. NO. 90-276 SC

STATE OF NEW MEXICO; and HEALTH
AND ENVIRONMENT DEPARTMENT,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on cross motions for summary judgment. The Court has considered the memoranda submitted by the parties, examined the exhibits attached thereto, and reviewed the applicable law. There are no material facts in dispute, and the Court concludes that Defendants are entitled to judgment as a matter of law. The Court's reasoning is set forth below.

This is an action for declaratory judgment brought by the United States of America. The United States, on behalf of the Department of Energy ("DOE"), challenges three conditions imposed in a Hazardous Waste Facility Permit issued by the New Mexico Health and Environment Department, Environmental Improvement Division ("EID") to the Los Alamos National Laboratory ("LANL"). LANL is owned by the United States and operated by the Regents of the University of California ("University") pursuant to a contract with DOE. The Court, in a Memorandum Opinion and Order dated March 21, 1991, denied Defendants' Motion to Dismiss, and ordered the University to be joined as a Plaintiff.

Plaintiffs contend that the permit, issued pursuant to the Resource Conservation and Recovery Act ("RCRA") and the New Mexico Hazardous Waste Act ("HWA"), imposes three conditions which improperly attempt to regulate the radioactive component of waste burned in an on-site incinerator. The Court is asked to declare that these three permit conditions are void and unenforceable. Defendants deny that the permit conditions regulate the radioactive component of waste.

LANL is a facility that generates both hazardous waste and radioactive waste. It uses the same incinerator to burn both. In 1985 DOE and the University filed an application with EID for a hazardous waste facility permit. After the application was revised twice, the permit with the three challenged conditions was issued to LANL in November 1989.[1] In December 1989, DOE and the University appealed the three permit conditions to the Environmental Improvement Board ("the Board"), but the Board dismissed this and all pending petitions for review because the HWA provides for direct appeal of permit decisions by EID to the state court of appeals. Separate appeals were filed in the New Mexico Court of Appeals by the University and the United States. The United States, which had already filed the present action in this Court, then moved to stay the appeal pending resolution of this federal action. On September 17, 1990, the New Mexico State Court

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[1] A draft permit had been issued in May 1989 and public comments were solicited. The draft did not contain the three conditions that are the basis of this lawsuit. They were added after concerns were expressed in public hearings held in July 1989.

of Appeals stayed the appeal.

RCRA, 42 U.S.C. §§ 6901-6992k, was enacted to address the environmental and health dangers arising from improper solid waste treatment, storage and disposal. It has been said that Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939b, creates a "cradle-to-grave" management system intended to ensure that hazardous wastes are safely treated, stored and disposed of. McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F.Supp. 1182, 1185-86 (E.D.Cal. 1988).

RCRA contains a waiver of sovereign immunity for federal facilities that engage in hazardous waste treatment which provides, among other things, that such facilities:

> shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting . . .), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements. . . .

42 U.S.C. § 6961.

The State of New Mexico is authorized by EPA to issue and enforce RCRA hazardous waste facility permits within the state. 50 Fed.Reg. 1515 (Jan. 11, 1985). New Mexico has implemented this authority through the New Mexico Hazardous Waste Act ("HWA"), §§ 74-4-1 to -13 N.M.Stat.Ann. 1978 (Repl. 1990).

Under the HWA, the Environmental Improvement Board ("the Board") is directed to adopt regulations requiring each person who owns and operates an existing facility for the treatment, storage or disposal of hazardous waste to have a permit issued pursuant to

requirements established by the Board. Id. at § 74-4-4(A)(6). See also Id., § 74-1-8(A)(13) (Board responsible for promulgating regulations in area of hazardous waste).

The HWA authorizes EID to "maintain, develop and enforce" the hazardous waste regulations adopted by the Board. Id. at § 74-1-7(A)(13). Upon a determination that an applicant has met the requirements adopted pursuant to § 74-4-4, the EID Director "may issue" a permit. Id. at § 74-4-4.2(C).

SUMMARY JUDGMENT STANDARD.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In this case there are cross motions for summary judgment supported by affidavits and exhibits, and all parties agree on the material facts. Therefore, the question boils down to which party is entitled to judgment as a matter of law.

MATERIAL FACTS THAT ARE NOT IN DISPUTE.

In November 1989, EID issued to DOE and the University jointly, Hazardous Waste Facility Permit NM 0890010515-1 for the Los Alamos National Laboratory pursuant to both RCRA and the State HWA. The permit, among other things, contains three conditions with respect to an on-site incinerator:

1. Permit Condition V.C.3 requires the permittee to survey

each batch of waste to determine its radionuclide content;

2. Permit Condition V.E.10 requires the permittee to monitor radioactivity from the incinerator's exhaust stack during any hazardous waste burn;

3. Permit Condition V.F.9 requires the permittee to assure that exhaust gas radioactivity measured during operation under the permit does not exceed certain background levels.

Occasionally, LANL mixes hazardous waste with radioactive waste which is not destined for immediate reuse. A Controlled Air Incinerator ("CAI") is used at the Los Alamos facility to incinerate hazardous waste as well as other materials including purely radioactive wastes and "toxic wastes" such as PCBs.[2] One of the unchallenged permit conditions permits the incineration of only hazardous waste under the permit (permit condition V.B.1.a.). The intent of permit condition V.C.3. was to insure that permit condition V.B.1.a. is adhered to, to insure that no purely radioactive waste or mixed waste is inadvertently or surreptitiously incinerated as hazardous waste under the permit.[3] Challenged permit conditions V.E.10 and V.F.9. were included in the permit because the incinerator is being used to incinerate radioactive waste; that process does not destroy or reduce the rate of the radioactivity but only changes the chemical and physical

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[2] Toxic waste incineration is authorized under yet another federal statute, the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2654.

[3] The University asserts that in the documents which form the basis of the administrative record, no mention is made of the need to ensure that purely radioactive or mixed waste is not inadvertently or surreptitiously incinerated as hazardous waste under the permit, but the University does not actually dispute either the truth of this fact or its materiality.

forms of the radionuclides. The burning of radioactive and mixed wastes can result in the deposition of radioactive vapors and ash in various parts of the CAI other than the ash collection bin and the residue may remain in the CAI even after the ash collection bin is emptied between burns. The purpose of monitoring of stack emissions for radionuclides was to determine if any radioactivity was being emitted during a strictly hazardous waste burn. Permit conditions V.E.10. and V.F.9. were also included to insure that the operation of the CAI during hazardous waste burns posed no threat to human health or to the environment due to the release of radioactive ash or other residue entrained in the CAI from previous burns. Permit conditions V.E.10. and V.F.9. only apply with regard to batches of waste that DOE and the University determine to be "hazardous." If a batch of waste is radioactive or mixed, the permit by its terms does not apply.

WAIVER OF SOVEREIGN IMMUNITY.

Plaintiffs argue that federal sovereign immunity has not been waived for the imposition of the challenged permit conditions by the state. Any waiver of federal sovereign immunity must be unequivocal, *see*, United States v. Mitchell, 445 U.S. 535, 538-39 (1980), and any such waiver must be construed strictly in favor of the sovereign. McMahon v. United States, 342 U.S. 25, 27 (1951); Ruckelshaus v. Sierra Club, 463 U.S. 680, 683-85 (1983). This principle has been affirmed recently in RCRA cases, United States Dept. of Energy v. Ohio, ___ U.S. ___, 112 S.Ct. 1627, 1633 (1992); Mitzelfelt v. Dept. of Air Force, 903 F.2d 1293, 1295-96 (10th Cir.

1990).

I. Do the Permit Conditions Regulate Solid Waste or Radioactive Waste?

Section 6001 requires federal facilities to be subject to and comply with, among other things, all state requirements "respecting control and abatement of **solid waste** or hazardous waste disposal. . . ." 42 U.S.C. § 6961 (emphasis added). Thus, one of the questions presented in this case is whether the permit conditions regulate solid waste or whether they regulate a type of waste that is excluded from the definition of solid waste.

"Hazardous waste" is defined by RCRA as a subset of "solid waste," 42 U.S.C. § 6903(5). The statute defines "solid waste" as "any garbage, refuse, . . . and other discarded material, . . . resulting from industrial, commercial, mining, and agricultural operations, and from community activities. . . ." 42 U.S.C. § 6903(27). RCRA specifically exempts from the definition of solid waste, "source, special nuclear, or byproduct material," as defined by the Atomic Energy Act ("AEA"), 42 U.S.C. § 6903(27).[4]

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[4] The AEA defines "source material" as:

(1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time. 42 U.S.C. § 2014(z).

The AEA defines "special nuclear material" as:

(1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material. 42 U.S.C. § 2014(aa).

Finally, "byproduct material" is defined by the AEA as:

(continued...)

The New Mexico HWA adopts RCRA's definition of "hazardous waste" as a subset of "solid waste," § 74-4-3(I), N.M.Stat.Ann. 1978 (Repl. 1990), and excludes "source, special nuclear, or byproduct material," as defined by the AEA, from the definition of solid waste. Id. at § 74-4-3(M).

The Hazardous Waste Management Regulations ("HWMR") that were adopted by the Board track EPA's RCRA regulations. They adopt EPA's definition of "hazardous waste," 40 C.F.R. §§ 260.10, 261.3, and of "solid waste," 40 C.F.R. §§ 260.10, 261.2(a)(1). Under EPA regulations, "source, special nuclear, or byproduct material" as defined by the AEA are not solid waste subject to RCRA regulation, 40 C.F.R. § 261.4(a)(4), and by definition only solid waste can be a hazardous waste. 40 C.F.R. § 261.3(a). *See also*, 40 C.F.R. Pt. 260, App. I.

It is Plaintiffs' position that because of this definitional exclusion, the permit conditions do not regulate solid waste and therefore are not within RCRA's waiver of sovereign immunity. Defendants' argument is that RCRA's waiver of sovereign immunity does apply, and that just because the permit requires radioactivity to be detected and monitored does not mean that radioactive waste is being regulated.

As for the first challenged permit condition, which requires

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[4](...continued)
(1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content. 42 U.S.C. § 2014(e).

Plaintiffs to determine the radionuclide content in each batch of hazardous waste, it seems obvious that it does not regulate radioactive waste in any way. It merely seeks to verify that the operations conducted under the RCRA permit are truly non-radioactive hazardous waste incineration activities by requiring pre-incineration testing for the presence of radioactivity. Put another way, the condition seeks to determine whether the batch of waste destined for the incinerator does or does not meet the definition of solid or hazardous waste.

The second condition, the requirement to monitor radioactivity escaping through the stack of the incinerator, appears to be a measure designed to detect the "inadvertent or surreptitious" release of radioactivity from the incinerator itself during a hazardous waste burn, resulting from the unique situation at LANL where the same incinerator is used for hazardous waste and nuclear waste burns. The radioactivity so released would most likely be from residue left in the incinerator after a nuclear waste burn. Even so, the state is not thereby regulating the nuclear waste burn itself; rather it is regulating only a hazardous waste burn.

It also seems permissible to allow the state to require LANL to shut down a hazardous waste burn if radioactivity levels reach a certain threshold, which is the thrust of the third condition. Again, the state is not telling the United States what to do with its nuclear waste, how to handle it, where to take it or what to do with it once it is removed from the hazardous waste burn operation. It is only making sure that hazardous waste burns are not

contaminated with radioactivity. Both the second and third conditions apply only to burns of exclusively hazardous waste, previously determined by operation of the first condition to contain no radioactive waste, and only incidentally refer to radionuclides and radioactivity.

In the Court's view, to require monitoring for radioactive emissions during a hazardous waste burn is not the same as to regulate the burning of nuclear waste. Under normal circumstances, i.e. where nuclear waste is not in danger of being commingled with hazardous waste and where the same incinerator is not used to burn both nuclear waste and hazardous waste, the EID could be safely assured that an incinerator was operating as required to protect human health and the environment[5] by monitoring performance standards having nothing to do with radioactivity. By requiring LANL to monitor for radionuclides, the permit is not "regulating" radionuclides. And by requiring LANL to halt a hazardous waste burn if radionuclides reach a certain level and to correct the problem before resuming the hazardous waste burn, the permit is not regulating nuclear waste. It is only ensuring the protection of health and the environment from radioactivity during a hazardous waste treatment operation.

In 1987 DOE issued a final rule interpreting the AEA definition of "byproduct material" set forth in the AEA:

> For purposes of determining the applicability of [RCRA] to any radioactive waste substance owned or produced by

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[5] The HWA § 74-4-4.2(C) gives the director the responsibility "to protect human health and the environment."

> [DOE] pursuant to . . . its . . . responsibilities under the [AEA], the words 'any radioactive material,' as used in paragraph (a) of this section, refer only to the actual radionuclides dispersed or suspended in the waste substance. The nonradioactive hazardous component of the waste substance will be subject to regulation under [RCRA].

10 C.F.R. § 962.3(b). In its summary of the final rule, DOE explained:

> The effect of this rule is that all DOE radioactive waste which is hazardous under RCRA will be subject to regulation under both RCRA and the AEA.

52 Fed.Reg. 15,937 col.3 (May 1, 1987). In the narrative discussion of how DOE came to adopt the final rule, it is stated:

> Read together, DOE believes that the definitional exclusion [of source, special nuclear and byproduct material from the definition of solid waste] and the language of section 1006(a) [which refers to inconsistencies between RCRA and the AEA] are correctly understood to provide for the regulation under RCRA of all hazardous waste, including waste that is also radioactive. RCRA does not apply to the radioactive component of such a waste, however, if it is source, special nuclear or byproduct material. Instead, the AEA applies to that radioactive component. Finally, if the application of both regulatory regimes proves conflicting in specific instances, RCRA yields to the AEA.

52 Fed.Reg. 15937, at 15940 col. 2 (May 1, 1987) (bracketed material added). Even if the permit conditions in this case were seen as regulating hazardous waste that is also radioactive, they would be permissible under RCRA unless they were in conflict with some regulation under the AEA, a point not argued by either side. But they are permissible because they do not regulate radioactive waste or the radioactive component of hazardous waste.

The Permit by its terms does not apply to the incineration of radioactive waste at LANL. It only applies to the incineration of hazardous waste. The Court concludes that the permit conditions challenged here regulate only hazardous waste and do not regulate radioactive waste or "byproduct material." Thus, sovereign immunity has been waived by section 6001 because hazardous waste admittedly is included in the definition of solid waste.

II. Do the Permit Conditions Implement "Requirements" Under the New Mexico HWA?

Congress in RCRA has waived sovereign immunity for all state hazardous waste management "requirements." The waiver requires federal facilities to:

> be subject to, and comply with, all Federal, State, interstate and local **requirements**, both substantive and procedural (including any **requirements for permits** or reporting . . . respecting control and abatement of solid waste. . . .

42 U.S.C. § 6961 (emphasis added).

The scope of the "requirements" for which sovereign immunity has been waived by RCRA has been an issue in other cases, and indeed has been dealt with quite recently by the Supreme Court in United States Dept. of Energy v. Ohio, ___ U.S. ___, 112 S.Ct. 1627 (1992), where the challenged act involved the imposition of civil monetary penalties. The Supreme Court adopted the language of the Tenth Circuit in Mitzelfelt v. Dept. of Air Force, 903 F.2d 1293 (10th Cir. 1990) in holding that civil penalties are not requirements for which sovereign immunity has been waived. United States Dept. of Energy v. Ohio, 112 S.Ct. at 1639-40. In discussing what "requirements" are, the Tenth Circuit stated that

"[t]he word can reasonably be interpreted as including substantive standards and the means for implementing those standards, but excluding punitive measures." Mitzelfelt, at 1295. The permit conditions challenged here certainly are not punitive measures, but rather represent the means for implementing state standards.

The Mitzelfelt court also reviewed McClellan Ecological Seepage Situation (MESS) v. Weinberger, 707 F.Supp. 1182 (E.D.Cal. 1988). MESS involved among other issues interpretation of the federal Clean Water Act ("CWA") sovereign immunity waiver provision which like RCRA waives sovereign immunity for "all . . . State . . . requirements. . . ." The district court held that "requirements" in the CWA context mean "objective and administratively preestablished water pollution control standards" and that "the only state law requirements that constitute enforceable effluent standards or limitations under [CWA] are those that have been established administratively through the issuance of NPDES permits." MESS, 707 F.Supp. at 1198-99. The concern expressed by the court is of an *ad hoc* judicial determination of the challenged "requirement" as contrasted with administratively established conditions. Accord, Colorado v. United States Dept. of Army, 707 F.Supp. 1562, 1572 (D.Colo. 1989); New York v. United States, 620 F.Supp. 374, 384 (E.D.N.Y. 1985); Florida Dept. of Environmental Regulation v. Silvex Corp., 606 F.Supp. 159, 163 (M.D.Fla. 1985). *See, also,* Romero-Barcelo v. Brown, 643 F.2d 835, 855-56 (1st Cir. 1981) (Noise Control Act). *Cf.*, United States v. Pennsylvania Dept. of Environmental Resources, 778 F.Supp. 1328,

1333-34 (M.D.Pa. 1991) (sovereign immunity waived for state statutory "requirement" prohibiting discharge of any hazardous waste without permit).

Here, Congress passed a law authorizing states to regulate hazardous waste at federal facilities. The State of New Mexico passed a statute to allow it to regulate hazardous waste pursuant to federal authority, and established a Board to develop regulations. The Board adopted regulations, which authorize the state to require permits for all entities that handle hazardous waste. The EID Director issues permits pursuant to the "requirements" established by the Board. The requirements in Plaintiffs' permit are pursuant to the EID's authority to issue, or to deny the issuance of, hazardous waste permits. They are specific, detailed and ascertainable. These are exactly the type of requirements contemplated by section 6001's waiver of sovereign immunity.

Congress wanted federal agencies to comply with both the federal hazardous waste program, RCRA, and each individually-developed state hazardous waste management program.

> [T]he controversy surrounding federal compliance with state environmental 'requirements' involved federal agencies' refusal 'to acquire the state permits, to submit to required reports, conduct the required monitoring and to permit on-site inspections by state inspectors,' as well as their refusal to meet substantive state standards.

Parola v. Weinberger, 848 F.2d 956, 961 (9th Cir. 1988) (*quoting* H.R.Rep. 94-1491, at 45, *reprinted in* 1976 U.S.Code Cong. & Admin. News at 6283). The Ninth Circuit in Parola held that local

regulations requiring use of an exclusive garbage collection franchise established under California's waste management plan are section 6001 "requirements" respecting control and abatement of solid waste, Parola, 848 F.2d at 962, affirming the district court's determination that "the 'usual meaning' of the words 'control' and 'abatement' is sufficiently broad to include 'collection'". Id. at 960. The court distinguished its earlier holding in California v. Walters, 751 F.2d 977 (9th Cir. 1984) that section 6001 did not waive sovereign immunity as to state criminal sanctions designed to enforce compliance with "state waste disposal standards, permits and reporting duties," Walters, 751 F.2d at 978, stating that:

> Permits and reporting duties are means of implementing environmental standards, and are clearly state 'requirements.' An exclusive garbage collection system is more like a permit requirement than a criminal sanction."

Parola, 848 F.2d at 962, n.3. *See, also,* Sierra Club v. United States Dept. of Energy 770 F.Supp. 578, 580 (D.Colo. 1991) ("regulations are necessarily generic. A permit insures more effective safeguard of human health and the environment because it can be tailored narrowly to the particular facility. The permit is the linchpin of RCRA's regulatory scheme."). *Cf.*, Maine v. Dept. of Navy, 702 F.Supp. 322 (D.Me. 1988) (payments of annual fee and generator fees that go into state hazardous waste fund are section 6001 requirements respecting control and abatement of solid waste).

The permit was issued with its conditions following the administrative procedure set out in the HWA. Accordingly, the

Court concludes as a matter of law that the LANL permit with its conditions is a section 6001 requirement. The Court therefore concludes that under 42 U.S.C. § 6961, RCRA waives sovereign immunity for the state to impose the three challenged permit conditions on the LANL federal facility.

CLEAN AIR ACT.

Defendants argue alternatively that the challenged permit conditions are requirements respecting the control and abatement of air pollution and that, as a result, Congress waived immunity for those conditions in the federal Clean Air Act, 42 U.S.C. §§ 7401 et seq. The United States counters that the Clean Air Act does not apply because the permit was issued under RCRA.

States have authority to regulate radioactive air emissions under section 116 of the Clean Air Act, 42 U.S.C. § 7416. This provision also allows states to set air standards that are more protective than the federal EPA standards. Congress waived sovereign immunity for state requirements with wording similar to that in RCRA. 42 U.S.C. § 7418.

Section 302(g) of the Clean Air Act, 42 U.S.C. § 7602(g), defines "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical, biological, **radioactive (including source material, special nuclear material, and byproduct material)** substance or matter which is emitted into or otherwise enters the ambient air." (Emphasis added). Neither the Clean Air Act nor RCRA specifically limits a state's authority as suggested by Plaintiffs. As one court stated:

> The language of section 118 is broad. Words highlighting the breadth of the section include 'all'; 'any'; 'any requirements whatsoever'; and 'this subsection shall apply notwithstanding any immunity . . . under any law or rule of law.' . . . The plain language of the statute reveals its expansiveness.

United States v. South Coast Air Quality Management Dist., 748 F.Supp. 732, 738 (C.D.Cal. 1990).

The Court concludes alternatively that the challenged conditions in the permit, admittedly issued under RCRA authority, can be upheld under the state's authority under the Clean Air Act.

O R D E R

IT IS THE ORDER OF THE COURT that Plaintiff United States' Motion for Summary Judgment should be, and hereby is, DENIED.

IT IS FURTHER ORDERED that Defendants' Cross Motion for Summary Judgment should be, and hereby is, GRANTED. A Declaratory Judgment for Defendants shall be entered forthwith. Counsel for Defendants are directed to submit a proposed form of judgment.

UNITED STATES DISTRICT JUDGE

Counsel for Plaintiff United States: Richard B. Stewart, Ass't A.G., Environment & Natural Resources Div. and Karen L. Egbert, Environmental Defense Section, Washington, D.C.

Counsel for Plaintiff University: John A. Bannerman, A. Michael Chapman, Sutin, Thayer & Browne, Albuquerque, N.M.

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THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF NEW MEXICO; and HEALTH AND ENVIRONMENT DEPARTMENT, Environmental Improvement Division, Defendants.	No. CV 90-0276 SC NOTICE OF APPEAL

PLEASE TAKE NOTICE that the United States of America, plaintiff in the above-captioned case No. CV 90-0276 SC, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the MEMORANDUM OPINION AND ORDER, filed and entered in this case on August 13, 1992. The Declaratory Judgment was entered on October 14, 1992. Copies of the Memorandum Opinion and Order and the Declaratory Judgment are attached hereto.

Respectfully submitted,

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Dated: December 10, 1992

CERTIFICATE OF SERVICE

I certify that copies of the foregoing docketing statement have been served on counsel by placing same in the United States Mail, postage prepaid and properly addressed, this 5th day of January 1993, to:

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

and

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Plaintiffs,

v.

STATE OF NEW MEXICO, and HEALTH AND ENVIRONMENT DEPARTMENT,

Defendants-Appellees.

No. 92-2275

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. 90-276-SC)

Elizabeth Ann Peterson (Myles E. Flint, Acting Assistant Attorney General; Karen L. Egbert and J. Carol Williams, Attorneys, Department of Justice, Washington, D.C.; and Robin Henderson, Office of the General Counsel, United States Department of Energy, Washington, D.C., of counsel, were with her on the briefs), Attorney, Department of Justice, Washington, D.C., for the Plaintiff-Appellant.

Susan M. McMichael (Tom Udall, Attorney General of New Mexico, and Randall D. Van Vleck, Assistant Attorney General, Santa Fe, New Mexico, were with her on the brief), Special Assistant Attorney General, Assistant General Counsel, New Mexico Environment Department, Santa Fe, New Mexico, for the Defendants-Appellees.

Before **ANDERSON**, **MCKAY**, and **TACHA**, Circuit Judges

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TACHA, Circuit Judge.

The issue presented in this appeal is whether section 6001 of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6961, waives federal sovereign immunity from certain state imposed permit conditions that address the presence of radionuclides in the disposal of hazardous waste at the Los Alamos National Laboratory ("LANL"). The district court found that RCRA does waive sovereign immunity for the permit conditions in question and granted summary judgment for the state of New Mexico. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

I. BACKGROUND

The Department of Energy ("DOE") is the owner of LANL, a federal facility operated by the Regents of the University of California. LANL is involved in research and development that produces and requires disposal of hazardous wastes[1], mixed wastes[2] and radioactive wastes. The Environmental Improvement Board ("the Board") of the New Mexico Health and Environment Department issued LANL a hazardous waste facility permit to incinerate hazardous waste at an on-site controlled air incinerator. LANL uses its incinerator to burn both hazardous and radioactive waste. This dual role presents the possibility of radioactive waste being

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1 Hazardous waste is defined by RCRA as "solid waste, or combination of solid wastes" that pose specified risks, by virtue of quantity, concentration or inherent characteristics. 42 U.S.C. § 6903(5). Solid waste is defined as "any garbage, refuse, . . . and other discarded material, . . . resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include . . . source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended." 42 U.S.C. § 6903(27).

2 "Mixed" waste is waste which has both hazardous and radioactive components. See State of New Mexico v. Watkins, 969 F.2d 1122, 1132 (D.C. Cir. 1992).

accidentally incinerated during a hazardous waste burn or of radioactive emissions from leftover radioactive material being emitted during a hazardous waste burn.

The United States sought a declaratory judgment challenging three conditions imposed in the permit, arguing that the conditions were outside the scope of the waiver of sovereign immunity contained in RCRA § 6001. The United States and the State of New Mexico filed cross-motions for summary judgment, and the district court granted summary judgment in favor of New Mexico. The district court determined that the three challenged permit conditions implemented state regulations adopted by the Board and were "requirements" as contemplated in RCRA § 6001.[3]

The United States argues that New Mexico has not established any standards for radionuclide emissions. Therefore, the permit conditions are not "requirements" because they are not established state standards nor do they implement any "legal or regulatory standard established by the State of New Mexico." The challenged permit requirements are:

1. V.C.3: Determination of Radionuclides Content. Each batch of waste treated under this permit shall be surveyed to determine its radionuclide content.

2. V.E. MONITORING
For each hazardous waste burn, the continuous monitoring and/or recording devices below shall be observed hourly by an operator during waste feed operation . . . .

10. Radioactivity from the exhaust stack.

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[3] The district court also upheld the permit conditions under the Clean Air Act. 42 U.S.C. § 7416. Because we find the challenged permit conditions acceptable under RCRA, we need not decide this issue.

3. V.F.: During hazardous waste feed operations the following operational limits shall be observed:

9. Radioactivity.

a. The exhaust gas radioactivity measured during operation under this permit shall not exceed the background by ten percent (10%) for more than one minute.

b. The exhaust gas radioactivity measured during operation under this permit shall not exceed the background by fifty percent (50%).

c. Background is defined as that level of radiation read when the incinerator is operating at the parameters required for hazardous waste treatment but no waste feed occurring measured prior to hazardous waste treatment.

The New Mexico Hazardous Waste Act ("HWA"), N.M. Stat. Ann. §§ 74-4-1 to 74-4-14, contains standards concerning hazardous waste permits and disposal. The Environmental Improvement Act, N.M. Stat. Ann. §§ 74-1-1 to 74-1-10 (1978), requires the Board to enforce these standards. N.M. Stat. Ann. § 74-1-8(13). If a hazardous waste disposal facility has met the requirements in the HWA the Board may issue a hazardous waste permit. N.M. Stat. Ann §§ 74-4-4(A)(6) and 74-4-4.2(C). The Board may issue permits subject to any condition necessary to protect health and safety. N.M. Stat. Ann. § 74-4-4.2(C). Sections 501 and 901 of the New Mexico Hazardous Waste Management Regulations ("HWMR"), which adopt Environmental Protection Agency regulations, contain more specific standards for both hazardous waste permits and disposal. 40 C.F.R. §§ 264.344 and 270.32(a), (b). The regulations require that "[t]he operator of a hazardous waste incinerator may burn only wastes specified in his permit." 40 C.F.R. § 264.344(a).

II. ANALYSIS

A. Standard of Review

We review the grant of summary judgment de novo, using the same standard applied by the district court. Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc., 912 F.2d 1238, 1241 (10th Cir. 1990). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

B. RCRA Section 6001

Absent an express waiver of sovereign immunity, the "activities of the Federal Government are free from regulation by any state." Mayo v. United States, 319 U.S. 441, 445 (1943). Congress may waive sovereign immunity and authorize the states to regulate federal instrumentalities. Id. at 446. "[A] waiver of the traditional sovereign immunity cannot be implied but must be unequivocally expressed." United States v. Testan, 424 U.S. 392, 399 (1976) (citation and internal quotations omitted).

RCRA section 6001 requires that all federal agencies and instrumentalities

> engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirements for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid waste or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements . . . .

42 U.S.C. § 6961. RCRA does not define what constitutes a "requirement." Courts have interpreted "requirements" to mean "objective and administratively preestablished" standards, McClellan Ecological Seepage Situation v. Weinberger, 707 F. Supp. 1182, 1198 (E.D. Cal. 1988) (interpreting similar provision of the Clean Water Act), and "objective, quantifiable standards subject to uniform application." Kelley v. United States, 618 F. Supp. 1103, 1108 (W.D. Mich. 1985) (also interpreting the Clean Water Act); see also Romero-Barcelo v. Brown, 643 F.2d 835, 855 (1st Cir. 1981) (interpreting similar "requirements" language in section 12 of the Noise Control Act, 42 U.S.C. § 4911, as meaning "relatively precise standards capable of uniform application"), rev'd on other grounds, 456 U.S. 305 (1982). However, "the meaning of 'requirement' cannot . . . be limited to substantive environmental standards--effluent and emissions levels, and the like--but must also include the procedural means by which those standards are implemented: including permit requirements, reporting and monitoring duties, and submission to state inspection." Parola v. Weinberger, 848 F.2d 956, 961 (9th Cir. 1988); Mitzelfelt v. Department of the Air Force, 903 F.2d 1293, 1295 (10th Cir. 1990) ("The word [requirement] can reasonably be interpreted as including substantive standards and the means for implementing those standards . . . ."). In PUD No. 1 v. Washington Department of Ecology, the Supreme Court, interpreting the Clean Water Act, recognized that "requirements" are not limited to specific and objective criteria, but can include criteria that are open-ended. 114 S. Ct. 1900, 1910-11 (1994)

(recognizing that criteria "are often expressed in broad, narrative terms, such as 'there shall be no discharge of toxic pollutants in toxic amounts.'"). With these standards as guides we address the government's arguments.

The United States first argues that, because New Mexico has not developed any standards dealing with radionuclides, these permit conditions cannot be construed as implementing any objective, preexisting state standards capable of uniform application. Second, the United States argues that the permit conditions themselves are not RCRA § 6001 requirements because they are not preexisting state statutes or regulations and are not capable of uniform application. We reject these arguments.

Permit condition V.C.3, requiring LANL to survey waste to determine its radioactive content, permit condition V.E.10, requiring that the emissions from a hazardous waste burn be monitored for unauthorized radioactivity, and permit condition V.F.9, requiring that a hazardous waste burn be discontinued if radioactive emissions are detected and reach a determined level, all serve to implement the state standard requiring that only permitted hazardous waste is being disposed of under the hazardous waste permit. See N.M. Stat. Ann. §§ 74-4-4(A)(6) and HWMR § 501 (incorporating 40 C.F.R. § 264.344(a) into the statutory scheme). Ensuring that only permitted waste is being burned also implements other regulatory goals expressed in N.M. Stat. Ann. 74-4-4(a) and 74-4-4.2(c), which provide for hazardous waste permit conditions necessary to protect human health and the environment.

The United States objects especially to permit conditions V.E.10 and V.F.9 because they do not merely call for surveying what waste is being burned but also call for the monitoring of radioactive emissions. The United States points out that there are no state standards for radioactive emissions which could guide such permitting conditions[4] and contend that, as a result, the permit conditions cannot be "requirements" for which sovereign immunity has been waived under RCRA § 6001. However, due to the dual capacity of the LANL incinerator as a hazardous waste and radioactive waste incinerator, permit condition V.C.3 alone is insufficient to ensure that only permitted waste is being burned. Radioactive material may remain in the incinerator apparatus following a radioactive burn and be caught in a hazardous waste burn. Permit conditions V.E.10 and V.F.9, therefore, merely recognize the particular circumstances at LANL and operate to ensure that only permitted hazardous waste is being burned. See Sierra Club v. United States Dept. of Energy, 770 F. Supp. 578, 580 (D. Colo. 1991) (recognizing that regulations are often generic while permits may be tailored to the specific facility to ensure greater protection of health and environment).

The United States objects strenuously to the specific provision in permit condition V.F.9 requiring that radioactive emissions during a hazardous waste burn "should not exceed the background by ten percent (10%) for more than one minute." It is

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[4] In its Reply Brief, the United States concedes that it does not challenge the district court's determination that these permit conditions do not "regulate" radioactive waste, instead relying on its argument that the conditions are not "requirements."

true that the state has not provided guidance for analyzing the effects of different levels of radioactive emissions. However, as pointed out above, it does not appear that the state is attempting to substantively regulate radioactive waste through this condition. The ten percent standard can be seen as a cut-off point beyond which it may be reasonably assumed that there is more than a de minimis level of radioactive material in the hazardous waste burn. In this way, condition V.F.9 is merely another tool for New Mexico to implement its statutory and regulatory hazardous waste provisions.

Finally, the United States asserts that permit condition V.F.9 contains a meaningless and unworkable standard. It argues that the condition requires LANL to measure "background" prior to any operation of the incinerator--an impossible task because the incinerator was in use prior to this permit. In the alternative, the United States asserts that the condition requires LANL to measure "background" from time-to-time, and that such a requirement lacks sufficient parameters to be workable. We reject the United States' reading of the permit condition. A plain reading of the condition's language suggests that "background" should be measured when the incinerator is operating and prepared to incinerate, but no waste has been introduced. A measurement at that time produces the "background" which the permit condition requires not be surpassed by certain parameters. Further, the language requiring measurement from time-to-time emphasizes New Mexico's position that it is not engaging in substantive

regulation of radionuclides, but simply attempting to ensure compliance with New Mexico's statutory requirements.

III. CONCLUSION

We affirm the district court's grant of summary judgment in favor of the State of New Mexico.

ADDITIONAL COMMENTS ON THE SECOND DRAFT HAZARDOUS WASTE PERMIT FOR THE WASTE ISOLATION PILOT PLANT

SUBMITTED BY
THE U. S. DEPARTMENT OF ENERGY
AND THE
WESTINGHOUSE ELECTRIC COMPANY
WASTE ISOLATION DIVISION

January 19, 1999

RH Bay area of the Waste Handling Building Unit pursuant to the terms of Module I.D.11.

1.1.4 Comment No. 155 - Regulation of Non-Mixed TRU Waste

The Permittees' Comment No. 155 concerned the provision of Module IV.B.2.b of the Draft Permit regulating the characterization and disposal of non-mixed TRU waste at WIPP. This comment objects to the regulation of non-mixed waste as being outside the scope of the NMED's regulatory authority. Implementation of both of the following two conditions will satisfy the Permittees' concerns regarding Comment No. 155:

1. Module IV.B.2.b of the final permit reads:

   IV.B.2.b Specific Prohibitions - the Permittees shall not dispose of non-mixed TRU waste in any unit specified in this Module once this Permit becomes effective unless such waste is characterized in a manner that substantially complies with the requirements of the WAP as specified in Permit Module II.C.1.

2. The Permittees are allowed to dispose of non-mixed TRU waste during the period before the permit becomes final under the following conditions:

   a. The non-mixed waste shall be characterized in a manner that substantially complies with the requirements and/or principles of the WAP and associated provisions set forth in Attachments B1-B6 contained in the Draft Permit;

   b. The LANL TA-55 waste stream shall not require further characterization; and

   c. The Permittees shall give the NMED at least fifteen (15) days notice of their intent to dispose of non-mixed waste during this period before the Permit becomes final.

1.1.5 Comment 179 - Financial Assurance

The Permittees' Comment No. 179 (and the previous comments incorporated therein) concerns the Draft Permit's requirement in Modules II.N and II.O that WID provide financial assurance for closure and post-closure. WID is a Management and Operating (M&O) contractor hired by the DOE to manage and operate WIPP on behalf of the DOE, and pursuant to the M&O contract, the DOE is ultimately liable for any WID expenditures to provide a financial assurance mechanism for WIPP. To avoid the financial burden on the taxpayers from the annual financing costs for meeting the financial assurance