UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ENVIRONMENTAL DEFENSE FUND, NATURAL RESOURCES DEFENSE COUNCIL, SOUTHWEST RESEARCH AND INFORMATION CENTER, AND CONCERNED CITIZENS FOR NUCLEAR SAFETY, Plaintiffs, v. JAMES D. WATKINS, Secretary, U.S. Department of Energy, UNITED STATES DEPARTMENT OF ENERGY, Defendants.	Civil Action No.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
ON THEIR FIRST, SECOND AND THIRD CLAIMS FOR RELIEF

Respectfully submitted this 12th day of November, 1991.

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INDEX

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Plaintiffs EDF et al. respectfully submit their Motion for Summary, Declaratory Judgment on their First, Second and Third Claims for Relief.

INTRODUCTION

In a related action, State of New Mexico v. Watkins, Civil Action No. 91-2527 (JGP), Defendants James D. Watkins and U.S. Department of Energy (DOE) moved for a summary declaratory judgment that they have "interim status" under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 - 6992k, for the Waste Isolation Pilot Project (WIPP). Federal Defendants' Memorandum in Support of Motion for Summary Judgment, Civil Action No. 91-2527 (JGP) at 67 (filed on or about October 28, 1991) (hereinafter cited as "Defendants' Brief"). Plaintiffs, who are intervenors in the related action, are today filing a complaint and cross-motion to

ensure that the RCRA issues are squarely and properly before this Court.

In general, RCRA prohibits treatment, storage or disposal of hazardous waste without a hazardous waste permit. Interim status — a narrow exception to this prohibition — allows facilities that are in existence when their wastes become subject to regulation to be treated as if they had a permit pending the regulatory agency's grant or denial of an actual permit. Thus, as EPA adds new substances to its lists of hazardous waste, previously unregulated facilities can obtain interim status by meeting filing deadines. To qualify for interim status, however, these facilities must be in existence on the date when the waste they manage first becomes subject to RCRA.

Based on statements by EPA and the State of New Mexico, DOE has attempted to bootstrap its WIPP facility into the interim status exception to RCRA's permitting requirement. Interim status, however, is a statutorily conferred grandfathering provision; it cannot be granted by regulatory agencies. Because WIPP will manage waste of a type that has been subject to regulation since RCRA's inception, when WIPP was not in existence, WIPP cannot qualify for interim status.

DOE's Motion for Summary Judgment in the related action is an attempted end run around the fact that Congress intended hazardous waste facilities to obtain permits before beginning management of waste. DOE's arguments cannot justify operation of WIPP without a permit, either as a matter of law or common sense. Congress never intended interim status to apply to facilities that, like WIPP, were designed and built after RCRA's effective date to manage waste of a type that has been subject to RCRA since the statute's inception. Moreover, transportation of hazardous waste to WIPP before issuance of a hazardous waste permit would be unnecessary and contrary to public policy. If New Mexico ultimately denies DOE's permit application, all the waste will have to be shipped back — doubling transportation risks and wasting taxpayers' money. Further, New Mexico residents are entitled to the protection of a full RCRA permit before DOE employs the unproven technologies at WIPP to manage mixed

hazardous and radioactive waste.

There are no disputes as to any material fact, and Plaintiffs are entitled to judgment as a matter of law.

STATEMENT OF UNDISPUTED FACTS

The following facts are undisputed:

1. DOE has no permit to manage hazardous waste at WIPP.

2. DOE has no exemption from the President from RCRA's prohibition of treatment, storage or disposal of hazardous waste without a permit.

3. The mixed radioactive and hazardous waste that DOE intends to manage at WIPP includes hazardous wastes that have been listed as hazardous by EPA since November 1980 and that exhibit characteristics of hazardous waste set forth in EPA regulations since November 1980.

4. The position of the United States is that RCRA has applied, since RCRA's inception (November 19, 1980), to hazardous and mixed wastes at DOE facilities.

5. WIPP was not in existence at any time in 1980.

6. The U.S. Environmental Protection Agency's (EPA's) July 3, 1986 notice about mixed waste, 51 Fed. Reg. 24504 (July 3, 1986), and EPA's September 23, 1988 "clarification notice," 53 Fed. Reg. 47045, 37046 (Sept. 23, 1988), are not regulations and did not involve notice and comment rulemaking.

7. DOE did not submit its RCRA Part A application for WIPP until at least January 18, 1991.

ARGUMENT

I. DOE CANNOT LEGALLY OPERATE WIPP WITHOUT A RCRA PERMIT, INTERIM STATUS, OR A PRESIDENTIAL EXEMPTION.

As a matter of federal law, DOE is ineligible for interim status and thus cannot manage hazardous waste in WIPP until it obtains a permit or Presidential exemption. Plaintiffs address the question of interim status twice — once under federal law and once under state law. The provisions of federal law that establish that DOE is not eligible for interim status are relatively (for RCRA) straightforward. The bottom line is that WIPP is too new a facility to qualify for grandfathering under RCRA's interim status provision. The analysis of federal law disposes of the issue before this Court. In the alternative, Plaintiffs also rebut DOE's highly technical legal arguments about calculation of interim status deadlines under state law. These arguments are complex and, because interim status is not available to WIPP as a matter of federal law, ultimately irrelevant. The bottom line here is that DOE did not meet state filing deadlines and, thus, would not qualify for interim status even if that status were not precluded by federal law.

A. RCRA prohibits storage of hazardous waste without a permit issued by EPA or an authorized state.

RCRA prohibits treatment, storage or disposal of hazardous waste without a permit issued by EPA or an authorized state.[1] 42 U.S.C. § 6925(a) ("after [November 19, 1980] the treatment, storage, or disposal of any ... hazardous waste ... is prohibited except in accordance with ... a permit."). Congress found that:

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[1]RCRA directs EPA to authorize states that administer hazardous waste regulatory programs that are "equivalent to" and "consistent with" the federal program to carry out their programs "in lieu of" the federal program. 42 U.S.C. § 6926(b). EPA authorized New Mexico to implement its base RCRA program in lieu of federal regulations on January 25, 1985. 50 Fed. Reg. 1515 (Jan. 11, 1985). EPA authorized New Mexico to replace the federal program with respect to mixed waste effective July 25, 1990. 55 Fed. Reg. 28397 (July 11, 1990).

> [I]nadequate controls on hazardous waste management will result in substantial risks to human health and the environment.

42 U.S.C. § 6901(b)(5) (emphasis added). Despite the discussion of Atomic Energy Act exclusions on page 68 of Defendants' Brief, DOE does not dispute that the mixtures of radioactive and hazardous waste that DOE intends to manage at WIPP are subject to RCRA. Id.

A RCRA permit application consists of two parts: Parts A and B. Part A includes a description of the processes to be used for treatment, storage and disposal, and a specification of the hazardous wastes to be treated, stored and disposed. 40 C.F.R. § 270.13. It is the Part A application that owners and operators must submit by statutory and regulatory deadlines to obtain interim status. The Part B application, upon which the RCRA permitting decision is based, is significantly more detailed. 40 C.F.R. § 270.14.

It beyond is dispute that DOE has failed to obtain a hazardous waste permit for WIPP.

B. Interim status is a narrow exception to RCRA's prohibition of unpermitted operations that does not provide the protections of a RCRA permit.

When creating RCRA's requirement for a permit, Congress "deemed it impractical to halt all hazardous waste activity pending issuance of permits." Sierra Club v. DOE, 734 F.Supp. 946, 947 (D. Colo. 1990). Accordingly, RCRA allows unpermitted facilities to operate under "interim status" if: (1) they are "in existence" when changes in the law require them to have a permit; (2) they comply with notice requirements; and (3) they timely submit Part A of their permit applications. 42 U.S.C. § 6925(e). Interim status facilities are "treated as having been issued [a] permit" pending issuance or denial of an actual permit. See 42 U.S.C. § 6925(e)(1).

Interim status is a temporary expedient that does not provide the

public with protections equivalent to those of a RCRA permit. For example, the process of obtaining interim status does not involve a regulatory determination that a facility will protect the public or the environment. In contrast, New Mexico has authority to deny an application for a RCRA permit if, inter alia, the State finds that the owner or operator will not run the facility in a manner that provides adequate public protection.

Interim status regulations (40 C.F.R. Part 265 and 6 CCR 1007-3, Part 265) contain generic standards for protection of the public pending issuance or denial of a permit. In contrast, RCRA permits include specific conditions to protect the public and the environment. E.g., 40 C.F.R. § 270.30. As one court held recently:

> [B]ecause they apply to a wide variety of TSD [treatment, storage or disposal] facility, the [interim status] 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.

Sierra Club v. U.S. Department of Energy, 770 F.Supp. 578, 580 (D. Colo. 1991). The same Court noted elsewhere:

> Although operating under interim status for years is perhaps allowed by the letter of the law, it clearly violates its spirit. Congress intended facilities to operate with permits. The reason is simple. The regulations governing interim status facilities are generic. A permit ... can be tailored to the dangers of a particular facility, thus providing enhanced protections.

Sierra Club v. U.S. Department of Energy and Rockwell International Corp., Slip op. at 7, Civil Action No 89-B-978 (D. Colo., Sept. 18, 1991) (Exhibit A).

C. Requirements for obtaining and maintaining interim status must be strictly enforced.

As a matter of law, interim status rules and deadlines are strictly applied. For example, in U.S. v. Environmental Waste Control, Inc., 710 F.Supp. 1172 (N.D. Indiana) aff'd 917 F.2d 327 (7th Cir. 1990), cert. denied 111 S.Ct. 1621 (1991), the court held:

> Having lost interim status and lacking a final permit to operate a hazardous waste facility, [Defendant] EWC has no legal basis to continue its operation ....
>
> * * *
>
> [Defendant] EWC argues that the court need not close the Landfill .... Regardless of whatever form of prosecutorial discretion the EPA may feel it has in a situation giving rise to a consent decree, RCRA limits this court's authority. Congress has provided that hazardous waste facilities may operate only through a final permit ... or interim status .... The statute leaves the court with no room for sanctions short of temporary closure ....
>
> * * *
>
> .... The Landfill must be closed. [Defendant] EWC must be restrained from the continued storage or disposal of hazardous wastes ....

Id. at 1240-41 (emphasis added). The Seventh Circuit affirmed and the Supreme Court denied certiorari, vindicating the federal government's position -- clearly compelled by RCRA -- that an owner or operator cannot be allowed to operate a hazardous waste facility without a permit or interim status.

D. To provide for national security, the President may exempt federal facilities such as WIPP from RCRA regulations, but has not done so in this case.

Congress has recognized that extraordinary considerations (i.e., national security) may, at times, require violation of laws enacted to protect heath and welfare. Thus, RCRA provides:

> The President may exempt any solid waste management facility of any department, agency, or

> instrumentality in the executive branch from compliance with [a RCRA requirement] if he determines it to be in the paramount interest of the United States to do so.

42 U.S.C. § 6961 (emphasis added). See also, Executive Order 12088 ("[e]xemptions from applicable pollution control standards may only be granted ... if the President makes the required appropriate statutory determination ..." (emphasis added)).

It is beyond dispute that DOE has neither sought nor received a national security exemption for WIPP from the President.

II. IT IS DOE'S BURDEN TO PROVE THAT IT HAS INTERIM STATUS BY A PREPONDERANCE OF THE EVIDENCE.

A. Because RCRA's provision for interim status is a narrow exception to the general prohibition against unpermitted operations, it is the burden of one claiming the benefit of the exception to prove that it applies.

It is well-established that a party claiming the benefit of an exception to a broad statutory or regulatory scheme has the burden of proving that the exception applies. See e.g., Securities and Exchange Commission v. Ralston Purina Co., 346 U.S. 119, 126 (1953) ("Keeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable."); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 747 (8th Cir. 1986), cert. denied 484 U.S. 848 (1987) ("[The Superfund Act] establishes an exception for costs that are inconsistent with the [National Contingency Plan], but appellants, as the parties claiming the benefit of the exception, have the burden of proving that certain costs are inconsistent with the NCP and, therefore, not recoverable"). See also, McKelvey v. United States, 260 U.S. 353, 356-57 (1922).

Interim status is a narrow exception to RCRA's most basic statutory

prohibition: "storage or disposal ... of any ... hazardous waste is prohibited except in accordance with ... a permit." 42 U.S.C. § 6925(a) (emphasis added). See U.S v. Production Plated Plastics, Inc., 762 F.Supp 722, 33 Env't Rep. Cas. (BNA) at 1023 ("[I]ssuance of operating permits is the primary mechanism established in RCRA for enforcing the hazardous waste regulatory scheme ..."). Sierra Club v. U.S. Department of Energy and Rockwell International Corp., Slip op. at 7, Civil Action No 89-B-978 (D. Colo., Sept. 18, 1991) ("Congress intended facilities to operate with permits."). Thus, it is DOE's burden to prove that it has somehow acquired interim status for WIPP.

B. DOE is not entitled to deference from this Court on RCRA issues.

DOE has argued for review of its Motion for Summary Judgment in Civil Action No 91-2527 (JGP) under an "arbitrary or capricious standard." Defendants' Brief at 24. DOE, however has also moved for a declaratory judgment that WIPP "has 'interim status' as a matter of law under both RCRA and the New Mexico Hazardous Waste Act." Defendants' Brief at 67. On the RCRA interim status issue, DOE is not before this Court as a regulatory agency but as one more member of the regulated community. 42 U.S.C. § 6961 (federal agencies shall comply with state requirements in the same manner and to the same extent as any person). Thus, DOE is not entitled to any deference from this Court and preponderance of the evidence standard of review applies.

III. INTERIM STATUS CANNOT BE GRANTED BY AN AGENCY; INSTEAD, IT IS A STATUTORILY CONFERRED GRANDFATHERING PROVISION WHICH CAN ONLY BE ACQUIRED BY OPERATION OF LAW.

Throughout its discussion of the interim status issue, DOE points to a New Mexico letter and an EPA notice and clarification. DOE claims that these agency statements somehow conferred interim status on WIPP. Under longstanding federal policy, however, and as a matter of law, interim status may be conferred only by operation of law and only under narrow factual

circumstances. As EPA has recognized, agency letters and notices about interim status are nothing more than expressions of the agencies' enforcement discretion and are not binding on citizen enforcers such EDF et al..

A. RCRA's plain language establishes that agencies do not grant interim status.

At 42 U.S.C. § 6925(e), RCRA creates an exception to the prohibition of 42 U.S.C. § 6925(a) against unpermitted operations. The exception states:

> (e) Any person who—
>
> (A) owns or operates a facility required to have a permit under this section which facility—
>
> * * *
>
> (ii) is in existence on the effective date of statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section,
>
> (B) has complied with the [notification] requirements of section 6930(a) of this title, and
>
> (C) has made an application for a permit under this section
>
> shall be treated as having been issued such permit until such time as final administrative disposition of such application is made ....

42 U.S.C. § 6925(e) (emphasis added).

This language is plain on its face. It does not require — or authorize — agencies to grant interim status.

B. EPA guidance and case law establish that EPA cannot grant interim status.

EPA has repeatedly recognized that it does not grant interim status. Vindicating EPA's position, the Eighth Circuit held in Hempstead County v. EPA., 700 F.2d 459 (8th Cir. 1983):

> EPA maintains that ... 'interim status' was not 'issued' by the administrator, but rather was a statutorily conferred grandfathering provision which allows a facility to continue until a permit is issued ....
>
> We are persuaded that the position taken by the EPA is correct.

Id. at 461 (emphasis added). Similarly, in the preamble to a November 1985 proposed RCRA rule, EPA stated:

> The reader should note that EPA does not grant interim status. The criteria for determining interim status eligibility are specified in RCRA section 3005(e) [42 U.S.C. § 6925(e)] and 40 CFR Part 270, Subpart G.

50 Fed. Reg. 49212, 49235, n. 124 (Proposed rule: Nov. 29, 1985; emphasis added). In its September 1985 Notice of Implementation and Enforcement Policy, EPA noted:

> Recognizing that EPA would not be able to issue permits to all hazardous waste management facilities at once, section 3005(e) of RCRA provides that a hazardous waste management facility that meets certain requirements will be treated as having been issued a permit. This statutorily-conferred authorization to operate pending issuance or denial of a permit is known as "interim status." A facility may lawfully operate only if it has a permit or interim status.

50 Fed. Reg. 38946, 38946 (Sept. 25, 1985) (emphasis added).

Exhibit B contains an EPA guidance document regarding EPA's

interpretation of interim status. Because the document is barely legible, it is quoted at length below. The EPA guidance states:

> There appears to be some confusion, both at headquarters and in the Regions, over EPA's role in the acquisition of interim status by hazardous waste management facilities. This confusion has resulted in communications to the public which are at odds with positions EPA has taken in litigation and which could conceivably prejudice future enforcement efforts. The purpose of this memorandum is not to establish any new policy in this area, but rather to clarify the law governing EPA's role in the acquisition of interim status so that we do not overstep or undermine that role in our dealings with the public.
>
> * * *
>
> A. EPA's Role in The Acquisition of Interim Status
>
> When Congress specified in Section 3005 [42 U.S.C. § 6925] that all hazardous waste management facilities must obtain a permit, it recognized that EPA would not be able to issue permits to all hazardous waste management facilities before the Subtitle C [permitting] program became effective. Accordingly, Congress provided in Section 3005(e) that a facility meeting certain conditions would be treated as having been issued a permit until final administrative action is taken on its permit application ....
>
> An essential feature of "interim status" (and the source of most of the confusion within the Agency) is that, unlike a permit, it is not granted or conferred by EPA. Rather it is conferred directly by statute. Any facility meeting the above three statutory requirements qualifies for interim status. The only exception is where it can be shown that the final administrative disposition of an application has not been made because the applicant has failed to provide necessary information. See Section 3005(e).
>
> This is not to say that EPA plays no part whatsoever in the acquisition of interim status .... [A]s the Agency vested with the administration of the RCRA program we have been called upon to

> apprise hazardous waste management facilities ...[and determine] (to some extent at least) whether particular facilities have met those prerequisites.
>
> This last function poses the most potential problems. An EPA pronouncement that a facility has met the statutory prerequisites for interim status is in essence a statement of opinion which reflects our decision not to take enforcement action against the facility. Such a pronouncement does not ultimately dispose of the issue of whether the facility has interim status. Nor does it preclude a private citizen from forcing a judicial resolution of the issue under the RCRA citizen suit provision, Section 7002(a)(1) [42 U.S.C. § 6972(a)(1)]. Such a pronouncement might, however, estop us from subsequently pursuing an enforcement action against the facility for operation without interim status, if the pronouncement is not properly qualified. Similarly, such a pronouncement, if not properly phrased, may incorrectly convey the impression that we are granting interim status to the facility.

EXHIBIT B at pp. 1-3 (emphasis added).

Clearly, EPA's notice and clarification could not confer interim status on an ineligible facility.

C. New Mexico also cannot grant interim status.

Since New Mexico implements RCRA in the State of New Mexico, the State's letters to regulated entities have the same effect under RCRA as letters from EPA. 42 U.S.C. § 6926(d) ("action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator [of EPA] ...") (emphasis added). As established above, it is beyond dispute that EPA has no authority to grant interim status. See Exhibit B at 2-3 (An EPA "pronouncement does not ultimately dispose of the issue of whether the facility has interim status. Nor does it preclude a private citizen from

forcing a judicial resolution of the issue under the RCRA citizen suit provision."). Thus, under 42 U.S.C. § 6926(d), New Mexico also has no authority to grant interim status — a narrow exception to a federal prohibition against unpermitted disposal or storage of hazardous waste. See U.S. v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 44 (1st Cir. 1991) (42 U.S.C. § 6925 prohibits treatment, storage or disposal of hazardous waste without a permit as a matter of federal law, even in states authorized to implement their own hazardous waste laws in lieu of the federal program.).

IV. EPA OR NEW MEXICO STATEMENTS ABOUT INTERIM STATUS CANNOT BIND PLAINTIFFS OR THIS COURT.

Regardless of the effect of EPA's and New Mexico's statements on the ability of EPA or New Mexico to enforce the law, the statements cannot estop Plaintiffs in this citizen enforcement action.

A. Regulatory agencies cannot change requirements of federal law by agreement; instead their agreements are only expressions of their own enforcement discretion.

Congress authorized citizen enforcement of environmental laws to "provide an alternative enforcement mechanism" when regulatory agencies choose not to enforce. See e.g., Proffitt v. Rohm & Hass, 850 F.2d 1007, 1011-12 (3rd Cir. 1988); Baughman v. Bradford Coal Co., 592 F.2d 215, 218 (3rd Cir.), cert. denied, 441 U.S. 961 (1979). Accordingly, agency agreements not to enforce the law cannot estop citizen enforcers or otherwise interfere with citizen enforcement. See Student Public Interest Research Group v. Fritzsche, Dodge & Olcott, Inc., 579 F. Supp. 1528, 1536-1537 (D.N.J. 1984), aff'd, 759 F.2d 1131 (3d Cir. 1985) (An administrative consent order that purports to extend impermissibly the Clean Water Act's compliance deadlines will not bar citizen enforcement); See Proffitt v. Rohm & Hass, 850 F.2d 1007, 1012 (3rd Cir. 1988) ("[I]t is questionable whether the EPA can bar a citizen's suit by any means other than its own diligent prosecution."); Proffitt v. Lower Bucks County Joint Municipal Authority, No. 86-7220, 1987

WL 28350 (E.D. Pa. 1987) (a consent order between the polluter and a state agency that purports to modify Clean Water Act permit requirements does not bar citizen suit); Sierra Club v. DOE, 734 F.Supp. 946, 950-52 (D. Colo. 1990) (administrative settlement agreement does not bar citizen enforcement).

B. The EPA "notice" and "clarification" that DOE rely upon, and the New Mexico letter of August 27, 1990, were not the result of rulemaking and are mere expressions of enforcement discretion.

DOE relies in its Brief at 78 - 81, on an EPA federal register "notice" and a subsequent "clarification" of that notice. However, these EPA documents do not purport to be regulations and do not bind citizen enforcers or this Court. EPA's July 3, 1986 notice specifically states: "EPA is not promulgating a regulation today." 51 Fed. Reg. 24504, n. 3 (July 3, 1986) (emphasis added). EPA's September 23, 1988 "clarification notice" states:

> EPA will treat the July 3, 1986 notice as the relevant regulatory change for establishing that facilities in existence on that date may qualify for interim status if other applicable requirements are met.

53 Fed. Reg. 47045, 37046 (Sept. 23, 1988) (emphasis added).

A Westlaw computer-assisted search of the Federal Register confirms the fact that EPA did not publish notices of proposed rulemaking before its July 3, 1986 and its September 23, 1988 publications. Nor did EPA invite comment on either the "notice" or the "clarification notice." EPA did not purport to engage in rulemaking or adjudication and did not issue any orders.[2]

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[2] EPA did state that it was exercising its authority under [40 C.F.R.] § 270.10(e)(2) to extend Part A permit application filing dates "in unauthorized States" until March 23, 1989. 53 Fed. Reg. at 37047. Whether or not such action could be effective without proper a administrative process need not

EPA's notice and clarification responded to DOE's loss, in court, to its claim of exemption from RCRA. Legal Environmental Assistance Foundation [LEAF] v. Hodel, 586 F. Supp. 1163 (E.D. Tenn. 1984) (RCRA applies to DOE facilities). Following, the LEAF case, the State of Colorado asserted jurisdiction over mixed radioactive and hazardous waste. The court in Sierra Club v. DOE, 734 F.Supp. 946, 947 (D. Colo. 1990) summarized this history:

> Since November 1980, DOE ... has been obligated, but has failed, to apply for a RCRA permit [for certain mixed waste operations at Rocky Flats] .... [A]fter the Colorado Department of Health threatened to close Rocky Flats unless DOE managed its mixed waste incompliance with RCRA, EPA issued a notice that RCRA applies to "mixed waste." .... Two years later, EPA announced that it would treat the notice as if it were a regulatory change ...

Id. at 947-48 (emphasis added).

Based in part on this history, the same court held:

> DOE's demonstrated attitude is that it is a governmental agency that can avoid RCRA's mandates indefinitely with impunity.

Sierra Club v. DOE, 770 F.Supp. 578, 584 (D. Colo. 1991). Indeed, the "lack of clarity" and "confusion" referred to in EPA's notices was nothing more than DOE's blatant refusal to comply with the law. See Sierra Club v. DOE, 770 F.Supp. at 584 ("DOE's ongoing disregard for RCRA's linchpin permit process [at Rocky Flats] has been flagrant").

In light of EPA's longstanding recognition that its pronouncements as

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be addressed here. EPA did not purport to extend the filing dates for -- or otherwise take final agency action with regard to -- facilities located in states, such as New Mexico, with base programs that had been authorized since at least 1985. See 50 Fed. Reg. 1515 (Jan. 11, 1985) (authorizing New Mexico's hazardous waste program).

to interim status are statements of enforcement discretion that do "not ultimately dispose of the issue of whether the facility has interim status ... nor ... preclude a private citizen from forcing a judicial resolution of the issue," Exhibit B at 2-3, DOE's reliance on EPA's notice and clarification is misplaced. EPA had no power to excuse DOE from its years of failure to comply with the Congressional mandates of RCRA, 42 U.S.C. § 6925(a) & (e).

Similarly, New Mexico's letter of August 27, 1990, cited by DOE in Defendants' Brief at 84, could not extend interim status deadlines. Moreover, by the time New Mexico wrote the letter, DOE had already missed all possible deadlines for obtaining interim status.

V. DOE FAILED TO MEET FEDERAL STATUTORY DEADLINES FOR OBTAINING INTERIM STATUS FOR WIPP.

It is beyond dispute that the mixed waste that DOE intends to dispose of at WIPP has been subject to RCRA regulation since November 19, 1980. See Sierra Club v. DOE, 734 F.Supp. 946, 947 (D. Colo. 1990). See also Legal Environmental Assistance Foundation v. Hodel, 586 F. Supp. 1163 (E.D. Tenn. 1984). Indeed, the United States has acknowledged that:

> RCRA has applied to all hazardous waste at all federal facilities since RCRA's inception [November 19, 1980], including all hazardous and mixed wastes at DOE facilities ...."

U.S. Justice Department Affidavit in Criminal Case No. 89-730M (D.Colo., filed June 6, 1989) at 29-30 ((Attached in pertinent part as Exhibit C). Moreover, in the Sierra Club v. DOE case, Sierra Club alleged in its Amended Complaint that "The position of the United States, as expressed to the District Court for the District of Colorado by the U.S. Justice Department is that 'RCRA has applied to all hazardous waste at all federal facilities since RCRA's inception [November 19, 1980], including all hazardous and mixed wastes at DOE facilities ....'" Amended Complaint at ¶ 48, Civil Action No. 89-

B-181 (D. Colo. May 31, 1991). By failing to deny the allegation in its Answer, 89-B-181 (D. Colo. July 19, 1991), DOE admitted it. Fed.R.Civ.P. 8(d); FDIC v. Caporale, 931 F.2d 1, 3 (1st Cir. 1991) (Pertinent parts of these pleadings are attached as Exhibit D). Further:

> [T]he Justice Department does not support one meaning of a statute in one action and another in a different lawsuit. The United States government has an obligation to the public it serves to decide on a view of the law and adhere to that view in all its dealing with the courts and public.

United States Memorandum of Law on Representation of Federal Agencies By the Department of Justice at 6, Civil Action No. 83-C-2379 (D.Colo. filed June 29, 1988) (Attached in pertinent part as Exhibit E).; United States v. Providence Journal Co., 485 U.S. 693, 706 (1988).

Clearly, WIPP was not "in existence" on November 19, 1980. Indeed, DOE did not decide to build WIPP in early 1981. Defendant's Brief at 5. Thus, since mixed waste has been subject to RCRA since 1980, WIPP was not in existence "on the effective date of statutory or regulatory changes under this chapter that render the facility subject to the requirement to have a permit under this section ..." 42 U.S.C. § 6925(e). Accordingly —as matter of federal law — WIPP is ineligible for interim status and DOE is prohibited from treating, storing or disposing of hazardous waste at WIPP without a hazardous waste permit. 42 U.S.C. § 6925(a).

DOE failed to take timely action to obtain a permit for WIPP — before beginning construction of the facility — in reliance on its spurious legal arguments for exemption. Such conduct should not be rewarded by this Court. See U.S. v. Vineland Chemical Co., 692 F.Supp. 415, 418 (D.N.J. 1988) aff'd 931 F.2d 52 (3d Cir. 1991), ("those who challenge the EPA's interpretation of its own regulation do so at their peril"). Moreover, interim status deadlines must be strictly applied regardless of DOE's

reasons for missing them.[3]

VI. DOE FAILED TO MEET STATE OF NEW MEXICO DEADLINES FOR OBTAINING INTERIM STATUS FOR WIPP.

Clearly, New Mexico law could not have afforded interim status to WIPP even if DOE had met all of New Mexico's filing deadlines (which it did not). As explained above, interim status was never intended to apply to facilities like WIPP, that were built after RCRA's effective date to manage waste of a type that has been subject to RCRA since the statute's inception. Rather than address this issue of federal law, DOE has chosen to ignore it, instead relying on arguments based on interpretations of state law.

Because, as a matter of federal law, WIPP could never have qualified for interim status, attempts to discuss State of New Mexico interim status deadlines in this context quickly become obscure. Moreover, because New Mexico law incorporates federal law by reference, but also makes changes to the federal definitions, the state law provisions themselves are less than clear. Nonetheless, it should be noted that even if mixed radicactive and hazardous waste were considered newly regulated as of 1988, DOE would have failed to meet state deadlines for obtaining interim status.

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[3] In re Commonwealth Oil Refining Co., 805 F.2d 1175, 1178 (5th Cir. 1986), cert. denied 483 U.S. 1005 (1987) ("Facilities that lose their eligibility to operate under interim status must cease acceptance of hazardous waste for ... storage ...."). Accord U.S. v. Professional Sales Corp., 56 B.R. 753, 23 Env't Rep. Cas. (BNA) 1946, 1948 (N.D. Ill. 1985); U.S. v. Vineland Chemical Co., 31 Env't Rep. Cas. (BNA) 1720, 1723 (D.N.J.), aff'd 931 F.2d 52 (3d Cir. 1991) ("Having lost interim status ... and lacking a final permit to operate ..., defendants had no legal alternative but to cease entirely using the impoundments ..."); U.S v. Production Plated Plastics, Inc., 762 F.Supp 722, 33 Env't Rep. Cas. (BNA) 1021, 1023 (W.D. Mich 1991) ("Upon losing interim status the facility must immediately cease its hazardous waste management operations ..."). See also, U.S. v. Vineland Chemical Co., 692 F.Supp. 415, 424 (D.N.J. 1988) aff'd 931 F.2d 52 (3d Cir. 1991) (rejecting a defense of the "balance of the equities" to an EPA enforcement action involving operation without interim status).

A. New Mexico law required DOE to file a permit application for WIPP by March 27, 1989.

EPA authorized New Mexico to implement its base RCRA program on January 25, 1985, 50 Fed. Reg. 1515 (Jan. 11, 1985). Effective April 8, 1987, New Mexico amended its RCRA program to exclude WIPP from hazardous waste regulation under state law. Defendants purported to submit a Part A RCRA permit application for WIPP to New Mexico on or about July 25, 1988. At the time of the submittal, however, WIPP was excluded from regulation under New Mexico law. Accordingly, New Mexico rejected the application.

Effective February 23, 1989, New Mexico repealed the provision which excluded WIPP from state regulation. This repeal required Defendants to apply for a hazardous waste permit under the New Mexico Hazardous Waste Act within 30 days (by March 27, 1989). 40 C.F.R. § 270.10(e)(1)(ii). Ignoring the plain language of the regulation, DOE argues that it had six months to submit its application (which would be August 23, 1989). DOE, however, missed both deadlines since it did not submit a Part A permit application for WIPP until about January 18, 1991.

B. New Mexico filing deadlines must be calculated from the date of changes in New Mexico law that required DOE to obtain a state hazardous waste permit.

If mixed hazardous and radioactive waste were considered "newly-regulated" — contrary to the U.S. Justice Department's own position — DOE's deadline for submitting a Part A permit application to obtain interim status would still be calculated from the effective date of the statutory change "that render[ed] the facility subject to the requirement to have a permit ...." 42 U.S.C. § 6925(e). The statutory change which created DOE's obligation to submit a permit application for WIPP occurred when New Mexico Hazardous Waste Act became effective as to WIPP on February 23, 1989. New Mexico Hazardous Waste Act regulations require owners or operators to file Part A of their permit application <u>within 30 days</u> after this change in

the law, or by March 27, 1989. 40 C.F.R. § 270.10(e)(1)(ii) & 270.70(a)(2). DOE and its operator delayed filing their Part A application until about January 18, 1991 — about 22 months after the change.

The New Mexico Hazardous Waste Act grants interim status to facilities managing newly regulated waste that meet deadlines calculated from the date of statutory or regulatory changes requiring a facility to obtain a permit under the "act" — defined specifically as the New Mexico Hazardous Waste Act, not the federal act. N.M. Hazardous Waste Management Regulations, Part 102. The New Mexico Hazardous Waste Act states: "[a]ny person owning or operating a hazardous waste facility who has met the requirements for interim status under 42 U.S.C. § 6925 shall be deemed to have interim status under the Hazardous Waste Act." N.M. Stat. Ann. § 74-4-9. Consistent with New Mexico's practice of incorporating EPA's RCRA regulations into State law by reference, this provision incorporates the requirements of 42 U.S.C. § 6925(e) as they apply to the State regulatory program.

DOE's attempt to read N.M Stat. Ann. § 74-4-9 to incorporate "federal" interim status deadlines is absurd. By the time EPA first authorized New Mexico's "base" RCRA program in 1985, DOE had already missed all federal deadlines for obtaining interim status.[4] Moreover, once EPA authorized New Mexico to implement the New Mexico Hazardous Waste Act as to mixed waste "in lieu" of the federal program, there could be no new federal deadlines in New Mexico. 40 C.F.R. § 271.3(b). Accordingly, interim status deadlines must be determined by reference to State law.

The New Mexico Environmental Improvement Board (EIB) is the agency entrusted with implementation of the New Mexico Hazardous Waste Act. The EIB has already interpreted N.M. Stat. Ann. § 74-4-9 to mean that interim status deadlines in New Mexico are calculated by reference to the date of

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[4]To qualify, WIPP would have had to have been in existence on November 19, 1980 to qualify for interim status, since WIPP will manage waste that has been subject to RCRA since November 1980.

changes in the State act. The EIB announced this interpretation when, by regulation, it incorporated EPA interim status regulations (40 C.F.R. § 270) by reference into New Mexico's Hazardous Waste Management Regulations (New Mexico Hazardous Waste Management Regulations). The EIB made an important change to the language of 40 C.F.R. § 270 (governing interim status) when incorporating it into State law. The regulations state:

> The following terms not defined in 40 CFR 260.10 have the meanings set forth herein:
> 1. "Act" or "RCRA" ("Resource Conservation and Recovery Act" as amended) means the Hazardous Waste Act, Sections 74-4-1 through 74-4-13 NMSA 1978. New Mexico Hazardous Waste Management Regulations, Part 102 (emphasis added).

40 C.F.R. 270.10(e)(1) (as incorporated into New Mexico law) imposes permit application deadlines (for achieving interim status) on "owners or operators of existing hazardous waste management facilities ... in existence on the effective date of statutory or regulatory amendments under the act that render the facility subject to the requirement to have a RCRA permit." Under Part 102 of the New Mexico Hazardous Waste Management Regulations (quoted above), the terms "act" and "RCRA" refer only to New Mexico Hazardous Waste Act.

DOE argues erroneously that EPA's approval of New Mexico's Hazardous Waste Act program in July 1990 caused DOE to become subject to the "requirement to have a permit" within the meaning of 42 U.S.C. § 6925(e). DOE again relies on the EPA clarification and notice, which, as discussed above, is not a regulation and did not change the requirements of federal or state law. Rather than rendering WIPP subject to the requirement to obtain a permit, however, EPA's approval eliminated application of EPA's regulatory program to WIPP. 55 Fed. Reg. 28397 (July 11, 1990). The "requirement to have a permit" was created by New Mexico law in February 1989. Any attempt to ignore this date in calculating interim status deadlines would be an affront to New Mexico's status as a sovereign State and inconsistent with 42 U.S.C. § 6961, which waives federal immunity from State permit obligations. The waiver is not contingent on EPA

authorization of State programs. 42 U.S.C. § 6961.

EPA "authorization" of a state program is not a prerequisite to application of state regulations. 42 U.S.C. § 6929 (retention of state authority). Instead, EPA authorization "suspends the applicability of certain Federal regulations in favor of [the state's] program," avoiding duplicative regulation. 55 Fed. Reg. 28397 (July 11, 1990). Federal agencies must comply with state hazardous waste regulations regardless of whether EPA has "authorized" the state program. 42 U.S.C. § 6961 (federal agencies shall comply with state requirements in the same manner and to the same extent as any person). Clearly, DOE could not hope to obtain interim status for a facility that it was building in violation of state law. Cf. 40 C.F.R. § 270.2 (defining "existing hazardous waste management facilities with respect to facilities existing as of November 19, 1980 as facilities that have "obtained the Federal, State and local approvals or permits necessary to begin physical construction."); See 42 U.S.C. § 6925(a) (it is illegal to construct hazardous waste management facilities without first obtaining a RCRA permit).

Thus, if WIPP were not ineligible for interim status as a matter of federal law, DOE's filing deadlines for obtaining such status would be calculated by reference to state law. DOE missed those deadlines.

C. Even if filing deadlines were calculated from EPA's authorization of New Mexico's mixed waste regulations, DOE would have missed those deadlines.

Even if mixed waste were somehow considered newly-regulated waste and if EPA's authorization were somehow construed to be a change that gave rise to a "requirement to have a permit," DOE still would have failed to meet the requirements for obtaining interim status. This is because, under 40 C.F.R. § 270.10(e)(1), to obtain interim status an owner or operator must file a Part A within six months of publication of regulations that require

compliance with interim status standards or thirty days after the regulations first become effective (i.e., the date facilities "first become subject" to interim status standards), "whichever first occurs." EPA's authorization of New Mexico's regulation of mixed waste was effective July 25, 1990. 55 Fed. Reg. 28397 (July 11, 1990). Thus, by failing to submit its Part A by August 24, 1990, DOE forfeited its claim to interim status under 42 U.S.C. § 6925(e). 40 C.F.R. § 270.10(e)(1)(ii).

DOE ignores the plain language of 40 C.F.R. § 270.10(e) and asserts that only the six month deadline is applicable. DOE rests its argument (made on page 72 of its Brief) on the EPA preamble to a rulemaking that cannot apply here. Specifically, DOE cites 45 Fed. Reg. 76630, 76633 (Nov. 19, 1980). The citation, however, is not on point. As DOE acknowledges, in 1980 RCRA did not authorize facilities that were built after 1980 to obtain interim status at all. Defendant's Brief at 70 (Before 1984 "only TSD facilities in existence ... as of November, 1980, were eligible for interim status"). Thus, when drafting the preamble to its 1980 regulations, EPA did not consider the issue before this court.

EPA has noted that in 1984, Congress amended RCRA, 42 U.S.C. § 6925(e), to provide:

> [T]hat facilities in existence as of the effective date of statutory or regulatory changes under the Act that render the facility subject to the requirement to have a permit, qualify for interim status if they make an application for a permit and comply with ... notification requirements ....
>
> In the legislative history accompanying this provision, Congress indicated that the amendment to section 3005(e) would apply to facilities in existence which treat, store or dispose of newly listed hazardous wastes.

Hazardous Waste Management System, Final Codification Rule, 50 Fed. Reg. 28702, 28723 (July 15, 1985).

This amendment could not afford interim status to WIPP, because mixed

waste was never "newly listed waste" after November 19, 1980. Moreover, in the preamble to its codification rule, EPA noted that:

> [T]he Agency is today amending the application requirements in § 270.10(e) to reflect the new § 270.10(a). Today's rule provides that owners and operators of HWM [hazardous waste management] facilities in existence on the effective date of statutory or regulatory amendments under RCRA that render the facility subject to permit requirement must submit Part A of their permit application by the dates specified in § 270.10(e)(1) in order to qualify for interim status.

50 Fed. Reg. at 28723 (emphasis added). Dates specified in § 270.10(e)(1) include: § 270.10(e)(1)(i) (six months from the date of publication) and § 270.10(e)(1)(ii) (30 days from the effective date of the regulations). Thus, EPA's July 15, 1985 regulations clarify that both dates apply to facilities that manage newly-regulated waste. And since the effective date of EPA's authorization of New Mexico's program was July 25, 1990, DOE would have had to file its part A in August 1990 to preserve any claim whatsoever to interim status. DOE failed to meet this deadline.

D. Even if DOE had obtained interim status, it would have lost it.

In New Mexico, to maintain interim status obtained by reason of a change in law, an owner or operator must file Part B of a permit application within 12 months after the pertinent change in law. Failure to meet this condition results in automatic loss of interim status under state law. 40 C.F.R. § 270.73 (as incorporated into New Mexico law). DOE missed this deadline (February 23, 1990) by almost a year and, thus, lost any claim to interim status. This loss is irrevocable. Clearly, DOE's only legal option is to forgo managing hazardous waste at WIPP until obtaining a permit.

VII. THE LACK OF INTERIM STATUS WILL NOT INTERFERE WITH THE PURPOSES OF WIPP; MOREOVER, THE POLICY BEHIND RCRA DEMANDS THAT DOE OBTAIN A PERMIT BEFORE OPENING THE FACILITY.

There is simply no reason for DOE to operate WIPP as an interim status facility. As part of its effort to demonstrate that it can manage a disposal facility for mixed radioactive and hazardous waste, it is incumbent on DOE to obtain a RCRA permit for WIPP before placing waste in the facility. The requirement to get a permit should not be an insurmountable obstacle if DOE truly has done adequate planning to safely manage the facility. Unless DOE has constructed a facility that cannot meet RCRA's permitting regulations, the requirement to get a permit will not interfere with the purposes of WIPP.

DOE's legal arguments are an attempt to apply interim status in a situation that Congress never intended it to cover: a facility designed and built after November 1980 which will manage waste of a type that has been regulated since RCRA's inception. DOE attempts to invoke legal technicalities to perform an end run around the fact that "Congress intended facilities to operate with permits." See Sierra Club v. U.S. Department of Energy and Rockwell International Corp., Slip op. at 7, Civil Action No 89-B-978 (D. Colo., Sept. 18, 1991). Especially since WIPP uses unproven technologies unlike the generic land disposal facilities for which interim status regulations were designed, sound public policy and protection of New Mexico residents — as well as the letter and spirit of RCRA — demand that DOE obtain a hazardous waste permit before managing hazardous waste at WIPP.

CONCLUSION

WHEREFORE: For all of the foregoing reasons, this Court should enter a declaratory judgment that the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6925(a), prohibits management of hazardous waste at WIPP, including mixed radioactive and hazardous waste, until such time that DOE obtains a RCRA permit or a presidential exemption for the facility.

Respectfully submitted this 12th day of November, 1991.

/s/

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion was hand-delievered on this 12th day of November, 1991, to the following:

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