State of New Mexico
ENVIRONMENT DEPARTMENT

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ENTERED

TRANSMITTAL MEMORANDUM

TO: Kathleen Sisneros, Director, W&WMD
Elizabeth Gordon, HRMB

FROM: Gini Nelson, Assistant General Counsel, NMED

DATE: March 24, 1992

RE: DOJ/DOE Appeal of WIPP District Court Decision

The following documents are enclosed:

RCRA/HWA-relevant excerpts from brief DOJ/DOE filed in the D.C. Circuit Court of Appeals on or about March 13, 1992 (pp. 21032, 37-40, 47-58)

PLEASE:

_____ File

_____ Record

__X__ For your information

_____ Other

Please call me if you have any questions.

Thank you very much,

Gini Nelson / 04 CLT
GINI NELSON
Assistant General Counsel

Enclosure(s)

cc: Benito Garcia, HRMB Chief, (w/o enclosures)
John Parker, HRMB, (w/o enclosures)

/clt

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I N D E X

PAGE

SCHEDULED FOR ORAL ARGUMENT ON MAY 15, 1992 03/13/92

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 91-5387, 92-5044, 92-5045

STATE OF NEW MEXICO ex rel. TOM UDALL, ATTORNEY GENERAL,
Plaintiff-Appellee

and

NATURAL RESOURCES DEFENSE COUNCIL, INC. ET AL.,
Plaintiff-Intervenors-Appellees

v.

JAMES D. WATKINS, SECRETARY OF ENERGY, ET AL.,
Defendants-Appellants

ENVIRONMENTAL DEFENSE FUND, ET AL.,
Plaintiff-Appellees

v.

JAMES D. WATKINS, SECRETARY OF ENERGY, ET AL.,
Defendants-Appellants

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS

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place by additional rockbolts, would prevent falling debris and provide supplamentary load support (id. at p. 4-8).

In September 1991, DOE submitted the design to another independent expert panel for review, which commended the "thorough design of the support system" (Ad. Rec. IV.II, p.6). This Design Review Panel concluded that the design "can be expected to provide a useful life of at least seven years from the time at which the proposed ground support system is installed" (ibid.). The Design Review Panel also declared that "the proposed testing and monitoring program is considered generally adequate" (id. at p. 4). That group made several observations and recommendations, to which DOE provided a written response (Ad. Rec. IV.D). The Design Review Panel, in turn, noted that the design team had addressed all the issues the panel had raised and had incorporated most of the panel's suggestions for modifications of the design (Ad. Rec. IV.C). The roof support system is now in place in Room 1, Panel 1.4/

6. RCRA statutory and regulatory background. -- RCRA was enacted to address the growing problem of disposing of solid wastes and, in particular, those wastes that are hazardous to the public health and the environment. The hazardous waste provisions establish a comprehensive scheme of regulation that applies from the moment such waste is generated to its ultimate

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4/ The New Mexico State Mine Inspector also inspected the system and stated that DOE "is installing three separate ground support systems in Room 1 which should be capable of supporting the roof. This degree of conservatism is unheard of in the mining industry" (Ad. REC. XIV.F, p. 2).

C I T A T I O N S

CASES:

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*/ Authorities chiefly relied upon are marked with an asterisk.

November 19, 1980. 94 Stat. 2338. Finally, in 1984, Congress extended interim status to facilities 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)(1)(A) (emphasis supplied).6/

In order to obtain interim status, an owner or operator of an existing facility must meet other requirements, including filing a permit application. 42 U.S.C. 6925(e)(1)(C). EPA has bifurcated the application process, requiring first a brief description of the facility, the regulated activities, and the types of waste; this is known as Part A. 40 C.F.R. 270.13. Part B must be significantly more detailed and must include a description of how the facility will comply with the applicable standards. 40 C.F.R. 270.14-270.29. An EPA regulation provides that to qualify for interim status, existing facilities must file their Part A application no later than:

> (i) Six months after the date of publication of regulations which first require them to comply with the standards set forth in 40 CFR Part 265 or 266, or
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> (ii) Thirty days after the date they first become subject to the standards set forth in 40 CFR Part 265 or 266, whichever first occurs.

6/ EPA has interpreted the "in existence" requirement to be satisfied by the commencement of actual waste management operations or by the commencement of construction of the facility by the relevant date. See 40 C.F.R. 260.10, 270.2; 52 Fed. Reg. 34,779 (Sept. 15, 1987) (EPA interprets its definition of "existing facility" to incorporate the expanded reach of interim status following the 1984 amendments).

disposal. In accordance with the statute, EPA has issued regulations designating wastes as "hazardous," and hence subject to regulation, because they exhibit certain dangerous characteristics or because they are listed on a compendium of particular substances. 42 U.S.C. 6921(a), (b); 40 C.F.R Part 261. In addition, EPA promulgated in 1980 the "mixture rule," which provides that any mixture of a "solid waste," as defined by RCRA, and substances listed as hazardous under RCRA would be regulated as RCRA hazardous waste also. 40 C.F.R.261.3(a)(2).2/

Facilities that treat, store or dispose of hazardous waste must meet certain standards for such activities, and such a facility must have a permit issued under the statute. 42 U.S.C. 6924, 6925. Congress recognized, however, existing facilities would need to continue operations while the permitting process ran its course, and therefore enacted a grandfather provision. Under this provision, known as "interim status," facilities that notify appropriate authorities of their activities and that file a permit application, are treated as if they had a permit. As originally enacted, the statute provided interim status for facilities "in existence on the date of enactment," i.e., October 21, 1976. 92 Stat. 2808. In 1980, Congress, because of the delay in promulgation of regulations, changed the date to

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2/ This rule was recently vacated and remanded by the D.C. Circuit for lack of adequate notice and comment. Shell Oil Co. v. EPA, 950 F.2d 741 (D.C. Cir. 1991). On February 18, 1992, prior to issuance of the mandate, EPA repromulgated the mixture rule, expressly noting that EPA considers the opinion to apply prospectively only. 57 Fed. Reg. 7628 (Mar. 3, 1992). The panel in Shell Oil denied, without explanation, EPA's request for clarification of the effect of the decision.

[AEA] except to the extent that such application * * * is not inconsistent with the requirements of [the AEA]." 42 U.S.C. 6905(a). Furthermore, the definition of "solid waste" in RCRA has, and always has had, a specific exclusion for "source, special nuclear, or byproduct material as defined by the [AEA]." 42 U.S.C. 6903(27). Thus, the handling of such material would be regulated by the AEA, rather than RCRA. According to DOE, "source material" and "special nuclear material" presented no confusion since their definitions refer to specific substances such as uranium, thorium, or plutonium or enriched uranium. 50 Fed. Reg. 45,736 (Nov. 1, 1985). The AEA defines "byproduct material," however, as "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." This presented a significant problem, since the waste stream from this process could include substances that were hazardous under RCRA but that could not be separated from the radioactive elements. 50 Fed. Reg. 45,737 (Nov. 1, 1985).

In 1984, a district court decision considered whether any facility regulated under the AEA was categorically exempt from any requirement of RCRA. Legal Environmental Assistance Fund v. Hodel, 586 F. Supp. 1163 (E.D. Tenn. 1984). The court held that RCRA did apply to DOE facilities even though they may be regulated under the AEA. 586 F. Supp. at 1167. The court did not, however, consider any issue of the jurisdiction of RCRA over

40 C.F.R. 270.10(e)(1). In addition, the 1984 amendments to RCRA provide that a land disposal facility such as WIPP will lose its interim status unless the Part B application is filed within 12 months of the date the facility first became subject to the permit requirement. 42 U.S.C. 6925(e)(3); 40 C.F.R. 270.73(d).

RCRA also provides in Section 3006, 42 U.S.C. 6926, for States to operate their own hazardous waste program, and if approved by EPA, such programs will operate "in lieu of the Federal program." 42 U.S.C. 6926(b). This means that EPA will no longer make permitting decisions and federal requirements would not apply, except that EPA retains its authority to bring enforcement proceedings.1/ The purpose is to minimize duplicative regulation, since nothing in RCRA preempts state law so long as state law requirements are at least as stringent. 42 U.S.C. 6929.

7. The uncertainty of RCRA's application to radioactive mixed waste. -- Congress, in writing RCRA, was aware of the existence of other regulatory schemes for handling waste material and the need to avoid regulatory conflicts. Radioactive materials had long been regulated under the Atomic Energy Act ("AEA"), 42 U.S.C. 2011 et seq., and Section 1006(a) of RCRA provides that "[n]othing in [RCRA] shall be construed to apply to * * * any activity or substance which is subject to the * * *

1/ Moreover, additional requirements imposed by the 1984 Hazardous and Solid Waste Amendments ("HSWA") to RCRA are effective and implemented by EPA in states authorized for the "base" RCRA program, i.e., the requirements of the program prior to HSWA. 42 U.S.C. 6926(g).

revise their program to include such wastes and to receive express authorization from EPA for the revised program.

Thereafter, DOE, in 1987, issued a final interpretative rule on the meaning of "byproduct material." 52 Fed. Reg. 15,937 (May 1, 1987). The r s was narrower than the proposal, and concluded that it was not appropriate to allow whole waste streams containing radioactive material to be excluded from RCRA regulation. Instead, the rule provided that any waste stream that contained radioactive elements regulated by the AEA and nonradioactive elements deemed hazardous under RCRA would be subject to both regulatory schemes, subject to consistency with the AEA. See 42 U.S.C. 6905(a).

Then EPA, in September 1988, issued another Federal Register Notice, this time addressing the question of interim status for facilities handling radioactive mixed wastes. 53 Fed. Reg. 37,045 (Sept. 23, 1988). EPA noted the confusion about the extent to which RCRA applied to radioactive mixed wastes and the fact that 44 states had, as of the date of the Notice, base authorization to operate a state hazardous waste program, but of those 44 only 4 had received the additional authorization to regulate radioactive mixed wastes. In all other jurisdictions, EPA ran a Federal hazardous waste program. Moreover, because the 1986 Notice did not address the issue of interim status for mixed waste facilities, EPA decided it had to clarify the applicability of RCRA interim status requirements to such facilities.

EPA first concluded that for facilities within its exclusive RCRA jurisdiction, i.e., those in jurisdictions without any

particular types of wastes, such as substances that are both radioactive and hazardous.

In 1985, DOE published a proposed rule interpreting the term "byproduct material" for purposes of RCRA. 50 Fed. Reg. 45,736 (Nov. 1, 1985). This proposed rule would have defined "byproduct material" to include not only the radioactive elements, but any waste stream that is a direct product of the process of making special nuclear material, even if that waste stream included substances that would otherwise be regulated as hazardous under RCRA, thereby excluding such waste from RCRA regulation.

EPA did not address this proposal directly, but in 1986 published a Federal Register Notice that addressed the extent to which state programs needed to have authority over wastes contaminated with radiation in order to have a legally adequate authorized state program. 51 Fed. Reg. 24,504 (July 3, 1986). EPA stated that because of the uncertainty about the reach of RCRA, the agency had not required states to have authority over the hazardous constituents of "radioactive mixed wastes" in order to be authorized under RCRA. Therefore, EPA had not, in deciding whether a state program qualified for authorization, examined a state's authority over "radioactive mixed wastes" and made no determination of the extent of such authority. EPA declared that currently authorized state programs did not apply to "radioactive mixed wastes" (ibid.). In this Notice, EPA announced its determination that "radioactive mixed wastes" were subject to RCRA regulation (ibid.). Consequently, authorized states had to

facility in an authorized state must meet the particular requirements of that state. Ibid.

8. The New Mexico Hazardous Waste Act and implementing regulations. -- On January 1 1985, EPA granted final authorization to New Mexico to operate a hazardous waste management program in lieu of the Federal program. 50 Fed. Reg. 1515 (Jan. 11, 1985). Thus, "New Mexico now has responsibility for permitting treatment, storage and disposal facilities within its borders and for carrying out all other aspects of the RCRA program" except for the newly enacted requirements of the HSWA amendments, for which EPA retained responsibility until further authorization was granted to the State. Ibid. Accordingly, the State enjoyed "base" authorization for its hazardous waste program, and state regulations replaced the Federal regulations, except that EPA retained the right to initiate enforcement proceedings.

The state statute defines the terms "solid waste" and "hazardous waste" in the same manner as the Federal statute. N.M. Stat. Ann. Section 74-4-3 (I), (M). In other respects, the New Mexico statute mimics the federal program. For example, Section 74-4-4 creates a state administrative agency to implement the program and directs that entity to

> adopt regulations for the management of hazardous waste equivalent to, and no more stringent than, federal regulations adopted by the federal environmental protection agency pursuant to the Resource Conservation and Recovery Act:
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> * * * * *

authorized state program, the 1986 Notice was a "regulatory change" for interim status purposes because it "was EPA's first official pronouncement to the general public that RCRA permitting requirements are applicable to radioactive mixed waste." 53 Fed. Reg. 37,046. Facilities in existence or under construction by the date of the 1986 Notice could qualify for interim status if other requirements could be met.[8/]

As for states having authorized base programs, EPA explained that if a facility handled radioactive mixed waste but not other hazardous waste, such a facility would not be subject to RCRA regulation until that state had received the necessary supplemental authorization to issue permits for radioactive mixed waste. EPA explained that such authorization would be the "regulatory change" for determining eligibility for interim status. 53 Fed. Reg. 37,047. EPA also noted that because such facilities are subject to all state laws, a state might set a different date from the date EPA had identified, and a facility handling radioactive mixed waste would have to satisfy that requirement. But in order to retain authorization to regulate radioactive mixed waste, a state could not select a date any later than the date of its authorization. 53 Fed. Reg. 37,047. Finally, EPA said that as to other requirements for interim status, such as the time for filing permit applications, a

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8/ Thus, this date would have ordinarily triggered the time periods for filing the permit application, but EPA decided that because of the confusion, it would exercise its authority under 40 C.F.R. 270.10(e)(2) to extend that time to a date six months after the date of the Notice, i.e., from September 23, 1988. 53 Fed. Reg. 37,047.

Thereafter, in July 1989, the State applied for additional authorization to operate its program in lieu of the Federal program, including approval to regulate radioactive mixed waste. 55 Fed. Reg. 28,397 (July 11, 1990). EPA granted this application, and final authorization for regulation of radioactive mixed waste became effective on July 25, 1990. Ibid.

9. The inconsistent behavior of the New Mexico state agency. -- On August 27, 1990, shortly after the State received final authorization for regulation of radioactive mixed waste, the head of the state agency wrote to DOE and set deadlines for filing Part A and Part B of the required permit application for WIPP (Ad. Rec. III. Q). The Director advised DOE that:

> You are reminded of the following requirements for the WIPP facility to qualify for interim status during the review of its Part B permit application: the Part A application must be received by Monday, January 22, 1991 and groundwater monitoring certification must accompany the Part B permit application.

DOE met these deadlines, submitting the Part A application on January 22, 1991, and the Part B application on February 26, 1991 (Ad. Rec. III.H., III.J., III.L., III.M., III.N.).

A year later, however, the state agency preliminarily reversed itself, suggesting to DOE that its filings may not qualify for interim status. In what was styled a "Preliminary Determination and Request for Information," a new director within the state agency suggested to DOE that the trigger date for filing the necessary papers was not the date New Mexico received final authorization from EPA to regulate radioactive mixed waste in lieu of the Federal program, but the date the state

> (6) requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subsection to have a permit issued pursuant to requirements established by the board;

N. M. Stat. Ann. Section 74-4-4 (emphasis supplied).

The state statute also provides that "[a]ny person owning or operating a hazardous waste facility who has met the requirements for interim status under 42 U.S.C. 6925 [Section 3005 of RCRA] shall be deemed to have interim status under the Hazardous Waste Act." N. M. Stat. Ann. Section 74-4-9 (Michie 1991). The state agency has issued regulations that largely incorporate by reference the regulations issued by EPA for the Federal program. In particular, Part IX of the New Mexico regulations, entitled "The Hazardous Waste Permit Program," incorporates into Part IX "[t]he regulations of the United States Environmental Protection Agency set forth in 40 CFR Part 270," which include EPA's regulations regarding interim status.

Finally, New Mexico at one point had statutorily excluded application of the state statute to WIPP. In 1987, the state legislature amended the statute to provide that "[n]othing in the Hazardous Waste Act shall be construed to apply to any radioactive waste processed and certified for emplacement in the mined geologic repository at the waste isolation pilot project." N. M. Stat. Ann. Section 74-4-3.2 (1988 Replacement Pamphlet). This exclusion, however, was an impediment to the State obtaining final authorization to regulate radioactive mixed waste, and in February 1989, the state legislature repealed this provision.

SUMMARY OF ARGUMENT

1. The district court plainly erred in its conclusion that the modification and extension of the withdrawal was issued in violation of FLPMA. A comprehensive view of the entire history of the project, including the direction of Congress to proceed and the issuance of the previous withdrawals, shows a plain purpose in the Interior Department authorizations to facilitate the phased development of a research and demonstration facility for disposal of radioactive waste. That development was not complete, and therefore an extension of the withdrawal was required to realize "the purpose for which the withdrawal was first made * * *." 43 U.S.C. 1714(f). Accordingly, the extension was validly issued.

The authority to modify a withdrawal and the authority to extend a withdrawal are distinct powers, and the validity of each action should be judged separately. In this case, the Interior Department had ample authority under FLPMA to modify the withdrawal to remove the restriction on use of radioactive waste and to add the Test Phase to the stated purposes. No provision of FLPMA specifically prohibits such action, and it was within the Interior Department's discretionary authority to manage the public lands. An extension of the withdrawal was also necessary to continue the protection of this site from the operation of the public land laws, which has always been a stated purpose of the Interior Department's authorizations. Consequently, both the authority to modify and the authority to extend were properly exercised here.

legislature repealed the statutory exemption for WIPP (Ad. Rec. III. E). The state agency also requested EPA to state "the legal standard EPA would use to determine whether WIPP has federal interim status" (Ad. Rec. III. B). EPA's Regional Counsel replied that (Ad. Rec. III. A):

> The repeal of the state law exempting WIPP from the State's hazardous waste program was not the relevant regulatory change for determining interim status under RCRA Subsection 3005(e) because the regulatory changes referred to at RCRA Subsection 3005(e)(3) are changes under "this Act" -- i.e., RCRA. The change in state law was not a change under RCRA until the State became authorized to regulate radioactive mixed waste under RCRA. As a result, to the extent that State interim status mirrors federal interim status requirements, WIPP would have been eligible for interim status on July 25, 1990, when the state received its authorization to regulate radioactive mixed waste.

There has been no final resolution of this question by the state agency, but its preliminary views became, in part, the basis for the claims made in the district court that WIPP was not entitled to interim status.

10. The proceedings below and the decisions of the district court. -- On October 3, 1991, the Secretary of Energy notified the Interior Department that all environmental permitting requirements had been met and that DOE was ready to begin the Test Phase (Ad. Rec. I.B). In response, the Interior Department issued a Notice to Proceed, thus setting the time for the Test Phase to begin. 56 Fed. Reg. 50,923 (Oct. 9, 1991). The Attorney General for the State of New Mexico then filed a complaint alleging that once the waste is brought into the facility it cannot practically be retrieved and therefore the FLPMA land withdrawal was in effect a permanent dedication of

5. The court also erred in holding the Interior Department had exceeded its authority under FLPMA by issuing a de facto permanent withdrawal. The court's premise was its conclusion that waste brought into WIPP for the Test Phase would not be retrievable. But the decision to proceed with the Test Phase was made only after the most rigorous review of the scientific, technical and regulatory requirements, and the question of the stability of the test room and ability to retrieve the waste was thoroughly reviewed. As a result of that process, DOE concluded that installation of the supplementary roof support system would provide sufficient room stability and allow the waste to remain fully retrievable.

The district court erroneously engaged in a de novo review of this highly technical issue. The court dismissed the carefully considered judgment of the expert agency, and relied instead on extra-record litigation affidavits submitted by the plaintiffs below to conclude the waste could not be retrieved. In doing so, the court impermissibly substituted its judgment for that of the agency, contrary to cardinal principles of judicial review laid down by the Supreme Court. Consequently, the court's determination that the waste would not be retrievable must be set aside, and the conclusion that the Interior Department exceeded its authority under FLPMA must be rejected.

6. Finally, the court seriously miscalculated the balance of harms in concluding that the harm to the plaintiffs outweighed the harm to the agency's program and the public interest. The court's ipse dixit that the risk that the waste may be

2. WIPP has interim status under RCRA. EPA's determination that radioactive mixed wastes were subject to RCRA was a "regulatory change" within the meaning of the interim status provisions because this announcement was a significant change in EPA's policy and because it required authorized states, such as New Mexico, to obtain new authorization through the regulatory process before radioactive mixed waste could be regulated in those states. The date of authorization was the trigger date for filing applications necessary to obtain interim status, and DOE indisputably met those filing requirements.

3. The permanent injunctions must be vacated because the district court failed to consider the equities of granting or withholding injunctive relief. Under the rule of Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982), the court had to find that an injunction was essential to prevent irreparable injury and that there was no adequate legal remedy. The court below made no appropriate findings, and therefore abused its discretion in granting the injunctions.

4. The appeal from the preliminary injunction is not moot because the later orders did not dispose of all the claims of all the parties. Therefore, under Rule 54(b), Fed. R. Civ. P., there is no final order in the case, and the preliminary injunction will continue to have effect in the event this Court reverses the grant of the permanent injunctions or DOE and the Interior Department correct the alleged legal defects through further administrative processes.

lands pending a legislative withdrawal if appropriate." 48 Fed. Reg. 31,038 (July 6, 1983) (emphasis supplied). The latter purpose had not been fully achieved.

Public Land Order 6826 both modified the prior order to "[e]xpand the stated purpose" to include the Test Phase and extended the prior order to preserve the ability to carry out its original purposes. 56 Fed. Reg. 3038 (Jan. 28, 1991) (emphasis supplied). While the modification stated that the withdrawal was being extended "to provide sufficient time to conduct the experimental test phase," it is manifest that a further extension was also necessary to carry out the other stated purpose of protection of the land. Although it appears the Secretary did not make an express determination that the other purpose necessitated an extension, such a judgment is necessarily implied in the circumstances: the withdrawal was set to expire within six months and Congress, while having directed DOE to proceed with the research and demonstration of the disposal of waste at WIPP, had not yet acted on proposals to grant DOE permanent protective authority over the land through legislation.

Therefore, this extension was valid. Since the modification was also proper, the Interior Department has met all the applicable requirements of FLPMA.

C. WIPP has interim status under RCRA. -- In order to qualify for and retain interim status, WIPP had to be in existence prior to a "regulatory change" subjecting the facility to RCRA regulation, and DOE had to file Part A and Part B of the

irretrievable was irreparable injury to the plaintiffs violates the requirement of Rule 52(a), Fed. R. Civ. P., for specific findings and conclusions in support of any preliminary injunction. Nor is there any ground for enjoining an agency's exercise of delegated authority on the basis that Congress might in the future decide to withdraw the authority for that action. Finally, the court incorrectly dismissed the vital public interest in proceeding with this carefully considered program for achieving safe, long-term disposal of radioactive defense wastes.

ARGUMENT

I. THE PERMANENT INJUNCTION IS BASED ON ERRONEOUS LEGAL CONCLUSIONS AND WAS AN ABUSE OF DISCRETION

A. Standard of review. -- On appeal from a permanent injunction, this Court will review all questions of law de novo and will review the decision to grant injunctive relief for an abuse of discretion. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982); Independent Bankers Ass'n v. Smith, 534 F.2d 921, 950 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976); Northeast Constr. Co. v. Romney, 485 F.2d. 752 (D.C. Cir. 1973). The grant of summary judgment is only appropriate when the material facts are undisputed and the law requires the relief requested by the moving party.

B. The Secretary of the Interior complied with the requirements of Section 204(f) of FLPMA in modifying and extending Public Land Order 6403. -- Under Section 204(a) of FLPMA, the Interior Department has multiple authorities with respect to withdrawals: it may make withdrawals, it may modify

950 F.2d at 755. For the reasons discussed below, a similar result is required here.

First, the operative language of the statute, left undefined by Congress, is "regulatory change." On its face, this phrase is certainly broad enough to encompass a variety of mechanisms that have the effect of changing the regulatory environment. An administrative agency may alter the impact of regulation in many ways, including the amendment of legislative rules, the publication of general statements of policy, and announcement of its interpretations of the scope of statutory provisions, whether issued as interpretative rules or in a more informal fashion. See, e.g., Fertilizer Institute v. EPA, 935 F.2d 1303, 1307-1308 (D.C. Cir. 1991) (recognizing that statutory interpretation announced in preamble published in Federal Register was an "interpretative rule"); Regular Common Carrier Conference v. United States, 628 F.2d 248, 250-251 (D.C. Cir. 1980) (ICC's statement of general policy retreated from arbitrary "rule of eight" in assessing whether carrier was serving a "limited" number of shippers); National Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971) (informal letter ruling of Wage and Hour Administrator overruled prior ruling because of intervening statutory amendments).

Moreover, EPA's interpretation is consistent with the obvious practical purposes of the interim status provision. Congress recognized the inequity of imposing on existing facilities a new permit requirement that would take months, and more frequently years, to satisfy. Originally, the statute

permit application within a specified time period. As we show below, WIPP satisfied all these requirements.

1. The district court erred in not deferring to EPA's determination there had been a regulatory change that would enable WIPP to qualify for interim status. -- The district court refused to recognize EPA's 1986 announcement that radioactive mixed waste was subject to RCRA's permitting requirements as a "regulatory change" because the notice was not an amendment of the substantive RCRA regulations, implemented by notice and comment rulemaking (slip op. 9).

EPA, however, concluded that the publication in the Federal Register of its determination qualified as a "regulatory change" because it was "EPA's first official pronouncement to the general public that RCRA permitting requirements are applicable to radioactive mixed waste" and because of the previous confusion about the question. 53 Fed. Reg. 37,047 (Sept. 23, 1988). The statutory language, not further defined by Congress, does not, on its face, preclude treating such an announcement as a regulatory change. Consequently, the district court should have deferred to EPA's conclusion "so long as it 'is reasonable and consistent with the statutory purpose.'" Shell Oil Co. v. EPA, 950 F.2d 741, 755 (D.C. Cir. 1991), quoting Ohio v. Department of the Interior, 880 F.2d 432, 441 (D.C. Cir. 1989). In Shell Oil, the court deferred to EPA's construction of its authority under RCRA to regulate resource recovery processes, given the "broad grant of authority to EPA to manage the problem of hazardous waste."

change" for purposes of the interim status provisions. The announcement in the Federal Register has several indicia of a change in the regulation of radioactive mixed waste. First, EPA acted to definitively resolve a question that was surrounded by confusion and the divergent views of the affected parties and of the governmental agencies charged with implementing RCRA and the AEA. Second, EPA resolved the issue by publication in the Federal Register of a statement of general applicability rather than in the context of the status of a particular facility. Third, in reality, EPA had not been regulating radioactive mixed waste under RCRA, and the practical effect of the announcement was to impact the reasonable and settled expectations of numerous types of facilities, including not only DOE installations, but commercial nuclear power plants, hospitals, and university research facilities.

Furthermore, EPA correctly concluded that there was considerable confusion and uncertainty about whether radioactive mixed waste was regulated by RCRA. First, Section 1006(a) of RCRA required reconciliation of the statute with the requirements already imposed by the Atomic Energy Act. Second, the statute expressly excluded "byproduct material" as defined by the AEA, raising a legitimate question concerning waste contaminated with radioactive materials. Third, the definition of "byproduct material" was itself unclear since it referred to the results of a manufacturing process rather than specifically identifiable substances. Moreover, in DOE's experience, byproduct material

grandfathered facilities in existence only on a particular date, but in 1984, Congress added the provision at issue here, thus expanding the applicability of interim status to facilities affected by regulatory changes. As a practical matter, changes in compliance obligations can occur in ways other than amendments to regulations, and a restrictive interpretation does not serve the evident intent to allow greater reliance on interim status.11/

Although the range of possible administrative action does not mean that every action that affects compliance with RCRA would allow regulated parties to claim interim status, it is equally clear that confining the applicable "regulatory changes" to formal amendments to regulations is too narrow a construction. The issue here is whether the particular action EPA took with respect to radioactive mixed waste constitutes a "regulatory

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11/ The legislative history of the 1984 amendments does not evidence a clear Congressional intent to the contrary. The amendment was added late in the process on the floor of the Senate, and the conference report explained the amendment as affecting facilities "which became subject to Subtitle C but which were not previously required to have a permit * * *." 130 Cong. Rec. 29518 (1984). There was no debate on the Senate floor on the amendment, and the only explanation was inserted after the Senate voted. 130 Cong. Rec. 20833-20835 (1984). That explanation describes the amendment as according interim status to facilities that "become subject to the Subtitle C requirements as a result of amendments to the RCRA statute or regulations issued pursuant thereto." 130 Cong. Rec. 20834-20835 (1984). The statutory language and the conference report, however, express no similar limitation on the availability of interim status. The implication of the isolated comment that was inserted in the Senate debate is not evidence that Congress as a whole intended such a narrow view of the provision. See NRDC v. EPA, 907 F.2d 1146, 1157 (D.C. Cir. 1990); Int'l Br. of Elec. Workers v. NLRB, 814 F.2d 697, 712-713 (D.C. Cir. 1987); Demby v. Schweiker, 671 F.2d 507, 510 (D.C. Cir. 1981).

It is also clear that during this period EPA was not regulating these wastes. It is true that in retrospect this situation resulted not from a lack of authority but from the exercise of EPA's discretionary authority to determine the reach of its statute. But the reality was that EPA was not treating these wastes as subject to RCRA. Consequently, EPA's announcement that it had finally determined that these wastes were regulated by RCRA represented a significant change in agency policy and in the compliance obligations of facilities handling such waste.

Furthermore, contrary to the district court this process did not take place outside the Administrative Procedure Act. Developing, publishing, and applying the agency's policy in such matters as statutory interpretations is a core function of an administrative agency. Here the 1986 Notice interpreted the reach of RCRA, and was therefore both a statement of general policy and an interpretative rule. Fertilizer Institute v. EPA, 935 F.2d at 1308. Moreover, this court has recently reaffirmed in Fertilizer Institute v. EPA that such publications can have "the effect of creating new duties." Ibid. (emphasis in original). When an interpretative rule has that effect, as the EPA Notice did here, that consequence results from functions exercised under the APA. In this case, the effect clearly constituted a "regulatory change."

Moreover, in the authorized states, such as New Mexico, there was in fact no regulation of radioactive mixed waste under RCRA. As EPA explained in its 1986 notice, these states had been

included wastes in which it was impossible to separate the radioactive parts from the nonradioactive parts.

DOE itself espoused differing views of the extent to which RCRA applied to these wastes. In 1985, that agency proposed to formalize the position under which it had been operating: that "byproduct material" included all the waste that was a direct product of the manufacturing process even if it included substances deemed hazardous under RCRA. Its final rule, however, adopted a narrower position, in which it agreed with EPA's recent determination that it was appropriate to construe RCRA to apply to radioactive mixed waste. This course of administrative review demonstrates that there was no single, obvious answer to the question.

Although the district court did not expressly reject the existence of confusion and uncertainty, it did conclude that radioactive mixed waste had been subject to RCRA from the beginning of the program in 1980. The court relied in part on EPA's "mixture rule," which provides that a mixture of solid waste as defined in RCRA and listed hazardous waste is regulated as a RCRA hazardous waste. But in this case, resort to the "mixture rule" simply begs the question since it applies only to combinations of hazardous waste and <u>solid</u> waste. The question remained whether radioactive mixed waste was regulated by RCRA at all because it was excluded from the statutory definition of "solid waste." The answer to that question was far from clear and did not depend in any way on the application of the mixture rule.

below erroneously refused to defer to that agency's determination.

2. DOE satisfied the other requirements for obtaining interim status for WIPP. -- Even though WIPP is qualified for interim status, other requirements had to be satisfied in order to obtain that status. Whether DOE met them was fully litigated below, but the district court did not address them. The relevant facts are not disputed, however, and it is appropriate for this Court, in the interest of achieving a final resolution, to determine this question.

Section 3005 of RCRA provides that if a facility qualifies under the "in existence" criterion, it must then submit a timely permit application to obtain interim status. 42 U.S.C. 6925(e). The pertinent EPA regulations require filing Part A of the application within 6 months after "publication of regulations which first require [the facility] to comply with the standards * * *" and filing Part B of the application "twelve months after the date on which the facility first becomes subject to such permit requirement * * *." 40 C.F.R. 270.10(e)(1), 270.73(d)(1).[12/] In this case, the trigger date for those deadlines was July 25, 1990, the effective date of New Mexico's final authorization by EPA to regulate radioactive mixed waste

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12/ EPA also has an alternative deadline for filing the Part A application of "[t]hirty days after the date [a facility] become[s] subject to the standards * * *." 40 C.F.R. 270.10(e)(ii). EPA has interpreted this deadline to apply only when changes in the operation of a facility subjects the facility to the permit requirement, not when changes in the law or regulations create that requirement. 45 Fed. Reg. 76,633 (Nov. 19, 1980). This deadline, therefore, is not applicable here.

given final authorization that did not include authority to regulate radioactive mixed waste. 51 Fed. Reg. 24,504 (July 3, 1986). Consistent with the statutory scheme for operation of state programs, the authorized state program, albeit incomplete, displaced Federal permitting authority. Consequently, EPA concluded that "radioactive mixed wastes are not currently subject to Subtitle C [hazardous waste] regulations in authorized States." Ibid. The 1986 notice, therefore, triggered a whole series of regulatory changes with respect to RCRA's application, and these were the formal processes by which authority to regulate would be obtained by the 40 authorized states where there was no regulation of radioactive mixed waste under RCRA.

Furthermore, these changes, ignored by the district court, even conform to that court's apparent criteria for a "regulatory change." Under Section 3006(b) of RCRA, EPA must publish a proposed approval of a state's application for final authorization, as well as provide notice and an opportunity for a hearing prior to granting final approval. 42 U.S.C. 6926(b). Thus, these changes are made under the same notice and comment rulemaking procedures prescribed in the Administrative Procedure Act. See 5 U.S.C. 553. There can be little doubt that in the authorized states, there was a "regulatory change" enabling existing facilities to obtain interim status.

For all these reasons, therefore, EPA reasonably concluded that there had been a regulatory change after WIPP came into existence that qualified it for interim status, and the court

"regulatory change" for determining interim status. Further, in response to the New Mexico state agency's specific request regarding the status of WIPP under Federal law, the EPA Regional Counsel explained that the trigger date would be the date of the authorization, and not the repeal of the state law exemption for WIPP. Thus, under the federal rule, which New Mexico has embraced, WIPP has interim status.12/

Second, the date of repeal simply cannot be the trigger date for purposes of interim status under RCRA because any requirement to have a permit as of that date could have arisen not under RCRA, but only as an independent state law requirement. The repeal was enacted and made effective in advance of the approval of the New Mexico state program for regulation of radioactive mixed waste. As the EPA Regional Counsel explained, "[t]he change in state law was not a change under RCRA until the state became authorized to regulate radioactive mixed waste under RCRA" (Ad. Rec. III. A) (emphasis supplied). At the time of the repeal, New Mexico did not have RCRA authority to regulate radioactive mixed waste, which was not regulated under RCRA by either the State or EPA. Accordingly, at that time, WIPP did not

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12/ Moreover, to the extent the plaintiffs assert that interim status was lost for failure to timely file Part B of the application, EPA's views are virtually conclusive because, as the Regional Counsel explained, only EPA, and not the State, has the authority to enforce in New Mexico the loss of interim status provisions added to RCRA by the 1984 amendments (Ad. Rec. III. A). See Arkansas v. Oklahoma, 60 U.S.L.W. 4176, 4181 (Feb. 26, 1992) (EPA's reasonable interpretation state water quality standards incorporated into federal law as a rule of decision entitled to deference,.

under RCRA. Indeed, the New Mexico state agency initially agreed with this position. As noted supra, p. 31, that agency set specific dates for DOE to submit Part A and Part B applications that were measured from the authorization date. The agency expressly noted that compliance was necessary to obtain and maintain interim status. There is no dispute that DOE met those dates. However, in the court below, the State and EDF argued that the trigger date was February 23, 1989, the effective date of New Mexico's repeal of the statutory exemption for WIPP, which was more than a year before New Mexico received authority under RCRA to regulate radioactive mixed waste.

The July 1990 date is the correct date for two reasons. First, as noted, the New Mexico Hazardous Waste Act and its implementing regulations incorporate the federal rules for determining interim status. See supra, pages 28-31. The state statute provides that facilities that have "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. Section 74-4-9. And Part IX of the New Mexico regulations incorporate verbatim 40 C.F.R. Part 270, EPA's regulations regarding permitting and interim status.

In its 1988 notice, EPA said that in states with base authorization, a facility that handled radioactive mixed waste but not other hazardous waste would not be subject to RCRA regulation until that state had received the supplemental authorization to issue permits for radioactive mixed waste. In EPA's view, the date of such authorization would be the

need interim status under RCRA since no permit requirement was applicable until the State received authorization.14/

WIPP, therefore, has satisfied all applicable requirements for interim status under RCRA, and DOE is entitled to a declaratory judgment to that effect.

D. The permanent injunctions must be set aside because the court did not weigh the equities in deciding whether to grant such relief. -- Even if the court correctly concluded that either DOE had not complied with RCRA permitting requirements or that the Interior Department had violated the limitations of FLPMA, the court did not satisfy the necessary prerequisites for granting injunctive relief for such violations. The Supreme Court has made clear that "a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every

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14/ Indeed, to the extent the parties below were relying on the repeal date as the trigger date for interim status, they were seeking to enforce a purely state law requirement. The citizens' suit provision of RCRA, however, is limited to enforcement of requirements that have "become effective pursuant to this chapter," i.e., RCRA. 42 U.S.C. 6972(a)(1)(A). While that phrase would include the provisions of an EPA-approved state program that is operating "in lieu of the Federal [RCRA] program," it plainly does not encompass requirements that have not become effective pursuant to RCRA but only pursuant to independently effective state law. Therefore, the court below had no jurisdiction to enforce a purely state law requirement with respect to radioactive mixed waste at WIPP.

Nor could there be pendent jurisdiction for such a claim. Since the New Mexico Hazardous Waste Act does not contain a citizens' suit provision, it is doubtful the private parties invoking RCRA's citizens suit provision possessed and could assert a state law claim to enforce purely state law requirements. And the State of New Mexico in its lawsuit did not invoke the citizens suit provision of RCRA. The State raised the RCRA issue only in the context of its claim that DOE had falsely represented to the Interior Department that DOE had obtained all necessary environmental permits.