

MEMORANDUM

TO: Benito Garcia, HRMB Chief
FROM: *SOZ* Steve Zappe
DATE: March 15, 1995
SUBJECT: Outstanding issues concerning WIPP Biennial Environmental Compliance Report (BECR)

We have a little over a month before the State must certify WIPP's compliance to the Solid Waste Disposal Act (implemented in the New Mexico Hazardous Waste Management Regulations) as required by the Land Withdrawal Act (LWA). I have attached my comments on the BECR for your review, which are admittedly brief due to the reasons stated in the second bullet. However, before the Secretary can issue any statement of compliance, several issues must be resolved.

- John Parker and his group reviewed several sections of the BECR (dealing with the NM Solid Waste Act, Air quality Control Act, Water Quality Act, and Water Supply Regulations). However, the UST Bureau has not reviewed applicable sections of the BECR for a compliance determination. We need to transmit those sections to the UST Bureau - what is the most appropriate mechanism? → *Call James Beazley & ask him who to contact on this issue*
- You will note that my comments #3 and #4 deal with WIPP operation under interim status. I spoke with Susan McMichael on March 9 and requested a fact sheet to help me clarify the issues in order to adequately incorporate them into the compliance determination. I think it might be more appropriate for you to request this information.
- Chris Wentz is hosting a meeting for affected state agencies on April 4 to discuss options for the State's certification response. There is some question about how much the State must certify - either everything in the BECR, or just what the LWA requires. At an informal meeting on March 9, we considered several response options: (1) a joint letter co-signed by whatever Secretaries have regulatory oversight, or (2) separate responses from each department. Do you have any suggestions?

See attached

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Comments from NMED Hazardous and Radioactive Materials Bureau on the WIPP Biennial Environmental Compliance Report, October 1994

1. Table 25-3, Section 25.2.2.11 (90-day or less accumulation time) - The table states the compliance status is "Achieved", when it should be "Up to Date". The 90-day storage requirements are an on-going issue, not something that can be considered achieved.

Cobr

2. Table 25-3, Section 25.2.2.18 (Extension of the 90-day storage period due to unforeseen, temporary, and uncontrollable circumstances) - The table states the compliance status is "Achieved", whereas the explanation on page 25-17 states an extension for waste nickel-cadmium batteries was granted on January 15, 1991. This was a one-time extension, and one-time compliance should not be construed to imply continued compliance. Unfortunately, none of the three categories of compliance status presented in Section 1.5.1 (Achieved, Up to Date, Not Applicable) fit this particular situation.

Cobg

3. Table 25-5, Section 25.2.4 (Regulatory requirements for interim status treatment, storage, and disposal facilities (TSDFs), 40 CFR Part 265, HWMR-7, §§601 and 602) - The assertion "The WIPP is an interim-status facility" is contested by the State, and as such the State will not certify the WIPP as being in compliance with regulations relating to interim status TSDFs.

AG'S Office

4. Table 25-6, Section 25.2.5 (Hazardous/mixed waste permit program, 40 CFR Part 270, HWMR-7, §§901 and 902) - The statement on page 25-59, "The DOE contends (with the concurrence of the EPA) that WIPP is an interim-status facility" is contested by the State, and as such the State will not certify the WIPP as being in compliance with regulations relating to interim status TSDFs. Specifically, compliance with these regulations is not certified:

AG'S Office

- 40 CFR 270.10 General Application Requirements
- 40 CFR 270.71 Operation During Interim Status
- 40 CFR 270.72 Changes During Interim Status

ATTORNEY GENERAL OF NEW MEXICO

TOM UDALL
Attorney General

P.O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6000

FACSIMILE NO.
(505) 827-4440

THIS IS
THE LATEST
DRAFT

DATE: 5 OCT. 1994

TO: SUSAN McMICHAEL

TELEPHONE NO. 0127

FACSIMILE NO. _____

FROM: LINDSAY LOVEJOY

TELEPHONE NO. 6695

TOTAL NUMBER OF PAGES, INCLUDING THIS PAGE: 38

MESSAGE: SUSAN - I THINK THE ATTACHED REFLECTS OUR
DISCUSSION. PLEASE CALL ME WITH ANY CONCERNS.
THANKS - LINDSAY

For the record
12/12/94 12:13
(2002-3) + 24, 30
(2002-6)

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DRAFT
July 19, 1994

REV. 10/5/94 LA

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STATE OF NEW MEXICO, ex rel.
TOM UDALL, Attorney General,

Plaintiff,

and

NATURAL RESOURCES DEFENSE COUNCIL,
et al.,

Plaintiff-Intervenors,

and

Congressmen PETER H. KOSTMAYER,
WAYNE OWENS, and BILL RICHARDSON,

Plaintiff-Intervenors,

and

STATE OF TEXAS, ex rel. DAN
MORALES, Attorney General,

Plaintiff-Intervenor,

v.

HAZEL O'LEARY, Secretary of
the Department of Energy, et al.,

Defendants.

Civil Action No. 91-2527 (JGP)

ENVIRONMENTAL DEFENSE FUND, et al.,

Plaintiffs,

v.

HAZEL O'LEARY, Secretary of the
Department of Energy, et al.,

Defendants.

Civil Action No. 91-2929 (JGP)
(Consolidated)

CONSENT DECREE

July 19, 1994

This Consent Decree is entered into and by the United States of America, through the U.S. Department of Energy ("DOE") and the U.S. Department of the Interior ("DOI"), the Secretary of Energy, the Secretary of the Interior, the Assistant Secretary of the Interior for Land and Minerals Management, and the Director of the Bureau of Land Management; the State of New Mexico; the State of Texas; Environmental Defense Fund; Southwest Research and Information Center; Concerned Citizens for Nuclear Safety; and Natural Resources Defense Council, (now-former) Congressmen Peter H. Kostmayer and Wayne Owens, and Congressman Bill Richardson (all of which are collectively referred to as the "Parties"). The Parties submit this Consent Decree to this Court for approval and entry as an Order of this Court in both of the above-styled cases (collectively referred to as "this action").

INTRODUCTION

A. In 1979, Congress authorized DOE to construct the Waste Isolation Pilot Plant ("WIPP"), which is located approximately 26 miles from Carlsbad, New Mexico, as a research and development facility. Pub. L. No. 96-164, 93 Stat. 1259, 1265 (1979).

B. During 1980, DOE prepared and published a final environmental impact statement ("FEIS") for WIPP. 45 Fed. Reg. 70,539 (Oct. 24, 1980). On January 22, 1981, DOE issued its Record of Decision ("ROD") on the FEIS, in which DOE made the

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determination to proceed with the phased development of the WIPP as a potential repository for the transuranic ("TRU") waste stored at the Idaho National Engineering Laboratory. The DOE ROD anticipated the need for supplemental NEPA review.

C. On March 23, 1982, DOI issued Public Land Order 6232, administratively withdrawing 8,960 acres for eight years for the purpose of facilitating site characterization and preliminary design studies for WIPP. 47 Fed. Reg. 13,340 (March 30, 1982).

D. On January 10, 1983, DOE made application to the Bureau of Land Management ("BLM") to withdraw the 8,960 acres at the WIPP site to permit the commencement of the construction phase of the WIPP project. On June 29, 1983, BLM acted upon DOE's January 1983 land withdrawal application by issuing Public Land Order 6403, withdrawing the requested acreage for eight years, for the purpose of construction of the WIPP facility. 48 Fed. Reg. 31,038 (July 6, 1983). DOE commenced the construction phase of the WIPP project in mid-1983.

E. On January 11, 1985, the United States Environmental Protection Agency ("EPA"), pursuant to section 3006(b) of the Resource Conservation and Recovery Act ("RCRA," 42 U.S.C. § 6901 et seq.), 42 U.S.C. § 6926(b), published a notice granting New Mexico final authorization to operate its basic hazardous waste program in lieu of RCRA. 50 Fed. Reg. 1515, 1516 (Jan. 11, 1985). Such

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authorization of New Mexico's hazardous waste program did not state that New Mexico is authorized to regulate radioactive mixed wastes under New Mexico state law in lieu of RCRA.

F. In January 1989, DOE made an application to DOI for an extension and modification of P.L.O. 6403 to authorize the project Test Phase, which included the introduction of mixed radioactive and hazardous waste for tests.

G. DOE presented a draft Supplement to the 1980 FEIS to the public in April of 1989 ("SEIS"). In January 1990, DOE issued a thirteen-volume final SEIS ("FSEIS"). In June 1990, DOE issued its ROD on the FSEIS in which it determined that it would continue with the phased development of WIPP by proceeding with the Test Phase. 55 Fed. Reg. 25,689 (June 22, 1990). The ROD states that DOE would issue a second SEIS prior to a decision to proceed with waste disposal at WIPP.

H. New Mexico received EPA authorization to enforce state law in lieu of RCRA for mixed radioactive and hazardous wastes, effective July 25, 1990. 55 Reg. 28397 (July 11, 1990).

I. The New Mexico Hazardous Waste Act, N.M. Stat. Ann. § 74-4-1, et seq. ("HWA"), governs the treatment, storage, and disposal of hazardous wastes, including mixed radioactive and hazardous waste, in New Mexico.

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J. The HWA was amended to apply to WIPP effective February 23, 1989. N.M.L. 1989, ch. 4, §§ 1,2.

K. The New Mexico Environment Department ("NMED") is the New Mexico state agency charged with administering and enforcing the HWA and related New Mexico regulations for the treatment, storage or disposal of hazardous waste and mixed radioactive and hazardous waste in the state of New Mexico.

L. WIPP is a DOE federal facility, and Westinghouse Electric Corporation operates WIPP under contract with DOE.

M. On March 29, 1990, EPA published an expanded Toxicity Characteristic ("TC") rule for the determination of a characteristic of hazardous waste, which rule had an effective date of September 25, 1990. 55 Fed. Reg. 11798 (March 29, 1990).

N. On August 22, 1990, BLM issued its ROD as a cooperating agency on the FSEIS and adopted DOE's proposed action of proceeding with the phased development of WIPP by conducting a Test Phase. 55 Reg. 38,586 (Sept. 19, 1990).

O. On January 22, 1991, DOI issued P.L.O. 6826, which extended and modified P.L.O. 6403 to permit the introduction of TRU waste at the WIPP site for the Test Phase. P.L.O. 6826 also provided that, upon certification by DOE that all applicable

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environmental laws and regulations had been complied with, DOI would issue a notice to proceed with the Test Phase. 56 Fed. Reg. 3038 (Jan. 28, 1991).

P. On the same date, January 22, 1991, DOE submitted a Part A permit application for WIPP to NMED. On February 26, 1991, DOE submitted a Part B permit application for WIPP to NMED.

Q. On October 3, 1991, the Secretary of Energy notified the State of New Mexico that DOE would begin transporting TRU wastes to WIPP for testing purposes. On October 3, 1991, DOI issued a notice to proceed with a Test Phase at WIPP. 56 Fed. Reg. 50,923 (October 9, 1991).

R. DOE did not and does not have an NMED permit or an EPA permit to treat, store or dispose of hazardous waste or mixed radioactive and hazardous waste at WIPP.

S. On October 9, 1991, New Mexico filed a Complaint for Declaratory and Injunctive Relief, a motion for a temporary restraining order to stop the introduction of waste for testing, and a memorandum in support, initiating the New Mexico action. New Mexico alleged that DOE and DOI had violated the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701, et seq., Public Law No. 96-164, and the Administrative Procedure Act, 5 U.S.C. § 551, et seq. New Mexico also alleged that DOE committed

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various violations under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq., pertaining to WIPP's Test Phase. Named defendants included DOE, the Secretary of Energy, DOI, the Secretary of the Interior, the Assistant Secretary of the Interior for Land and Minerals Management, and the Director of the Bureau of Land Management.

T. On or about October 28, 1991, the Environmental Defense Fund, Natural Resources Defense Council, Southwest Research and Information Center, Concerned Citizens for Nuclear Safety, (now-former) Congressmen Peter H. Kostmayer and Wayne Owens, and Congressman Bill Richardson moved to intervene in the New Mexico case as plaintiff-intervenors.

U. On or about November 1, 1991, the State of Texas moved to intervene in the New Mexico case as a plaintiff-intervenor.

V. The Environmental Defense Fund, Natural Resources Defense Council, Southwest Research and Information Center, and Concerned Citizens for Nuclear Safety on or about November 12, 1991, filed the EDF case, alleging four claims for relief; (i) that DOE had not obtained a permit to treat, store or dispose of hazardous waste or mixed radioactive and hazardous waste at WIPP; (ii) that, in the alternative, DOE failed to obtain interim status for WIPP; (iii) that, in the alternative, if WIPP ever had interim status, it was lost by failure to make certain filings within the necessary time

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periods; and (iv) that, in the alternative, DOE had violated interim status regulations.

W. On November 26, 1991, the Court entered a preliminary injunction in the New Mexico case, ordering DOE to immediately cease all activities relating to the introduction of TRU waste into WIPP based on the Court's conclusion that the DOI administrative land withdrawal violated FLPMA.

X. On January 31, 1992, the Court entered a permanent injunction in both consolidated cases, prohibiting DOE from introducing radioactive and hazardous waste to WIPP, based on findings that the DOI administrative land withdrawal order violated FLPMA and that WIPP did not have interim status.

Y. On July 10, 1992, the United States Court of Appeals for the District of Columbia Circuit, in Case Nos. 91-5387 and 92-5044, affirmed the District Court's entry of an injunction under FLPMA, but reversed and remanded the District Court's ruling under RCRA.

Z. On October 30, 1992, the "Waste Isolation Pilot Plant Land Withdrawal Act," Pub. L. No. 102-579 (the "WIPP Act"), became law. The WIPP Act sets forth a number of conditions which must be satisfied by DOE before DOE may introduce radioactive waste or mixed radioactive and hazardous waste into WIPP.

DRAFT
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AA. On October 21, 1993, DOE publicly stated that it would not conduct tests using radioactive waste, hazardous waste, or mixed radioactive and hazardous waste at the WIPP site.

BB. There is currently pending in the New Mexico case a motion for attorneys' fees and costs filed by the non-governmental Plaintiff(s) regarding litigation of the FLPMA claims.

CC. There are pending cross-motions for summary judgment pending in the EDF case on the question of whether DOE has interim status for WIPP under the HWA.

DD. It is in the interests of the public, the Parties, and judicial economy to resolve certain pending disputes in this action without further litigation.

EE. The Parties have agreed to a settlement of the New Mexico case and the EDF case, without any further admission or adjudication of fact or law, which they consider to be a fair, just, adequate and equitable resolution of all remaining claims raised in the cases.

FF. The Parties agree that settlement and entry of this Consent Decree is made in good faith to avoid expensive and protracted litigation and to settle and resolve all remaining

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claims and defenses between the Parties which have been asserted in this litigation.

GG. The Parties agree that the terms and provisions of this Consent Decree represent a fair, reasonable and equitable settlement of all remaining matters which have been raised by the Parties to this litigation.

HH. The Parties to this Consent Decree consent to the entry hereof as an order and judgment of this Court.

NOW THEREFORE, it is hereby ordered, adjudged and decreed as follows:

I. DEFINITIONS

Words used in this Consent Decree are to be taken and understood in their common and ordinary sense unless this Consent Decree indicates that a different meaning was intended. Words having a technical meaning are to be interpreted in their technical sense. Notwithstanding the foregoing, whenever the following terms are used in this Consent Decree, the following meanings shall apply:

A. "EPA Permit" means a permit to dispose of hazardous waste or mixed radioactive and hazardous waste issued by EPA pursuant to RCRA for those matters for which New Mexico law does not operate in lieu of federal law pursuant to 42 U.S.C. § 6926.

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B. "RMED Permit" means a permit to dispose of hazardous waste or mixed radioactive and hazardous waste issued by RMED pursuant to the HWA.

A C. "Physical construction" has the definition contained in 40 C.F.R. § 270.2 (1993), and means excavation, movement of earth, erection of forms or structures, or similar activity to prepare WIPP to accept hazardous waste or mixed radioactive and hazardous waste.

D. "Plaintiffs" means the original and intervening plaintiffs in the above-styled cases.

E. "Withdrawal" means the geographical area described pursuant to §3(c) of the WIPP Act.

II. JURISDICTION

This Court has jurisdiction over the parties and the subject matter of this action.

III. PARTIES BOUND

This Consent Decree shall apply to and be binding upon each of the Parties and their successors. DOE is obligated to each of the Plaintiffs to perform all of the requirements of this Consent Decree. DOE shall be responsible for ensuring that its contractors

Rider A

The New Mexico Hazardous Waste Management Regulations, effective September 23, 1994 ("20 NMAC Part 4.1"), Part 901, which incorporates by reference

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and subcontractors comply with this Consent Decree. The undersigned representatives of the respective Parties certify that they are fully authorized by the party they represent to enter into the terms and conditions of this Consent Decree and to execute this Consent Decree and to legally bind that party.

IV. AGREEMENTS

The Parties agree and the Court hereby orders as follows:

A. DOE shall not transport to or treat, store, or dispose of any hazardous waste, any mixed radioactive and hazardous waste and/or any radioactive waste within the Withdrawal without a final NMED permit and a final EPA permit.

B. DOE shall not transport to or treat, store or dispose of ~~[at the WIPP facility]~~ any hazardous waste, any mixed radioactive and hazardous waste and/or any radioactive waste within the Withdrawal without having complied with the requirements of [§§ 6 (c)(2)(B), 7(a), 7(b), 8(d), 8(g), 9(a), 12, 16, 17 and 19] of the WIPP Act.

(B) →

DOE shall not undertake physical construction ^{within the Withdrawal} ~~[of the WIPP facility]~~ without a final NMED Permit and a final EPA Permit; provided, however, that DOE may undertake activities within the Withdrawal that are specifically identified and described in Exhibit A ("Exhibit A Activities") before obtaining a final NMED Permit and a final EPA Permit. DOE may undertake Exhibit A

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To	Benito Garcia	From	Susan McMichael		
Co./Dept.		Co.			
Phone #		Phone #			
Fax #		Fax #	1628		

Rider B

C. DOE shall not engage in any activity within the Withdrawal covered by 20 NMAC Part 4.1, Part 901, incorporating by reference 40 CFR Part 265, Subparts I, J, K, L, M, N, O, P, Q, R, W, AA, BB, or DD prior to obtaining a final NMED Permit and a final EPA Permit.

D. DCE shall not make any of the changes during interim status listed under paragraph (a) of 20 NMAC Part 4.1, Part 901, incorporating by reference 40 CFR 270.72, with respect to the WIPP prior to obtaining a final NMED Permit and a final EPA Permit.

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Activities only in compliance with applicable law and regulations, including the requirements applicable to facilities with interim status pursuant to RCRA and HWA. ~~With respect to HWER-7 Rule 901, 40 C.F.R. § 270.72, DOE shall be deemed to have obtained any necessary NMED consent to undertake the Exhibit A Activities identified and described in Exhibit A.~~ However, no other consents are deemed obtained, and any departure from the descriptions in Exhibit A may give rise to additional administrative requirements under HWER-7, Rule 901, ~~40 C.F.R. §270.72 or other regulations.~~

20 NMAC Part 4.1

or other regulations.

F ~~D~~. DOE may undertake activities within the Withdrawal that are not prohibited by paragraphs A, B, ^{C, D} and ^E of this Section IV. DOE may undertake such activities only in compliance with applicable law and regulations, including the requirements applicable to facilities with interim status pursuant to RCRA and HWA.

G ~~E~~. Although DOE may have or claim to have an obligation or administrative approval to undertake an activity, DOE shall nevertheless comply with paragraphs A, B, C and D of this Section IV.

H ~~F~~. 1. To enable Plaintiffs to monitor compliance by DOE with this Consent Decree, every three months, commencing on a date three months after the first day of the month following the date this Consent Decree is effective, DOE shall provide to Plaintiffs

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C

a Report of Activities ("Report"). The Report shall set forth, with reasonable specificity, the activities which DOE performed at the WIPP facility during the three months preceding the date of the Report and the activities which DOE intends to perform at the WIPP facility during the three months after the date of the Report. (The first Report shall cover the period beginning with the date this Consent Decree is effective.) Office work, employee training, and environmental monitoring activities may be excluded from the Report. The Report shall be certified in accordance with 40 C.F.R. § 270.11.

2. The identification in a Report of an intended activity in itself does not create any obligation to perform the intended activity, nor does it create any right to perform the intended activity.

or NMED

3. In response to a request by any of the Parties, DOE shall provide ~~existing~~ documents concerning any past or intended activities identified in a Report within 30 days of the request. DOE shall provide the Plaintiffs ^{and NMED} with free and timely access to data relating to health, safety, or environmental issues at WIPP, including preliminary reports relating to health, safety or environmental issues at WIPP, and shall to the extent practicable permit the Plaintiffs to attend meetings relating to health, safety, or environmental issues at WIPP with expert panels and peer review groups.

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DOE shall also provide a copy of the Report to NMED, provided that acceptance of the Report does not constitute NMED approval of any described activity or waiver of NMED's right to enforce the HWA, 20 NMAC Part 4.1, or other applicable statutes and regulations.

G. Prior to submission of a compliance certification application to EPA pursuant to § 8(d) of the WIPP Act, DOE shall complete a Second Supplemental EIS (SSEIS) covering all current and proposed facilities and activities at WIPP and related activities at waste generating sites. A ROD will be issued by DOE before submission of a compliance certification ^{application} package.

H. Subject to expansion in the scoping process, DOE agrees that the SSEIS will address all generation, treatment, storage and disposal alternatives for all relevant waste types and waste generating sites. The SSEIS will address, at a minimum, the generation, management, and minimization of TRU waste. The SSEIS will analyze the relationship among these activities and their integration with defense and energy research, environmental restoration, decontamination and decommissioning, pollution prevention, and technology development. Issues to be examined include waste source reduction, land use planning assumptions related to waste management (including institutional controls and site dedication), general categories of decontamination and decommissioning, and alternative waste treatment technologies. The SSEIS will cover existing waste inventories; past, present, and anticipated future sources of different waste types; and past, present, and anticipated future treatment, storage and disposal facilities. The final scope, however, will be subject to the NEPA scoping process, including full public participation.

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I. Preparation of the SSEIS will be coordinated with the development of the Site Treatment Plans by generating sites under the Federal Facility Compliance Act (FFCA) of 1992 and the Environmental Restoration and Waste Management Programmatic EIS (PEIS). Alternatives developed in the FFCA processes and the PEIS process will be included among alternatives considered in the WIPP SSEIS. D

J. The WIPP SSEIS will consider a full range of engineered alternatives, including cementation, shredding, supercompaction, incineration, vitrification, improved waste canisters, grout and bentonite backfill, melting of metals, alternative configurations of waste placement in the disposal system, and alternative disposal system dimensions. Pending completion of a ROD DOE shall take no action constituting an irrevocable commitment with respect to any such alternative.

K. The DOE waste minimization and source reduction program will be analyzed in detail in the WIPP SSEIS as to all relevant waste types and waste generating sites.

L. Scoping meetings will be held in Albuquerque, Carlsbad, Santa Fe, and other locations. Public hearings on the draft SSEIS will be held in Albuquerque, Carlsbad, Santa Fe, and other locations where hearings were held in connection with the draft

Rider D

and State or EPA orders requiring compliance with any approved Site
Treatment Plans

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applicable to a facility having interim status pursuant to Paragraphs C and D of Section IV.

B. Violations of RCRA, HWA, NEPA, or any other statute, regulation, rule or order, or common law for claims that were not made in the EDF Case or the New Mexico Case.

F →

VI. DISPUTE RESOLUTION

G →

In the event a dispute arises regarding DOE's compliance with this Consent Decree, the Parties shall proceed as follows:

A. The Plaintiff(s), or any one of them, may notify DOE in writing of the alleged item of noncompliance.

B. DOE shall respond in writing within ten (10) days of its receipt of the notice of noncompliance, stating its position with respect to the alleged noncompliance.

C. If the dispute remains unresolved, designated representatives of DOE and the Plaintiff(s) claiming noncompliance, having authority to act on their behalf, with counsel also present if any party so requests, shall meet at an agreed upon time and place in New Mexico in an attempt to resolve the dispute. The meeting shall occur no later than ten (10) days, following the Plaintiffs' receipt of the DOE response.

Rider G

The following dispute resolution procedure ~~is supplemental to,~~
~~and does not preclude~~ ^{or} ~~the administrative and judicial enforcement~~
~~powers of NMED,~~ ^{by} ~~for activities arising under its regulatory~~ ^{any activity}
pursuant to the HWA. ^{arising under this}
~~agreement~~ ^{and}
^{under the regulatory}
^{authority of NMED}
^{pursuant to}

— Noting in this agreement shall be construed
as affecting the administrative or judicial enforcement powers
of NMED.

HWA, ~~and~~
its
regulations
or other
applicable
law.

— The term "supplemental" implies that
DR may need to be exhausted first ~~if~~
DR provision does not deal with issue that
NMED shall not be precluded from enforcement
for ^{TSD} activities arising under the Agreement.

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FSEIS or where hearings are needed to ensure affected citizens can provide testimony.

V. COVENANTS NOT TO SUE

In consideration of the agreements made by DOE in Section IV above, the Plaintiffs covenant not to sue or take administrative action against DOE pursuant to RCRA, HWA, or any other statute, regulation, rule or order, or common law with regard to the following:

A. All claims made in the EDF Case;

B. All claims in the New Mexico Case ^(E) ~~that have not been judicially resolved, including claims made pursuant to NEPA in conjunction with introduction of waste for the Test Phase;~~

C. Any claim by the Plaintiffs that DOE does not have interim status pursuant to the HWA by virtue of DOE's withdrawal or NMED denial of the pending NMED permit application to conduct test phase activities.

This covenant not to sue shall not apply to the following:

A. Failure by DOE to comply with this Consent Decree, including the failure of DOE to comply with laws and regulations

Rider E

concerning the adequacy of the 1990 FSEIS. This covenant shall not apply to the extent that DOE continues to rely on any portion of the 1990 FSEIS subsequent to DOE's preparation of the SSEIS concerning WIPP.

Rider F

C. Violations of NEPA arising in connection with DOE's future NEPA compliance concerning WIPP.

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D. The entire dispute resolution period shall not be more than twenty (20) days; provided, however, that DOE and the Plaintiff(s) claiming noncompliance may by written agreement extend the time for dispute resolution by an additional twenty (20) days. In no event shall the total time for dispute resolution exceed forty (40) days.

E. If the dispute is resolved pursuant to this Section VI, the Parties shall, as necessary, jointly petition the Court for amendment of this Consent Decree.

F. If the dispute is not resolved pursuant to this Section VI, the Plaintiff(s), or any one of them, may petition the Court for enforcement of this Consent Decree and seek all available relief, including the imposition of sanctions.

G. The service of notice on DOE of an alleged item of noncompliance shall not automatically halt an activity that is the subject matter of the dispute. DOE and the Plaintiff(s) claiming noncompliance may agree in writing that the activity shall be halted pending dispute resolution, or the Plaintiff(s), or any one of them, may petition the Court to halt the activity.

H. If the Plaintiff(s) claiming noncompliance prevail(s) or substantially prevail(s) in any dispute, DOE shall pay to such Plaintiff(s) all of their attorney fees (including a reasonable fee

for the services of salaried counsel), expenses, and costs arising by reason of the dispute.

I. Dispute resolution need not be commenced or continued if in the opinion of any Plaintiff the alleged noncompliance by DOE may present an imminent and substantial endangerment to health or the environment.

VII. ATTORNEYS' FEES

DOE and/or DOI [?] agree to pay within ninety (90) days of the effective date of this Consent Decree the following amounts in full satisfaction of all claims of the Plaintiffs for attorney fees, expenses, and costs incurred through the date of the filing of this Consent Decree in the New Mexico and EDF cases:

A. \$ _____ to the Environmental Defense Fund for the claims of the Plaintiffs in the EDF case; and

B. \$ _____ to _____ for the claims of the non-governmental Plaintiffs in the New Mexico case.

VIII. NOTICE

Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those

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individuals or their successors give notice of a change to the other Parties in writing.

A. As to DOE and DOI:

B. As to State of New Mexico:

C. As to NMED:

D. As to State of Texas:

E. As to Southeast Research and Information Center:

Mr. Don Hancock
Southwest Research and Information Center

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F. As to Concerned Citizens for Nuclear Safety:

Ms. Margret Carde
Concerned Citizens for Nuclear Safety
107 Cienega Street
Santa Fe, New Mexico 87501

G. As to Environmental Defense Fund:

H. As to Natural Resources Defense Council:

IX. EFFECTIVE DATE

The Consent Decree shall become effective upon the date of entry as an Order of this Court.

X. AMENDMENTS

This Consent Decree can only be modified by the express written consent of the Parties. Every amendment to this Consent Decree shall be in writing and approved by Court order and its effective date shall be as established by the Court.

It is understood and agreed that the date on which DOE may receive a NMED permit, an EPA permit and all required certifications under the WIPP Act is unknown and unpredictable and that DOE may not obtain such permits and certifications until many years after the date now planned by DOE. It is further agreed that delays in obtaining such permits and certifications and consequent costs will not constitute a significant change in factual conditions, will not render this decree unworkable because of

July 10, 1984

unforeseen obstacles, and in any event are anticipated at the time of entry of this decree.

XI. RETENTION OF JURISDICTION

This Court shall retain jurisdiction over the Parties and this Consent Decree for purposes of enforcing its terms and conditions, to consider amendments, and to resolve disputes.

XII. TERMINATION OF CONSENT DECREE

DOE may petition the Court for termination of this Consent Decree only following its receipt of a final NMED Permit and a final EPA Permit for the disposal of hazardous waste and mixed radioactive and hazardous waste at the WIPP facility and receiving all required certifications to authorize disposal of radioactive waste pursuant to the WIPP Act. The Plaintiff(s) may file any objection to the DOE petition within thirty (30) days of the date DOE files a petition with the Court.

July 18, 1994

FOR THE UNITED STATES OF AMERICA

Date: _____

U.S. Department of Justice

Date: _____

U.S. Department of Energy

Date: _____

U.S. Department of the Interior

DRAFT
July 18, 1994

FOR THE STATE OF NEW MEXICO

Date: _____

**Attorney General of the
State of New Mexico**

July 19, 1984

FOR THE STATE OF TEXAS

Date: _____

Attorney General of the
State of Texas

STAFF
July 19, 1994

FOR THE ENVIRONMENTAL DEFENSE FUND

Date: _____

DRAFT
July 19, 1994

FOR THE NATURAL RESOURCES DEFENSE COUNCIL

Date: _____

DRAFT
July 19, 1994

FOR THE SOUTHWEST RESEARCH AND INFORMATION CENTER

~~_____~~ to: _____

Don Hancock
Southwest Research and
Information Center
105 Stanford, S.E.
Albuquerque, New Mexico 87106

DRAFT
July 18, 1994

FOR THE CONCERNED CITIZENS FOR NUCLEAR SAFETY

Date: _____

Margret Carde
Concerned Citizens for Nuclear
Safety
107 Cienega Street
Santa Fe, New Mexico 87501

DRAFT
July 19, 1994

FOR
FORMER CONGRESSMAN PETER H. KOSTMAYER
FORMER CONGRESSMAN WAYNE OWENS AND
CONGRESSMAN BILL RICHARDSON

Date: _____

DRAFT
July 19, 1994

FOR THE SOUTHWEST RESEARCH AND INFORMATION CENTER

Date: _____

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July 19, 1994

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CONGRESSMAN BILL RICHARDSON

Date: _____

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MEMORANDUM

TO: Steve Zappe, Hazardous Waste & Materials Bureau

FROM: Susan M. McMichael, Assistant General Counsel

DATE: March 27, 1995

RE: WIPP Interim Status

RCRA, and the State Hazardous Waste Act, provide "interim status" to hazardous waste treatment, storage and disposal facilities that were in existence prior to November 19, 1980 (the effective date of RCRA) "or a "statutory or regulatory change" that subjected the facility to RCRA regulation provided that the facility meet certain requirements, including the timely submittal of Part A and Part B applications. "Interim status is not granted by the regulatory agency; it is statutorily conferred. The agency's decision that a facility qualifies for interim status is in essence a statement of opinion which reflects the agency's decision not to take enforcement action against the facility." EDF et. al. v. DOE, No. 92-5045 (Ct.App. 1992)

The Environmental Defense Fund brought a federal lawsuit against DOE alleging, among other things, that the WIPP facility did not have a permit for the management of TRU waste at WIPP as required under RCRA, and that WIPP lacked "interim status" to exempt it from any of RCRA's permit requirements. The New Mexico Attorney General joined in this lawsuit. EDF v. DOE.

In February of 1992, the federal district court ruled that WIPP did not have interim status under RCRA because it was not in existence prior to November 19, 1980 or a "statutory or regulatory change" that subjected the facility to RCRA regulation. The district court's ruling was based upon its conclusion that because components of the radioactive mixed waste were subject to RCRA regulation before WIPP came into existence, the facility could not qualify for interim status.

DOE appealed the district court's decision to the federal court of appeals. On July 10, 1992, the Court of Appeals remanded to the district court for a determination of an issue the lower court did not reach: "the precise date of the regulatory change for the WIPP facility" [which would allow the facility to qualify for interim status]. The Court's ruling was limited to federal RCRA; the Court acknowledged in a footnote that the state has not made a final determination of the applicable trigger date for state law for interim status purposes. This issue has been briefed, but not decided by the district court.

I spoke with the AG's office (Linsey Lovejoy) to confirm the status of the lawsuit. The plaintiffs' are attempting to settle this issue with DOE. The negotiations have been slow. According to the AG, if DOE cannot provide a position by this summer, the plaintiffs may ask court may take some action.

When confronted with an allegation by DOE that the WIPP facility has interim status or should meet Part 265 standards, we should be careful to take a position which is consistent with the position of the State of New Mexico and the litigation. It has long been the position of the State of New Mexico that the WIPP facility is required to have a permit for the management of TRU waste at WIPP as required under state and federal law, and that the facility lacks "interim status" to exempt it from any state or federal permit requirements.

I have attached a copy of the decision from the Court of Appeals for your information.