



GARY E. JOHNSON
GOVERNOR

VIA TELEFAX

April 28, 1997

Cooper Wayman
Area Office Legal Counsel
U.S. Dept. of Energy
Carlsbad Area Office
P.O. Box 3090
Carlsbad, NM 88221

Dear Cooper:

This letter is to confirm our understanding of the procedural requirements and associated timeframes required for a final agency action regarding the Department of Energy/Westinghouse's (DOE/WID) Hazardous Waste Part B permit application for the Waste Isolation Pilot Plant (WIPP). Further, as we discussed briefly at the meeting and later by telephone, DOE/WID must submit several major areas of technical information to the Hazardous and Radioactive Waste Bureau (HRMB) in order for HRMB to issue a draft permit.

I. MINIMUM PROCEDURAL REQUIREMENTS

At our meeting we discussed the following minimum procedural requirements associated with the public hearing process for the draft permit. These procedural steps (with minimum changes as proposed in amendments to 20 NMAC 1.4) are currently set forth in 20 NMAC 1.4. and/or 20 NMAC 4.1. Procedural steps which are not expressly set forth are required as a matter of legal practice and are consistent with Department procedures. Based upon our discussion, we agreed that the time period between the issuance of the draft permit and final agency action is approximately 400 days. From the date of the issuance of the draft permit, the time periods are as follows:

1. Public review and comment period. The public review and comment period is forty-five (45) days, and is automatically extended to the end of the public hearing.

2. Notice of public hearing. The notice of public hearing is published at the end of the public review and comment period. The notice should be published sixty (60) days prior to the hearing to ensure that all parties have an adequate opportunity to file and review Notices of Intent to Present Technical Testimony.

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3. Public hearing. The public hearing may require thirty (30) to forty-five (45) days. At this time, however, it is difficult to predict.

4. Preparation of transcript. The preparation of the transcript for the public hearing may take between fifteen (15) to thirty (30) days from the date of the close of the public hearing.

5. Proposed findings of fact and conclusions of law. Following the preparation of the transcript, the parties will require between thirty (30) to sixty (60) days to prepare and file proposed findings of fact and conclusions of law.

6. Recommended decision. After the filing of proposed findings of fact and conclusions of law, the Hearing Officer must prepare and file a recommended decision. Given the scope of this proceeding, the Hearing Officer will require at least sixty (60) days to prepare and file the recommended decision.

7. Comments on recommended decision. After the Hearing Officer files the recommended decision, the parties will require at least thirty (30) days to prepare and file comments on the recommended decision.

8. Oral argument. The Secretary may request oral argument on the recommended decision. If the Secretary requests oral argument, the parties will require additional time to prepare for the oral argument, and the Secretary will require additional time to conduct the oral argument.

9. Final permit decision. The Secretary must prepare and issue a final permit decision and a written response to comments received during the public comment period. The preparation of the final permit decision and the written response to comments will require take between sixty (60) and ninety 90 days.

As you know, we are working on draft amendments to the Department's permitting procedures (20 NMAC 1.4) which we intend to distribute for public review and comment sometime next week. However, we have not included this is the timeframe above because the proposed amendments do not impact upon the timeliness of final agency action.

II. OUTSTANDING TECHNICAL INFORMATION REQUESTS

In addition to these procedural issues, we also discussed HRMB's request that DOE/WID provide additional technical information. A primary factor affecting the timeliness of issuing a draft permit is the amount of time DOE/WID takes to provide HRMB with the additional technical information, as well as the time needed by HRMB to review the information for administrative completeness and technical adequacy.

1. Groundwater Monitoring Plan

As stated in our February 25, 1997 letter, the DOE/WID determined that the groundwater monitoring plan was insufficient for the purpose of preparing for the WIPP Operational Readiness Review. HRMB also identified fifteen (15) deficiencies in the permit application for the groundwater monitoring plan (Appendix D18). HRMB received a response from DOE/WID on March 20, 1997, and is reviewing the technical adequacy of the information. We anticipate the need for further clarification, and will inform DOE/WID of specific additional requirements as soon as possible.

2. SWMU - No Further Action

DOE/WID is currently preparing additional technical information on a variety of corrective action requests to justify the request for "no further action" on these units. HRMB staff must review the information and modify the preliminary corrective action module to reflect the new information.

3. 1996 WIPP Land Withdrawal Act Amendments

The RCRA Part B permit application was predicated on EPA's Office of Solid Waste's full evaluation of the No-Migration Variance Petition. As a result, to demonstrate compliance with 40 CFR §264.601, the RCRA Part B permit application directly relied upon technical data and assumptions which presumably were substantiated in the Petition. See Chapter E and Appendix E. As we discussed, NMED does not believe the LDR exemption in the 1996 WIPP Withdrawal Act Amendments alleviates the need for the DOE/WID to comply with the requirements of 40 CFR 264.601(a). As a consequence, HRMB must obtain and evaluate additional supporting technical information to determine whether the application is administratively complete and technically adequate pursuant to 40 CFR §264.601. HRMB is in the process of preparing a list of items needed to review the RCRA Part B permit application for completeness and will provide the DOE/WID with a list of such additional information shortly.

4. Unidentified Additional Information

DOE/WID has indicated that it may want to submit "other information" and materials not (reflected) in the current application before the draft permit is issued for public comment. It is difficult to speculate upon the scope of this information, and therefore very difficult to determine the impact of the information on completing the draft permit. HRMB is required to review such information for administrative completeness and technical adequacy. This, in turn, could create the potential for further delay in the issuance of the draft permit. However, if any information is determined by DOE/WID to be necessary prior to the

issuance of the draft permit or a final permit it may be prudent to provide HRMB such information as soon as possible.

We do not anticipate that the amendments to the permit procedures under 20 NMAC 1.4 will create any delay in the permitting process due to the fact that these minimal procedural steps are required regardless of the new amendments. The purpose of the proposed amendments is to ensure an efficient process for the WIPP public hearing that protects due process and eliminates legal maneuvering. We fully expect to have the amendments in place before the public hearing. At this point in time, our primary concern regarding timeliness is the receipt and review additional technical information needed to issue a draft permit for public review and comment.

If you have any additional questions, do not hesitate to call me at (505) 827-0127.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan McMichael". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

SUSAN MCMICHAEL
Assistant General Counsel

cc: Gloria Barnes
Benito Garcia
Eric Ames