

September 26, 1997

Ms. Susan M. McMichael
Assistant General Counsel
New Mexico Environment Department
Harold Runnels Building
1190 St. Francis Drive
Santa Fe, NM 87501-6110

Subject: WIPP PART B PERMIT PROCEEDING/TELEPHONE CONVERSATION
SEPTEMBER 26, 1997 REGARDING NMED'S COMPLETENESS
DETERMINATION

Dear Susan:

On behalf of the United States Department of Energy (DOE) and the Westinghouse Waste Isolation Division (WID), co-applicants for a hazardous waste permit for WIPP, we certainly appreciate your efforts to raise and discuss certain permit related issues with us. Based on our telephone conversation today, we have significant concerns regarding NMED's apparent decision to issue a new completeness determination in connection with the DOE/WID's permit application.

As we understand our telephone conversation today, you explained that NMED has sent a letter to DOE/WID regarding its determination to issue a new completeness determination based on information received, at NMED's request and on DOE/WID's own initiative, since the original completeness determination in June 1996. Further, you stated that this decision was based on the fact that information that should have been provided in the application was not available as of June 1996, for example, disclosure information and the Groundwater Monitoring Plan, and which does not "clarify, modify, or supplement" the permit application. Finally, you explained that you were taking this action in order to avoid any challenge to the draft permit based on an inaccurate completeness determination.

Although we have not received your letter regarding this decision, we are confident that each post-completeness submission of information was intended to "supplement, clarify, or modify" information that had already been provided to NMED. With respect to specific information requested by NMED, we are confident that this information specifically related to previously submitted application material, or was in response to a statutory or regulatory change since submission of the permit application. As regards information submitted with NMED's approval at DOE/WID's request, we provided that

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information pursuant to our obligation to disclose all relevant facts during the application process in order to avoid any subsequent claims of misrepresentation. See 40 C.F.R. § 270.43(a)(2).

Notwithstanding the above, we believe that there is no legitimate basis for the NMED to rescind its original completeness determination and issue a new determination. Furthermore, we believe that this action undermines the integrity of the NMED review and decision making process and calls into question NMED's credibility as the entity solely responsible for making the completeness determination. Although DOE/WID submitted the permit application, which we deemed to be consistent with applicable requirements, it was NMED's exclusive responsibility to determine if that application met the regulatory requirements for "completeness" as of a certain point in time. DOE/WID had no control over that agency decision, except to respond to any requests for additional information. As you know, the HWMR, 20 NMAC 4.1.901.A.1., states that "[o]nce an application is determined to be administratively and technically complete, the Secretary shall prepare and issue either a Draft Permit or a Notice of Intent to Deny." As NMED stated in its June 1996 letter, the permit application was complete as of that date. The completeness letter provided a mechanism for addressing subsequent issues that arose after the completeness determination. Also, we would not like any schedule impacts to occur on permit issuance based on establishing a new completeness determination date, since we note that the current rules tie the permit issuance date to some number of months after the completeness determination.

Any concern about the agency's completeness determination could be fully addressed if NMED issued an updated completeness determination based on the statutory and regulatory changes since the original June 1996 determination, instead of rescinding its original decision. Furthermore, by virtue of DOE/WID's timely responses to requests for additional information from NMED subsequent to the determination of administrative completeness, potential challenges to procedural matters should be unwarranted.

Sincerely,



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Carlsbad Area Office
Legal Counsel



G. J. Barnes
Westinghouse
Senior Counsel

Ms. Susan McMichael

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cc: George Dials, CAO
Mike McFadden, CAO
Joe Epstein, WID
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