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MARK E. WEIDLER
SECRETARY

September 26, 1997

Senator Dede Feldman, Chairwoman
Radioactive & Hazardous Materials Committee
c/o Gordon Meeks, NM Legislative Counsel
311 State Capitol
Santa Fe, NM 87503

RE: Response to Memos for Record made by DOE

Dear Senator Feldman:

This letter responds to comments made by the Department of Energy (DOE) and a "Memo for Record" submitted to the Hazardous & Radioactive Materials Committee regarding the permitting of the WIPP facility. As I stated at the August 27, 1997 meeting in Carlsbad, we are working as diligently and expeditiously as possible to issue a draft permit for the WIPP facility. However, our efforts have been impeded by several factors which, in turn, have directly and adversely affected the permitting process.

Enclosed please find a letter which outlines some of these problems and responds to comments made by DOE in its "Memo for Record." We believe that DOE's efforts to "expedite" this process and create political pressure serves to hinder and not advance the more important task of issuing a draft permit. We appreciate your concern and are hopeful that you can support the Department's efforts to concentrate its resources upon the permitting of the WIPP facility.

If you, or any of your distinguished colleagues, have any questions, do not hesitate to contact me at (505) 827-2834.

Sincerely,

A handwritten signature in cursive script that reads "Ed Kelley".

Ed Kelley

970939



cc: w/encl.

Governor Gary Johnson
Tom Udall, Attorney General
J. Heaton, Representative & Vice Chair
Radioactive & Hazardous Waste Materials Committee
Mr. Gordon Meeks, NM Legislative Council
George Dials, DOE
Joe Epstein, Westinghouse
F. Marcinowski, USEPA
Al Alm, DOE



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EDGAR T. THORNTON, III
DEPUTY SECRETARY

September 26, 1997

Mr. Cooper Wayman
DOE Carlsbad Office
PO Box 3090
Carlsbad, NM 88221

Ms. Gloria Barnes
Westinghouse Corp.
PO Box 2078 ms-120
Carlsbad, NM 88221-2078

Dear Cooper and Gloria:

This letter confirms our telephone conversation of today regarding some factors which have impeded the WIPP permitting process. The New Mexico Environment Department (NMED) is working diligently and expeditiously as possible to issue a draft permit for the WIPP facility. Our efforts, however, have been impeded by several factors which, in turn, have unfortunately created delay in this process. The issuance of a draft permit for the WIPP facility is a top priority for NMED and we are appreciative of any help which you may provide in understanding that attempts to "expedite" this process through political pressure serves only to hinder and not advance NMED's goal of issuing a draft permit.

1. *Political Pressure*

During the last several months, NMED expended substantial valuable time and resources addressing issues arising from political pressure and other issues which neither it nor the State of New Mexico has any control. For example, the Department of Energy's (DOE) proposed "timeline for issuance of a WIPP permit" was based upon assumptions which cannot be verified. It is virtually impossible to estimate how much time the public participation process associated with the permit issuance will take. Neither the NMED Secretary nor any person in this State can legally waive procedural requirements or otherwise exempt DOE and Westinghouse (WID) from these processes. Further, we could spend the next year discussing whether fourteen (14) days (as suggested by DOE/WID) is sufficient time for persons to provide a Hearing Officer proposed findings of fact and conclusions of law for a complex permit hearing which, in turn, could take up to 30 days. Common sense tells us that it almost certainly not enough time. Under the law, however, we can advise our clients that providing insufficient notice and opportunity to respond has resulted in reversible error which would result in a remand for a new hearing. In any event, we cannot predict these issues with any certainty.

In addition, as recently as last week, we received a letter and "Memo for Record" from DOE addressed to Senator Feldman suggesting that NMED's Division Director, Mr. Kelley somehow "exaggerated" his remarks in a August 29, 1997 meeting of the Hazardous and Radioactive Materials Committee. As a result, NMED will once again spend valuable and crucial time to respond to DOE's letter in that they contain statements which are inaccurate. For example, DOE stated that it "concludes" that the permitting of the Andrews facility in Texas took approximately one and one half years. The "time period" for Texas or any other state to issue RCRA Part B permits depends upon many factors such as the complexity of the issues involved, completeness and technical adequacy of the application, public participation and staff resources. We simply do not believe that the WIPP permitting process should be hindered by issues which have little relevancy to the more important task at hand: permitting the WIPP facility.

Political pressure placed upon NMED to expedite this process, respond to "procedural" and "timeline" issues serves no useful purpose at all except to further hinder this complicated process. NMED has sufficient staff to work on the draft permit; notwithstanding, we are not (and never will be) a large institution such as USEPA, DOE or Westinghouse and cannot fully insulate ourselves from this pressure. I fully understand that you cannot control political efforts aimed at "expediting" this process. However, we are appreciative of any help which you may give to advise your respective clients regarding the futility of political tactics and pressure to change what cannot be changed. In this way, NMED can concentrate its resources on the important task at hand: issuance of a draft permit.

2. *Other Factors Creating Additional Delay As A Result of DOE/WID*

A. Additional Technical Materials

NMED would also like to clarify that it has, in fact, received substantial technical materials as part of DOE/WID's applications as recently as July of 1997. To the extent there seems to be a contrary public impression, the following is a list of technical materials submitted by DOE/WID for our technical review. Please advise me immediately if DOE/WID determines to "withdraw" this material thereby alleviating the need for NMED to conduct a full technical review and to incorporate its results in a draft permit. I have attached a list of technical material submitted for HRMB review since May of 1997.

B. Inaccuracies in the WIPP Permit Application

Contrary to DOE's letter to Senator Feldman, the submittal by DOE/WID of inaccurate information in revisions to the permit application has created delay and was not "greatly" exaggerated. In fact, as of this date, this issue has not been adequately resolved. Approximately two months ago, NMED staff independently discovered that DOE/WID had submitted revisions to the permit application (Permit Revision No. 6.3) which were inaccurate. NMED staff discovered areas of the application which contained additional information that was not identified by redline; information which was deleted without indicating strikeout. These "problems"

occurred not only in the proposed revision but appeared on pages of the application which were not proposed to be changed at all (e.g. previous revisions). DOE's assertions regarding statements made by Mr. Zappe are misleading. Mr. Zappe did not state that future work was not impacted. To the contrary, incorporation of the affected chapters or appendices into the draft permit will require careful review to ensure that there are no other undocumented changes. As stated by Mr. Kelley, the inaccuracies in the permit application have called into question the integrity of all revisions submitted to NMED since April 12, 1996 (Permit Revision No. 6.0).

In addition, DOE's statement that we declined its offer of a "new computer" (suggesting that we are uncooperative) is misleading. NMED's computer capabilities have nothing to do with timely development of a draft permit and would not help DOE's problem. Instead, NMED has requested that DOE/WID certify that the application revisions "are true, accurate and complete" in a form as required under 40 CFR 270.11. DOE's conclusions that Mr. Kelley's statements were "greatly exaggerated" are not based upon the facts.

C. WIPP Land Withdrawal Act Amendments (LWAA).

DOE's statement that the LWAA have not created a delay and is inconsistent with prior NMED statements is similarly inaccurate. In a April 28, 1997 letter to DOE/WID, NMED informed DOE/WID that additional technical information was necessary as a direct result of the LWAA:

"DOE/WID's application was predicated on USEPA's full evaluation of the No-Migration Variance Petition submitted by DOE/WID to USEPA. As a result, to demonstrate compliance with 40 CFR 264.601, DOE/WID's permit application directly relied upon technical data and assumptions which were presumably substantiated in the Petition."

NMED supplied DOE/WID with a letter requesting specific additional information. In May, DOE/WID supplied that information which consisted of seven volumes of material. DOE/WID did not indicate in writing or otherwise that this material is unnecessary for determination of compliance with 40 CFR 264.601. As stated by DOE, NMED's request was not related to the CCA and No-Migration: it was directly needed to determine compliance with applicable regulations as needed to draft the RCRA Part B permit. NMED has no idea what DOE means when it states that "NMED staff indicated it would not become part of the permit." This would have been an impossible conclusion to make in May of 1997, before review and receipt of the requested material. To avoid any future confusion or "surprise," NMED would like to clarify that the review of this information was necessary as a direct result of the LWAA and further, the technical material to be reviewed was substantial and has created a delay in the permitting process. If the LWAA had not passed, and DOE/WID obtained a No-Migration Variance, these additional materials would have been unnecessary.

3. *Summary*

As we discussed, I am hopeful that you understand the difficulty NMED has encountered in addressing political pressure to "expedite" the permitting process in addition to other factors which, unfortunately, have delayed this process. The Department fully understands the importance of this permit for the State and will continue to work diligently and as expeditiously as possible. There is little benefit to be gained from discussions regarding "expediting" the process, who is to be blamed for delay and other issues either irrelevant to the future and/or outside our control. The fact remains that review of the WIPP permit application, including the July 1997 revisions, involves a substantial amount of data and is a time-intensive process for all involved. NMED believes that it is far more important to concentrate its valuable resources on the issuance of the draft permit, and the defense of that permit at a public hearing.

We appreciate your efforts in this regard and are hopeful that you will call if you have any questions or concerns. Thank you for your cooperation.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan M. McMichael". The signature is fluid and cursive, with a large initial "S" and a long, sweeping underline.

Susan M. McMichael

cc: Benito Garcia

Attachment A

Following is a list of items HRMB received from DOE and Westinghouse in support of the draft permit since receiving the current permit application on April 12, 1996.

#	Date Received	Requested by NMED?	Document
1	5/29/97	no (EPA)	Solid Waste Management Unit (SWMU) Data Summary Report Number 4
2	5/31/96, 6/4/96	no	Revised Part A, editorial and typographical changes throughout the application
3	8/15/96	no (EPA)	Information copies of TCLP and total analytical data for selected SWMUs at WIPP
4	9/17/96	no	Submittal of 3 procedures missing from controlled copy of WIPP Methods Manual
5	9/30/96	yes	Submittal of Final Shaft Seal Report in response to Notice of Deficiency
6	9/30/96	no (EPA)	Submittal of 6 SWMU data packages, request for No Further Action determination
7	10/8/96	no (EPA)	Submittal of 8 SWMU data packages, request for No Further Action determination
8	10/22/96	yes	Submittal of SWMU sample location maps and comparison of total metals analytical results
9	11/25/96	no (EPA)	Final Voluntary Release Assessment/Corrective Action Report for 16 SWMUs at WIPP
10	12/16/96 12/27/96	no	Interim changes to CAO-94-1010, TRU Waste Characterization QAPP, Rev 0
11	1/22/97	no	Submittal of Change Notice #1 to DOE/WIPP-069, WIPP Waste Acceptance Criteria, Rev 5
12	1/30/97	no (EPA)	Final SWMU Assessment Report (replaced Data Summary Report #4 received 5/29/97)
13	3/21/97	yes	Submittal of Groundwater Monitoring Program Plan (Appendix D18, Rev 6.2) in response to 2/25/97 request
14	5/2/97	yes	Submittal of Supplemental Information for SWMUs at WIPP in response to 4/11/97 request
15	5/9/97, 5/13/97	yes	Response to four specific comments in NMED letter of 4/29/97
16	5/16/97	yes	DOE/WID legal opinion regarding applicability of financial responsibility requirements in response to 4/28/97 request
17	5/16/97	yes	Submittal of changes DOE/WID wishes to make to permit application (Rev 6.3, first try) in response to 4/29/97 request
18	5/27/97	yes	Submittal of 7 volumes of information related to modeling and parameter data from NMVP and CCA in response to 4/29/97 request

#	Date Received	Requested by NMED?	Document
19	6/16/97	no	Revisions of submittal received 5/16/97 (Rev 6.3, second try)
20	7/14/97	yes	Submittal of environmental compliance and disclosure information in response to 4/28/97 request
21	7/21/97	yes	Revisions of submittal received 6/16 (Rev 6.3, third try) in response to 6/30/97 request
22	7/21/97, 7/28/97	yes	Submittal of Groundwater Monitoring Program Plan (Appendix D18, Rev 6.4) and response to comments in response to 6/18/97 request
23	8/6/97	yes	Submittal of informational copy of contract laboratory SOPs for analysis of groundwater sample in response to 6/18/97 request
24	8/13/97	yes	Clarification of information regarding SWMUs at H-3 drillpad
25	8/22/97	yes	Submittal of Generator Site Certification Guide
26	9/10/97	yes	Submittal of WIPP Procedures Manual WP 05-WA, WIPP Waste Acceptance Procedures Manual
27	9/18/97	yes	Submittal of DOE/CAO-97-2273, WIPP Waste Information System User's Manual For Use By Shippers/Generators

These submittals may be broken down into the following broad categories:

Revisions to the RCRA Part B permit application - (items #2, 5, 13, 15, 17, 19, 21, 22, 23)

Additional information related to the HSWA Module - (items #1, 3, 6, 7, 8, 9, 12, 14, 24)

Additional information in support of the permit - (items #4, 16, 18, 20)

Other miscellaneous technical information - (items #10, 11, 25, 26, 27)