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**Department of Energy**  
Carlsbad Area Office  
P. O. Box 3090  
Carlsbad, New Mexico 88221

October 9, 1997

Dr. Ed Kelley  
Director, Water and Waste Management Division  
New Mexico Environment Department  
PO Box 26110  
Santa Fe, NM 87502

Subject: DOE/WID PART B PERMIT APPLICATION COMPLETENESS  
DETERMINATION

Dear Dr. Kelley:

The purpose of this letter is to request reconsideration of your recent decision rescinding the New Mexico Environment Department's (NMED's) June 27, 1996, determination of completeness. We find this action to be without support and believe that the initial completeness determination was properly issued.

In its completeness determination, the NMED stated that "[t]his determination does not preclude HRMB from requesting additional information during the development of the draft permit, but only as necessary to clarify, modify, or supplement previously submitted material. **Requests for additional information will not render the application incomplete.**" (Emphasis added). NMED's letter, dated September 26, 1997, failed to provide any examples of information supplied by the Department of Energy/Westinghouse Waste Isolation Division (DOE/WID) that were not requested by NMED to clarify, supplement, or modify previously submitted material. For example, the March 21, 1997, request for a revised Groundwater Monitoring Plan was based on the NMED's identification of what it deemed to be inadequacies in the existing plan. The NMED requested specific information which it stated was needed to "clarify, supplement, and possibly modify the material previously submitted as Appendix D18" in WIPP's permit application. The list of 15 requested items included the three mentioned in NMED's September 26, 1997, letter. Specifically, the monitoring frequency information modified and clarified frequencies shown in Table D-11; the analytical parameters modified and supplemented those found in Table D-12 and Appendix D5, Table 5-2, as well as indicator parameters discussed in Section 5.3 of Appendix D18; and the sampling documentation modified and clarified those discussed in Sections 5.7 and 5.8 of Appendix D18. Consequently, none of the changes provided in Revision 6.2, 6.3 or 6.4 go beyond modifying, clarifying, or supplementing the application, as requested by NMED.

DOE and WID disagree with NMED's statement that its "completeness determination" relates solely to "whether DOE/WID supplied NMED with all necessary information and data to



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satisfy the appropriate information requirements set forth in the Hazardous Waste Act (HWA) and regulations.” In a memorandum dated May 2, 1984, the United States Environmental Protection Agency clarified that “[a] determination that an application is complete is not necessarily a determination that the application is free of deficiencies. During the detailed review of the application and the drafting of permit conditions, it may become necessary to clarify, modify or supplement previously submitted material . . .” [Memorandum from John H. Skinner, Director, Office of Solid Waste and Gene A. Lucero, Director, Office of Waste Programs Enforcement to James H. Scarbrough, Chief, Residuals Management Branch, Region IV, May 2, 1984]. Therefore, issuance of a draft permit is the measure of whether or not the NMED has been provided with all the necessary information—not the issuance of a completeness determination.

NMED’s letter of September 26, 1997, states that “after [NMED] receives from WID the requested information set forth in 20 NMAC 4.1.1103 (incorporating 40 CFR 270.14(b)(15)(16)(17) [Financial Responsibility Requirements ]), it will review all information and promptly inform DOE/WID whether the application is “complete”. . .” Once again, the application was complete in June 1996 when NMED issued its completeness determination . The WIPP Part B Permit Application expressly addressed the financial responsibility regulations in a manner consistent with all existing guidance and regulations. See, for example, page I-42 of the application.

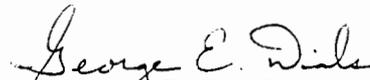
NMED’s letter, dated September 26, 1997, alleges that WID’s July 1997 submittal of financial disclosure information, pursuant to NMED’s request, rendered the DOE/WID Part B permit application incomplete. We disagree for the following reasons. At the time NMED issued its letter, dated June 27, 1996, stating that the permit application was “complete,” all applicable requirements as set forth in 20 NMAC 4.1, Subpart IX had been addressed in the application, based on our assessment. The disclosure requirements under the New Mexico Hazardous Waste Act (HWA), NMSA, 1978, §74-4-4.7, exempts “the United States or any agency or instrumentality of the United States.” Westinghouse WID, as managing and operating contractor at a federal facility, is therefore an agent or instrumentality of the United States and is also exempt. (See NMSA 1978, §74-4-4.7(F) of the HWA.) Prior to NMED’s issuance of its completeness determination of June 27, 1996, there was no request from NMED to DOE or WID for information about our interpretation of §74-4-4.7 of the HWA. Rather, the NMED waited until April 1997 to request a response from both DOE and WID regarding §74-4-4.7 of the HWA. In discussions with the NMED for clarification of the NMED’s April 1997 request, it became obvious that NMED expected WID to submit evidence of Westinghouse’s registration under the Federal Securities Act and a copy of the corporation’s 10-K report. This material was provided to the NMED in July 1997. Accordingly, NMED’s completeness determination of June 27, 1996, should remain unchanged as to this issue.

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All of DOE's and WID's submissions since the issuance of the completeness determination (Revisions 6.2, 6.3, and 6.4) have been made in accordance with the requirements to provide the NMED with any supplemental information it needs to draft the permit. If we have failed to provide any information NMED believes is necessary, please let us know so that we can correct the situation. We urge NMED to reconsider its action of rescinding the completeness determination.

In summary, we want to work with NMED towards issuance of a draft RCRA Part B permit and we believe that withdrawal of the completeness determination was unnecessary. We believe that NMED now has all the information necessary to issue the draft permit, and we look forward to NMED's prompt action in this matter.

Sincerely,

  
George E. Dials, Manager  
Carlsbad Area Office

  
Joseph L. Epstein, General Manager  
Westinghouse Waste Isolation Division

cc: Benito Garcia, NMED  
Susan McMichael, NMED  
Cooper Wayman, CAO  
Gloria Barnes, WID  
Mike McFadden, CAO  
Craig Snider, CAO  
Kevin Donovan, WID