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MARK E. WEIDLER  
SECRETARY

VIA INTER-AGENCY MAIL

June 17, 1998

The Honorable Gary E. Johnson  
State Capitol Building  
Santa Fe, New Mexico 87502

Post-It* Fax Note		7671	Date	# of pages
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Dear Governor Johnson:

On June 12, 1998, you received a letter from Department of Energy (DOE) Secretary Federico Pena wherein he responded to the New Mexico Environment Department's (NMED) determination and notification of June 11, 1998 that the Los Alamos National Laboratory (LANL) waste stream has not been adequately characterized under the State Hazardous Waste Act (HWA) and the Resource Conservation and Recovery Act (RCRA) for purposes of storage or disposal of the waste stream at the Waste Isolation Pilot Project (WIPP). We fully share the Department of Energy's (DOE) goal to open WIPP in a manner which is protective of the health and safety of our citizens.

Secretary Pena's letter of June 12<sup>th</sup>, however, raises three substantive issues which I believe require clarification in order to avoid further misunderstanding regarding the State's June 1<sup>st</sup> notice and determination.

First, Secretary Pena expresses concern that NMED's notification and determination was untimely, stating that he was disappointed and shocked and that this decision was an unfortunate "delay". It appears, however, that he may have been misinformed with respect to the factual background regarding NMED's review of the LANL Waste Stream characterization documentation. In a February 2, 1998 letter, I informed Secretary Pena that the Department "would expect the DOE to demonstrate that any TRU waste to be shipped to the WIPP has been fully characterized in accordance with the requirements of RCRA." It was not until May 18, 1998, however, that DOE took the following actions:

- (1) identification of the waste stream (TA-55-43) to be disposed of from LANL without a RCRA permit, and



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- (2) production of waste characterization documentation for review by NMED. This documentation contains approximately 3000 pages of technical data and other materials regarding DOE's characterization of the TA-55-43 waste stream.

NMED staff immediately undertook a technical review of the characterization documentation and inspected the LANL waste stream on May 28, 1998 and June 1, 1998. After the May 18<sup>th</sup> submittal of this information, we are aware of only two meetings between DOE and NMED regarding the LANL Waste Stream. During these meetings, NMED staff expressed no opinion regarding whether the proposed waste stream was adequately characterized. Further, DOE cannot reasonably expect NMED staff to reach a decision regarding the adequacy of waste characterization prior to the Department's review of the 3000 page packet of characterization documentation. Rather, NMED acted promptly to

- (1) review the voluminous characterization documentation,
- (2) to conduct two inspections of the LANL waste stream, and
- (3) to notify DOE of its determination in approximately three weeks.

With respect to the second concern raised in Secretary Pena's June 12 letter, he expresses "surprise" that NMED did not agree with the characterization process used by DOE. This reaction on the part of DOE is unfortunate and unjustified for the following reasons:

- (1) DOE's proposal to use acceptable knowledge (AK) as a form of waste characterization under RCRA assumes the process is approved under a RCRA permit; and
- (2) NMED did not approve this same AK process as proposed by DOE and, instead, has proposed approval of a significantly modified AK process, subject to numerous conditions, as set forth in the May 14, 1998 draft permit issued by NMED.

EPA similarly conditioned approval of DOE's AK process. In the absence of a State RCRA permit, DOE is required to demonstrate that the LANL Waste Stream contains no material that is "characteristic" or "listed" under the HWA and RCRA.

NMED staff concluded that the LANL waste stream was inadequately characterized on numerous grounds including the following:

- (1) the "process" for characterization was incomplete and substantially deviated from AK requirements;
- (2) there was no validation of acceptable knowledge, a minimal requirement for use of the AK process; and
- (3) there was no chemical analysis of any constituents.

The third issue raised in Secretary Pena's June 12 letter concerns whether NMED (in the press) suggested that DOE "blend" the wastes and conduct testing to properly characterize the wastes under the HWA. This concern is unfounded. We are unaware that NMED indicated that the

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LANL wastes must be blended in this manner to meet the characterization requirements of the HWA/RCRA. Chemical analysis is a more conventional method by which to demonstrate that materials are not "characteristic" or "listed" and subject to regulation under RCRA. The State recognizes that the draft permit would require approval before becoming legally enforceable. Nonetheless, the draft permit should provide DOE with useful guidance in characterizing waste streams intended for disposal at WIPP in the absence of an approved State permit. DOE cannot reasonably expect NMED to condone the use of an AK process for an allegedly non-mixed waste stream which is inconsistent with the AK process NMED has proposed to approve in the draft permit, and one which is incomplete and inadequate as stated above.

I hope this letter clarifies the concerns raised in the Secretary's June 12, 1998 letter. I assure you that the State of New Mexico and the DOE are working toward a timely resolution of this matter. Please do not hesitate to contact us at (505)827-2855 with any additional questions or concerns.

Sincerely,



Mark E. Weidler  
Secretary

cc: The Honorable Senator Domenici  
The Honorable Senator Bingaman  
The Honorable Congressman Skeen  
The Honorable Congressman Redmond  
The Honorable Tom Udall, Attorney General, State of New Mexico  
The Honorable Janet Reno, Attorney General of the United States, U.S. Department of Justice  
Carol Browner, Administrator, Environmental Protection Agency  
Gregg Cooke, Regional Administrator, Environmental Protection Agency  
Mark Weidler, Secretary of Environment Department  
Jennifer Salisbury, Secretary of Energy, Minerals & Natural Resources Department  
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Benito Garcia, Bureau Chief, HRMB, Environment Department