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**GARY E. JOHNSON**  
GOVERNOR

**State of New Mexico**  
**ENVIRONMENT DEPARTMENT**

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**PETER MAGGIORE**  
Secretary

September 9, 1998

Don Hancock  
Southwest Research & Information  
Center  
P.O. Box 4534  
Albuquerque, N.M. 87105

Dear Mr. Hancock:

The New Mexico Environment Department (NMED) offers the following response to your concerns raised by letters dated September 3, 1998 and August 11, 1998. On August 20, 1998, NMED sent a letter which acknowledged receipt of your August 11, 1998 public comments regarding the Department of Energy's (DOE) draft permit for WIPP under the New Mexico Hazardous Waste Act (HWA). Your September 3, 1998 letter requests NMED to public notice, conduct public meetings and respond to your August 11, 1998 public comments addressing DOE's confirmatory sampling and analysis plan (SAP) concerning the disposal of a DOE-designated non-mixed waste stream at WIPP (waste stream TA-55-43, Lot No. 1). This request has implications in two, distinct decision-making processes by NMED: (1) the hazardous waste permitting process public noticed on May 15, 1998; and (2) the potential disposal of non-mixed waste at WIPP in the absence of a hazardous waste permit. Regarding the former, NMED is unaware of any basis in law or policy supportive of your request, that during the administrative permitting process and prior to a public hearing, the Department is required to provide a response to public comment whether the comment concerns DOE's SAP or another issue. To the contrary, it would be entirely inappropriate for NMED to provide responses to public comment received for a draft permit prior to the Department's review of all public comments and issuance of the final permit. See 20 NMAC 4.1.901.A. As previously stated, NMED appreciates your public comments and will consider these comments and provide a response at the appropriate time as provided for under law.

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Regarding the latter process, NMED did not receive a request from DOE to amend the permit application for WIPP to include the SAP. The adequacy of DOE's determination is not a permitting issue, but a possible enforcement issue under the HWA and regulations, see e.g. 20 NMAC 4.1.300 (incorporating 40 C.F.R. 262.11). If NMED determines that DOE failed to adequately characterize waste stream TA-55-43, Lot No. 1 as "non-mixed," then this waste stream could not be stored or disposed of at the WIPP facility in the absence of a final permit under the HWA. On the other hand, if NMED determines that DOE has adequately characterized this waste stream to contain no hazardous waste, then it falls outside the jurisdictional scope of the HWA.

Although there is no legal requirement to public notice the ongoing process regarding DOE's determination that waste stream TA-55-43, Lot No. 1 is not hazardous, NMED will continue our policy of accepting public comments regarding Department actions. In this regard, NMED fully intends to address your concerns in any final decision regarding the adequacy of DOE's determination. Further, I would be available to meet with you regarding this decision-making process. However, at the present time, it would be inappropriate for Department staff or myself to meet with you to discuss substantive concerns regarding the SAP.

If you have any further questions or would like to schedule a meeting, do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Peter Maggiore".

Peter Maggiore, Secretary

cc: Benito Garcia