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PETER MAGGIORE
Secretary

VIA FACSIMILE: (202)586-4403

October 12, 1998

The Honorable Bill Richardson
Secretary of Energy
U.S. Department of Energy
Washington D.C. 20585

Re: Mr. Jim Owendoff's October 7, 1998 Letter

Dear Secretary Richardson:

I would like to express my deep concern regarding an October 7, 1998 letter from Mr. Jim Owendoff. In that letter, Mr. Owendoff made numerous and substantial misleading and inaccurate statements directed towards testimony presented by Ms. Susan McMichael which I believe are essential to be clarified. First, Mr. Owendoff entirely misconstrues Ms. McMichael's testimony to suggest that she "announced" that the Department of Energy (DOE) should not dispose of any non-mixed transuranic waste at the Waste Isolation Pilot Plant (WIPP) until a final State Resource Conservation and Recovery Act (RCRA) permit was issued. Ms. McMichael did not provide this testimony. Rather, she testified that NMED's approval of the confirmatory Sampling and Analysis Plan for the Los Alamos waste stream (TA-55-43) was a step forward, and an accomplishment achieved with the DOE's cooperation. Ms. McMichael did, however, express our serious concerns with DOE policy regarding "future" disposal of waste prior to permit issuance from outside New Mexico - "*Rocky Flats, Colorado and INEEL, Idaho.*" These concerns were precisely the same concerns I specifically addressed with DOE officials, including Mr. Owendoff, at our September 28, 1998 meeting in Washington D.C. Further, I have outlined these concerns by letter to you dated Friday, October 7, 1998. It is disingenuous to suggest that DOE was surprised about NMED's concerns regarding the disposal of future non-mixed radioactive waste prior to permit issuance and the impact this would have on our administrative permitting process. These issues were, in fact, discussed at our meeting. Given the cooperative efforts my staff has engaged in with DOE over the past five months, I believe that DOE's new position as articulated at our September 28, 1998 meeting is a set-back to these efforts.

Second, I am perplexed by Mr. Owendoff's belief that the DOE policy change was not "recent" and that NMED somehow changed its position. Prior to our September 28, 1998 meeting, DOE

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did not reveal its intent to dispose of future, unknown quantities of waste from both Rocky Flats and INEEL prior to permit issuance. From our perspective, this policy decision was quite "recent." In fact, certain statements made at that meeting caused me to question DOE's intent, and whether DOE is committed to the RCRA permitting process. In addition, NMED's position has not changed. We require approval of characterization of all waste streams proposed by DOE for disposal at WIPP (including the LANL waste stream) prior to permit issuance. We do not, however, believe that future proposals by DOE to dispose of non-mixed radioactive waste at WIPP prior to permit issuance and during our administrative permitting process advances our common goal to timely issue a State RCRA permit. Any prior statements made by our Department were made in the context of our consistent policy to require characterization and cannot be reasonably construed as support for the disposal of waste at WIPP without a State RCRA permit.

Third, Mr. Owendoff suggests that NMED's demands for confirmation of the Los Alamos waste stream are unnecessary, costly and that DOE undertook this task to "cooperate." Mr. Owendoff ignores that NMED previously determined that this waste stream was inadequately characterized based upon numerous and substantial inconsistencies, including the fact that the characterization process directly conflicts with the process approved under the State RCRA permit. In this regard, I have not made a final determination regarding the acceptability of this waste stream. To suggest that DOE's efforts in this regard are being undertaken simply to "cooperate" is misleading. There is no question, however, that use of DOE time and resources could be avoided entirely by simply waiting for the final RCRA permit.

Fourth, Mr. Owendoff implies that NMED delay is a major factor in supporting DOE's new policy regarding the disposal of non-mixed radioactive waste at WIPP prior to a State RCRA permit. His statements, however, are both factually inaccurate and misleading. NMED did not, as Mr. Owendoff states, receive a permit application from DOE "more than four years" ago. I have attached a copy of a final order signed September 2, 1994 allowing DOE to withdraw its application for the test phase and to resubmit an application. Further, DOE's application was both technically and administratively incomplete three years ago. In addition, Mr. Owendoff fails to acknowledge that NMED received over a several month period approximately 10,000 pages of additional technical information (27 separate documents) to review less than 1 1/2 years ago. We understand that DOE assumed that the EPA certification and NMED's permitting would be issued coincidental. However, the respective agencies have different resources and statutory obligations. Thus, DOE has no factual basis to justify the assumption that processing of the certification and permit would be simultaneous.

Fifth, NMED is quite surprised Mr. Owendoff stated that NMED should expend permitting fees on characterization of non-mixed waste. Such expenditure would violate the New Mexico Hazardous Waste Act, which requires the expenditure of permitting fees only on activities related to processing of the permit. The further offer of funds toward this Department's work on non-mixed waste is similarly surprising.

Finally, Mr. Owendoff contends that "many of the activities" Ms. McMichael described under as regulatory requirements under RCRA are "regulated by USEPA as part of its responsibilities

under the WIPP Land Withdrawal Act.” This is a position which I am hard-pressed to understand, and which causes me concern. No reasonable person could construe the regulations under 40 CFR Part 191 Subpart A as encompassing “many” of the RCRA regulatory requirements for permitting and enforcement. USEPA’s regulations under 40 CFR Part 191 Subpart A do not provide the comprehensive, substantive external regulation of the WIPP facility such as requirements for inspection, monitoring (air and groundwater), general facility standards, contingency planning, emergency response, corrective action, closure, post-closure, financial assurance and enforcement of these requirements. Further, the Defense Nuclear Facilities Safety Board (DNFSB) is not an external regulatory agency. DNFSB has no authority to regulate or enforce; rather, it is a board of civilians respected in the field of nuclear safety. To represent to the citizens of this State that USEPA under 40 CFR Part 191, Subpart A and the DNFSB will provide DOE external comprehensive human health, safety and environmental protection similar to those provided under RCRA during operations for WIPP is both unsupportable and misleading.

I hope this letter clarifies the statements made by Ms. McMichael in her October 5th testimony and responds to the concerns raised by Mr. Owendoff. We fully understand and respect that due to other legal obligations DOE cannot agree to NMED’s timeline to issue the final WIPP permit. However, we are committed to this process. I am hopeful that you understand our concerns and that we can move forward in a cooperative effort towards the permitting of the WIPP facility. I look forward to discussing these issues with you in person.

Sincerely,



Peter Maggiore, Secretary
New Mexico Environment Department

PM/cjm

cc: The Honorable Governor Johnson

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STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF NEW MEXICO
DRAFT HAZARDOUS WASTE PERMIT
AT THE WASTE ISOLATION PILOT PLANT:

ORDER ON DRAFT PERMIT

This matter is before the Secretary of Environment for decision on the draft permit for the Waste Isolation Pilot Plant ("WIPP"), Carlsbad, New Mexico.

THE SECRETARY FINDS:

1. In February 1991, the New Mexico Environment Department ("NMED") received an application from the Department of Energy ("DOE") and the Westinghouse Electric Corporation ("WEC") which requested a permit to operate a hazardous waste container storage area in the Waste Handling Building and to operate two miscellaneous hazardous waste management units with a portion of the subsurface mined openings.

2. This application was revised twice during the years of 1991 through 1993.

3. NMED reviewed the permit applications and upon determination that the application was complete, prepared the draft permit.

4. Pursuant to HWMR-7 §902.A, public notice was given on the WIPP draft permit on August 30, 1993 requesting public review and comment.

5. The first comment period closed on November 1, 1993, but at the request of DOE was extended for 30 days.

Post-it Fax Note	7671	Date	# of pages ▶
To	<i>Susan McMichael</i>	From	<i>Steve Tappe</i>
Co./Dept	<i>OGC</i>	Co.	<i>HRMB</i>
Phone #		Phone #	
Fax #		Fax #	

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6. At the end of the second comment period, December 1, 1993, DOE requested a sixty day extension of time in which to comment. A forty-four day extension was granted and the public comment period closed on January 14, 1994.

7. The federal Environmental Protection Agency made technical comments regarding the draft permit on August 31, 1993.

8. On October 21, 1993, DOE commented "that tests involving radioactive waste will not be conducted at WIPP." Comment from Arlen Hunt.

9. DOE "no longer intends to conduct mixed-waste testing during a Test Phase at WIPP". Comment dated November 30, 1993 from Arlen Hunt.

10. Southwest Research and Information Center ("SRIC") commented that the entire application should be withdrawn, because the test phase plan has been withdrawn. Comment dated November 24, 1993 from Don Hancock.

11. Comment received from Concerned Citizens for Nuclear Safety ("CCNS") asserts that DOE should withdraw its permit application and that it is not a viable application. Comment dated November 24, 1993 from Margret Carde.

12. Ed McClelland commented that though the "trained scientists at WIPP should be able to handle waste far better and safer than lesser trained personnel scattered around the country", WIPP "should be put to beneficial use before too long or closed down." Comment dated November 27, 1993 from Ed McClelland.

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13. Maurice Webster commented that the contempt shown by WEC for the public interest cannot be allowed and that "[f]ailure to implement Part B of the Proposal must cause cessation of all activity on the WIPP site." Letter dated September 30, 1993 from Maurice H. Webster.

14. "DOE recognizes that the current RCRA Part B permit application for WIPP requires revision in light of the October 1993 decision to abandon waste tests at WIPP." Comment from George Dials dated January 13, 1994.

15. DOE requested "the opportunity to revise its permit application to accurately reflect the current programmatic direction regarding WIPP." Comment from George Dials dated January 13, 1994.

16. SRIC commented that the draft permit should be terminated and that "[n]o additional public resources are justified to be expended on this draft permit. Instead, DOE, state, and public resources should be focused on discussing issues related to matters that must be adequately addressed in DOE's permit application for the disposal activities at WIPP" Comment dated January 14, 1994 from Don Hancock.

17. CCNS stated that "it would be a waste of time and taxpayer money both for NMED and for the people of this state to continue the permitting process. . . . NMED must not waste any more time or money on processing this invalid application." Comment dated November 24, 1993 from Margret Carde.

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18. HWMR-7 §902.A.5 states that "[n]o ruling shall be made on permit issuance or denial without an opportunity for a public hearing."

19. A public hearing at this time is not appropriate and an unnecessary expenditure of public monies because of DOE's stated intent not to conduct waste tests at WIPP.

20. All comments received during the comment period have been considered in this Order.

21. Comments, verbal or written, received after January 14, 1994 have not been considered in this Order.

THEREFORE THE SECRETARY ORDERS:

22. The Regulations require a public hearing before a ruling on the issuance or denial of the draft permit; however, in an effort to achieve the most efficient use of public monies, no ruling is made on the issuance or denial of the draft permit at this time.

23. In that DOE has stated that it no longer intends to conduct testing at WIPP, the draft permit is **WITHDRAWN AND REMANDED** ✓
to NMED's Hazardous and Radioactive Materials Bureau.

24. By May 31, 1995, DOE shall submit a complete revised application that more accurately reflects future WIPP activities.

25. Within twenty-one calendar days of this order, DOE shall submit a schedule of milestones of its anticipated progress of submissions on the revised application.

26. Within one month of this Order, DOE shall hold a stakeholders meeting to explain its schedule and permit revisions.

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 27. If no complete revised permit application is received by the Hazardous and Radioactive Materials Bureau by May 31, 1995, a public notice of intent to deny will automatically be issued.

Date:

September 3, 1994

Judith M. Espinosa
 JUDITH M. ESPINOSA
 Secretary