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From: Richard Kamp, Director, Border Ecology Project, Inc.
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Re: Waste Isolation Pilot Project (WIPP) RCRA Permit Docket-Failure of State of New Mexico to comply with obligations of the La Paz Agreement on Border Environment and request to delay said permit until required consultations are complete.

Summary: The State of New Mexico, by consultation and in communication with and in coordination with the United States Government, through the State Department in coordination with the Environmental Protection Agency is required to give notice to Mexico of any sources of pollution that could have substantial impact to that country under Article 2 of the August, 1983 Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area (La Paz Agreement) signed by Presidents Reagan and De La Madrid.

This article calls for high level consultation between the two countries through the EPA and State Dept. and SEMARNAP (Mexico's federal environmental secretariat) and the Secretariat for External Relations (SRE) when ever any source within the sovereign boundary of either country can impact the environment within 100 kilometers of the US-Mexico border. WIPP is such a source. New Mexico and other border states have established precedents for coordinating with federal authorities under this process. Failure of both the state of New Mexico and the United States Government to had complied with the La Paz process is grounds to withhold the NMED RCRA permit until the appropriate consultations with Mexico are complete.

Submitter: Border Ecology Project (BEP) is a 501 c 3 public charity, established in 1983 as a nonprofit advocate and research organization based in Bisbee, Arizona on the Arizona-Sonora

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border. BEP and director Kamp have considerable experience in participating in creating and implementing US-Mexico and continental environmental accords as well as working on practical means to resolve environmental problems. BEP participated in the negotiations and implementation of two annexes to the La Paz Agreement and Kamp is a coauthor of a 1998 draft report for EPA Office of Air Quality Planning and Standards on Technical Bases for Appendices to Annex IV of the La Paz Agreement and is a member of the 3 nation Advisory Group on the Environmental Effects of the North American Free Trade Agreement established by the Commission for Environmental Cooperation.

Basis for withholding the NMED RCRA permit: The WIPP facility is located within 26 miles of the Pecos River, a body of water that enters the Rio Grande/Rio Bravo on the border of Mexico. Scientifically it is accepted by all parties that the facility is located above large amounts of pressurized brine that could theoretically flow to the surface or to overlying aquifers carrying both radioactive and/or hazardous wastes. In the event of such an occurrence, these wastes in turn could enter existing or future faults or penetrations to surface or groundwaters. Potential contamination that enters surface or groundwaters in the Pecos aquifer could then be carried to Mexico. These arguments have formed the bases for litigation that included as plaintiffs the states of New Mexico and Texas in order to establish environmental protection against such contingencies.

The RCRA permit must adequately address these issues to Mexico through high level consultation between the United States and Mexico under the La Paz Agreement.

Given these facts, it is reasonable to believe that WIPP could potentially contaminate the waters of Mexico with either nuclear or hazardous wastes or mixtures of transuranic wastes and solvents within the waste barrels could in turn increase the mobility of radioactive contamination. Under Article 2 of the La Paz agreement, high level consultations are to take place when a major potential source could contaminate the other country within a 100 kilometer area of the international border **no matter where the source originates**. As far fetched as it sounds, the agreement could cover sources at the Canadian or Guatemalan borders and Annex III of the agreement goes beyond this point and regulates impacts of hazardous waste or other contaminants that could impact the other country anywhere within the boundaries of that country.

On March 24 and 25, 1999, I conducted phone interviews with EPA and with Dr. Alberto Szekeley, co author of the La Paz Agreement and frequent attorney for the government of Mexico on environmental issues (and Director of Research for University of New Mexico School of Law International transboundary Resource Center. WIPP consultations, including discussions of RCRA related issues, apparently have never formally taken place through the working groups established by the La Paz Agreement nor through any pronouncements of the national coordinators established by the Agreement in the period since August, 1983--although WIPP has been a Mexican concern since 1983 or earlier.

This came as a surprise since I was personally contacted by the Mexican Secretary of Environment, Alicia Barcena, in February, 1984 to request that I facilitate getting the EPA and

Mexico's environmental secretariat to address the WIPP facility. I have requested that EPA Region 6 Administrator Gregg Cooke verify the status of past discussions and Dr. Szekeley is doing the same from Mexico City.

In Dr. Szekeley's opinion, Mexico should request these consultations immediately since WIPP constitutes a potential source of pollution to Mexico for the reasons discussed above.

Precedents for State (New Mexico and other) involvement in consultation process: The RCRA permit is a state permit for a DOE Federal facility that can impact the border region. New Mexico has less history than other border states in including Mexican input (or requesting information from Mexico) or providing information to Mexico regarding potential sources of pollution that could impact the 100 kilometer border area within New Mexico or that New Mexico could impact. New Mexico has done this and would do so in the future as a participant in the working groups established under the La Paz Agreement. However, from 1984-86, NMEID was actively involved in discussions with Mexico that including air quality modeling provided to the Mexican environmental secretariat that addressed 2 sources of border air pollution outside of the state the Nacozari, Sonora and Douglas, Arizona copper smelters that were later regulated under La Paz Annex IV. NMEID's director as well as air quality director Gordon Venable met with the Mexican Environmental Secretariat and joined in working group meetings, entered amicus briefs on EPA-Environmental Defense Fund-State of Arizona litigation that resulted in a consent decree that guaranteed protection of Mexican air quality from the Phelps Dodge Douglas Smelter after August, 1986. Since 1987, NMED has also overseen the submission of data to EPA to be presented to SEMARNAP and its predecessors on emissions from two New Mexico smelters that are obligated to not pollute Mexican air under Annex IV-- the Phelps Dodge Playas and Hurley copper smelters.

In Arizona, where BEP is based, it is considered normal practice to include in any permitting actions all possible impacts on Mexico and the Arizona Dept. Of Environmental Quality (ADEQ) maintains a border office and border team to work on both sides of the border on all transboundary environmental problems. BEP has been, for example, involved with ADEQ in water quality analysis over a 5000 square mile area of Sonora jointly with a multidisciplinary Mexican team. Two agency permitting actions have taken place based on data gathered by this project since analysis began in 1997, to control facilities (smelter slag and wastewater discharges from Douglas, Arizona) that data shows are impacting Mexico. The data is also being utilized to determine what actions Arizona may enter into with Sonora and federal authorities to protect Arizona environment.

California and Texas have similar mechanisms in place and all these states participate regularly in EPA-SEMARNAP working groups that are designed to control air, water, hazardous waste, etc. discharges that could impact either country.

Nuclear waste is neither explicitly included nor is it by any means exempted and in the case of WIPP, NMED has not established that it has the capacity to determine that hazardous waste covered by RCRA can be accurately measured at the WIPP facility. The appropriate action to ensure that WIPP does not impact Mexico is through an Annex to the La Paz Agreement;

possibly as part of a broader annex addressing nuclear waste. However, the first step that should have taken place at least 15 years ago is the high level consulting process between the two countries that includes the involvement of the State of New Mexico.

The fact that this is a Federal facility means that much of the blame for improper consultation with Mexico rests with the United States Government. However, since New Mexico is claiming jurisdiction over the RCRA permit and other issues, it is automatically a participant in the La Paz process.

The Permit should be withheld until Consultations between Mexico and the United States have been completed with New Mexico State participation and a course of action is determined that guarantees environmental protection of Mexico's border region: The NMED permit should be withheld until this consultation process--jointly with DOE, EPA, State Dept. including the International Boundary and Water Commission (IBWC-CILA) and NMED--takes place. The next La Paz working group and National Coordinating meeting is scheduled for May 11-14 in Ensenada, Baja California and the agenda is not complete at this time. The logical working groups would include those that address water contamination and hazardous waste/nuclear waste coordinated through EPA's border teams.

Other international legal actions: Clearly, all NEPA actions should have and in the future should address the cross-border consequences of WIPP on Mexico apart from and inclusive within the La Paz Agreement commitments.

It is probable that an IBWC-CILA minute should be developed through the State Department to address adequate environmental protection from WIPP. There is also the possibility of submissions to the Commission for Environmental Cooperation established as a side agreement to NAFTA under Article 14 that could challenge the legality of allowing opening of WIPP at a Federal level without adequate consultation with Mexico.

Respectfully submitted: Richard A Kamp
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Attachment: La Paz Agreement