



Department of Energy

Washington, DC 20585

ENTRANCE

April 12, 1999

BY FACSIMILE (505-827-2836) AND FIRST CLASS MAIL

Mr. Greg Lewis, Director
Water and Waste Management Division
New Mexico Environment Department
Harold Runnels Building
1190 St. Francis Drive
Santa Fe, New Mexico 87502

Dear Mr. Lewis:

In response to your letter to Secretary Richardson of March 25 and our conference call of April 6, 1999, we are providing you with the following information about the waste that the Department of Energy (DOE) intends to ship from its Idaho National Engineering and Environmental Laboratory (INEEL) to the Waste Isolation Pilot Plant (WIPP).

This shipment will consist of approximately 42 drums of graphite molds used at the Rocky Flats Environmental Technology Site in its Foundry and Casting Operations located in Building 707. These and similar molds were used at Rocky Flats from December 1972 through June 1988. The plutonium casting operation in which they were used changed very little during this period. After these molds were discarded, Rocky Flats shipped them to INEEL for storage. The Item Description Code (IDC) for this waste is 300. DOE determined that this waste is not regulated by RCRA or New Mexico's Hazardous Waste Act (HWA) based on: (1) acceptable knowledge about the processes and materials used in the generation of this waste; (2) sampling and analysis using the Toxicity Characteristic Leaching Procedure (TCLP) of randomly selected molds from drums also selected at random; (3) headspace gas analysis of every drum; (4) real-time radiography of every drum; and (5) visual examination of the contents of every drum to confirm the absence of prohibited items. All of the information gathered from these five methods established that this waste is not regulated by RCRA or the HWA - that is, it is non-mixed waste.

The methods DOE used to make this determination and the results produced by these methods comply with the requirements for making hazardous waste determinations pursuant to 40 C.F.R. § 262.11 and are fully supported by guidance EPA and other regulatory agencies have issued on



Mr. Greg Lewis
April 12, 1999
Page 2

making these determinations. In fact, the methods DOE used and the results we obtained go far beyond what is required by the regulations or asked of others who manage non-hazardous waste. As the New Mexico Environment Department (NMED) has confirmed on several occasions, the requirements for making these hazardous waste determinations are separate from the RCRA permitting process, and if waste is determined to be non-hazardous, it falls outside the jurisdictional scope of RCRA, the HWA, and any permit issued pursuant to those statutes. As DOE's representatives explained during our conference call on April 6, we are unaware of any requirement or precedent that obligates those who manage non-hazardous waste to submit all of the information they used to determine that the waste is non-hazardous to NMED and await its review of that information. Your letter of March 25 cites no such requirement; it simply references the entirety of RCRA and the HWA.

Even if the INEEL waste were mixed waste - and it clearly is not - DOE would be entitled to ship it to WIPP now that Judge Penn has confirmed that the facility has interim status. The fundamental principle of interim status is that facilities with that status are to be treated as if they had a RCRA permit. Congress enacted the interim status provisions of RCRA to address the precise situation that DOE and WIPP face in New Mexico: the need of existing facilities to operate while States complete the lengthy and complex process of issuing permits. As to waste characterization, interim status facilities that intend to manage hazardous waste are only obligated to comply with the general waste analysis requirements of 40 C.F.R. 265.13. WIPP's and INEEL's procedures for hazardous waste determinations would satisfy these requirements if they had been used for characterizing a hazardous waste stream rather than determining that the INEEL waste is not regulated by RCRA or the HWA.

We are troubled by statements in your letter suggesting that disposal of waste at WIPP prior to its receipt of a RCRA permit might "affect the substance and timetable for issuance" of the permit and that disposal of waste from INEEL and Rocky Flats "may preclude further use of [Panel 1]" after NMED issues the permit. There would be no substantive difference between disposal of waste from Los Alamos in Panel 1 prior to issuance of the permit and disposal of waste from INEEL or Rocky Flats. More importantly, there would be no legal basis for the imposition of conditions in the permit based on the prior disposal of non-mixed waste from any DOE site. Under interim status, DOE is entitled to dispose of mixed waste prior to issuance of the RCRA permit, and there is no provision in RCRA or the HWA that would allow NMED to preclude DOE from continuing to use Panel 1 after the permit is issued because it had already placed mixed waste in that panel under interim status. Accordingly, we believe there is no basis for your assertion that the disposal of waste from Rocky Flats or INEEL that is not regulated by RCRA would somehow justify such a restriction in the permit.

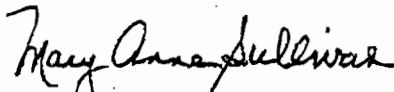
Judge Penn's decision is, as Governor Johnson has stated, "clear and forceful." Moreover, the clarity and force of that decision are not limited to the disposal of waste from Los Alamos, as Judge Penn himself confirmed on March 31 when he determined that his ruling that WIPP has

Mr. Greg Lewis
April 12, 1999
Page 3

interim status is final. DOE must ship waste from INEEL prior to April 30, 1999, or suspend its retrieval of foreign research reactor fuel. Such a suspension could put at risk a significant nonproliferation program that has already removed from civilian use enough highly enriched uranium to make 14 crude nuclear weapons.

DOE is willing to work with New Mexico and NMED to address legitimate concerns about WIPP's operation. We believe, however, that such discussions should be based on a recognition of the recent legal rulings affecting WIPP and the legal obligations DOE faces at INEEL, Rocky Flats, and elsewhere. Please contact me at 202-586-6732, or Keith Klein at 505-234-7300, to discuss how we can move forward cooperatively from here.

Sincerely,



Mary Anne Sullivan
General Counsel