



GARY E. JOHNSON  
GOVERNOR

State of New Mexico  
ENVIRONMENT DEPARTMENT

Office of the Secretary  
Harold Runnels Building  
1190 St. Francis Drive, P.O. Box 26110  
Santa Fe, New Mexico 87502-6110  
Telephone (505) 827-2855  
Fax: (505) 827-2836

PRINTED



PETER MAGGIORE  
SECRETARY

PAUL R. RITZMA  
DEPUTY SECRETARY

October 4, 1999

Dr. Inés Triay, Manager  
Carlsbad Area Office  
U.S. Department of Energy  
P.O. Box 3090  
Carlsbad, NM 88221

Re: Clarification of Permitting Issues

Dear Dr. <sup>Inés</sup>Triay:

It has come to my attention that the Department of Energy (DOE) may be unclear as to how the New Mexico Environment Department (NMED) intends to regulate pre-permit waste disposed at the Waste Isolation Pilot Plant (WIPP) once the final permit is issued. NMED has recently been contacted by several other states and numerous media sources claiming that DOE has told them that NMED is attempting to restrict and delay DOE's use of WIPP through the permitting process. This letter is intended to clarify NMED's intentions and our interpretation of the permit requirements.

DOE, in both its Proposed Findings of Facts and Conclusions of Law, as well as in subsequent comments on the Hearing Officer's Report, has arrived at conclusions that are quite different, and we believe erroneously so, from those of NMED. For example, DOE apparently believes permit condition IV.B.2.b could be construed to limit additional pre-permit waste shipments as well as the continued use of Panel One. DOE apparently also believes that upon final permit issuance, NMED may cite DOE and Westinghouse (WID) for permit violations related to pre-permit disposal of waste not characterized in accordance with the waste analysis plan (WAP) contained in the final permit. As support for its position, DOE cites NMED testimony from the WIPP public hearing and erroneously concludes that Permit Condition IV.B.2.b "would *ex post facto* turn DOE's legal action into a permit violation." See DOE's Findings, pg. M-38.

In NMED's comments to the Hearing Officer's September 28, 1999 final order, NMED clearly stated that the final permit does not apply to the pre-permit period (pp. 12 - 15). Based upon the March 22, 1999 opinion by Judge Penn in New Mexico v. Richardson, there is no question that WIPP has interim status. Thus, should NMED be compelled to take any enforcement action

991002



Dr. Inez Triay  
October 4, 1999  
Page Two

against DOE and WID for issues pertaining to pre-permit disposal, it must do so under interim status regulations at 20 NMAC 4.1.600 (incorporating 40 CFR §265). NMED has no intention of taking enforcement action against DOE and WID for pre-permit disposal under Permit Condition IV.B.2.b of the final permit. However, DOE and WID must comply with all requirements of the final permit (including Permit Condition IV.B.2.b) once it becomes effective.

After the final permit is issued, and before any additional waste may be disposed, NMED is required to review audit reports for each waste shipment to ensure compliance with the WAP. Recognizing the potential for these reviews to delay waste disposal we in early spring discussed the feasibility of reviewing audit reports for compliance with the WAP before the permit was issued. Although NMED was willing to perform the reviews, both parties understood that any such early review would be "at risk" until the final WAP requirements were more certain. Accordingly, it was mutually decided to wait until the likely final WAP was better defined.

At this point in time, I believe it is safe to assume that the WAP and permit are virtually final. The Secretary's decision is expected later this month. Moreover, NMED does not wish to delay continued waste shipments to WIPP after final permit approval. Therefore, we urge you to submit audit reports for NMED's review in accordance with the proposed final permit as soon as possible.

I hope this letter helps to clarify NMED's position. Please contact me if you have any questions.

Sincerely,



Gregory J. Lewis

Director

Water and Waste Management Division

cc: Paul Ritzma, NMED  
James Bearzi, HRMB  
Susan McMichael, NMED OGC  
Steve Zappe, HRMB  
David Neleigh, EPA Region 6  
Mary Kruger, EPA ORIA  
Connie Walker, TechLaw  
WIPP File - Red '99