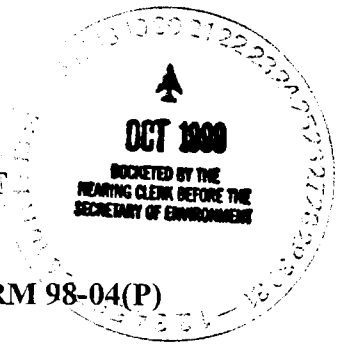


ENTERED



STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT

IN THE MATTER OF THE FINAL PERMIT)
ISSUED FOR THE WASTE ISOLATION) *Oct 20, 1999* HRM 98-04(P)
PILOT PLANT (WIPP), U.S. EPA No.)
NM4890139088)

THE UNITED STATES DEPARTMENT OF ENERGY'S AND THE WESTINGHOUSE
WASTE ISOLATION DIVISION'S RESPONSE TO THE SECRETARY'S QUESTION
REGARDING PERMIT CONDITION IV.B.2.b

The United States Department of Energy ("DOE") and the Westinghouse Waste Isolation Division ("WID") (collectively "the Permittees") respectfully respond to the question posed in the October 14, 1999 Amended Order of the Secretary of the New Mexico Environment Department ("Secretary") as follows:

Without waiving their legal objections to Module IV.B.2.b,¹ the Permittees believe that the second sentence in the June 25 Proposed Final Permit version of this module is ambiguous and could be misinterpreted to apply to non-mixed waste that was disposed of prior to the permit's effective date. To avoid any misinterpretation, the Secretary should add language making it clear that the second sentence applies only to non-mixed waste disposed of after the permit is effective.²

The second sentence of Module IV.B.2.b refers to two distinct events: (1) the disposal of TRU-mixed waste in an Underground HWDU; and (2) the characterization of the non-mixed

¹ The Permittees continue to believe that NMED lacks the legal authority under RCRA and the HWA to regulate non-mixed waste either before or after the permit is issued, that non-mixed waste is special nuclear or byproduct material exempt from the definition of solid waste, and that Module IV.B.2.b's regulation of non-mixed waste violates § 1006 of RCRA as inconsistent with the Atomic Energy Act. Pages 6 - 9 of the Permittees' Comments on the Report of the Hearing Officer detail legal arguments which establish that the module exceeds NMED's legal authority and violates the *ex post facto* provision of the Constitution.

² The Hearing Officer and the Permittees agree that the ambiguity of the first sentence can and should be resolved by adding "after the Permit is effective" at the beginning of the sentence. See Hearing Officer Report, p. 78; Permittees' Comment on the Report of the Hearing Officer at p. 8. NMED "does not object" to the Hearing Officer's recommendation. See NMED's Comments to Hearing Officer Report at p. 13.



waste in the Underground HWDU at the time of TRU-mixed waste disposal in that same unit. The Permittees agree that Module IV.B.2.b will only apply prospectively to TRU mixed waste disposal. However, there is no obvious time element applicable to the characterization of the non-mixed waste. The second sentence as written can be interpreted as requiring that, at the time of TRU-mixed waste disposal, the Permittees must assess whether the non-mixed waste already in the panel was characterized "in accordance with the WAP" whenever that characterization occurred. See Tr. p. 2425, line 15 through p. 2426, line 3; p. 2484, lines 7-15 (S. Zappe). If any of the non-mixed waste was not characterized in accordance with the Waste Analysis Plan, then the entire panel cannot be used for mixed waste disposal. This interpretation would make Module IV.B.2.b apply to the non-mixed waste disposed of prior to permit issuance.

Such an interpretation would have serious operational consequences at WIPP. NMED testified that characterization "in accordance with the WAP" was not possible until the permit was final, Tr. p. 2483, lines 7-20, p. 2639, line 17 through p. 2640 line 7 (S. Zappe); if the second sentence applies to non-mixed waste disposed of before the permit was effective, then the Permittees could be required to suspend disposal operations at WIPP for several months until Panel 2 is ready for waste. This would penalize the Permittees for waste disposal that was authorized by Judge Penn's ruling, see Record Proper ("RP") No. 154, was in compliance with all applicable laws (including the Atomic Energy Act), and occurred while WIPP had interim status. This interpretation could forfeit the existing disposal capacity at WIPP, see RP No. 214, pp. 5-6, which the Record Proper conclusively shows could otherwise be maintained until used to dispose of waste. See Report of Hearing Officer, Findings No. 129-144.

The Permittees believe that this interpretation of the second sentence would be arbitrary, capricious, and inconsistent with the law, yet the sentence's language does not conclusively

exclude this interpretation. The ambiguity of the second sentence underscores the need to delete Module IV.B.2.b entirely or to make it clear that Module IV.B.2.b applies only to waste disposed of after the permit becomes effective.³ Thus, as proposed on page 9 of their Comments on the Report of the Hearing Officer, the Permittees urge the Secretary at a minimum to revise Module IV.B.2.b to read as follows:

Specific Prohibition -- after the Permit is effective, the Permittees shall not dispose non-mixed TRU waste in any Underground HWDU unless such waste is characterized in accordance with the requirement of the WAP specified in Permit Condition II.C.1. The Permittees shall not dispose TRU mixed waste in any Underground HWDU if the Underground HWDU contains non-mixed TRU waste which was disposed of after this permit became effective and was not characterized in accordance with the requirements of the WAP.

Respectfully Submitted,

UNITED STATES DEPARTMENT OF ENERGY and
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³ The effect of Module IV.B.2.b on the ability of WIPP to operate during the transition from interim status to regulation under the permit could also be ameliorated by the Secretary using his discretion, under 20 NMAC 4.1.901.A.10, to delay the effective date of the permit or Module IV.B.2.b until one or more final audit reports have been approved by NMED.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October 1999, a copy of the foregoing **THE UNITED STATES DEPARTMENT OF ENERGY'S AND THE WESTINGHOUSE WASTE ISOLATION DIVISION'S RESPONSE TO THE SECRETARY'S QUESTION REGARDING PERMIT CONDITION IV.B.2.b** was mailed by first-class mail, postage prepaid to the following:

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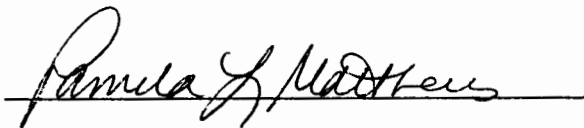
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A handwritten signature in cursive script, reading "Pamela G. Matthews", is written over a horizontal line.