

STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT



IN THE MATTER OF THE FINAL PERMIT)
ISSUED TO THE UNITED STATES)
DEPARTMENT OF ENERGY AND)
WESTINGHOUSE ELECTRIC COMPANY)
WASTE ISOLATION DIVISION FOR)
A HAZARDOUS WASTE ACT PERMIT)
FOR THE WASTE ISOLATION PILOT)
PLANT; US EPA No. NM4890139088)

Oct 29, 1989

HRM 98-04(P)

NEW MEXICO ENVIRONMENT DEPARTMENT'S
COMMENTS ON THE SECRETARY'S AMENDED ORDER

The Secretary requested comments on the following issue:

Does the prohibition regarding disposal of TRU mixed waste referenced in the second sentence of Permit Condition IV.B.2.b apply to waste disposed of prior to permit issuance?

For the reasons stated below, the prohibition regarding disposal of TRU mixed waste referenced in the second sentence of Permit Condition IV.B.2.b cannot as a matter of law apply to any waste disposed at WIPP prior to permit issuance. To the extent this issue is unclear, NMED recommends the following clarifying language to ensure that both sentences of this permit condition apply only prospectively. See also Applicants' Comments on the Report of the Hearing Officer, at pg. 6.

After this Permit becomes effective, (1) the Permittees shall not dispose non-mixed TRU waste in any Underground HWDU unless such waste is characterized in accordance with the requirements of the WAP specified in Permit Condition II.C.1 and (2) the Permittees shall not dispose TRU mixed waste in any Underground HWDU if the Underground HWDU contains non-mixed TRU waste not characterized in accordance with the requirements of the WAP.

The clarifying language is reasonable, consistent with NMED's original intent in proposing this permit condition as reflected in the record and supported by the HWA and regulations. The following factual and legal basis support this revision. First, there is apparent confusion that stems from the Applicant's post-hearing submittal in which they contend, based upon a response from NMED witness Mr. Steve Zappe, that the second clause of Permit Condition IV.B.2.b might be interpreted to mean that "no waste could legally be emplaced at

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WIPP prior to the issuance of the final HWA permit” and that “permittees could be subject to an enforcement action.” Applicants’ Proposed Findings of Fact and Conclusions of Law at pp. M-37 and M-38. Specifically, upon cross-examination, Mr Zappe testified: “I believe my testimony did state numerous times that we propose to prohibit nonmixed waste that is not characterized in accordance with the final [WAP] as approved in the final permit.” Pleading Log #172: Vol. XIII, Mr. S. Zappe p. 2483. This testimony apparently concerned the Applicants because since the permit proceedings, they have disposed TRU waste at WIPP prior to issuance of a final permit and feared a potential enforcement action after the permit was issued.¹

Further complicating the matter, the Hearing Officer misconstrued NMED’s findings of fact and conclusions of law on this issue stating that NMED believed the proposed addition of the phrase “after this permit becomes effective” was “inappropriate for a final permit and is, on its face, applicable to the pre-permit period.” Hearing Officer’s Report at pg. 78 -79. As NMED subsequently explained, the Hearing Officer’s statement was factually inaccurate. See NMED’s Comments to Hearing Officer’s Report at pp. 13 - 15. NMED did not contend, as Applicants’ contend now, that Permit Condition IV.B.2.b is applicable to the “pre-permit period.” Id. Notably, NMED never testified that the second clause of Permit Condition IV.B.2.b should be applied retroactively to prohibit the disposal of TRU mixed waste due to pre-permit disposal.

The proposed clarifying language is also supported under the HWA and regulations. NMED regulations at 20 NMAC 4.1.500 (incorporating 40 CFR§264.13(a)) establish the requirement for an approvable WAP under a final permit and requires that “before an owner or operator treats, stores or disposes of any hazardous wastes ... he must obtain a detailed chemical and physical analysis of a representative sample of the wastes” and “must develop and follow a written [WAP] which describes the procedures which he will carry out to comply with 40 CFR §264.13(a).” 20 NMAC 4.1.500 (incorporating 40 CFR §264.13(b)). Thus,

¹ Judge Penn determined that WIPP had interim status under RCRA and could lawfully treat, store or dispose of mixed-waste prior to permit issuance under 40 CFR Part 265 . New Mexico ex rel Madrid v. Richardson, 39 F.Supp.2d. 48 (March 29, 1999).

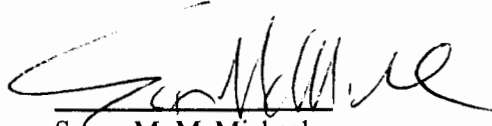
under the HWA regulations, the “WAP” referred to in both clauses of Permit Condition IV.B.2.b is the final WAP as required by 20 NMAC 4.1.900 (incorporating 40 CFR§264.13) which can be applicable only after the final permit becomes effective. NMSA 1978, Section 74-4-4.2(c)(Repl. Pamp. 1993) and 20 NMAC 4.1.900 (incorporating 40 CFR §§270.1 and .10) (Applicants are issued HWA permits after complying with applicable standards under 40 CFR Part 264.) Mr. Zappe’s testimony supports this conclusion. See also NMED’s Comments to the Hearing Officer’s Report at pp. 14 - 15.

In addition, the interim status standards under 40 CFR Part 265 are the operative legal standard to measure compliance for mixed waste stored or disposed at WIPP prior to final permit issuance. NMED regulations at 20 NMAC 4.1.600 (incorporating 40 CFR Part 265) establish the requirements for a facility without a final RCRA permit, like WIPP, to operate under interim status. See also 20 NMAC 4.1.900 (incorporating 40 CFR§270.1) (facilities with interim status must comply with interim status standards set forth at 40 CFR Parts 265 and 266). 20 NMAC 4.1.600(incorporating 40 CFR§265.13(a)) also states that “before an owner or operator treats, stores or disposes of any hazardous wastes ... he must obtain a detailed chemical and physical analysis of a representative sample of the wastes” and “must develop and follow a written [WAP] which describes the procedures which he will carry out to comply with 40 CFR §265.13(a).” 20 NMAC 4.1.500 (incorporating 40 CFR§264.13(b)).

For these reasons, Permit Condition IV.B.2.b’s prohibition of disposal of TRU mixed waste referenced in the second sentence cannot as a matter of law apply to any waste disposed of at WIPP prior to permit issuance. If the Applicants fail to comply with interim status standards under 40 CFR Part 265, the appropriate enforcement mechanism is not Permit Condition IV.B.2.b, but an administrative or civil enforcement action pursuant to Section 74-4-10 of the HWA.

Respectfully submitted,

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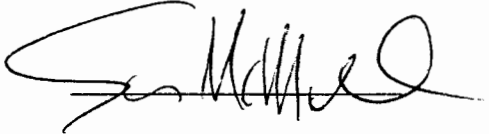
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 1999, a true and correct copy of NMED's Comments To The Secretary's Amended Order was filed and served on all parties and counsel of record via first class U.S. mail on the same date.



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