State of New Mexico
Before the Secretary of the New Mexico Environment Department

OCT 2000

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 PERMIT FOR THE WASTE ISOLATION PILOT PLANT; US EPA NO. NM 4890139088	)	HRM 98-04(P)

Final Order of the Secretary of the New Mexico Environment Department

This matter is before the Secretary of the New Mexico Environment Department ("Secretary") upon the application for a permit for the storage of transuranic mixed wastes ("TRU mixed waste") in surface areas and the disposal of such waste in the underground repository at the Waste Isolation Pilot Plant ("WIPP"). The permit applicants are the United States Department of Energy ("DOE") as owner and operator and the Westinghouse Waste Isolation Division, a private corporation, as co-operator ("Permit Applicants").

A public hearing was held before a Hearing Officer, appointed by the Secretary, from February 22, 1999 through March 26, 1999. After considering the full record including post-hearing submissions, the Hearing Officer issued a one hundred and four page report ("Report") on September 9, 1999. The Report includes Recommended Findings of Fact and Conclusions of Law. Parties were afforded the opportunity to provide written comments on the Report by September 28, 1999. Also, parties were given the opportunity to respond to a question posed in an Amended Order issued by the Secretary on October 14, 1999. The Secretary has reviewed the Report and the record and is otherwise fully advised in this matter.

I. DISCUSSION

Permit Condition IV.B.2.b

The Secretary has clear legal authority to impose Permit Condition IV.B.2.b

The Report, at page 77, expresses reservations concerning whether the first sentence of Permit Condition IV.B.2.b impermissibly seeks to impose regulations on the disposal of TRU non-mixed waste. The Secretary hereby clarifies this point. The Secretary has clear legal authority under the New Mexico Hazardous Waste Act ("HWA"), NMSA 1978, section 74-4-1 et seq. and the Resource Conservation and Recovery Act, 42 USC section 6901 et seq. to impose permit condition IV.B.2.b.

Permit Condition IV.B.2.b in the Proposed Final Permit of June 25, 1999 follows:

> Specific prohibition - 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. 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 Secretary has the clear authority and duty to impose this condition. The condition requires characterization of all waste, regardless of type, destined for disposal in WIPP. This ensures that the WIPP facility complies with environmental performance standards under the HWA and regulations; that the WIPP facility complies with the waste acceptance criteria set forth in Permit Condition II.C; and, that the WIPP facility does not accept materials that are prohibited under the HWA permit. See, Report, Findings of Fact, 262 through 271 and Conclusions of Law, 46 through 55 (and amendments in this order).

The Hearing Officer concluded that Permit Condition IV.B.2.b does not regulate TRU non-mixed waste and that United States v. New Mexico, 32 F.3d 494 (10th Cir. 1994) was persuasive, but by "the thinnest of threads." Report at 77. The Secretary disagrees, in that the requirement of waste characterization in Permit Condition IV.B.2.b is clearly supported by United States v. New Mexico, and does not substantively regulate source, special nuclear or byproduct material in conflict with the Atomic Energy Act.

This permit condition is nearly identical to the conditions imposed upon Los Alamos National Laboratories ("LANL") when it sought a HWA permit to incinerate hazardous waste and radioactive waste in the same incinerator. Id. at 496. The Tenth Circuit ruled that the lawful purpose of requiring characterization of all waste, including radioactive waste, is to ensure that only permitted hazardous waste is being disposed of under the hazardous waste permit. Id. at 498. Similarly, the purpose of Permit Condition IV.B.2.b is not to regulate TRU non-mixed waste, but is to ensure that all waste destined for WIPP is properly characterized so that it complies with the terms of the HWA permit.

Just as with the LANL incinerator, Permit Condition IV.B.2.b is required by unique circumstances at WIPP, where DOE may commingle TRU mixed waste with TRU non-

mixed waste. The Tenth Circuit recognized that permit conditions requiring monitoring and measuring radioactive materials were proper when the same incinerator was being used for radioactive and hazardous materials. The permit conditions merely operate to ensure that under these particular circumstances, only hazardous waste is being burned. Id. Permit Condition IV.B.2.b was imposed for the same reason, i.e., commingled waste may be disposed of in the same area at WIPP.

Revision to Permit Condition IV.B.2.b

The Permit Applicants have expressed concern that Permit Condition IV.B.2.b will apply to waste disposed of at WIPP prior to the HWA Permit becoming effective. Permit Applicants are concerned that they will be subject to enforcement because they have already disposed of waste not characterized in accordance with the WAP. Furthermore, Permit Applicants are concerned that they will not be able to dispose of additional waste in panel 1 after the HWA Permit becomes effective, because there is already waste in panel 1 not characterized in accordance with the WAP.

These concerns are misplaced. The terms of the HWA Permit only apply after the permit becomes effective. The New Mexico Environment Department ("NMED") does not intend that the permit condition apply to the pre-permit period. See NMED Comments to Hearing Officer's Report at 13 –15.

NMED testimony on the permit condition was prior to the ruling in New Mexico ex rel. Madrid v. Richardson, 39 F.Supp.2d 48 (D.D.C. 1999) giving interim status to WIPP. With this ruling, WIPP could be used for the treatment, storage, and disposal of mixed waste prior to permit issuance pursuant to 40 CFR part 265. This is the legal standard for measuring compliance for mixed waste stored at WIPP prior to final permit issuance. If the Permit 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 enforcement action under Section 74-4-10 of the HWA.

Accordingly, the Secretary will amend the Hearing Officer's Proposed Conclusions of Law 46 through 54 and 56. These amendments should clarify that Permit Condition IV.B.2.b applies only after the permit becomes effective.

II. FINDINGS, CONCLUSIONS AND ORDER

The Findings of Fact and Conclusions of Law contained in the Hearing Officer's Report of September 9, 1999 are reasonable and supported by the record. It is ordered that these Findings of Fact and Conclusions of Law are incorporated by reference into this final order with the following amendments.

Conclusions of Law

Conclusions of Law 46, 47, 48, 49, 50, 51, 52, 53 and 54 are amended as follows:

The words, "The version of Permit Condition IV.B.2.b proposed by NMED in the Proposed Final Permit of June 25, 1999, or the substitute version recommended by the Hearing Officer," are deleted from Conclusions of Law 46, 47, 48, 49, 50, 51, 52, 53 and 54, and replaced with the words "Permit Condition IV.B.2.b".

Conclusion of Law 56 is deleted.

A new Conclusion of Law 56 is added to read:

56. Permit Condition IV.B.2.b in NMED's Proposed Final Permit of June 25, 1999 shall be amended, in the final HWA Permit, to read:

> Specific prohibition – 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.

It is further ordered that the Permit Applicants are granted a HWA Permit that conforms to NMED's Proposed Final Permit of June 25, 1999, with the amendment to Permit Condition IV.B.2.b set forth in Conclusion of Law 56.

Peter Maggiore

Peter Maggiore
Secretary
New Mexico Environment Department

10/27/99 at 2:00pm MST
Date

CERTIFICATE OF SERVICE

I hereby certify that a copy of New Mexico Environment Department's Order was served on this day, October 27, 1999 to each of the individual parties and counsel of record listed below:

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