KAFB 91

IN THE COURT OF APPEALS
FOR THE
STATE OF NEW MEXICO

UNITED STATES OF AMERICA
DEPARTMENT OF THE AIR FORCE
Appellant

v.

No. 12,550

STATE OF NEW MEXICO
HEALTH AND ENVIORNMENT DEPARTMENT,
ENVIORNMENTAL IMPROVEMENT DIVISION
Appellee

BRIEF-IN-CHIEF IN SUPPORT OF APPELLANT'S APPEAL OF A HAZARDOUS WASTE STORAGE PERMIT

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INTRODUCTION

COMES NOW the Appellant, the United States of America, Department of the Air Force, and submits this Brief in chief in support of its appeal of the Hazardous Waste Storage Facility Permit issued to Kirtland Air Force Base (KAFB) by the New Mexico Health and Environment Department, Environmental Improvement Division (EID), dated July 24th, 1990, for a ten year period. RP-1272. Notice of Appeal was timely filed on August 22nd, 1990. The jurisdiction of this court is invoked under SCRA 12-102, 12-201, and 12-601 1986 (1990 Repl.).

The permit was issued under the authority of the Resource Conservation and Recovery Act (RCRA), 42 USC 6901, et seq., of 1980, as incorporated by the New Mexico Hazardous Waste Act, NMSA 74-4-1, 1978 (1990 Repl.), et seq., and as implemented in the Code of Federal Regulations (CFRs), 40 CFR Sections 260 and 270. EID has received authority from the United States Environmental Protection Agency for regulation of storage facilities. Prior to the issuance of this Part B permit under the New Mexico Hazardous Waste Act, NMSA 74-4-1, 1978 (1990 Repl.), et seq, all facilities currently in operation in 1980 received interim Part A permitting status until the Part B application process was completed. KAFB submitted the first draft on May 10, 1984. RP-352. At the request of EID, KAFB submitted revised Part B permit applications in May 1985, May 1988 and June 1989. RP-469, 645 and 914. The final draft permit, sent to KAFB on June 30, 1989, was essentially unchanged from the last version submitted by KAFB, contrary to Appellee's assertion on p.2 of Appellee's Brief Opposing Stay of Administrative

Order that EID wrote the draft permit. In fact, the permit was the result of [redacted]ttee comprised of representatives of KAFB, EID and the Defense Reutilization and Marketing Organization (DRMO), the tenant on KAFB that operates the three hazardous waste storage facilities.

not such committee

During the court-ordered settlement conference, held November 27, 1990, KAFB and EID reached an agreement with regard to Issues a. and f. in the Docketing Statement and filed a Stipulation of Agreement on January 3rd 1991. Those issues will not be addressed in this Brief. The Stipulation was noted by the court on January 4th, 1991, but no disposition was made pending assignment to a panel after briefing. If the court ultimately does not accept the Stipulation, then Appellant wishes to reserve the option of briefing those two issues at that time.

Although EID terminated the settlement conference and was unwilling to continue negotiations, KAFB has further attempted to settle the remaining issues on appeal by filing a request with the Director of EID, Mr Richard Mitzelfelt, for a permit modification. This request was made in accordance with 40 CFR 270.41 (1988) and requires KAFB to submit a revised permit application for those portions of the permit that need modification. The request was mailed on January 29, 1991; at the time of filing of this Brief, KAFB has not received a response to this request.

Strike?

NATURE OF PROCEEDINGS

This appeal is the result of a Hazardous Waste Storage Facility Permit (Part B permit) issued to KAFB as the result of a process extending over a seven period, beginning with the first draft in 1984. RP-352. Prior to and during the application process KAFB was operating its two existing storage facilities under the provisions of an interim (Part A) permit in accordance with the New Mexico Hazardous Waste Act and the Code of Federal Regulations.

KAFB is a large, multi-agency, federal facility located in the southeast quadrant of Albuquerque, New Mexico. Approximately 180 tenant units from all armed services plus the Department of Energy (DOE), Sandia National Laboratories (SNL) and other federal agencies maintain offices or operating sites on KAFB. However, DOE and SNL operate under permits separate from that of KAFB.

Among the sites at KAFB are three hazardous waste storage facilities. The newest, Bldg 1024, was recently built and is not being used until this appeal is resolved. It did not operate under interim status. KAFB is the owner or landlord of the base proper; however, the operator of the hazardous waste facilities is DRMO, whose parent organization is the Defense Reutilization Marketing Region (DRMR) located in Salt Lake City, Utah. The operation of the three hazardous waste storage facilities is in cooperation with KAFB and is the standard

arrangement within the Department of Defense for storage and disposal of hazardous waste. Neither KAFB nor the Department of the Air Force owns DRMO, it is a separate organization ultimately belonging to the Defense Logistics Agency.

The 1984 proposed Part B Permit was the result of a collaboration among several organizations, comprised of representatives from EID, KAFB, and DRMO. The final draft, determined to be complete by EID, was issued on June 30, 1989. RP-994. In accordance with the provisions of the New Mexico Hazardous Waste Act, a period of public input and hearings was then begun. Written public input and comments regarding the Part B permit were allowed until October 16, 1989, with a public hearing conducted on October 24, 1989. RP-318. Input included comments from the public at large as well as from KAFB, DRMR, and the Environmental Protection Agency. KAFB submitted its comments during the appropriate public comment period. RP-282. These comments questioned several aspects of the proposed permit and requested specific changes and modifications, the necessity for which arose during the lengthy period of time it took to finalize the permit application. A large facility such as KAFB does not remain static for a seven year period. The issues on appeal cover the same permit provisions addressed in the comments.

KAFB attempted to discuss these issues with EID after the close of the public comment period. RP-319. EID responded by letter dated October 31, 1989, that in part states:

"We share your concern that the final permit consist of procedures and requirements that are both practical and protective of human health and the environment. We will contact your staff as necessary during

revision of the draft permit to avoid inadvertently imposing any untenable permit conditions."

No such contact occurred despite numerous verbal attempts by KAFB personnel to discuss these issues prior to the issuance of the final permit.

Under RCRA and the federal regulations, states may establish their own set of environmental protection regulations which are in compliance with federal regulations. Federal agencies will comply with state regulations which meet the requirements of RCRA and the federal regulations. KAFB has paid the $27,000 permit application fee and otherwise cooperated with EID in the application procedure for the Part B permit.

QUESTIONS PRESENTED

Under the provisions of NMSA 74-4-4.2H, 1978 (1990 Repl.), the court of appeals shall set aside the decision of the director only if found to be:

> "(1) arbitrary, capricious or an abuse of discretion;
> (2) not supported by substantial evidence in the record; or
> (3) otherwise not in accordance with law."

Therefore, the following questions are presented for the court's consideration:

a. Whether EID exceeded its authority at law by issuing a Part B permit more restrictive and more stringent than federal regulations in violation of NMSA 74-4-4A, 1978 (1990 Repl.);

b. Whether EID acted in an arbitrary and capricious manner by imposing time limits and testing requirements more burdensome than

federal requirements and that do not serve to protect human health and the environment;

c. Whether the unique categorization of hazardous waste and the automatic reclassification of material into hazardous waste, absent regulatory authority, with no supported necessity provided and [redacted] were not supported by substantial evidence.

SUMMARY OF ARGUMENT

EID, in the issuing of the Part B permit to KAFB, exceeded its authority at law. The Part B permit is more restrictive and more stringent than federal regulations. The New Mexico Hazardous Waste Act prohibits any permit requirement more stringent than federal law. The Part B permit imposes several requirements that are more stringent and imposes waste categories and time limits inapplicable to KAFB.

The record does not contain substantial evidence to support these decisions. The 1984 draft proposal was issued essentially unchanged despite legal and typographical errors and in disregard of repeated and timely comment and correspondence. Undefined and inconsistent designations of 'permitee', 'operator', 'owner' and many other terms create a confusing, cumbersome and unenforceable permit.

Under NMSA 74-4-4A, 1978 (1990 Repl.), the Environmental Improvement Board (EIB) is given authority to adopt regulations to manage hazardous waste equivalent to, and no more stringent than, those federal

regulations adopted by the US Environmental Agency as embodied in RCRA and the CFRs. The New Mexico Hazardous Waste Regulations-5 incorporate most provisions of 40 CFR 260-270 (1988). Although the CFRs have been updated, the New Mexico Regulations have not been, therefore, it is the 1988 version that is still applicable. 1990 revisions are currently pending before the Environmental Improvement Board in order to bring New Mexico law current with the federal regulations.

The EIB may set standards to protect human health and environment with terms and conditions that specifically apply to each facility. The requirements in the permit were established by EID, not the EIB, through an erroneous interpretation of its regulatory authority. However, requirements that go beyond federal requirements, with no substantial evidence on the record to support them as necessary to protect the environment are arbitrary and capricious and involve unnecessary time and expense. Site specific conditions must still remain within the scope of the regulations, no matter how stringent. If it is necessary to be more stringent than federal regulations in order to protect the environment, then that is a matter for the legislature to consider. Absent legislative change, EID is prohibited by state law from imposing more restrictive requirements. This is supported by EID v. Bloomfield Irrigation District, 108 N.M. 691, 694, 778 P.2d 438, 441 (Ct.App.1989), which states "Courts defer to the interpretation of a regulation by the agency to which it is addressed unless such interpretation is plainly erroneous or inconsistent with the regulation."

Duke City Lumber Company v. NMEIB, 101 N.M. 291, 681 P.2d 717 (1984), establishes the standard for review as a whole record review. The record proper in this case contains no support for protection of the environment in the manner required by the permit. Tenneco Oil Company v. NMWQCC, 107 N.M. 469, 477, 760 P.2d 161, 169 (Ct.App.1987) states that in a whole record review, 'the review is 'not ... limited to those findings most favorable to the agency order.' The reviewing court must also look to evidence that is contrary to the findings and then decide whether, on balance, the agency's decision was supported by substantial evidence.' If the whole record does not support the agency's decision, as is the case with this permit, then the decision cannot stand.

Because the permit as issued is arbitrary and capricious, not supported by substantial evidence and is not in accordance with the law, it must accordingly be modified.

ARGUMENT

I. THE INCLUSION OF A 90-DAY AUTOMATIC RECLASSIFICATION OF MATERIAL AS WASTE IS NOT IN ACCORDANCE WITH THE LAW, IS ARBITRARY AND CAPRICIOUS AND IS NOT SUPPORTED BY THE EVIDENCE.

At PA II-2, p.2, the last two sentences of the second paragraph, EID has added:

'If these attempts are unsuccessful, the material is designated a

waste and enters the hazardous waste management system. Any hazardous material held by DRMO for more than 90 days after turn-in will automatically be classified as a hazardous waste."

There is no authority under RCRA to reclassify material as hazardous waste. 40 CFR 261 (1988) provides no such provision among its definitions of and distinctions between materials and hazardous waste. It is a primary mission of DRMO to store acquired and generated materials until a satisfactory user can be found.

In any proceeding for review of an agency decision or order, the court may set aside the decision or order if the action was in excess of the statutory authority or jurisdiction of the agency or otherwise not in accordance with law. NMSA 12-8-22A(2), 1978 (1988 Repl.) The New Mexico Hazardous Waste Act states "(t)he board shall adopt regulations for the management of hazardous waste equivalent to, and no more stringent than, federal regulations adopted by the federal Environmental Protection Agency pursuant to the Resource Conservation and Recovery Act." (emphasis added), NMSA 74-4-4A, 1978 (1990 Repl.).

It is well established in New Mexico case law that EID may not promulgate regulations more restrictive than federal law. Public Service Commission v. New Mexico Environmental Improvement Division, 89 N.M. 223, 549 P.2d 638 (Ct.App.1976). An administrative agency may not enlarge its authority under the guise of making rules and regulations. Id at 227, 642. The EIB, having set the standard, is also bound by it. However, it may not set a new standard or adopt regulations implementing it or explaining it for any reason other than the purpose stated in the applicable statute, which in this case is to protect human health and the

environment. Because the requirements also constitute a clear violation of NMSA 74-4-4A, 1978 (1990 Repl.), the EID actions in including these requirements exceeded the statutory authority and were not in accordance with law.

The court may also set aside an order or decision if it is unsupported by substantial evidence. NMSA 12-8-22A(5), 1978 (1988 Repl.) Duke City Lumber Company v. NMEIB, 101 N.M. 291, 681 P.2d 717 (1984) established the basic standard for "substantial evidence" in New Mexico; that the substantial evidence rule must be applied to the entire record. (See also New Mexico Human Services Department v. Garcia, 94 N.M. 175, 608 P.2d 151 (1980). While the evidence must be viewed in the light most favorable to the agency decision, **other evidence in the record considered as a whole may not be disregarded.** In this context, the court must decide whether, on balance, the agency's decision was supported by substantial evidence. Trujillo v. Employment Sec. Dep't, 105 N.M. 467, 734 P.2d 245 (Ct.App.1987). If the evidence as a whole does not support the agency's decision, that decision cannot be upheld. Tenneco Oil Company v. New Mexico Water Quality Control Commission, 107 N.M. 469, 760 P.2d 161 (1987) cert. denied (1988); Cibola Energy Corp. v. Roselli, 105 N.M. 774, 737 P.2d 555 (Ct.App.1987).

By arbitrarily redefining materials as hazardous waste after 90 days, EID was not acting in accordance with the law, violating NMSA 74-4-4A, 1978 (1990 Repl.) and exceeding its authority. A review of the record reveals an almost unswerving reliance on the 1984 proposed permit and a disregard of subsequent KAFB comments and correspondence. RP-282.

However, this provision was added after the public comment period without the discussion with KAFB that Mr Boyd Hamilton stated would occur.

check this

RP-320. In response to a letter from KAFB (RP-319) inquiring about possible changes to the permit after the comment period ended, Mr Hamilton responded:

"We share your concern that the final permit consist of procedures and requirements that are both practical and protective of human health and the environment. We will contact your staff as necessary during revision of the draft permit to avoid inadvertently imposing any untenable permit conditions."

KAFB was never consulted on this addition to the permit, which is untenable and adds nothing to protect the environment.

These materials are turned in as excess, in original containers, and are not waste until no buyer can be found. The fact that KAFB has no further use for them does not mean the materials become waste per the definitions of 40 CFR 261.2. KAFB does not turn them in for disposal initially, but for reuse. It is inaccurate to state that these materials are turned in to the hazardous waste storage facilities; they are turned in to DRMO. It is a primary function of DRMO, separate from storage and disposal of hazardous waste, to recycle material. **The materials are not placed in any hazardous waste storage facility, thus they cannot be regulated as waste until it is determined there is no use for them.** In EID's response to public comments, (RP-339) Comment 14, regarding waste reduction by finding users, it was stated that this process to find users is already in place at DRMO, prior to declaring an item a waste. (emphasis added). Further, EID states that "This process cannot actually be required by the permit because these materials do not come under

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recycling material RCRA storage while it is awaiting recycling

regulation until all alternatives to disposal are exhausted." Therefore, EID admitted this material does not fall within its authority to regulate. The 90-day cut-off discourages recycling efforts and eliminates large quantity buyers from the market, unnecessarily increases disposal costs, and undercuts the hazardous waste minimization philosophy of RCRA, 40 CFR 262, Appendix. Only if no reuse is possible should the material be reclassified as waste and subject to regulation by EID.

Within the same document, EID responded to KAFB's Comment 4, (RP-344) by agreeing that KAFB is correct that the permit applies only to waste, not material and that the permit presumes all attempts to find a use for an item have been exhausted. "It is EID's opinion the change recommended by KAFB would confuse the issue by appearing to subject hazardous materials to all permitting requirements." EID then added the provision that automatically reclassifies material as waste in 90 days. The point at which DRMO declares material is waste is a matter of agency discretion, as it involves their efforts at recycling and involves disposal costs for KAFB if DRMO cannot resell the material. Again in the same document, in its response to KAFB Comment 25 (RP-348), on a related issue, EID states that storage of hazardous material within the storage facility, which is optional, is a matter of internal policy and is not appropriate for inclusion in the permit. If this is true for storage of hazardous material inside the storage facility, then it must also be accurate for material outside the facility that is awaiting resale.

There is absolutely no authority in 40 CFR 261 which establishes an automatic 90-day reclassification; there is nothing in the New Mexico

Hazardous Waste Act that authorizes regulation of materials or reclassification as waste. 40 CFR 261.11 states that it is the generator who determines at turn-in whether the item is material or waste. If during the annual RCRA inspection EID determines that DRMO is keeping material for an inordinate amount of time or the containers pose a threat to the environment, then DRMO can be required to become a satellite collection point, thereby invoking regulation by EID. This is the appropriate mechanism for insuring that the material is not sitting an inordinate amount of time. In fact, this is the system that existed prior to the permit and no inspection by EID ever identified this as a problem. 90 days is not a reasonable amount of time to find a large quantity buyer.

One comment at the public hearing on this issue (RP-340), without any evidence that material is being stored indefinitely, does not expand EID's authority to regulate material. Using the 90 day timeframe, which is the cutoff for storage at satellite accumulation points under 40 CFR 262.34(a), is inappropriate because this applies to collection points at the generator site, not a hazardous waste storage facility. The reason for the 90 day cutoff for satellite accumulation points is to keep the collection points from becoming storage sites. The material turned in to DRMO is not located at a collection point. KAFB had no opportunity to discuss the addition of the 90 day provision because it was added after the public comment period and KAFB was unaware of its addition until the final permit was issued. For all the above reasons, inclusion of the 90 day automatic reclassification of material to waste is not within the

authority of EID under 40 CFR 270.32(b)(2) because there is no evidence to show its necessity based on protection of human health and the environment.

II. THE INCLUSION OF ANNUAL WASTE STREAM VERIFICATIONS IN THE PERMIT BY EID IN ARBITRARY, CAPRICIOUS AND IS NOT SUPPORTED BY THE EVIDENCE.

#16 Under Section II-C, General Waste Analysis, first line of page II-2, p.5 (RP-1298), EID requires each waste stream be verified annually as part of the quality assurance program. This requirement is reiterated on page PA II-2, p.6, line 7, (RP-1299) wherein KAFB is required to annually update the waste profile sheet for each continuous waste stream or whenever a waste stream changes.

There is no evidence on the record to support the need, rationale or justification for annual sampling requirements. According to 40 CFR 264.13, analysis is required only when the owner or operator is notified, or has reason to believe that the process or operation generating the hazardous waste has changed. One of the waste streams is dead sealed batteries, and annual sampling would only confirm what is already known about its contents. The cost of sampling a sealed battery is approximately $2,000 each, which is costly and unnecessary sampling; a capricious and overly burdensome requirement. Many other waste streams can be similarly categorized for appropriate testing without the exorbitant cost for all tests required by the permit. There are no facts on the record to support the establishment of annual sampling requirements.

this is for verification

Although EID may have discretion is determining what is necessary under 40 CFR 264.13(a)(3), there must be specific evidence on the record to support this requirement, rather than speculation of a problem. EID's response to KAFB's Comment 1 (RP-342, 343), concludes that turnover of base personnel, rate of change of process and the infancy of KAFB's waste stream identification program justify annual verification. However, during the seven year permitting process, KAFB completed waste stream verification and now does a waste profile sheet on each generated waste. There have been approximately 40 waste streams identified. Annual testing of existing waste streams will not identify new waste streams, only verify known results. The generator is in the best position to know when the waste stream changes, which is the requirement in 40 CFR 264.13(a)(1). During the last several inspections of KAFB, both before and after the permit was issued, user knowledge was deemed sufficient because there were no discrepancies of this kind noted. The annual inspection conducted by EID is the appropriate mechanism for determining whether waste stream analysis is sufficient and whether waste is being properly handled. No harm to the environment has been identified by using the existing mechanism. Annual testing consumes time and limited funding that over the course of ten years can be better spent elsewhere. The annual testing requirement disregards the facts and circumstances of KAFB as it progressed over the lengthy permitting process, which is a requirement of Tenneco Oil Company v. NMWQCC, 107 N.M. 469, 760 P.2d 161 (Ct.App.1987), cert. denied (1988). The permit's annual testing requirements are not reasonably related to the purpose of RCRA and the

New Mexico Hazardous Waste Act, therefore, they are arbitrary and capricious under Tenneco.

III. BY THE CREATION OF GROUP I AND GROUP II WASTE CATEGORIES, EID HAS EXCEEDED ITS AUTHORITY AND IMPOSED RESTRICTIONS MORE STRINGENT THAN FEDERAL REGULATIONS.

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By its definitions found in paragraph 3, Page PA II-2, p.2, EID created two categories of hazardous waste. Group I consists of waste held in its original, unopened container, all other wastes fall under Group II. RP-1296. Specific requirements are then levied for each category throughout the permit.

these construct

40 CFR 261 specifies the identifications and listings of hazardous waste. Section 261.3 defines hazardous waste according to chemical composition, characteristic or source. Categories among hazardous wastes are delineated by means of disposal. There is a total absence of any authority to create a classification system based on whether the hazardous waste is stored in its original container. Under 40 CFR 261.2, material can become waste if discarded, but this is not the case with DRMO, who stores it for productive future use. EID may argue that this material is only stored in lieu of disposal, but this would only qualify it as a solid waste. A process or disposal must be involved for material to become hazardous waste. The arbitrary distinctions should be deleted and reference made only to the requirements for hazardous waste.

Unused, unopened containers may be turned in as surplus and a buyer may be found, therefore it is not waste. As defined in the permit, Group I items are actually material. Regulation of reusable material is

beyond the scope of EID's authority to regulate as stated above in Issue I. Also, if the containers must be opened to perform the mandatory testing, rather than using the information on the label, it no longer meets the definition of Group I as it is no longer unopened. A further inconsistency exists in the appendices (RP-1301, 1323) which list Group I and II wastes in that Group II lists wastes as the result of a process and Group I lists characteristic wastes. The listings do not match the definitions of Group I and II earlier in the permit. The classification serves no useful purpose in protecting human health and the environment.

KAFB did include these categories in its various permit applications, which were the result of a committee comprised of members of EID, KAFB and DRMO. This committee used boilerplate from a permit in use at another facility and then attempted to tailor the provisions to KAFB. The individuals from all organizations who began the permitting process were inexperienced in drafting permits. The experience level increased throughout the course of the seven year process. However, when KAFB became aware of the inconsistencies and problems associated with the definitions, attempts were made to correct the issue during the appropriate final public comment period. RP-282. Although phrased in a slightly different manner, the definition of Group I and II wastes was raised and modification requested.

EID's response to KAFB Comment 4, which requested a change in the definition of Group I and II (RP-344), admits that KAFB is correct that the permit language presumes all attempts to find a user were exhausted. EID further stated that KAFB's requested change would appear to subject

material to hazardous waste permitting requirements. However, EID did change the permit based on this comment and added new language to the permit, already discussed in Issue I above. Had EID discussed this provision with KAFB, prior to issuing the permit, as it stated in would in its October 31, 1989 letter to KAFB, (RP-320), the problems and inconsistencies could have been avoided.

EID may argue that because KAFB submitted draft permit applications with this language, KAFB is precluded from later requesting changes. Changes are the very reason for 'draft' permits and subsequent revisions, down to the last opportunity for public comment, which KAFB was entitled to and did, under NMSA 74-4-4.2E 1978 (1990 Repl.). RP-282. As a regulatory authority, EID has the obligation to independently review the application. The final permit was issued essentially unchanged. The fact that any final permit language can be traced back to an applicant's submission at some stage of the permitting process does not relieve EID of any statutory constraints or obligations, nor does it give EID authority to impose burdensome and arbitrary requirements that are not supported by regulation or facts in the record without independently reviewing the rationale for protection of the environment. Further, when KAFB became aware, over the course of the application process, of the problems inherent in this classification, attempts were made to change the provisions, to no avail. An additional error in the permit, not revised by EID in its review, is on PA-II, p.4, (RP-1295), where it

states that DRMO personnel determine whether the turned in item is a waste or material, when 40 CFR 261.11 states this decision is made by the generator.

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Under the holding in NMEID v. Thomas, 789 F.2d 825 (10th Cir.1986), KAFB fulfilled its responsibility to raise dissatisfaction with the agency involved and has done so on the record. Because the regulations do not specifically provide for Group I and II definitions, EID must show the requirements are related to its purpose of protecting the environment and there must be substantial evidence on the record to support the requirement. There is not, therefore, the definitions cannot be upheld.

IV. THE REQUIREMENT TO CONDUCT SPECIFIC TESTS EXCEEDS AND IS MORE STRINGENT THAN FEDERAL REGULATIONS

In addition to classifying waste as Group I or Group II waste, EID also erred in designating which tests will be run on page PA-II-2, p.5, first paragraph and which references Table C-2. RP-1296. The manner in which tests are to be conducted is in 40 CFR 261, referring to Appendices 2 and 3 for specifics. However, the knowledge and experience of the waste generator, with consideration of the nature of the waste, dictates the type of tests conducted. Per 40 CFR 264.13, the owner develops and follows a written waste analysis plan which describes the testing procedures.

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By specifying certain tests be performed on all waste streams, EID imposes a more stringent and burdensome requirement on KAFB than federal regulations require, again violating NMSA 74-4-4A, 1978 (1990 Repl.) and exceeds its authority at law. There is no evidence on the record to

support doing all tests for all waste streams. Doing all nine tests listed in Table C-2 for a waste stream such as a sealed battery, is overly burdensome and unnecessarily expensive as was discussed in Issue I. In fact, the EP Toxicity test is no longer required by the federal regulations and has been replaced by the TCLP test. This permit, as it stands, requires an outdated test on all waste streams for the next ten years. In response to KAFB Comment 8 on this issue (RP-344), EID did add the word 'appropriate' in front of 'tests'. However, the following sentences then require certain tests be run on all wastes. (emphasis added) It is an arbitrary requirement to require all tests for a waste stream with a known contaminant. The type of testing is determined by the nature of the waste. KAFB's current standard practice is to do a waste profile sheet on each generation. The cost of $2,000 per waste stream is exorbitant if the tests are made unnecessary by operator knowledge of the contents.

KAFB proposes to settle this by creation of two lists of waste streams. One would list specific appropriate tests for certain waste streams based on user knowledge, the other waste streams will receive all testing. During the annual inspection, EID can determine whether the testing is adequate. This type of specification of testing is not more stringent than the regulations, whereas across the board testing is. Although these testing methods may have been submitted by KAFB, EID must still review them for applicability. Again, EID participated in the permitting committee and helped draft the provisions therein. The issue was timely raised during the comment period (RP-283) and reflects

increased knowledge and experience by KAFB personnel during the course of the lengthy permit process.

V. THE USE OF THE WORDS 'PERMITEE', 'OWNER' AND 'OPERATOR' ARE USED INTERCHANGEABLY AND INCONSISTENTLY, MAKING IT UNCLEAR AS TO WHICH REQUIREMENTS ARE APPLICABLE TO WHOM.

Throughout the permit (RP-1272), the words 'permitee', 'owner' and 'operator' are interchanged and so inconsistent as to make it unclear if specific requirements apply to KAFB, DRMO or both. The term 'DRMO' is ambiguous because it could refer to the DRMO organization itself or to just one Hazardous Waste Storage facility. 'Facility' could be interpreted as referring to any of the three storage facilities or to all of KAFB as the 'facility'. Some of the requirements could refer to either or both, with a vast disparity in what is necessary for compliance. Although KAFB is ultimately responsible, this is much too simplistic to describe the actual nature of base facilities. Unnecessary confusion is created when it is unclear which requirements may apply to KAFB as the permitee or owner and which requirements apply to DRMO as operator. 'Facility' personnel could be all of KAFB or just the DRMO personnel. A definition section added to the permit would clarify or retyping of the permit with more specific wording is needed. KAFB has offered to do this administrative task and correct all the existing typographical errors in the permit as well. Even the page numbering system is difficult to comprehend. The sheer number of issues relating to mistakes, errors, questions, etc raised in KAFB's comments (RP-282) indicate the problem inherent in the entire permit. Anything more than a

cursory review of the permit application by EID would have revealed the terminology problems. Again, the final permit application was the result of a combined effort by KAFB, EID and DRMO; therefore EID shares the responsibility for the origin of these errors and furthermore had to statutory duty to correct them in the review process.

Without such clarification, the permit is arbitrary, confusing and unenforceable. ~~Needless~~ ambiguities and unclear taskings defeat the legislative purpose in enacting the Hazardous Waste Act. Undefined terms, used in an inconsistent manner, create a permit that is confusing and prone to violation. Annual inspections by EID will be difficult to perform and there is a lack of notice to KAFB as to what is required. This confusion was evident during the September 1990 annual inspection, the first under the issued permit. The end result will be inevitable unintentional violations and time-consuming judicial review of enforcement attempts. Judicial efficiency dictates that this problem be settled once, by modifying the permit for clarification. The raising of this issue is an attempt to have a permit that is workable for both parties over a lengthy period of time and improve working relationships toward the shared goal of protecting human health and the environment.

CONCLUSION

For all the foregoing reasons, the Hazardous Waste Operating Permit should be modified accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Brief-in-Chief was mailed to the following counsel of record this 5th day of February, 1991:

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