

**From:** [Kevin Draper](#)  
**To:** [Roberts, Kathryn, NMENV](#)  
**Subject:** Comments  
**Date:** Wednesday, May 18, 2016 10:11:43 AM

---

Globally throughout the Draft Consent Order (CA), the terminology “should include” is applied. The term “should” is ambiguous at best and does not specifically require the Permittee to comply with the CA but rather allows discretion as to whether the Permittee needs to comply. Just one of many examples: Appendix F part I states that “site-specific work plans should include the data quality objectives and proposed methods....” The United States Environmental Protection Agency (U.S. EPA) delegates the primary responsibility of implementing the Resource Conservation and Recovery Act (RCRA) hazardous waste program to individual states in lieu of the EPA. This process ensures national consistency and minimum standards while providing flexibility to states in implementing rules. The State of New Mexico received authorization on January 25, 1985 from the U.S. EPA to implement its base hazardous waste management program. On January 2, 1996, New Mexico received authorization to implement Hazardous and Solid Waste Act (HSWA) corrective action. New Mexico received its most current authorization from the U.S. EPA on October 16, 2007. States that receive final authorization from the U.S. EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal Hazardous Waste Program. However, the U.S. EPA Corrective Action guidance clearly outlines what the minimum requirements are for the various phases of corrective action, to include work plans, RCRA Facility Investigations, Corrective Measures Studies/Implementation, and other closure documents. The use of terms such as “should” in the Draft CA is in violation of the State authorization act, in that allowing such flexibility in RCRA investigations/compliance is deemed less stringent than the Federal Hazardous Waste Program. The Draft CA must be globally revised to clearly state the requirements for corrective action. The term “should” must be removed throughout the Draft CA and replaced with “will”, “must”, “shall”, or similar so that the Draft CA is in compliance with the Federal Hazardous Waste Program and State authorization rules.

XIII Facility Investigation, part D. The Draft CA states that “if during investigation, DOE determines that changes to approach or work scope detailed in the work plan are needed to meet the investigation objectives, DOE shall notify

NMED in writing. However, the Draft CA does not allow for review and approval of such changes. Changes in approach and/or scope should be reviewed, commented, and approved by NMED prior to implementation.

XXIII Preparation/Review/Comment on the Documents part E. The Draft CA allows for an informal review and comment process allowing for an informal discussion of documents prior to submittal for official review by NMED. It is not clear, but it appears that NMED will not be provided a full document for review but rather will only be allowed to discuss issues; at a minimum, a Draft Final document must be submitted to facilitate the review process. Further, the language of the Draft CA appears to allow DOE flexibility on whether they chose to address the State’s concerns/comments. This process, as currently written, is limiting the State on its

legal authority to review and comment on documents and require modification for either technical content or regulatory compliance. Once DOE submits the document, NMED may only approve the document as submitted; approve the document with modifications; or, disapprove the document. It is not clear how this process allows the State full review capability of the documents (other than through disapproval). Further, the informal review process does not allow for clear documentation of State concerns and DOE responses. This lack of transparency is concerning, as it is unclear how the review process will be documented for the public record. Further, this informal process appears to favor the facility, limiting the NMED's legal right to review and comment on submitted documents.