

Permit

SRIC



ENTERED



SOUTHWEST RESEARCH AND INFORMATION CENTER

P.O. Box 4524 Albuquerque, NM 87196 505-262-1862 FAX: 505-262-1864 www.sric.org

March 12, 2010

TO: SALLY WORTHINGTON, Hearing Clerk, 505/827-2836

FROM: Don Hancock, PO Box 4524, Albuquerque, NM 87196-4524, 505/262-1862

RE: HWB 09-37 (P) and HWB 10-04 (P) LANL Permit

Entry of Appearance on behalf of Southwest Research and Information Center

3 pages transmitted, excluding this cover page





**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT**

**IN THE MATTERS OF THE APPLICATION OF
THE UNITED STATES DEPARTMENT OF ENERGY
AND LOS ALAMOS NATIONAL SECURITY LLC
FOR A HAZARDOUS WASTE FACILITY PERMIT
FOR LOS ALAMOS NATIONAL LABORATORY
AND THE NOTICE OF INTENT TO DENY A PERMIT
FOR OPEN BURN UNITS TA-16-388 AND TA-16-399 FOR
LOS ALAMOS NATIONAL LABORATORY**

**HWB 09-37(P)
HWB 10-04(P)**

**ENTRY OF APPEARANCE ON BEHALF OF
SOUTHWEST RESEARCH AND INFORMATION CENTER**

COMES NOW Southwest Research and Information Center ("SRIC") and notices its entry of appearance in this proceeding, pursuant to 20.1.4.300.A(1) NMAC.

SRIC has submitted comments on the draft permit, participated in negotiations, and signed two stipulations in this proceeding, on June 26, 2009, and February 15, 2010.

Appearing for SRIC in these proceedings is Don Hancock. He may be contacted at:

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Respectfully submitted,

Don Hancock

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March, 2010, a copy of the foregoing Entry of

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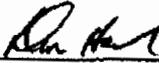
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Don Hancock

Life-cycle Costs

As part of its application of DOE Order 413.3A to operating expense-funded cleanup projects, EM identifies contingency that increases the probable project cost with a resulting higher confidence level (from a nominal 50% confidence level to 80% confidence level) that the project can be completed on time at the estimated cost. EM's budget request does not include any contingency funding to support this higher confidence.

The EM program has developed life-cycle estimates with cost and schedule ranges to account for the uncertainty associated with long-term project execution. These ranges have been reviewed independently for reasonableness by the DOE Office of Engineering and Construction Management. These ranges represent EM's best estimate for life-cycle cost. In instances where a project has not been reviewed or is complete, a single point estimate or actual cost is provided. The life-cycle costs represent active projects at EM sites and those sites completed prior to FY 2009 that are transitioning to the Office of Legacy Management or other program landlords for long-term stewardship. In addition, the life-cycle cost ranges include prior year costs beginning in FY 1997 through FY 2009.

ENVIRONMENTAL MANAGEMENT PROGRAM LIFE-CYCLE COST RANGE (Millions of Dollars)			
Site	LCC Total Range		
Argonne National Laboratory-East	\$78	-	
Ashtabula	137	-	
Brookhaven National Laboratory	435	-	469
Columbus	172	-	
Energy Technology Engineering Center	345	-	394
Fernald	3,495	-	
Hanford Site	58,523	-	61,285
Headquarters	2,291	-	
Idaho National Laboratory	26,248	-	32,881
Inhalation Toxicology Laboratory	11	-	
Kansas City Plant	30	-	
Laboratory for Energy-Related Health Research	40	-	
Lawrence Berkeley National Laboratory	36	-	
Lawrence Livermore National Laboratory	330	-	
Los Alamos National Laboratory	2,647	-	3,593
Miamisburg	1,945	-	
Moab	1,000	-	1,040
Nevada Test Site	2,443	-	2,750
Oak Ridge Reservation	10,078	-	10,553
Office of River Protection	56,784	-	74,687
Other	1,401	-	1,404
Paducah Gaseous Diffusion Plant	10,241	-	17,062
Pantex Plant	208	-	
Portsmouth Gaseous Diffusion Plant	9,199	-	16,092
Program Direction	12,080	-	
Rocky Flats Environmental Technology Site	9,047	-	
Sandia National Laboratory	235	-	

ENVIRONMENTAL MANAGEMENT PROGRAM LIFE-CYCLE COST RANGE (Millions of Dollars)			
Site	LCC Total Range		
Savannah River Site	53,286	-	64,120
Stanford Linear Accelerator Center	52	-	54
Technology Development and Deployment	3,073	-	
Waste Isolation Pilot Plant	6,832	-	7,393
West Valley Demonstration Project	1,849	-	1,987
TOTAL EM PROGRAM	\$274,569	-	\$328,974

Site Closure Dates

EM's lifecycle cost estimates reflect a range of site completion dates. This range is shown on the following table. In instances where a project has not been reviewed or is complete, a single point estimate or actual date is provided. Note that the dates in the table are based on fiscal years to conform with the budget cycle. Changes from the FY 2010 Congressional Request are discussed in each site's budget narrative.

ENVIRONMENTAL MANAGEMENT PROJECT SCHEDULE RANGE	
Site	Completion Range
Pantex Plant	2009*
Argonne National Laboratory - East	2009*
Inhalation Toxicology Laboratory	2010
General Electric Vallecitos Nuclear Center	2011
Stanford Linear Accelerator Center	2012**
Separations Process Research Unit	2013 - 2014**
Sandia National Laboratories - NM	2014
Lawrence Livermore National Laboratory - Site 300	2014
West Valley Demonstration Project	2018
Los Alamos National Laboratory	2015
Energy Technology Engineering Center	2018 - 2025
Brookhaven National Laboratory	2018 - 2020**
Oak Ridge Reservation	2021 - 2022
Nevada Test Site Projects	2027 - 2038
Moab	2028
Savannah River Site	2038 - 2040
Idaho National Laboratory	2035 - 2044
Waste Isolation Pilot Plant	2035 - 2039
Paducah Gaseous Diffusion Plant	2040 - 2052
Portsmouth Gaseous Diffusion Plant	2044 - 2052
Hanford Site	2050 - 2062

*Physical completion occurred in FY 2009. Critical Decision 4 paperwork expected to be signed in first quarter, CY 2010.

** With ARRA funding the completion date for these sites are expected to be accelerated to FY 2011.

Lifecycle Costs by Program Baseline Summary (PBS)

Thousands of Dollars

Site	PBS Field Code	PBS Name	Prior Costs FY 97-2009	FY10 and Remaining Cost (Low Range)	FY10 and Remaining Cost (High Range)	Lifecycle Cost (Low Range)	Lifecycle Cost (High Range)
Lawrence Livermore National Laboratory	VL-LLNL-0030	Soil and Water Remediation-Lawrence Livermore National Laboratory - Main Site	136,158	0	0	136,158	136,158
Lawrence Livermore National Laboratory	VL-LLNL-0031	Soil and Water Remediation-Lawrence Livermore National Laboratory - Site 300	122,482	0	0	122,482	122,482
Lawrence Livermore National Laboratory Total			330,462	0	0	330,462	330,462
Los Alamos National Laboratory	VL-LANL-0013	Solid Waste Stabilization and Disposition- LANL Legacy	586,208	214,454	263,454	800,662	849,662
Los Alamos National Laboratory	VL-LANL-0030	Soil and Water Remediation-LANL	1,059,768	570,602	1,429,085	1,630,370	2,488,853
Los Alamos National Laboratory	VL-LANL-0040-D	Nuclear Facility D&D-LANL (Defense)	92,036	106,143	145,143	198,179	237,179
Los Alamos National Laboratory	VL-LANL-0040-N	Nuclear Facility D&D-LANL (Non- Defense)	13,352	3,937	3,937	17,289	17,289
Los Alamos National Laboratory Total			1,751,364	895,136	1,841,619	2,646,500	3,592,983
Miamisburg	OH-MB-0013	Solid Waste Stabilization and Disposition- Miamisburg	264,692	0	0	264,692	264,692
Miamisburg	OH-MB-0020	Safeguards and Security-Miamisburg	28,284	0	0	28,284	28,284
Miamisburg	OH-MB-0030	Soil and Water Remediation-Miamisburg	252,228	6,610	6,610	258,838	258,838
Miamisburg	OH-MB-0031	Soil and Water Remediation - OU-1	43,000	0	0	43,000	43,000
Miamisburg	OH-MB-0040	Nuclear Facility D&D-Miamisburg	504,677	0	0	504,677	504,677
Miamisburg	OH-MB-0100	Miamisburg Post-Closure Administration	58,956	776,320	776,320	835,276	835,276
Miamisburg	OH-MB-0101	Miamisburg Community and Regulatory Support	9,831	0	0	9,831	9,831
Miamisburg Total			1,161,668	782,930	782,930	1,944,598	1,944,598
Moab	CBC-MOAB-0031	Soil and Water Remediation-Moab	130,029	869,629	909,564	999,658	1,039,593
Moab Total			130,029	869,629	909,564	999,658	1,039,593
Nevada Test Site	VL-NV-0013	Solid Waste Stabilization and Disposition- Nevada Test Site	101,022	0	0	101,022	101,022
Nevada Test Site	VL-NV-0030	Soil and Water Remediation-Nevada Test	757,679	912,308	1,194,036	1,669,987	1,951,715

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II.L.7. Survey Plat

No later than the submission of the certification of closure of each Underground HWDU, the Permittees shall submit a survey plat detailing the location and dimensions of each Underground HWDU with respect to permanently surveyed benchmarks, as required by 20 NMAC 4.1.500 (incorporating 40 CFR §264.116).

II.M. GENERAL POST-CLOSURE REQUIREMENTS

General post-closure care requirements are specified in Permit Module VI, Post-Closure Care Plan.

II.N. COST ESTIMATES FOR FACILITY CLOSURE AND POST-CLOSURE

II.N.1. Cost Estimates

WID shall implement financial assurance instruments in the amount of the most recent closure and post-closure cost estimates, prepared in accordance with 20 NMAC 4.1.500 (incorporating 40 CFR §§264.142 and 264.144), as specified in Permit Attachment K.

II.N.2. Adjustment of Cost Estimates

WID shall adjust the closure and post-closure cost estimates for inflation within sixty (60) calendar days prior to the anniversary date of the establishment of the financial instrument(s) used to comply with 20 NMAC 4.1.500 (incorporating 40 CFR §§264.143 and 264.145) and Permit Condition II.O, as required by 20 NMAC 4.1.500 (incorporating 40 CFR §§264.142(b) and 264.144(b)).

II.N.3. Revision of Cost Estimates

WID shall revise the closure and post-closure cost estimates no later than thirty (30) calendar days after the Secretary approves a request to modify the Closure or Post-Closure Plans, if the change increases the cost of closure or post-closure, as required by 20 NMAC 4.1.500 (incorporating 40 CFR §§264.142(c) and 264.144(c)).

II.N.4. Recordkeeping

WID shall maintain the current closure and post-closure cost estimates in the operating record, as required by 20 NMAC 4.1.500 (incorporating 40 CFR §§264.142(d) and 264.144(d)).

II.O. FINANCIAL ASSURANCE FOR FACILITY CLOSURE AND POST-CLOSURE

II.O.1. Submittal of Financial Assurance Documentation

WID shall submit a signed duplicate original of the closure and post-closure financial assurance instrument(s), and any other required documentation, to the Secretary at least sixty (60) calendar days before receiving TRU mixed waste for management, storage, or disposal, as required by 20 NMAC 4.1.500 (incorporating 40 CFR §§264.143 and 264.145).

II.O.2. Changes to Financial Assurance Instrument

WID shall not change the financial assurance instrument(s) without approval of the Secretary, as required by 20 NMAC 4.1.500 (incorporating 40 CFR §§264.143 and 264.145).

II.P. LIABILITY REQUIREMENTS

II.P.1. Liability Coverage Amounts

WID shall have and maintain liability coverage for sudden and accidental occurrences in the amount of one million dollars (\$1,000,000) per occurrence, with an annual aggregate of at least two million dollars (\$2,000,000), exclusive of legal defense costs, as required by 20 NMAC 4.1.500 (incorporating 40 CFR §264.147(a)). WID shall have and maintain liability coverage for nonsudden accidental occurrences in the amount of three million dollars (\$3,000,000) per occurrence, with an annual aggregate of at least six million dollars (\$6,000,000), exclusive of legal defense costs, as required by 20 NMAC 4.1.500 (incorporating 40 CFR §264.147(b)).

II.P.2. Submittal of Liability Documentation

WID shall submit a signed duplicate original of the liability policy, and any other required documentation, to the Secretary at least sixty (60) calendar days before receiving TRU mixed waste for management, storage, or disposal, as required by 20 NMAC 4.1.500 (incorporating 40 CFR §264.147).

II.Q. INCAPACITY OF OWNERS OR OPERATORS, GUARANTORS, OR FINANCIAL INSTITUTIONS

WID shall comply with the requirements of 20 NMAC 4.1.500 (incorporating 40 CFR §264.148(a)).

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; USEPA No. NM4890139088)

HRM 98-04(P)

REPORT OF THE HEARING OFFICER

STATEMENT OF THE CASE
ISSUE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED DECISION AND PROPOSED FINAL ORDER

STATEMENT OF THE CASE

The United States Department of Energy ("DOE") is the owner and operator, and the Westinghouse Waste Isolation Division ("WID"), a private corporation, is the co-operator (collectively "Applicants") of the Waste Isolation Pilot Plant ("WIPP"). The WIPP facility is located in southeastern New Mexico, approximately 26 miles east of the City of Carlsbad. WIPP was designed and constructed to store and dispose transuranic ("TRU") nuclear waste and TRU waste that is mixed with hazardous waste ("TRU mixed waste") in an underground geologic repository, mined within a bedded salt formation. Owners and operators of facilities located in New Mexico that store or dispose TRU mixed waste must apply for a permit from the New Mexico Environment Department. Accordingly, Applicants seek a permit under the New

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Ex. 5

preclude the collection of a representative core subsection, provided the appropriate SW-846 sample preparation methods and containers are used. Accordingly, NMED proposes to allow the use of containers other than 40 milliliter vials, provided that these containers do not prevent the application of the SW-846 Test Methods. *Id.*; Proposed Final Permit of June 25, 1999, Module II.2.C.1.b., Attachment B1-2a(2).

231. Careful collection and preparation of composited samples will not bias the VOC analyses. VOC loss should be minimal and any volatile loss during sample collection would be offset by the use of heated purge-and-traps methods that minimize VOC loss during the analytical process. *Id.*

232. The composite sampling requirement would not impose significant additional costs or sampling delays. The time required to collect three sub-samples, rather than a single sample, is minimal compared to the other tasks associated with core sampling. *Id.*

Financial Assurance

233. On April 28, 1997, and September 24, 1997, NMED notified Applicants that WID was required to comply with the financial assurance requirements under 20 NMAC 4.1.500 (incorporating 40 C.F.R. Part 264, Subpart H, §§264.140 *et seq.*) and requested cost estimates for financial assurance in accordance with 20 NMAC 4.1.900 (incorporating 40 C.F.R. §270.14(b)(15),(16),(17)). AR No. 970930.

234. On November 19, 1997, Applicants submitted the requested cost estimates. AR No. 971114.

235. On January 5, 1998, NMED issued the completeness determination for Applicants' RCRA Part B permit application (Revision 6.5). AR No. 980102.

236. The approved financial assurance cost estimates are \$2,018,966.00 for partial closure; \$9,840,679.00 for contingency closure; \$80,263,644.00 for final closure; and \$18,800,615.00 for post closure. Revised Draft Permit (Attachment K, Table K1, K2).

237. Applicants proposed that financial assurance be provided in the form of DOE indemnifying WID, or any successor, for closure and post-closure costs and by WID providing a declaration of self-insurance. RP No. 36 (Comment 179); *See also* Tr. 2423 (S. Zappe).

238. The alternative mechanisms proposed by Applicants are inadequate to provide financial assurance for closure and post-closure costs in order to protect human health and the environment.¹⁸ Tr. 2419-22 (S. Zappe).

239. Because WID is a private corporation, AR No. 981134, and not a state or federal government entity, NMED imposed financial assurance requirements upon WID under Module II.N, II.O, II.P, II.Q. Tr. 2392-93 (S. Zappe).

240. DOE has previously invoked the Anti-Deficiency Act with respect to clean-up obligations under state environmental laws. Tr. 2407-11 (S. Zappe).

Tentatively Identified Compounds

241. Permit Condition II.C.4 of the Revised Draft Permit prohibits the management, storage or disposal at WIPP of any TRU mixed waste with corresponding hazardous waste codes not listed in the Applicants' Part A permit application and in Module II, Table II.C.4. AR No. 981134.

¹⁸ These proposed mechanisms may also be void as a matter of state law. *See generally* NMED's Memorandum of Law, pgs. 12-14.

inadequate because NMED would not have access to records and results of waste analyses and waste determinations in order to ensure that waste is characterized in compliance with the WAP, as required by 20 NMAC 4.1.500 (incorporating 40 C.F.R. §§264.13, 264.73(a), 264.73(b)(3), 264.601).

27. No Party or commentor has met their burden in challenging NMED's determination to impose Permit Condition II.C.1.g, and associated language in Attachment B, by presenting substantial evidence that this condition is unreasonable or inconsistent with the HWA. *See* 20 NMAC 4.1.901.E.6; 20 NMAC 1.4.401.A.

28. Permit Condition II.C.1.b, and incorporated language, requiring the collection of cores from soil/gravel and solid TRU mixed waste to ensure a representative sample, is reasonable and in accordance with 20 NMAC 4.1.200 (incorporating 40 C.F.R. Part 261, Appendix I). 20 NMAC 4.1.500 (incorporating 40 C.F.R. §264.13(a)(1)).

29. No Party or commentor has met their burden in challenging NMED's determination to impose a permit condition requiring the collection of cores from soil/gravel and solid TRU mixed waste by presenting substantial evidence that this condition is unreasonable or inconsistent with the HWA. *See* 20 NMAC 901.A.E.6; 20 NMAC 1.4.400.A.

30. The financial assurance requirements imposed under Module II.N, II.O, II.P, II.Q are required by and in accordance with 20 NMAC 4.1.500 (incorporating 40 C.F.R. Part 264, Subpart H, §§264.140 *et seq.*).³⁵

31. No Party or commentor has met their burden in challenging NMED's determination to impose financial assurance. *See* 20 NMAC 4.1.901.E.6; 20 NMAC 1.4.401.A.

³⁵ *See generally* Discussion (Financial Assurance) *supra*.



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PETER MAOIORE
SECRETARY

August 9, 2000

PAUL R. RITZMA
DEPUTY SECRETARY

BY TELEFAX AND CERTIFIED U.S. MAIL

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On July 13, 2000, President Clinton signed the "Military Construction Appropriations Act, 2001," Pub. L. No. 106-246, 114 Stat.511 (2000) which contains the following provision effecting the financial assurance requirements of the Waste Isolation Pilot Plant ("WIPP") hazardous waste permit (the "Permit") issued to the Department of Energy ("DOE") and Westinghouse Electric Company Waste Isolation Division ("Westinghouse") by the Secretary of the New Mexico Environment Department ("NMED") on October 27, 1999. Section 201 of Public Law 106-246 states:

"Funds appropriated in this or any other Act and hereafter may not be used to pay on behalf of the United States or a contractor or subcontractor of the United States for posting a bond or fulfilling any other financial responsibility requirement relating to closure or post-closure care and monitoring of the Waste Isolation Pilot Plant. The State of New Mexico or any other entity may not enforce against the United States or a contractor or subcontractor of the United States, in this or any other fiscal year, a requirement to post bond or any other financial responsibility requirement relating to closure or post-closure care and monitoring of the Waste Isolation Pilot Plant. Any financial responsibility requirement in a

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Dr. Inez Triay and Joel Epstein
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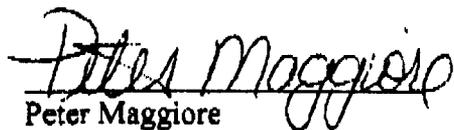
permit or license for the Waste Isolation Pilot Plant on the date of the enactment of this section may not be enforced against the United States or its contractors or subcontractors at the Plant." Pub. L. No. 106-246, 114 Stat. at 536.

A careful legal review of this new law, including a legal analysis from the New Mexico Attorney General, has convinced me that the standards and regulations upon which the Permit was based have changed and the State of New Mexico may no longer impose upon DOE's contractors the financial assurance requirements set forth in Modules II.N, II.O, II.P and II.Q of the Permit (*see also*: 40 C.F.R. §§ 264.143 and 264.145). Pursuant to 40 C.F.R. § 270.41, and in light of this clear change in the law, DOE's contractors are not required to satisfy the financial assurance requirements set forth in Modules II.N, II.O, II.P and II.Q of the Permit (*see also*: 40 C.F.R. §§ 264.143 and 264.145). Effective immediately, the financial assurance requirements set forth in Modules II.N, II.O, II.P and II.Q of the Permit (*see also*: 40 C.F.R. §§ 264.143 and 264.145) may not be enforced, are no longer effective, and are hereby withdrawn.

However, this change in the law does not effect or alter DOE's or any of its contractor's responsibility for closure, post-closure care and monitoring of the WIPP pursuant to the terms of the Permit. All other provisions of the Permit remain in full force and effect.

Respectfully,

Date 8/9/00



Peter Maggiore
Secretary

New Mexico Environment Department