



ADAM BABICH
ATTORNEY AT LAW
1515 Arapahoe Street, Tower 3, Suite 1100
Denver, Colorado 80202

FAX COVER PAGE

From Fax No. : ~~(303) 820-4420~~ **303 440 8052**
Telephone: ~~(303) 820-4497~~ **303 440 4901**
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~~To: (303) 440-8052~~

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~~Equipment Defense Fund~~
~~ATTN: Kate~~
~~1405 Arapahoe Ave.~~
~~Denver, CO 80202~~

~~RECIPIENT~~ **TO:**
~~RECIPIENT~~

Lindsay Lovejoy, Jr., Esq.
P.O. Box 1508
Santa Fe, New Mexico 87504-1508
Fax: 505-827-5826

Gini Nelson, Esq.
Office of General Counsel
P.O. Box 26110
1190 St. Francis Drive, Room N-4050
4050 Harold Runnels Bldg.
Santa Fe, New Mexico 87502
Fax: (505) 827-2836, attn 2854



ADAM BABICH

ATTORNEY AT LAW
1818 Arapahoe Street
Tower 3, Suite 1100
Denver, Colorado 80202

(303) 820-4497
FAX: (303) 820-4425

October 29, 1991

Registered Mail

Governor Bruce King
State of New Mexico
PERA Building, Room 542
Santa Fe, New Mexico 87503

Admiral James D. Watkins
Secretary of Energy
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

A. LaMar Trego
General Manager
Westinghouse Electric
Corporation, Waste Isolation
Pilot Plant Project Office
P.O. Box 3090
Carlsbad, NM 88221

Re: Citizen Notice of Violations

Dear Governor King, Admiral Watkins and Mr. Trego,

Pursuant to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6972(b), and 40 C.F.R. Part 254, the Environmental Defense Fund (EDF), the Natural Resources Defense Council (NRDC), the Southwest Research and Information Center (SRIC) and Concerned Citizens for Nuclear Safety (CCNS) hereby notify you that the U.S. Department of Energy (DOE) and Westinghouse Electric Corporation have violated, and are violating, RCRA at the Waste Isolation Pilot Plant (WIPP) near Carlsbad, New Mexico. A "Detailed Notice of Violations," attached as Exhibit A and incorporated by reference, provides a full explanation.

This Notice is primarily in response to DOE's announcement that it will begin managing mixed radioactive and hazardous waste at WIPP before obtaining a hazardous waste permit from the State of New Mexico. DOE's decision to proceed without a permit will prevent New Mexico from imposing specific permit conditions to protect the public as a condition of operation of WIPP.

DOE's assertions that interim status regulations would protect the public sufficiently are in error. As a federal court recently noted:

[B]ecause they apply to a wide variety of TSD [treatment, storage or disposal] facility, the regulations are necessarily generic. A permit

Governor Bruce King
Admiral James D. Watkins, and
A. LaMar Trego
Page 2

insures more effective safeguard of human health and the environment because it can be tailored narrowly to the particular facility. The permit is the linchpin of RCRA's regulatory scheme.

Sierra Club v. U.S. Department of Energy, Slip op. at 4, Civil Action 89-B-181 (D. Colo. August 13, 1991).

The situation at WIPP raises issues that DOE resolved with respect to its Fluidized Bed Incinerators at the Rocky Flats plant in Colorado. DOE built the incinerators in the early 1980's, after RCRA already was in effect. The incinerators use unproven technology and, as at WIPP, DOE had not begun routine operations by the time it first submitted a permit application. Recognizing these facts, Colorado Senator Timothy E. Wirth and Colorado Congressman David E. Skaggs wrote to DOE about the need for a permit. Senator Wirth noted:

[I]nterim status regulations do not provide the full public protection of a RCRA permit and were intended as only a temporary expedient.

In light of the widespread public concern about planned incineration at Rocky Flats, I believe it would be inappropriate to conduct this proposed incineration under interim status regulations. Incineration should only go forward after issuance of a RCRA permit

....

Letter from Senator Timothy E. Wirth to Rush Inlow, DOE (May 24, 1989).

Similarly, Congressman Skaggs said:

[I]nterim status regulations do not provide the public with the same level of protection as a final RCRA permit.

I believe that both legislative intent and relevant facts warrant the conclusion that the public should have the protection of a final permit before incineration goes forward. Those facts include ... that the incineration would be an essentially new program (not merely a continuation of ongoing operations)

....

Governor Bruce King
Admiral James D. Watkins, and
A. Lamar Trago
Page 3

Letter from Congressman David E. Skaggs to Leo P. Duffy, DOE (Dec. 20, 1989).

Ultimately DOE voluntarily agreed that:

[DOE] ... shall not operate the FB's ["Fluidized Bed Incinerators"] under authority of RCRA interim status regulations and shall not operate either of the FB's ... until such time, if any, that operation of the FB is subject to and complies with a RCRA permit
....

Stipulated Consent, Sierra Club v. DOE, Civil Action No. 89-B-978 (D. Colo. July 19, 1990) (emphasis added).

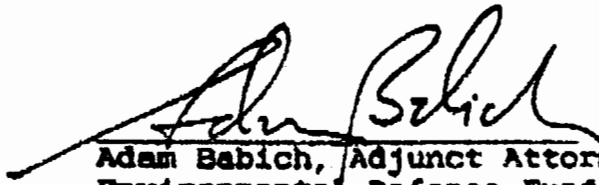
DOE's decision to forgo unpermitted operation of the Fluidized Bed Incinerators in Colorado provides a precedent that should guide DOE's and New Mexico's decisions at WIPP. DOE should not afford New Mexico citizens a lesser standard of protection from risks posed by unproven technology at WIPP than DOE has already agreed to afford the citizens of Colorado with respect to the Fluidized Bed Incinerators. New Mexico should close its borders to waste bound for WIPP until and unless DOE obtains a hazardous waste permit for the facility.


Unless we are able to negotiate a resolution to this matter, EDF, NRDC, BRIC and CCNS currently expect to file suit about the violations specified in Exhibit A within the next 90 days. In addition to the counsel identified in the exhibit, appropriate local counsel will join in representing EDF, NRDC, BRIC and CCNS in this matter. If you are interested in exploring a negotiated resolution, please contact me as soon as possible.

EDF, NRDC, BRIC and CCNS believe this Notice sufficiently states the grounds for complaint. If you have any questions or concerns about the Notice, please contact me. It would be consistent with the Department of Energy's recent statements of respect for environmental laws for the Department and its contractor to comply voluntarily with RCRA and obtain a hazardous waste permit before managing mixed radioactive and hazardous waste at WIPP.

Governor Bruce King
Admiral James D. Watkins, and
A. LaMar Trego
Page 4

Very truly yours,


Adam Babich, Adjunct Attorney
Environmental Defense Fund
Council
1515 Arapahoe Street
Tower 3, Suite 1100
Denver, Colorado 80202
(303) 820-4497


Dan W. Reicher, Senior Attorney
Natural Resources Defense
1350 New York Ave., N.W.
Washington, D.C. 20005
(202) 783-7800

cc:

Judith M. Espinosa, Secretary
New Mexico Environment
Department
1190 St. Francis Drive
Santa Fe, New Mexico 87502

Ms. Kathleen Sisneros, Director
Water and Waste Management
New Mexico Environment
Department
1190 St. Francis Drive
Santa Fe, New Mexico 87502

Mr. William Reilly,
Administrator, U.S. EPA
401 M Street, S.W.
Washington, D.C. 20460

The U.S. Attorney General
U.S. Department of Justice
10th and Constitution Ave.,
N.W.
Washington, DC 20530

Regional Administrator,
U.S. EPA, Region VI
1201 Elm Street
Dallas TX 75270

Arlen E. Hunt
Project Manager
U.S. Department of Energy
Waste Isolation Pilot Plant
Project Office
P.O. Box 3090
Carlsbad, NM 88221

Prattice-Hall Corporate
Systems, Inc.
(Agent for Westinghouse
Electric Corporation)
121 E. Palaca Ave.
Santa Fe, NM 87501

EXHIBIT A

DETAILED NOTICE OF VIOLATIONS

INTRODUCTION

1. The Environmental Defense Fund (EDF), Natural Resources Defense Council (NRDC), Southwest Research and Information Center (SRIC) and Concerned Citizens for Nuclear Safety (CCNS), by their attorneys Adam Babich and Dan W. Reicher, hereby provide notice of violations of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k, at the Waste Isolation Pilot Plant (WIPP) near Carlsbad, New Mexico. The U.S. Department of Energy (DOE) and Westinghouse Electric Corporation (Westinghouse) designed WIPP to use unproven technology for disposal of hazardous waste. DOE and Westinghouse are taking steps to begin managing hazardous waste at WIPP without first obtaining a permit under the Resource Conservation and Recovery Act (RCRA) in violation of 42 U.S.C. § 6925(a) ("... treatment, storage, or disposal of any ... hazardous waste is prohibited except in accordance with ... a permit.") (emphasis added).

JURISDICTION

2. Jurisdiction over the violations alleged herein lies with the Federal District Courts pursuant to RCRA, 42 U.S.C. § 6972(a)(1), the Declaratory Judgment Act, 28 U.S.C. § 2201, and 28 U.S.C. § 1331 (federal question jurisdiction).

3. This Detailed Notice of Violations is provided to: (1) the State of New Mexico; (2) the Administrator of the U.S. Environmental Protection Agency (EPA); (3) DOE; and (4) Westinghouse. The notice complies fully with RCRA, 42 U.S.C. § 6972(b)(1)(A) and 40 C.F.R. Part 254.

4. The violations complained of herein are continuing. Neither the State of New Mexico nor EPA has commenced or is diligently prosecuting an action to redress the violations complained of herein.

PARTIES

5. EDF is a not-for-profit public membership organization with over 200,000 members nationwide. EDF's staff, including scientists, economists, attorneys, engineers, educators, other professionals and concerned citizens, is dedicated to the task of protecting environmental resources and public health. Through research and advocacy in administrative, legislative and judicial proceedings, EDF seeks to protect the use and enjoyment of the environment by, and the health and safety of, EDF's members and the public at large. EDF also seeks to obtain information about environmental risks posed by industrial and governmental activities and to

communicate that information to its members and the public. EDF has long focused on safe management of toxic substances, including mixed hazardous and radioactive waste. Organized under the laws of New York, EDF maintains offices in New York, NY; Washington, D.C.; Austin, Texas; Raleigh, South Carolina; Boulder, Colorado; Berkeley, California; and Richmond, Virginia.

6. NRDC is a national non-profit membership organization with over 150,000 members and contributors and a staff of over 150 lawyers, scientists, environmental specialists and support personnel. Organized under the laws of New York, NRDC maintains offices in New York, Washington, D.C., Los Angeles, San Francisco and Honolulu. NRDC pursues a broad range of environmental, energy and defense issues. NRDC seeks to obtain information about environmental risks posed by industrial and governmental activities and to communicate that information to its members and the public. The organization has long been concerned about safety and environmental problems at DOE nuclear facilities and has actively enforced federal environmental laws at various DOE facilities. NRDC litigation in 1984 established the applicability of RCRA to DOE facilities. Legal Environmental Assistance Foundation (LEAF) v. NRDC, 586 F. Supp. 1168 (E.D. Tenn. 1984).

7. SRIC is a private nonprofit educational and scientific organization, incorporated in New Mexico. SRIC provides information to the public and technical assistance to community groups in New Mexico and throughout the nation on a wide variety of environmental, natural resource, and health issues. The organization has participated actively in public processes regarding all aspects of WIPP since the mid-1970s, including testimony before congressional committees, publications on WIPP and on nuclear and hazardous waste storage and disposal, and participation in public hearings for the benefit of SRIC's contributors, staff members, clients, directors and the public at large. SRIC has long advocated safe management of hazardous and nuclear wastes.

8. CCNS is a non-profit community-based education and information organization focusing on the economic, environmental, health and safety effects of the nuclear weapons complex. CCNS has long been involved in obtaining information on WIPP, disseminating that information to the public and commenting on that information for the benefit of CCNS's contributors, staff members, clients, directors and the public at large.

9. EDF, NRDC, SRIC and CCNS are associations, and therefore "person(s)" within the meaning of RCRA, 42 U.S.C. § 6903(15).

10. EDF and NRDC members use and enjoy air, water and soils placed at risk by management of mixed radioactive and hazardous waste at WIPP and transportation of mixed radioactive and hazardous waste to WIPP. EDF and NRDC members depend on the protection of the RCRA regulatory system to reduce the risks to natural resources and to public health posed by hazardous waste management and

EXHIBIT A

Page 8

transportation. The RCRA violations alleged herein injure EDF and NRDC members by: (1) diminishing the members' use and enjoyment of the air, water and soils in areas that may be at risk from WIPP and from transportation of waste to WIPP; (2) diminishing members' quality of life by threatening their ability to leave a legacy of a reasonably uncontaminated environment to their descendants and future generations; (3) threatening members' health and welfare and the health and welfare of their descendants. The violations deprive EDF and NRDC members of the protections contemplated by RCRA and implementing regulations.

11. The failure of DOE and Westinghouse to follow the permitting process at WIPP injures EDF, NRDC, SRIC, and CCNS by interfering with their ability to obtain, and disseminate to their members, contributors, clients, directors and the public, accurate and detailed information about the processes to be employed at WIPP and the characteristics of the waste to be treated, stored or disposed of at WIPP. The violations also preclude EDF, NRDC, SRIC and CCNS from serving their members, contributors clients, and directors by submitting comments on a WIPP RCRA permit application to be considered by the New Mexico Environment Department before DOE and Westinghouse begin management of hazardous waste at WIPP.

12. The interests that EDF, NRDC, SRIC and CCNS seek to protect by providing this notice are germane to EDF, NRDC, SRIC and CCNS' purpose of protecting and conserving environmental resources and protecting the public health and welfare from environmental hazards.

13. James D. Watkins is the Secretary of the Department of Energy and is charged by law and regulations with the responsibility for constructing WIPP and complying with RCRA and all state laws governing hazardous waste.

14. DOE is an agency of the federal government. DOE owns and operates and has jurisdiction over WIPP.

15. Westinghouse is a Pennsylvania corporation doing business in New Mexico. Westinghouse is an operator of WIPP and is engaged in construction of WIPP pursuant to a contract with DOE.

16. Congress waived sovereign immunity against suit under RCRA for each department, agency, officer, agent and employee of the U.S. government that has jurisdiction over any solid waste management facility or disposal site, or engages in any activity resulting, or which may result, in the disposal or management of hazardous waste. 42 U.S.C. § 6961.

17. The State of New Mexico is the government charged with enforcing RCRA in New Mexico. Bruce King is New Mexico's Governor. Judith M. Espinosa is Secretary of the New Mexico Environment Department.

GENERAL ALLEGATIONS

A. Statutory and Regulatory Framework

(i) Protection of the public

18. Congress enacted RCRA to promote protection of public health and the environment by regulating management of hazardous waste from generation to disposal.

19. RCRA provides both a statutory and regulatory definition of "hazardous waste." The broad statutory definition (42 U.S.C. § 6903(5)) primarily governs actions to abate substantial risks to the public and environment. See e.g., 42 U.S.C. § 6972(a)(1)(B). The more narrow regulatory definition applies to RCRA's permit program. See 42 U.S.C. § 6925(a) (prohibiting treatment, storage or disposal of "hazardous waste identified or listed under this subchapter" without a permit) (emphasis added). This Complaint concerns wastes that meet both definitions.

20. RCRA regulations list certain wastes as hazardous at 40 C.F.R. Part 261, Subpart D. The regulations also set forth characteristics that identify hazardous wastes at 40 C.F.R. Part 261, Subpart C. Those characteristics are: ignitability, corrosivity, reactivity and toxicity. A waste meets the regulatory definition of hazardous waste if it is listed or if it exhibits a characteristic of hazardous waste.

21. Congress found that:

[I]nadequate controls on hazardous waste management will result in substantial risks to human health and the environment....

42 U.S.C. § 6901(b)(5) (emphasis added).

(ii) State implementation

22. RCRA directs EPA to authorize states that administer qualifying hazardous waste programs to carry out their programs "in lieu of" the federal RCRA program. 42 U.S.C. § 6926(b). Any action taken by a state under such an EPA-authorized program has the same force and effect as action taken by EPA under RCRA. 42 U.S.C. § 6926(d).

23. EPA "authorization" of a state program is not a prerequisite to application of state regulations. 42 U.S.C. § 6929 (retention of state authority). Federal agencies must comply with state hazardous waste regulations regardless of whether EPA has "authorized" the state program. 42 U.S.C. § 6961 (federal agencies shall comply with state requirements in the same manner and to the same extent as

EXHIBIT A

Page 6

any person). Indeed, to operate as "existing" facilities under federal law, hazardous waste facilities must obtain state permits. See 40 C.F.R. § 260.10 (definitions of "Federal, State and local approvals or permits necessary to begin physical construction" and "existing facility"). EPA authorization "suspends the applicability of certain Federal regulations in favor of [the state's] program," avoiding duplicative regulation. 55 Fed. Reg. 28397 (July 11, 1990).

24. Effective July 25, 1990, EPA authorized New Mexico to operate its hazardous waste program in lieu of the federal RCRA regulatory program. 55 Fed. Reg. 28397 (July 11, 1990).

25. New Mexico's Hazardous Waste Act (HWA), §§ 74-4-1 through 13, New Mexico Statutes Annotated (NMSA) 1978, implements the hazardous waste regulatory program in New Mexico. Unless context requires otherwise, use of the term "RCRA" in the remainder of this Notice refers to both the federal RCRA statute, New Mexico's HWA and implementing regulations.

26. The New Mexico Environmental Improvement Board is the agency entrusted by law with promulgating regulations to implement RCRA in New Mexico. New Mexico's Hazardous Waste Management Regulations (HWMR) generally incorporate EPA's RCRA regulations by reference. However, the New Mexico regulations redefine certain key terms. For example:

The following terms not defined in 40 CFR 280.10 have the meanings set forth herein:

1. "Act" or "RCRA" ("Resource Conservation and Recovery Act" as amended) means the Hazardous Waste Act, Sections 74-4-1 through 74-4-13 NMSA 1978.

HWMR, Part 102 (emphasis added). Unless context requires otherwise, citations to EPA's RCRA regulations (40 C.F.R. Parts 260 -- 270) in the remainder of this complaint refer to those regulations as they are incorporated into New Mexico's regulatory program.

(iii) RCRA's permit requirement

27. After the effective date of the federal RCRA regulations (November 19, 1980), Congress prohibited treatment, storage or disposal of hazardous waste without a permit issued by the U.S. Environmental Protection Agency (EPA) or an authorized State. 42 U.S.C. § 6925(a).

28. A RCRA permit application consists of two parts: Part A and B. Part A includes a description of the processes to be used for treatment, storage and disposal, and identification of the hazardous wastes to be treated, stored and disposed. 40 C.F.R. § 270.18. The Part B application is significantly more detailed,

including an extensive description of facility design, construction and operation. 40 C.F.R. § 270.14.

(iv) RCRA interim status

29. When creating RCRA's requirement for a permit, Congress (and the New Mexico legislature) deemed it impractical to halt all hazardous waste activity pending issuance of permits. Accordingly, RCRA allows unpermitted facilities to operate under "interim status" if: (1) they are "in existence" when changes in the law require them to have a permit, (2) they comply with notice requirements, and (3) they timely submit Part A of their permit applications. Interim status facilities are "treated as having been issued [a] permit" pending issuance or denial of an actual permit. See 42 U.S.C. § 6925(e)(1).

30. A facility automatically loses interim status if its owner or operator fails to observe regulatory deadlines for submitting Part B of a permit application. 40 C.F.R. § 270.78.

31. Interim status is a temporary expedient that does not provide the public with protections equivalent to those of a RCRA permit. For example, the process of obtaining interim status does not involve a regulatory determination that the facility will protect the public or the environment. In contrast, New Mexico has authority to deny an application for a RCRA permit if, *inter alia*, the State finds that the owner or operator will not run the facility in a manner that provides adequate public protection.

32. RCRA's interim status regulations (40 C.F.R. Part 265) contain generic standards for protection of the public pending issuance or denial of a permit. In contrast, RCRA permits include specific permit conditions to protect the public and the environment. E.g., 40 C.F.R. § 270.80. See Sierra Club v. U.S. Department of Energy and Rockwell International Corp., Slip op. at 7, Civil Action No 89-B-978 (D. Colo., September 18, 1991) ("Congress intended facilities to operate with permits. The reason is simple. The regulations governing interim status facilities are generic. A permit, on the other hand, can be tailored to the dangers of a particular facility, thus providing enhanced protections.").

33. Generic interim status regulations are poorly suited to regulation of a facility using new, unproven technologies such as WIPP. WIPP is unlike the types of land disposal facilities that the interim status regulations were written to address.

34. Because RCRA's provision for interim status is a narrow exception to RCRA's prohibition against unpermitted operation, it is the burden of one claiming the benefit of the exception to prove that it applies. See e.g., McKelvey v. United States, 260 U.S. 359, 356-57 (1922).

(v). Citizen enforcement

85. In addition to enforcement by EPA and the State of New Mexico, RCRA provides for citizen enforcement, authorizing any person to bring suit against any person (including a United States agency or a private corporation) to enforce any permit, standard, regulation, condition, requirement, prohibition or order which has become effective pursuant to RCRA. 42 U.S.C. § 6972(a)(1)(A).

B. The WIPP Facility

86. WIPP is a land disposal facility located in Eddy County, New Mexico. DOE and Westinghouse designed and constructed WIPP for disposal of transuranic waste produced by defense programs. Transuranic waste is waste contaminated with constituents containing an element, e.g., plutonium, that has an atomic number greater than that of uranium.

87. DOE and Westinghouse intend to manage mixed radioactive and hazardous waste ("mixed waste") at WIPP. Upon information and belief, most of the waste DOE and Westinghouse intend to manage at WIPP is mixed waste.

88. Construction of WIPP began on a date after November 19, 1980. Upon information and belief, DOE and Westinghouse began construction of WIPP on or about July 4, 1983. DOE and Westinghouse continue to engage in construction activities at WIPP.

C. Regulatory History

89. The United States has adopted the position that "RCRA has applied to all hazardous waste at all federal facilities since RCRA's inception [November 19, 1980], including all hazardous and mixed wastes at DOE facilities" U.S. Justice Department Affidavit in Criminal Case No. 89-730M (D.Colo., filed June 6, 1989) at 29-30.

40. The federal RCRA program has applied to all hazardous waste at all federal facilities since November 19, 1980, including all hazardous and mixed wastes at DOE facilities.

41. From about 1983-1985, DOE took the position that RCRA did not apply to nuclear weapons production facilities. That argument was rejected by the court in LEAF, NRDC v. Hodel, 588 F. Supp. 1163 (E.D. Tenn. 1984).

42. On July 8, 1986 — pursuant to a political compromise with DOE — EPA issued a notice purporting to "clarify" that RCRA applies to radioactive mixed waste. 51 Fed. Reg. 24504 (July 8, 1986). See also 53 Fed. Reg. 27045 (Sept. 23, 1988). EPA stated that it would "treat the July 8, 1986 notice as the relevant regulatory change

for establishing that facilities in existence on that date may qualify for interim status if other applicable requirements are met." 58 Fed. Reg. at 37046-7. EPA's decision to treat its July 3, 1986 notice as a regulatory change was never the subject of notice-and-comment rulemaking or judicial review. EPA's decision was an exercise of enforcement discretion which is not binding on EDF, NRDC, SRIC and CCNS or the State of New Mexico.

43. Effective April 8, 1987, New Mexico excluded WIPP from hazardous waste regulation under state law.

44. DOE and Westinghouse purported to submit a Part A RCRA permit application for WIPP to New Mexico on or about July 25, 1988. At the time of the submittal, however, WIPP was excluded from regulation under New Mexico law. Accordingly, New Mexico rejected the application. Upon information and belief, the July 1988 Part A application did not identify all processes and wastes that DOE and Westinghouse now intend to employ and manage at WIPP.

45. Effective February 23, 1989, New Mexico repealed the provision which excluded WIPP from state regulation. This repeal required DOE and Westinghouse to apply for a hazardous waste permit under the HWA within 80 days. 40 C.F.R. § 270.10(e)(1)(ii).

46. DOE and Westinghouse did not submit a Part A permit application for WIPP to New Mexico until about January 18, 1991.

47. DOE and Westinghouse have agreed to accept hazardous waste for management in WIPP. Upon information and belief, by at least December 1, 1991, DOE and Westinghouse will be in the process of illegally transporting hazardous waste to WIPP or illegally managing hazardous waste at WIPP.

FIRST CATEGORY OF VIOLATIONS **(Failure to obtain a permit)**

48. EDF, NRDC, SRIC and CCNS incorporate by reference the allegations set forth in paragraphs 2 through 47.

49. RCRA prohibits treatment, storage or disposal of hazardous waste, and construction of new hazardous waste facilities, after the effective date of RCRA regulations unless the owner or operator of the facility has obtained a RCRA permit from EPA or an authorized state. 42 U.S.C. § 6925(a).

50. DOE and Westinghouse have agreed to accept hazardous waste for disposal in WIPP beginning on or about November 8, 1991.

51. DOE and Westinghouse have never obtained a RCRA permit for WIPP.

SECOND CATEGORY OF VIOLATIONS
(Failure to obtain interim status)

52. EDF, NRDC, SRIC and CCNS incorporate by reference the allegations set forth in paragraphs 2 through 47 and 50 through 51.

53. To obtain interim status, owners or operators of hazardous waste management facilities must submit a Part A permit application within 80 days after the effective date of changes in the law that require them to comply with RCRA interim status regulations. 40 C.F.R. §§ 270.10(e)(1)(ii) & 270.70(a)(2).

54. The statutory change that required DOE and Westinghouse to comply with interim status regulations at WIPP occurred when New Mexico amended its RCRA statute (the HWA) on February 23, 1989 to make the act applicable to WIPP. (Before then, New Mexico had intentionally excluded WIPP from State regulation.)

55. To obtain interim status for WIPP, DOE and Westinghouse would have had to submit their Part A permit application by March 27, 1989. 40 C.F.R. §§ 270.10(e)(1)(ii) & 270.70(a)(2).

56. DOE and Westinghouse submitted their Part A application about 22 months too late to obtain interim status (on or about January 22, 1991).

57. In the alternative, even if EPA's determination that New Mexico's program would operate "in lieu of" the federal RCRA program were considered to be the applicable change in law that required compliance with interim status regulations, DOE and Westinghouse would have failed to obtain interim status. EPA's authorization of New Mexico's regulation of mixed waste was effective July 25, 1990. 55 Fed. Reg. 28897 (July 11, 1990). DOE and Westinghouse failed to submit their Part A by August 24, 1990, forfeiting any possible claim to interim status. 40 C.F.R. § 270.10(e)(1)(i).

58. DOE and Westinghouse have agreed to accept hazardous waste for disposal in WIPP without first obtaining a permit or interim status.

THIRD CATEGORY OF VIOLATIONS (In the Alternative)
(Loss of interim status)

59. EDF, NRDC, SRIC and CCNS incorporate by reference the allegations set forth in paragraphs 2 through 47 and 50 through 51.

60. To maintain interim status obtained by reason of a change in law, an owner or operator must file Part B of a permit application within 12 months after the pertinent change in law. Failure to meet this condition results in automatic loss of

interim status. 40 C.F.R. § 270.73 (as incorporated into New Mexico's hazardous waste regulations). Because New Mexico repealed the provision of the HWA which excluded WIPP from state regulation effective February 28, 1989, DOE and Westinghouse would have had to submit their Part B permit application by February 28, 1990 to maintain any possible claim to interim status.

61. DOE and Westinghouse did not submit a Part B permit application for WIPP to New Mexico until about February 26, 1991.

62. If DOE and Westinghouse had obtained interim status for WIPP, they would have lost that status on or about February 28, 1990 by failing to submit a timely and complete Part B permit application.

FOURTH CATEGORY OF VIOLATIONS (In the Alternative)
(Violations of interim status regulations)

63. EDF, NRDC, SRIC and CCNS incorporate by reference the allegations set forth in paragraphs 2 through 47 and 50 through 51.

64. Changes in the processes for the treatment, storage or disposal of hazardous waste, or management during interim status of wastes not identified on a Part A, require submission of a revised Part A and prior approval by the New Mexico Environment Department. 40 C.F.R. §§ 270.71(a)(1) & (2); 270.72(a)(1) & (3).

65. Upon information and belief, DOE and Westinghouse have agreed to accept hazardous waste, and to employ processes, not adequately identified in a Part A application or an approved change to a Part A application.

POTENTIAL RELIEF

WHEREFORE:

A. EDF, NRDC, SRIC and CCNS may request that the Court enter an Order, pursuant to 23 U.S.C. § 2201, declaring that WIPP does not have interim status under RCRA and that any treatment, storage or disposal of hazardous waste at WIPP is illegal;

B. Additionally, EDF, NRDC, SRIC and CCNS may request that the Court enjoin DOE and Westinghouse from treating, storing or disposing of hazardous waste at WIPP until such time, if any, that DOE and Westinghouse obtain a RCRA permit for the facility;


C. Additionally, EDF, NRDC, SRIC and CCNS may request that the Court order Westinghouse to pay to the U.S. Treasury civil penalties in the amount of twenty-five thousand dollars (\$25,000) per violation per day for each day that

Westinghouse violates RCRA and the HWA by managing hazardous waste at WIPP following the date of filing of this Complaint;


D. Additionally, EDF, NRDC, SRIC and CCNS may request that the Court order DOE and Westinghouse, jointly and severally, to pay EDF, NRDC, SRIC and CCNS their costs of litigation, including but not limited to reasonable attorney and expert witness fees as authorized by 42 U.S.C. § 6972(e); and

E. Finally, EDF, NRDC, SRIC and CCNS may request that the Court grant such further relief as the Court deems just and appropriate.

Respectfully submitted this 29th day of October, 1991.



**Adam Babich, Adjunct Attorney
Environmental Defense Fund
1515 Arapahoe Street
Tower 2, Suite 1100
Denver, Colorado 80202
(808) 820-4497**



**Dan W. Reicher, Senior Attorney
Natural Resources Defense Council
1850 New York Ave., N.W.
Washington, D.C. 20005
(202) 783-7800**

COUNSEL FOR EDF, NRDC, SRIC and CCNS

Addresses:

**Environmental Defense Fund
1405 Arapahoe Ave.
Boulder, CO 80302
(803) 440-4901
Fax: (803) 440-8052**

**Natural Resources Defense Council
1850 New York Ave., N.W.
Washington, D.C. 20005
(202) 783-7800
Fax: (202) 783-8917**

**Southwest Research and
Information Center
105 Stanford, S.E.,
P.O. Box 4524
Albuquerque, New Mexico 87106
Phone: (505) 262-1862
Fax: (505) 262-1864**

**Concerned Citizens for Nuclear
Safety
412 West San Francisco St.
Santa Fe, NM 87501
Phone: (505) 986-1973
Fax: (505) 986-0997**