AA:97:00063

May 15, 1997

Mr. Benito Garcia
Bureau Chief
Hazardous and Radioactive Materials Bureau
New Mexico Environment Department
2044 Galisteo
P.O. Box 26110
Santa Fe, NM 87502

RECEIVED
MAY 16 1997
NM ENVIRONMENT DEPARTMENT
OFFICE OF THE SECRETARY

Subject: NMED LETTER DATED APRIL 28, 1997, REGARDING FINANCIAL RESPONSIBILITY/DISCLOSURE REQUIREMENTS

Dear Mr. Garcia:

We have received and reviewed Ms. Susan McMichael's letter dated April 28, 1997, requesting that we provide certain information directly to you in connection with the WIPP RCRA Part B permit application. Specifically, she requested our legal opinion regarding the applicability of the financial responsibility requirements of the Hazardous Waste Act, NMSA 1978, § 74-4-4(A) (5) (f) (I) [sic], to the co-applicant on the WIPP RCRA Part B permit application, the Waste Isolation Division of Westinghouse Electric Corporation (Westinghouse). In addition, she asked us to provide information to comply with the disclosure requirements set forth in NMSA 1978, § 74-4-4.7. Finally, she requested all information relevant to NMSA 1978, § 74-4-4.2.D (4), (5) and (6) from the United States Department of Energy (DOE) and Westinghouse. This letter and its attachments address the financial responsibility requirements. We will address the disclosure and other related requirements in a future correspondence.

The New Mexico Hazardous Waste Act (HWA) requires the Environmental Improvement Board (EIB) to adopt regulations which establish performance standards applicable to the owners and operators of facilities for the treatment, storage, or disposal of hazardous waste, including adoption of financial responsibility requirements. NMSA 1978, § 74-4-4 (A) (5) (f). To comply with this mandate, the EIB adopted 20 NMAC 4.1.500, 40 C.F.R. Part 264, Subpart H-Financial Requirements.

Based on the exclusion contained in Subpart H, the United States Environmental Protection Agency's (EPA) explanation of the intent of the exclusion, supporting EPA correspondence, and precedence from other jurisdictions, Westinghouse, as the co-operator and co-permittee on the RCRA Part B permit application, is exempt from the financial assurance requirements contained in 40 C.F.R. Part 264, Subpart H.

Pursuant to 40 C.F.R. § 264.140 (c), "States and the Federal government are exempt from the requirements" of 40 C.F.R. Part 264, Subpart H, Financial Requirements. In support of this exemption, the EPA has explained that "State and Federally-owned facilities will always have adequate resources to conduct closure and post-closure care activities properly." 45 FR 33198-33199 (May 19, 1980) (emphasis added), a copy of which is attached hereto as Tab 1. Based on EPA's interpretation, the regulation exempts the entire federally-owned facility, regardless of whether the facility is co-operated by a private contractor.

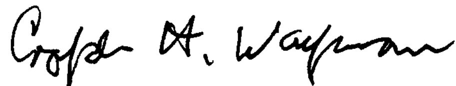
In addition to EPA's interpretive language contained in the preamble to the rule, we located a January 5, 1983, letter from Mr. John Skinner, EPA Acting Director of Solid Waste, to Bradley Dillon, US Ecology, Inc., a copy of which is attached hereto as Tab 2. In that letter, Mr. Skinner states that "[t]he Agency interprets this exemption [in 40 CFR § 265.140 (c)] to mean that where one party (the owner or the operator) is an exempted party because it is a State or Federal governmental unit, the other, private sector party need not comply with the Subpart H requirements."

We understand that there is precedent at NMED for recognizing the exemption of government contractors from Subpart H requirements, lending additional support to Westinghouse's exemption at the WIPP facility. Specifically, we have been told that the University of California at LANL has not been required to comply with financial assurance requirements.

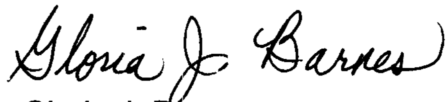
Finally, other states have exempted private contractors at federally-owned facilities. We have attached to this letter as Tab 3, a 1994 letter from the Washington Department of Ecology exempting certain private contractors from the financial assurance and liability requirements at the Hanford federal facility. The letter interprets the Washington State Dangerous Waste Regulations, which are somewhat more inclusive than 40 CFR § 264.140 (c), but are analogous to the situation here.

We believe that this letter fully addresses your request regarding financial responsibility requirements by providing a sound basis for Westinghouse's exclusion from the requirements of Subpart H. Our response to your request for information regarding the disclosure and other related requirements is expected to be submitted on or before June 1, 1997, as requested.

Sincerely,



Cooper H. Wayman
U.S. Department of Energy
Carlsbad Area Office Legal Counsel



Gloria J. Barnes
WID Senior Counsel
Westinghouse Electric Corporation

le

Enclosure

cc: S. McMichael, NMED
G. E. Dials, CAO
M. H. McFadden, CAO
C. A. Snider, CAO
J. L. Epstein, WID
J. L. Lee, WID
K. S. Donovan, WID
R. J. Leonard, WID
K. A. Day, WID
RCRA Chronology

TAB 1

However, Section 3004 applies only to "owners and operators of facilities for the treatment, storage, or disposal of hazardous waste," and can therefore be applied to closed sites only if the owners or operators of those sites are [illegible]d to come within that definition. As noted above, policy considerations support reading the statute in this manner. In addition, the same conclusion is hard to avoid simply as a matter of textual interpretation, since land in which hazardous waste is buried is certainly either "storing" or "disposing" of those wastes within the meaning of the specific definitions of those terms given in RCRA Section 1004.

If owners or operators of inactive sites which once were covered by RCRA permit are still "storing" or "disposing" of those wastes, it follows that they must get a permit under Section 3005. Once again, that conclusion makes sense as a matter of policy as well as a strict matter of textual interpretation. For example, the provisions of the statute for EPA inspection and monitoring are best enforced as part of a permit. Though EPA believes that the terms of any post-closure RCRA permit should be strictly limited and require an absolute minimum of paperwork, there are strong policy reasons, as well as legal reasons, why a permit of this type [illegible]ht be essential to the overall [illegible]ation of the program. For example, it might be very difficult for EPA to gain access to land to clean up a leaking site without the aid of permit terms authorizing that access.

Accordingly, in the near future EPA plans to develop proposed regulations calling for the owners or operators of closed sites that once were permitted or operated under interim status to apply for and receive a post-closure permit from EPA. EPA anticipates that the conditions of this permit will relate almost exclusively to general procedures concerning access, monitoring, and financial responsibility, and that cumbersome permit procedures will not be necessary. EPA anticipates that these will be lifetime permits.

It may be that this approach may reduce paperwork in the end, for example, by making possible the modification or elimination of the present requirement to record conditions on the facility title in State or local deed recording systems. EPA will be examining these questions further in the course of developing its proposal.

[illegible] activities in accordance with the closure plan, (2) those assuring funds to conduct post-closure activities at disposal facilities in accordance with the post-closure plan and (3) those assuring funds to cover third party damage cases.

1. *Liability.* The financial responsibility requirements covering third party damages during the post-closure care period are not covered in the Part 265 interim status standards. As stated in the preamble to the proposed regulation, the Agency has been unable to identify a viable mechanism to provide for liability coverage during the post-closure care period, and is supporting an initiative in Congress which would set up a national fund to provide for such coverage.

During the life of the site, most companies are likely to seek private insurance to cover liability claims. Through discussions with the insurance industry, the Agency has determined that non-sudden pollution coverage often would be made effective only when a facility received a permit. Because facilities do not have permits during the interim status period, they might not be able to get insurance for non-sudden occurrences. Thus, site-life liability for non-sudden occurrences is not required during the interim status period. However, the Agency is proposing a rule requiring site-life liability for sudden and accidental occurrences during the interim status period. The Agency intends to add this rule to the interim status standards, after public comment, later this year.

2. *Financial Assurance.* The proposed financial standards assuring funds for closure and post-closure care required that owners or operators first estimate the cost of closure, and post-closure care where applicable, based on the closure and post-closure care plans. Then a trust fund was to established to assure that the necessary funds would be available. EPA received numerous comments asking that the trust fund requirement be restructured, and that financial instruments other than a trust fund be allowed. After considerable re-analysis, the Agency is convinced that other financial mechanisms can provide protection equivalent to trusts, and that the trust mechanism requirement could benefit from major restructuring. Because of the complexity of the subject matter and the magnitude of the changes, the Agency believes that the regulated community and the general [illegible] instruments it intends to allow.

3. *Cost Estimates.* The Agency is promulgating in Phase I the requirement that owners or operators develop cost estimates for closure, and post-closure activities where applicable. Several commenters suggested that the Agency allow for partial closure in the cost estimate requirements. This had always been the Agency's intent. The reproposed rules better reflect this intent by requiring that funds be set aside equal to the highest cost of closing the facility, either at any given point leading up to closure, or at the point of final closure. Thus, facilities which close as they go (partially close) need obtain only a fraction of the financial assurance that will be required by those closing at the end of site operations.

A few commenters suggested that the closure and post-closure cost estimates be reviewed periodically to ensure continued accuracy. EPA agrees that changes in facility design and operation, and the uncertainties inherent in inflation and interest rates, make such a review highly desirable. Thus, the final rules require that the owner or operator prepare a new closure cost estimate whenever the closure plan is modified, and, for disposal facilities, a new post-closure cost estimate whenever the post-closure plan is modified. In addition, the final rules require that these estimates be indexed to inflation on an annual basis, using the U.S. Department of Commerce Gross National Product Implicit Price Deflator.

4. *Publicly Owned Facilities.* A few commenters suggested that publicly-owned facilities should be exempted from the financial requirements, because government institutions are permanent and stable, and have as their reason for being the health and welfare of their people. Therefore, according to the commenters, publicly-owned facilities would be more likely and more able financially to carry out their closure and post-closure responsibilities.

The Agency agrees that State and Federally-owned facilities will always have adequate resources to conduct closure and post-closure care activities properly. Therefore, an exemption for these facilities has been incorporated in a new "Applicability" section. (The other provisions of the section make it clear that the closure requirements apply to all other facilities, and that the post-closure requirements apply only to disposal facilities.)

TAB 2

January 5, 1983

Mr. Bradley E. Dillon
Associate General Counsel
US Ecology, Inc.
3200 Melbville Road, Suite 526
P.O. Box 7216
Louisville, Kentucky 40207

Dear Mr. Dillon:

Your letter of November 5, 1982, raises a question about the applicability of the Subpart H, Financial Responsibility requirements to a US Ecology facility. Your specific concern is the extent of your responsibility for compliance in view of the §265.140(c) exemption for States and the Federal government and the fact that your facility operates on land leased from the State of Nevada.

Section 265.140(c) states "States and the Federal government are exempt from the requirements of this subpart." The Subpart H regulations apply to owners and operators; while either party may fulfill the requirements, the Agency may take action against either or both of the parties in the event of noncompliance. The Agency interprets this exemption to mean that where one party (the owner or the operator) is an exempted party because it is a State or Federal governmental unit, the other, private sector party need not comply with the Subpart H requirements. However, a State or Federal agency owner may, of course, require the private sector operator by contractual agreement to demonstrate financial responsibility.

I suggest that you confer with staff of EPA Region IX and the state of Nevada to determine the extent and applicability of responsibility for the concerned parties under the Resource Conservation and Recovery Act regulations. You should be aware that the RCRA Subpart G regulations, which stipulate the

Fax Back Number 12088

This has been retyped from the original document.

requirements for performance of closure and post-closure care, do not contain any such exemption. The exemption applies only to the Subpart H regulations, which contain the requirements for proving financial responsibility for closure and post-closure care and for liability coverage.

Sincerely,

John H. Skinner
Acting Director
Office of Solid Waste

cc: Dick Procunier, Region IX

This has been retyped from the original document.

TAB 3

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
Mail Stop PV-11 • Olympia, Washington 98504-8711 • (206) 459-6000

June 30, 1994

Mr. William T. Dixon, Manager
Regulatory Support
Westinghouse Hanford Company
P. O. Box 1970, B2-17
Richland, WA 99352

Mr. Glenn R. Hoenes, Manager
Laboratory Safety
Battelle
Pacific Northwest Laboratory
P. O. Box 999, P7-78
Richland, WA 99352

Mr. Joe F. Nemec, Vice President
Bechtel Hanford, Inc.
P. O. Box 969
Richland, WA 99352

Dear Messrs. Dixon, Hoenes, and Nemec:

Thank you for your June 23, 1994, letter requesting an interpretation of the financial assurance and liability protection requirements for federal contractors pursuant to Washington Administrative Code (WAC) 173-303-620(1)(c). Based upon our review of this issue, we have concluded that the financial requirements of the Washington State Dangerous Waste Regulations (Chapter 173-303 WAC) were never intended to apply to contractors for a federal or state government in situations such as that at the U.S. Department of Energy's (USDOE) Hanford Facility.

The financial requirements of Chapter 173-303 WAC provide an exemption for state and federal governments (WAC 173-303-620(1)(c)) similar to that found in the federal Resource Conservation and Recovery Act (RCRA) regulations (40CFR264/265 Subpart H). However, the state regulations contain an exception to the exemption. The state exemption reads "States and federal government are exempt from the requirements of this section, except that operators of facilities who are under contract with the state or federal government must meet the requirements of this section." It is this exception that has been in the Dangerous Waste Regulations since 1982, which could appear to require your companies to meet the financial requirements for some of

Mr. William T. Dixon et al
June 30, 1994
Page 2

your dangerous waste activities at Hanford. Our office was not successful in locating relevant written legislative history or interpretive documents to accompany the exception. Therefore, our interpretation is based upon Environmental Protection Agency (EPA) analyses of federal regulations, Washington State Department of Ecology institutional memory, and a common sense approach to regulatory interpretation.

The RCRA exemption for state and federal governments was provided because state and federally-owned facilities "will always have adequate resources to conduct closure and post-closure care activities properly" (45FR33198; May 19, 1980). Therefore, under RCRA requirements, there is no reason to impose financial assurance requirements at the Hanford Facility because the U. S. Department of Energy (USDOE), as a federal agency, is financially secure. The Department concurs with the federal interpretation and therefore concludes that USDOE, as part of the federal government is, in itself, financially secure and inherently meets the financial assurance and liability requirements of Chapter 173-303 WAC.

Additionally, the EPA, in order to differentiate between owner versus operator responsibility, "changed its usage of the term 'owner/operator' to 'owner or operator' to indicate when EPA will be satisfied by compliance by either party (but also to indicate that the agency may enforce against either or both)" (45FR33169; May 19, 1980). Since the financial requirements within the RCRA regulations apply to the "owner or operator," these requirements may be satisfactorily fulfilled by either the owner or operator. As the Department also uses the term "owner or operator" in our financial responsibility regulations, we will also be satisfied with compliance by either the owner or operator, or in the case at Hanford, the co-operators. Since, as stated above, we believe USDOE already meets the financial requirements, we see no reason to require your companies to also meet the financial requirements.

It is, however, not our position that all contractors to the federal or state government are exempt from the financial requirements. This is obvious from the state-only exception to the exemption. We believe our position is consistent with the EPA as they clarified that the governmental exemption applies to "State and Federally-owned facilities" [emphasis added] (45FR33198; May 19, 1980). Therefore, the EPA did not intend that all hazardous waste facilities involving the state and federal government be exempted. Only facilities owned by the government may qualify for the federal exemption. It is our interpretation that the state-only exception was added for similar reasons. As an example, a private company under contract to the government, but conducting dangerous waste treatment, storage, or disposal on the company's property, would need to meet the financial requirements. The state-only exception may also be applied in situations not contemplated by EPA because it may be applied at a government-owned facility. For example, the government may choose to vest all operational responsibility in the contractor, including financial assurance. This would be legitimate as we have interpreted that the financial requirements may be fulfilled by either the owner or operator. As the Hanford Facility is owned

by the federal government and it is willing to accept financial responsibility for dangerous waste management operations, the Hanford Facility does not fit into the category of facilities at which we would interpret the state-only exception to apply.

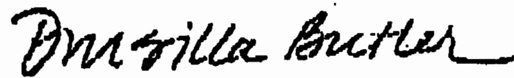
In summary, the Department does not interpret the state's dangerous waste financial requirements to be applicable to your companies' dangerous waste work at the Hanford Facility. It should be noted that this only relieves your companies from complying with the financial requirements. It does not relieve your companies from preparing closure and postclosure plans, nor from closing and/or postclosure of dangerous waste management units for which you are operationally responsible in an environmentally protective manner and consistent with Chapter 173-303 WAC. Furthermore, although we do not believe it is required for your companies to provide financial assurance and liability protection, it is our opinion that closure and postclosure cost estimates continue to be valuable information. We appreciate USDOE's willingness to provide such estimates in light of the governmental exemption. We also encourage and appreciate your support in providing such information.

It is understandable that the current language of WAC 173-303-620(1)(c) needs to be clarified. Therefore, during the next revision to Chapter 173-303 WAC, we will consider modifications to this language that would clarify the Department's intent. Until that time, this letter will serve as our interpretation that financial assurance and liability protection requirements will not be imposed by the Department on your companies.

If you have questions regarding the future revision of the Dangerous Waste Regulations, please contact Ms. Loria Hewitt at (206) 407-6714. Questions regarding the applicability of financial requirements at the Hanford Facility should be directed to Mr. Joe Witczak at (206) 407-7132.

Sincerely,

Tom Eaton, Manager
Hazardous Waste and Toxics Reduction



Drusilla Butler, Manager
Nuclear Waste Program

JJW:dr

cc: Dan Duncan, EPA
Cliff Clark, USDOE
Tanya Barnett, AG Office
Moses Jaraysi, Ecology