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September 24, 1997

Mr. George Dials, Manager
Carlsbad Area Office
Department of Energy
P.O. Box 3090
Carlsbad, N.M. 88221

Mr. Joe Epstein, General Manager
Westinghouse Electric Corporation
P.O. Box 2078
Carlsbad, N.M. 88220

RE: Response to Request for Financial Responsibility

Dear Messrs. Dials and Epstein:

This letter responds to the submittals received by the Hazardous and Radioactive Materials Bureau (HRMB) from the Department of Energy (DOE) and the Westinghouse Waste Isolation Division (WID) regarding disclosure and financial responsibility information. On April 28, 1997, HRMB requested DOE/WID to provide disclosure information to satisfy Section 74-4-4.7 of the New Mexico Hazardous Waste Act (HWA) and a legal opinion regarding whether the requirements of financial responsibility set forth under the HWA and regulations (20 NMAC 4.1.600, incorporating 40 CFR 264.140) are applicable to WID, as a private operator. We are appreciative of WID's determination on July 11, 1997 to submit a disclosure statement as required under the HWA. However, as discussed below, do not believe that the HWA or regulations "exempt" Westinghouse from its obligation to comply with financial responsibility requirements. Therefore, we are requesting that Westinghouse provide HRMB with cost estimates and all necessary documentation to satisfy the informational requirements under 20 NMAC 4.1.900 (incorporating 40 CFR 270.14(b)(15)(16) and (17)).

DOE/WID's legal opinion that Westinghouse be considered "exempt" from the requirement under the HWA to comply with financial responsibilities requirements is based upon three reasons. The first is an interpretation by USEPA dated 1983 in which USEPA stated that this exemption applies because federal facilities "will always have adequate resources" to conduct closure and post-closure care activities properly. DOE/WID's interpretation appears to be based upon an outdated USEPA policy. In addition, in 1992 the "adequacy" of federal funding has become a significant issue related to federal facility compliance under RCRA and state hazardous waste laws and in fact, "inadequacy" of funding is used by federal facilities throughout the United States

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as a *defense* under the Anti-Deficiency Act to compliance with its obligations to comply with environmental laws. Since 1983, Congress passed the Federal Facility Compliance Act which, as an amendment to the Resource Conservation and Recovery Act (RCRA), affirmatively places federal facilities on equal footing with private entities.

Second, the State of Washington's letter regarding the Hanford facility is not supportive as suggested by DOE/WID. There is a significant distinction between an existing facility like Hanford and a *new* proposed RCRA facility like WIPP. Unlike the WIPP facility, the Hanford site is an existing facility in which significant *releases* to the environment occurred at the time the State of Washington drafted the letter in question; the facility's mission is cleanup not production or operation. A requirement of financial responsibility in a RCRA Part B permit at Hanford under these circumstances would have been a difficult, if not impossible, task and serve no useful purpose (e.g. corrective action was already required).¹ Unlike Hanford, WIPP is a new facility in which no releases from units proposed to be permitted have occurred and which unquestionably is required under the law to follow the applicable state law requirements (e.g. Congress and the courts have disposed of DOE's arguments based upon sovereign immunity etc.). Finally, HRMB is unaware of any precedent in which it has determined that a private operator of a federally owned facility is "exempt" from financial responsibility requirements under the HWA under circumstances, such as WIPP, when HRMB receives a new permit application.

There are several compelling legal and policy reasons to require Westinghouse to submit the necessary documentation regarding financial responsibility in compliance with the HWA. A *primary* factor in determining whether financial assurance is appropriate for any facility is "history of non-compliance." A review of the Westinghouse's "history of non-compliance" reveals substantial and significant evidence of past environmental violations (approximately 200 to 300 violations since 1990). It would be very difficult for HRMB to state at a public hearing that it considered this history and determined under these circumstances that financial assurance was unnecessary. Second, as previously stated, due to the fact that DOE has relied upon "inadequacy" of funding as a defense to liability under environmental laws "adequacy" of funding is an issue.

In addition, the requirement to comply with financial responsibility is applicable to "*owners and operators of all hazardous waste facilities, except... state and federal government[s] are exempt.*" 20 NMAC 4.1.600(incorporating 40 CFR 264.140). This regulation does not exempt private operators of a new hazardous waste facility which is owned by the federal government. Therefore, proof of financial responsibility is required under the HWA and regulations. Finally, evidence of financial responsibility will ensure that New Mexico does not bear the burden of costs associated with closure or post-closure care.

¹ Even at the Hanford site, the Department of Ecology in Washington stated that they "appreciate USDOE's willingness to provide cost estimates because it provides the State with valuable information."

For all of these reasons, HRMB requests that Westinghouse promptly submit the necessary documentation and cost estimates for closure and post-closure to comply with the informational requirements set forth in 20 NMAC 4.1.900 (incorporating 40 CFR 270.14(b)(15)(16) and (17)).

If you have any questions, do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Ed Kelley". The signature is written in a cursive, flowing style.

Ed Kelley

cc: Benito Garcia
Susan McMichael
Cooper Wayman
Gloria Barnes