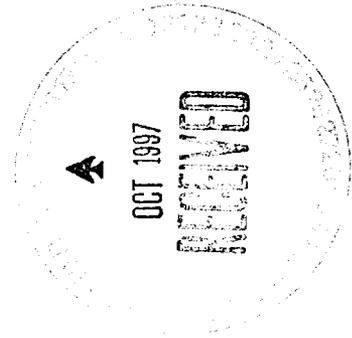




Department of Energy

Carlsbad Area Office
P. O. Box 3090
Carlsbad, New Mexico 88221

October 9, 1997



Dr. Ed Kelley
Director, Water and Waste Management Division
New Mexico Environment Department
P.O. Box 26110
Santa Fe, NM 87502

Subject: FINANCIAL RESPONSIBILITY REQUIREMENTS

Dear Dr. Kelley:

This is in response to the New Mexico Environment Department's (NMED's) letter, dated September 24, 1997, in which NMED set forth its position regarding the applicability of the "financial responsibility" requirements under the New Mexico Hazardous Waste Act (HWA) and its implementing regulations (which incorporates Subpart H of 40 CFR §264, "Financial Requirements") to the Westinghouse Waste Isolation Division (WID). For the reasons set forth below, we disagree with the position taken by the NMED.

As NMED is aware, the United States Department of Energy (DOE) and WID have concluded that WID, as a government contractor providing services at a federal facility, i.e., the DOE's Waste Isolation Pilot Plant (WIPP), and consistent with written policy established by the U.S. Environmental Protection Agency (EPA), is exempt from the Subpart H financial responsibility requirements. We explained our position at page I-42 of the WIPP Part B Permit Application and, at NMED's request, we subsequently supplied a short memorandum, dated May 15, 1997, regarding our position.

NMED's September 24, 1997, letter states that "DOE/WID's interpretation appears to be based upon an outdated USEPA policy [i.e. Mr. John Skinner, EPA Acting Director of Solid Waste, to Bradley Dillon, U.S. Ecology, Inc., January 5, 1983]." The letter also states that the "Federal Facility Compliance Act . . . an amendment to the Resource Conservation and Recovery Act (RCRA), affirmatively places federal facilities on equal footing with private entities." Based upon our inquiries, EPA has not overturned or retracted its policy of exempting federal contractors from the Subpart H financial responsibility requirements. EPA Region VI has advised DOE that the 1983 EPA policy applies and has not been modified. (Telephone conversation between Sherry Brown-Wilson and DOE-CAO Area Office Counsel, October 7, 1997). Moreover, the Federal Facility Compliance Act did not eliminate the exemption from the financial assurance requirements for federal facilities, and did not modify EPA's position that there is a corresponding exemption for contractors providing services at federal facilities.



Printed on recycled paper

971015



Dr. Ed Kelley, NMED
Financial Responsibility Requirements
October 9, 1997
Page 2

Our position is based directly on the language in Subpart H. The general "Applicability" section of Subpart H, 40 CFR §264.140, states as follows: "The requirements . . . apply to owners and operators of all hazardous waste facilities . . ." (Emphasis added). However, in subsequent sections (40 CFR §§264.142-148), which set forth the substantive financial responsibility requirements of Subpart H, compliance is required by **either** the "owner or operator," not both. For example, 40 CFR §264.142 states that the "owner or operator" is required to have a "detailed written estimate;" and 40 CFR §264.143 states that an "owner or operator" must establish financial assurance for closure." (Emphasis added). The language is consistent with EPA's goal of assuring that facilities have sufficient funding to complete cleanup and closure. With particular reference to federal facilities, EPA states, in its Training Module entitled, "Introduction to RCRA Financial Assurance," that "[t]he requirements of this subpart [Subpart H] are not applicable to state and federally owned or operated **facilities** . . ." EPA RCRA, Superfund & EPCRA Hotline Training Module, Introduction to RCRA Financial Assurance (40 CFR Parts 264/265, Subpart H), updated July 1996. Accordingly, the focus is on **facilities**, not the owner or operator entities. Since the United States government, i.e., the DOE, is the owner of the WIPP facility, there is sufficient assurance of proper closure of the facility. See 45 FR 33198-33199 (May 19, 1980). Thus, it is unnecessary and not in accordance with the regulations to mandate WID's compliance with Subpart H.

NMED's proposed application of the Subpart H Financial Responsibility requirements at 20 NMAC 4.1.500, incorporating by reference 40 C.F.R §264.140 to 264.151, is more stringent than EPA's regulations. Although NMED asserts that EPA's 1983 letter appears to be an outdated policy, we have not located any retraction or rescission by EPA of its policy. EPA applies the exemption in §264.140(c) to both the owners and operators of federally-owned facilities. See also the preamble to 40 C.F.R. Subpart H. Further, the HWA prohibits the EIB from adopting "regulations for the management of hazardous waste that are more stringent than federal regulations..." unless "the board determines, after notice and public hearing, that such federal regulations are not sufficient to protect public health and the environment." (Emphasis added). NMSA 1978, §74-4-4.D. Because EIB has not followed this process with respect to the financial assurance requirement, NMED cannot impose a financial assurance requirement that is more stringent than the federal regulation.

NMED's distinction between a hazardous waste facility which has had "releases" and one, such as WIPP, which has not had "releases" is not a basis under Subpart H for determining if an owner or operator must satisfy the financial responsibility requirements for a particular facility. The Subpart H requirements are applicable to all hazardous waste facilities, subject to the exemptions set forth in the regulations. NMED's attempt to establish "releases" as a basis

for the exclusion of federal contractors from the benefits of the Subpart H exemption is without basis in law. The Subpart H exemptions are expressly stated in 40 CFR §264.140(c), including the exemption of the federal government, which has been interpreted by EPA to include government contractors. NMED further states that the Hanford facility's mission is "cleanup not production or operation" and that "[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)." The focus of a facility, either in a cleanup or operational mode, is not an appropriate factor for determining whether the Subpart H requirements apply to federal contractors.

In addition, NMED's statement that Westinghouse's "history of non-compliance" justifies the state's imposition of the Subpart H requirements on WID is not supported by the facts or logic. Westinghouse is a large company with complex operations. Its environmental compliance record for an organization of its size and type is excellent. More fundamentally, that compliance record has no bearing on its ability to conduct closure and postclosure activities for a federal facility, i.e., WIPP. WID does not own the WIPP facility and WID has no authority to make programmatic decisions on behalf of DOE. Those decisions belong to the federal government, which the law recognizes in exempting federal contractors from the financial assurance requirements.

NMED also raises concerns about the adequacy of federal funding as related to compliance with hazardous waste requirements. As NMED is aware, funds for federal facilities are allocated by the Congress out of taxpayers' dollars. Congress allocates these funds based upon numerous factors, including a facility's potential to impact the health and safety of the public and the environment. When the parties to a compliance agreement have a valid reason for being unable to fully implement the agreement by a date designated in the agreement, the affected entities generally renegotiate the agreement to establish revised milestones. DOE does not use lack of sufficient funding in a particular fiscal year to **avoid** compliance with its environmental responsibilities.

In summary, a federal facility remains a federal facility, while federal contractors may change from time to time. The DOE, as owner of the WIPP facility, is exempt from the requirements of Subpart H. EPA "interprets this exemption [40 CFR §265.140] to mean that where one party (the owner or 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." (Emphasis added). Mr. John Skinner, EPA Acting Director of Solid Waste, to Bradley Dillon, U.S. Ecology, Inc., January 5, 1983.

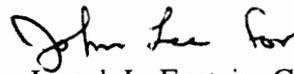
Dr. Ed Kelley, NMED
Financial Responsibility Requirements
October 9, 1997
Page 4

The NMED lacks authority to impose a more restrictive standard than the applicable federal requirement, unless the EIB adopts a new regulation pursuant to NMSA 1978, §74-4-4.D, which it has not done here.

We think that the information set forth herein demonstrates full and complete compliance with Subpart H. If NMED still disagrees with our position, we respectfully request a meeting as expeditiously as possible. If NMED has any questions or requires additional information, please do not hesitate to contact us.

Sincerely,


George E. Dials, Manager
Carlsbad Area Office


Joseph L. Epstein, General Manager
Westinghouse Waste Isolation Division

cc: Benito Garcia, NMED
Susan McMichael, NMED
Cooper Wayman, CAO
Gloria Barnes, WID
Mike McFadden, CAO
Craig Snider, CAO
Kevin Donovan, WID