



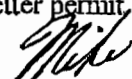
U.S. DEPARTMENT OF ENERGY
OFFICE OF REGULATORY COMPLIANCE & ASSURANCE
CARLSBAD AREA OFFICE
P.O. BOX 3090
CARLSBAD, NM 88221-3090


ENTEREDNO. OF PAGES (EXCLUDING COVER) 9DATE: January 14, 1999**TO: Susan McMichael, John McKay, Steve Zappe****LOCATION:****FAX # 505-827-2836****FROM: Mike McFadden**
Assistant Manager for Regulatory Compliance & Assurance**LOCATION: 4021 National Parks Hwy., 2nd Floor****PHONE/FAX #: 505-234-7486 / 505-234-7008****MESSAGE:** Susan:

As a follow-up to our meeting on Monday, January 11, 1999, DOE/WID considered the possible alternatives we discussed as possible vehicles for resolving issues raised by our comments on the Second Draft Permit. We have prepared the attached as our proposals for withdrawing some of the comments as a potential way to streamline the hearing.

We understand that the resolution of these issues may require NMED policy determinations, and these issues may not be resolved prior to Permittees' final comment submittal on January 19, 1999. We also understand that any conditions in the Final Permit will be determined in the hearing process and with recommendation from the Hearing Officer. However, we will make every effort to reflect any input that you or your staff can provide this week in the Permittees' final comment submission.

Once again, thank you for the opportunity to meet with you and your staff. We are hopeful that we can continue to maintain a dialogue with your office, which will allow us to streamline the hearing and ultimately result in a better permit.



1/14/99

PERMITTEES PROPOSAL CONCERNING REGULATION OF RH WASTE (for inclusion in Clarifications section of 1/18/99 Comment submission Executive Summary)

Permittees would withdraw their Comments No. 177 concerning NMED regulation of RH waste if the Final Permit reflected the following:

1. Modify Module III.A so that RH Bay is included as area within the Waste Handling Building Unit
2. Delete RH prohibitions from TSDF-WAC in Module II.C.3.h, WAP set forth in Permit Attachment B, waste characterization provisions of Permit Attachments B, and facility/handling references in Permit Attachments M - M2
3. Include new provision, in Module III.A.1.g:

III.A.1.g -- Use/Modification of RH Bay of the Waste Handling Building Unit

III.A.1.g.1 -- Permittees shall not store or manage TRU waste in the RH Bay of the Waste Handling Building Unit or dispose of any Remote Handled TRU waste in any HWDU until:

- (a) Permittees propose and the Secretary approves the methods for characterizing RH waste under the Waste Analysis Plan; and
- (b) Permittees propose and the Secretary approves procedures for the storing and management of RH waste in the RH Bay.

III.A.1.g.2 -- Permittees shall be allowed to make modifications to the RH Bay area of the Waste Handling Building Unit pursuant to the terms of Permit Module I.D.11.

1/14/99

PERMITTEES PROPOSAL CONCERNING PRE-PERMIT AUDIT PROCEDURES (for inclusion in Clarifications section of 1/18/99 Comment submission Executive Summary)

Permittees would withdraw their Comment No. 151 concerning NMED approval of final audit reports for generator sites if:

1. In Module II.C.2, the Initial Site Certification Audit shall also be called the "WAP Audit"
2. Module II.C.2.b of Final Permit reads:

II.C.2.b NMED Observation of Audit - the Secretary may observe such audits as necessary to validate the implementation of and compliance with applicable WAP requirements at each generator site.

II.C.2.b.1 Notice to NMED - The Permittees shall provide the Secretary with a current audit schedule and notify the Secretary no later than thirty (30) calendar days prior to each WAP Audit.

II.C.2.b.2 NMED Input During Audit - The Secretary shall raise any and all conflicts or other issues associated with a generator site's performance or the Permittees' performance of the audit during the audit itself.

3. Module II.C.2.c of the Final Permit reads:

II.C.2.c Final WAP Audit Report - the Permittees shall provide the Secretary a final WAP Audit report. The final WAP Audit report shall include as a minimum the following information:

- Identity of audited organization
- Dates of the Audit
- Audit Scope and Purpose
- Summary of Deficiencies
- Audit Observations
- Listing of procedures audited

A detailed description of all corrective action requests and the resolution of any corrective action applicable to WAP requirements, including re-audits if required;

All reasonable documentation necessary for the Secretary to determine if the corrective action was resolved.

The Secretary shall use the completed audit checklists, the WAP, and the documentation of the resolution of corrective actions as the criteria for approval of the

final WAP Audit report.

The Secretary shall have forty five (45) days to respond to the final audit report. If the Secretary does not respond in writing to the Permittees within 45 days of receipt of the final WAP Audit report or subsequent requested documentation receipt, then report will be deemed approved and will be deemed a demonstration to the Secretary that the generator/storage site has implemented and complies with the applicable requirements of the WAP.

4. Final Permit reflects Permittees Proposed Revisions Nos. 2-3 to Draft Permit set forth in Comment No. 151
5. Permittees be allowed to conduct WAP Audits of generator sites during period before HWA permit becomes final under following conditions:
 - a. Such pre-permit audits shall be to the WAP and associated provisions set forth in Permit Attachments B1 - B6 as set forth in Second Draft Permit
 - b. Permittees shall provide 30-day notice to NMED of such audits and NMED may observe such audits under the terms of the proposed II.C.2.b set forth above
 - c. The Permittees shall submit and NMED shall review and approve a final WAP Audit report under the terms of the proposed II.C.2.c set forth above
 - d. NMED approval of final WAP Audit reports from such audits shall be recognized as satisfaction of audit requirement under Module II.C.2 once HWA permit is final (i.e., Permittees shall not be required to perform the audit again once permit is final)

1/14/99**PERMITTEES PROPOSAL CONCERNING REGULATION OF NON-MIXED WASTE (for inclusion in Clarifications section of 1/18/99 Comment submission Executive Summary)**

Permittees would withdraw their Comment No. 155 concerning regulation of non-mixed TRU waste if:

1. Module IV.B.2.b of Final Permit reads: the Permittees shall not dispose non-mixed TRU waste in any unit specified in this Module unless such waste is characterized in a manner consistent with the requirements of the WAP specified in Permit Condition II.C.1. *See response*

2. Permittees are allowed to dispose of non-mixed TRU waste during period before HWA permit becomes final under following conditions:

- not in permit*
- a. The non-mixed waste shall be characterized in manner consistent with the requirements and/or principles of the WAP and associated provisions set forth in Permit Attachments B1 - B6 as set forth in Second Draft Permit issued 11/13/98
 - b. The LANL TA-55 waste stream shall require no further characterization.
 - c. Permittees shall give NMED at least 15 days notice of their intent to dispose of non-mixed waste during period before HWA permit becomes final

1/14/99

PERMITTEES PROPOSAL CONCERNING FINANCIAL ASSURANCE (for inclusion in Clarifications section of 1/18/99 Comment submission Executive Summary)

1. DOE will provide NMED a guarantee of liability for closure and post-closure in a form similar to the attached draft Guarantee to resolve need for financial assurance by WID under Modules II.N, II.O
2. WID will provide a Declaration of Self-Insurance in a form similar to the attached Declaration to resolve need for liability protection by WID under Module II.P

Q. intent of proposal?

A: not one of six mechanisms
it's a substitute

DRAFT (Subject to further review and approval)

**UNITED STATES DEPARTMENT OF ENERGY
GUARANTEE FOR CLOSURE/POST-CLOSURE CARE**

Guarantee made this _____ day of _____ by the United States Department of Energy, an agency of the United States Government, herein referred to as guarantor. This guarantee is made on behalf of the Westinghouse Electric Company, Waste Isolation Division, herein referred to as Westinghouse.

RECITALS

1. The U. S. Department of Energy (DOE) is the owner and operator of the Waste Isolation Pilot Plant (WIPP), located in Carlsbad, New Mexico. In 1980, pursuant to section 213 of the Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act, the United States Congress authorized the WIPP as a research and development facility to demonstrate the safe disposal of radioactive wastes resulting from the defense activities of the United States. *See Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1980, § 213, Pub. L. 96-164; 93 Stat. 1259, 1265.* The Secretary of Energy has been authorized by the U.S. Congress to use WIPP for the "construction, experimentation, operation, repair and maintenance, disposal, shutdown, monitoring, decommissioning, and other activities associated with the purposes of WIPP." *See Waste Isolation Pilot Plant Land Withdrawal Act, Pub. L. 102-579; 106 Stat. 4777 (1992).*
2. For purposes of permitting WIPP for hazardous waste storage and disposal, the DOE is designated as owner and operator. The DOE has entered into a contract with Westinghouse to manage and operate the WIPP facility on behalf of the DOE. As such, Westinghouse is designated as co-operator of the WIPP facility for purposes of permitting the facility for hazardous waste storage and disposal. Facility identifying information is as follows:

EPA Identification Number- NM4890139088
Name of Facility-Waste Isolation Pilot Plant (WIPP)
30 Miles East of Carlsbad on Jal Highway
Post Office Box 3090
Carlsbad, New Mexico, 88221
3. "Closure plans" and "post-closure plans" as used below refer to the plans maintained as required by Subpart G of 40 CFR Parts 264 or 265 for the closure and post-closure care of the facility identified above.
4. Guarantor guarantees to the State of New Mexico, Environment Department, that in the event Westinghouse, or any successor contractor responsible for managing and

operating the facility, herein referred to as successor, fails to perform closure and post-closure of the above facility in accordance with closure or post-closure plans and other

permit requirements whenever required to do so, the guarantor is ultimately liable to do so.

5. Guarantor agrees to remain bound under this guarantee notwithstanding any or all of the following: amendment or modification of the closure or post-closure plan amendment or modification of the permit, the extension or reduction of the time of performance of closure or post-closure or any other modification or alteration of an obligation of the owner or operator pursuant to 40 CFR Part 264 or 265.

6. Guarantor agrees to remain bound under this guarantee for as long as Westinghouse, or any successor must comply with the applicable financial assurance requirements of Subpart H of 40 CFR Parts 264 and 265 for the above listed facility.

7. Guarantor expressly waives notice of acceptance of this guarantee by the State of New Mexico, Environment Department, or by Westinghouse. Guarantor, in said capacity only, also expressly waives notice of amendment or modification of the closure and post-closure plans and of modifications or amendments of the facility permit.

8. Nothing contained in this guarantee shall affect the responsibilities of Westinghouse, or any successor, under its contract with the Department of Energy to manage and operator the facility. Nor shall the provisions of this guarantee affect the Department of Energy's rights pursuant to the contract.

9. Nothing contained in this guarantee shall be construed as affecting the Department of Energy's responsibilities under, or its duty to comply with, the requirements and provisions of applicable federal and state law.

I certify under penalty of law that I am authorized to execute this document and that the information contained here is, to the best of my knowledge and belief, true, accurate and complete.

Effective Date: _____

United States Department of Energy

(signature)

(Name of person signing)

(title of person signing)

(signature of witness or notary)

DRAFT (Subject to further review and approval)

**WESTINGHOUSE ELECTRIC CORPORATION - WASTE ISOLATION
DIVISION
DECLARATION OF SELF-INSURANCE**

The Westinghouse Electric Company Waste Isolation Division maintains a self-insurance program for purposes of addressing its liabilities to third parties. Third party liability protection is available for sudden accidental occurrences in the amount of at least \$1 million per occurrence with an annual aggregate of at least \$2 million, as required by 20 NMAC 4.1, Subpart V, §264.147(a); and for non-sudden accidental occurrences in the amount of at least \$3 million per occurrence with an aggregate of at least \$6 million, as required by 20 NMAC 4.1, Subpart V, §264.147(b).

In addition, as co-permittee at a federal nuclear facility subject to the Atomic Energy Act of 1954 (AEA), Westinghouse provides financial assurance for bodily injury and property damage to third parties caused by sudden and nonsudden accidental occurrences arising from contractor operations through the Nuclear Hazards Indemnity Agreement between DOE and Westinghouse. The DOE/Westinghouse Contract, No. DE-AC04-86AL31950, incorporates the Nuclear Hazards Indemnity Agreement, which generally provides that the DOE will indemnify Westinghouse against claims of "public liability," (i.e. liability which arises out of or in connection with the activities under the contract and arises out of or results from a nuclear incident or precautionary evacuation), and that Westinghouse will not be required to maintain financial protection to cover any such "public liability." A "nuclear incident" is defined, in relevant part, as "any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." Accordingly, bodily injury or property damage to third parties caused by accidental occurrences involving source, special nuclear, or byproduct material components of TRU mixed waste, which arise from contractor operations at WIPP, would be subject to the Nuclear Hazards Indemnity Agreement in the DOE/Westinghouse Contract.

Section 170(d) of the AEA requires DOE to indemnify Westinghouse against claims of public liability and for associated legal costs, in the aggregate for each nuclear incident or precautionary evacuation occurring within the United States, provided the costs do not exceed the limits set forth in the AEA. Section 170(j) of the AEA provides that the required indemnification agreement may be entered into in advance of appropriation and thus the agreement is not subject to the availability of funds. In addition, in the event a nuclear incident involves damages in excess of the amount of aggregate public liability,

section 170(e) of the AEA provides that the United States Congress will thoroughly review the particular incident, and in accordance with applicable procedures, take whatever action is determined to be necessary to provide full and prompt compensation of the public for all public liability claims resulting from the incident.

I certify under penalty of law that I am authorized to execute this document and that the information contained here is, to the best of my knowledge and belief, true, accurate and complete.

Effective Date: _____

Westinghouse Waste Isolation Division

(signature)

(Name of person signing)

(title of person signing)

(signature of witness or notary)