



GARY E. JOHNSON
GOVERNOR

**State of New Mexico
ENVIRONMENT DEPARTMENT**

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PETER MAGGIORE
Secretary

VIA FACSIMILE: (202) 536-4403

April 20, 1999

The Honorable Bill Richardson
Secretary of Energy
U.S. Department of Energy
Washington D.C. 20585

Dear Secretary Richardson:

As you know, the New Mexico Environment Department (NMED) has repeatedly requested that the U.S. Department of Energy (DOE) promptly and voluntarily provide documentation demonstrating the non-hazardous nature of Waste Stream Profile INW276, which DOE intends to ship from the Idaho National Environmental and Engineering Laboratory (INEEL) to the Waste Isolation Pilot Plant (WIPP) on April 27, 1999. On Saturday, you personally told me that DOE would not voluntarily provide this documentation. As a result, I must issue the enclosed compliance order.

Sincerely,

Greg Lewis
Director, Water and Waste Management Division

cc: Governor Johnson
Attorney General Madrid

Secretary Salisbury, NMENMRD
Senator Domenici
Senator Bingaman
Representative Skeen
Representative Udall
Representative Wilson
Keith Klein, CAO/DOE
Joseph Epstein, WID
Carol Browner, USEPA
Gregg Cooke, USEPA

**STATE OF NEW MEXICO
ENVIRONMENT DEPARTMENT**

**IN THE MATTER OF
U.S. DEPARTMENT OF ENERGY
CARLSBAD, NEW MEXICO
NM4890139088,**

**COMPLIANCE ORDER
HRM-99-04 (CO)**

RESPONDENT.

ADMINISTRATIVE COMPLIANCE ORDER

The Secretary of Environment, acting through the Director of the Water and Waste Management Division of the New Mexico Environment Department (NMED or Complainant), issues this Administrative Compliance Order (Order) to the U.S. Department of Energy (DOE or Respondent), pursuant to the New Mexico Hazardous Waste Act, §74-4-10, NMSA 1978 (Repl.Pamp. 1993).

FINDINGS OF FACT

1. NMED is the agency within the executive branch of the government of the State of New Mexico charged with the administration and enforcement of the New Mexico Hazardous Waste Act (HWA), NMSA 1978 §§74-4-1. et seq., (Repl.Pamp. 1993), and New Mexico Hazardous Waste Management Regulations (HWMR), 20 NMAC 4.1.
2. The HWA, §74-4-4.3, provides that upon request by the NMED Secretary or authorized representative, any person generating, storing, transporting, disposing, or otherwise managing hazardous wastes shall furnish information relating to such hazardous wastes.
3. The HWMR, 20 NMAC 4.1.300 (incorporating 40 CFR §262.11), require any person generating a solid waste to perform a hazardous waste determination.

4. The HWMR, 20 NMAC 4.1.600 (incorporating 40 CFR §265.13(a)), require any owner or operator of an interim status facility to obtain a detailed chemical and physical analysis of a representative sample of hazardous waste before storing or disposing such waste.

5. DOE is the agency within the executive branch of the government of the United States of America charged with the management of transuranic waste at the Idaho National Environmental and Engineering Laboratory (INEEL) and the storage and disposal of transuranic waste at the Waste Isolation Pilot Project (WIPP) in Carlsbad, New Mexico.

6. DOE owns and operates WIPP, a hazardous waste storage and disposal facility for which a permit or interim status is required under 20 NMAC 4.1.900 (incorporating 40 CFR §270.1(a)).

7. Transuranic waste contains solid waste as defined in the HWA, §74-4-3(M).

8. On March 23, 1999, DOE posted notice on TRANSCOM, a computer and satellite tracking system, that it intended to ship transuranic waste identified as Waste Stream Profile INW276 from INEEL to WIPP during the week of May 17, 1999.

9. On March 25, 1999, NMED wrote a letter to DOE requesting characterization information regarding Waste Stream Profile INW276.

10. On April 6, 1999, NMED participated in a telephone conference call with DOE in which NMED again requested characterization information regarding Waste Stream Profile INW276.

11. On April 12, 1999, DOE wrote a letter to NMED, representing that Waste Stream Profile INW276 was not hazardous, but that even if it were hazardous, WIPP could store and dispose Waste Stream Profile INW276 pursuant to the interim status regulations, 40 CFR Part

265. However, DOE failed to provide any characterization information for Waste Stream Profile INW276.

12. On April 17, 1999, the NMED Secretary personally requested the DOE Secretary to provide characterization information regarding Waste Stream Profile INW276.

13. On April 17, 1999, the DOE Secretary personally told the NMED Secretary that DOE would not provide characterization information regarding Waste Stream Profile INW276.

14. The HWA, §74-4-3.3, provides that the term "hazardous waste" includes any waste defined or classified as hazardous waste in the state of origin.

15. Upon information and belief, Waste Stream Profile INW276 is hazardous waste. Waste Stream Profile INW276 originated at the DOE's Rocky Flats Environmental Technology Site in Colorado. The DOE's Baseline Inventory Reports, Revision 1 (February 1995) and Revision 2 (December 1995) identify Waste Stream Profile INW276 as mixed transuranic waste containing EPA Hazardous Waste Codes D022, D028, F001, F002, F003, and F005.

CONCLUSIONS OF LAW

1. DOE is a "person" as defined in the HWA, §74-4.3(K), and the HWMR, 20 NMAC 4.1.101 (incorporating 40 CFR §260.10).
2. DOE generated Waste Stream Profile INW276, and intends to transport this waste stream through the State of New Mexico for storage and disposal at WTPP.
3. Waste Stream Profile INW276 originated in the State of Colorado.
4. Waste Stream Profile INW276 has been defined or classified as hazardous waste in the State of Colorado.
5. Waste Stream Profile INW276 is hazardous waste because it contains waste listed

in 40 CFR Part 261, Subpart D, as provided by 20 NMAC 4.1.200 (incorporating 40 CFR §261.30).

6. DOE must perform an adequate hazardous waste determination on Waste Stream Profile INW276 as required by the HWMR, 20 NMAC 4.1.300 (incorporating 40 CFR §262.11).

7. DOE must obtain a detailed chemical and physical analysis of a representative sample of Waste Stream Profile INW276 as required by the HWMR, 20 NMAC 4.1.500 (incorporating 40 CFR §265.13(a)).

8. DOE has failed and refused to provide to NMED any characterization information regarding Waste Stream Profile INW276.

9. In the absence of characterization information regarding Waste Stream Profile INW276, NMED cannot determine compliance with the HWMR, 20 NMAC 4.1.300 (incorporating 40 CFR §262.11).

CORRECTIVE ACTION

1. Pursuant to the HWA, §74-4-4.3, the NMED Secretary, through his authorized representative, orders DOE to furnish all characterization information for Waste Stream Profile INW276 by 5:00 p.m. Mountain Standard Time, Wednesday, April 21, 1999.

2. Pursuant to the HWMR, 20 NMAC 4.1.300 (incorporating 40 CFR §262.11), the NMED Secretary, through his authorized representative, orders DOE to prepare and submit an adequate hazardous waste determination for Waste Stream Profile INW276 by 5:00 p.m. Mountain Standard Time, Wednesday, April 21, 1999.

3. Pursuant to the HWMR, 20 NMAC 4.1.600 (incorporating 40 CFR §265.13(a)), the NMED Secretary, through his authorized representative, orders DOE to obtain and submit a

detailed chemical and physical analysis of a representative sample of Waste Stream Profile INW276 by 5:00 p.m, Mountain Standard Time, Wednesday, April 21, 1999.

NOTICE

The HWA, §74-4-10(C)(1), authorizes the NMED Secretary to assess a civil penalty of not more than twenty-five thousand dollars (\$25,000) for each day of continued non-compliance with this Order.

NOTICE OF OPPORTUNITY TO ANSWER AND REQUEST A HEARING

Respondent may request a hearing pursuant to the HWA, §54-4-10(H), and NMED's Adjudicatory Procedures, 20 NMAC 1.5.200, by filing a written request for hearing with the hearing clerk within thirty (30) calendar days after receipt of this Order. The request for hearing shall include an answer which:

- (1) admits or denies each alleged finding of fact. Any alleged finding of fact which is not specifically denied shall be deemed to be admitted. Respondent may assert that it has no knowledge of any alleged finding of fact, and such finding shall be deemed to be denied;
- (2) asserts any affirmative defenses upon which Respondent intends to rely. Any affirmative defense not asserted in the answer, except an affirmative defense asserting lack of subject matter jurisdiction, shall be deemed to be waived;
- (3) has been signed under oath or affirmation that the information contained therein is true and correct to the best of the signatory's knowledge; and
- (4) has attached a copy of this Order.

Upon Respondent's request, the NMED Secretary shall hold a hearing on the issues raised in this Order and Respondent's answer. The hearing, including pre-hearing procedures, shall be

governed by NMED's Adjudicatory Procedures, 20 NMAC 1.5. Respondent may obtain a copy of NMED's Adjudicatory Procedures from:

Hearing Clerk
New Mexico Environment Department
P.O. Box 26110
1190 St Francis Drive
Santa Fe, New Mexico 87502-6110
(505) 827-2842

FINALITY OF ORDER

This Order shall become final unless Respondent files a request for hearing, as specified above, within thirty (30) days of receipt of this Order. Respondent's failure to file an answer shall constitute an admission of the alleged findings of fact in this Order and a waiver of Respondent's right to a hearing under the EWA, §74-4-10.

SETTLEMENT CONFERENCE

Respondent may confer with NMED concerning settlement at any time, but such conference does not extend or waive the thirty (30) day period for file a request for hearing and answer. Respondent may confer regarding settlement as an alternative to, or simultaneously with, a hearing on this Order. Respondent may appear pro se or through counsel at any settlement conference.

Any settlement shall be approved by the NMED Secretary through a stipulated final order pursuant to the conditions set forth in NMED's Adjudicatory Procedures, 20 NMAC 1.5.601. Any stipulated final order shall resolve all issues raised in this Order, shall bind all parties to this Order, shall be final, and shall not be appealable.

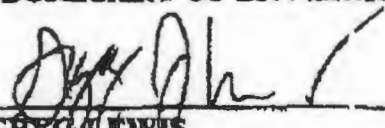
To confer regarding settlement, contact:

Mr. John Tymkowych
Enforcement Manager
Hazardous and Radioactive Materials Bureau
New Mexico Environment Department
P.O. Box 26110
1190 St Francis Drive
Santa Fe, New Mexico 87502-6110
(505) 827-1508

TERMINATION

Compliance with this Order does not relieve Respondent of its obligation to comply with all applicable laws and regulations. This Order shall terminate upon Respondent's certification of compliance with this Order and NMED's approval of such certification, or upon the NMED Secretary's approval of a stipulated final order.

**PETER MAGGIORE
SECRETARY OF ENVIRONMENT**



**GREG LEWIS
DIRECTOR, WATER AND
WASTE MANAGEMENT DIVISION**

DATE: 4/20/99

CERTIFICATE OF SERVICE

I certify that on this 20th day of April, 1999, this Order was faxed and mailed, certified

mail-return receipt requested, to the following persons:

Keith Klein
Carlsbad Area Office
U.S. Department of Energy
P.O. Box 3090
Carlsbad, NM 88221

Natalie J. Resumpin for
Eric Ames