ANSWER AND REQUEST FOR A HEARING

Pursuant to section 74-4-10 of the New Mexico Hazardous Waste Act (HWA), NMSA 1978 § 74-4-10 (Repl. Pamp. 1993), and the adjudicatory procedures set forth in section 1.5.200 of title 20 of the New Mexico Administrative Code (NMAC), 20 NMAC 1.5.200, the United States Department of Energy (DOE) hereby requests a hearing concerning Administrative Compliance Order HRM-99-04 issued by the New Mexico Environment Department (NMED) on April 20, 1999.

RESPONSES TO NMED'S FINDINGS OF FACT

DOE responds to NMED's allegations in the Compliance Order as follows:

1. The extent of NMED's authority under the HWA and the Hazardous Waste Management Regulations (HWMR) is a question of law, not an issue of fact. As such, the allegation requires no response at this time.

2. The extent of the authority granted to NMED by section 74-4-4.3 of the HWA is a question of law, not an issue of fact. As such, the allegation requires no response at this time.

3. The extent of the obligations imposed by 20 NMAC 4.1.300 (incorporating 40 C.F.R. § 262.11) of the HWMR is a question of law, not an issue of fact. As such, the allegation requires no response at this time.
4. The extent of the obligations imposed by 20 NMAC 4.1.600 (incorporating 40 C.F.R. § 262.13) of the HWMR is a question of law, not an issue of fact. As such, the allegation requires no response at this time.

5. Denied. Both DOE and the United States Environmental Protection Agency have authority over the disposal of transuranic waste at the Waste Isolation Pilot Plant (WIPP) in Carlsbad, New Mexico.

6. Denied. Currently, DOE is storing and disposing of only non-mixed (i.e., non-hazardous) transuranic waste at WIPP. The storage and disposal of non-mixed transuranic waste at WIPP does not require a permit or interim status under 20 NMAC 4.1.900, the HWA or RCRA. The State of New Mexico and NMED have no regulatory authority over the management of non-mixed transuranic waste at WIPP. At some point in the future, DOE intends to store and dispose of mixed transuranic waste at WIPP.

7. Denied. Transuranic waste that does not contain hazardous waste is not, nor does it contain, solid waste. Moreover, the definition of “solid waste” is a question of law, not an issue of fact.


10. Denied. NMED’s request contained no reference to “Waste Stream Profile INW276.”
11. Denied. DOE’s letter of April 12, 1999, provided sufficient information and assurances that the waste it shipped from Idaho to WIPP in April 1999 is not regulated by the HWA or RCRA.

12. Denied. The Secretary of NMED’s request contained no reference to “Waste Stream Profile INW276.”


14. The definition of “hazardous waste” under section 74-4-3.3 of the HWA is a question of law, not an issue of fact. As such, the allegation requires no response at this time.

15. Denied. The waste DOE shipped to WIPP from Idaho in April 1999 is non-mixed (i.e., non-hazardous) waste. The Transuranic Waste Baseline Inventory Report preliminarily listed the waste stream from which DOE selected the 42 drums it shipped to WIPP as mixed transuranic waste pending completion of waste characterization. DOE completed the characterization of these drums and that characterization conclusively demonstrates that they contain non-mixed waste. DOE stated in its Part B Application for WIPP’s RCRA permit that:

“The information provided by the generator/storage sites in the WTWBIR [WIPP Transuranic Waste Baseline Inventory Report] is not the result of waste characterization. It is an estimate of waste stream constituents. . . . All waste characterization activities must still be conducted and each waste stream submitted to the WIPP facility on a Waste Stream Profile Form for approval. Waste stream descriptions will be finalized over the course of waste characterization at the sites.”

WIPP RCRA Part B Permit Application, DOE/WID 91-005, Rev. 6 at C-8.
RESPONSES TO NMED'S CONCLUSIONS OF LAW

DOE responds as follows to NMED's conclusions of law, some of which are actually allegations of fact:

1. As this is a conclusion of law, no response is required at this time.

2. Denied. DOE generated a waste stream that contains graphite molds to which the Idaho National Engineering and Environmental Laboratory (INEEL) subsequently assigned in 1995 the designation "Waste Stream IN-W276" pending characterization and segregation. To date, DOE has shipped only 42 drums of this waste stream to WIPP, although it reserves its right to ship additional drums of this waste stream in the future.

3. Denied. The waste stream was generated in the State of Colorado; INEEL subsequently assigned it the designation "Waste Stream IN-W276" pending characterization and segregation.

4. Denied. This waste stream was and is designated as non-mixed waste in Colorado; INEEL subsequently assigned it the designation "Waste Stream IN-W276" pending characterization and segregation.

5. Denied. The waste DOE shipped to WIPP from INEEL in April 1999 is not a hazardous waste and does not contain waste listed in 40 C.F.R. Part 261, Subpart D, as provided by 20 NMAC 4.1.200 (incorporating 40 C.F.R. § 261.30).

6. As this is a conclusion of law, no response is required at this time.

7. As this is a conclusion of law, no response is required at this time.
8. Denied. DOE provided NMED with a description of the waste it shipped from INEEL to WIPP as well as a description of the information it used to determine that the waste is non-mixed.

9. Denied. DOE provided NMED with a description of the waste it shipped from INEEL to WIPP as well as a description of the information it used to determine that the waste is non-mixed.

**AFFIRMATIVE DEFENSES**

1. The waste DOE shipped from INEEL to WIPP in April 1999 is not a hazardous waste as defined in section 74-4-3(1) of the HWA.

2. The HWA does not give NMED subject matter jurisdiction over the waste that DOE shipped from INEEL to WIPP in April 1999.

3. Contrary to the requirements of section 74-4-10(A)(1) of the HWA, the Compliance Order fails to state with reasonable specificity the nature of the alleged violation or threatened violation.

4. Contrary to the requirements of section 74-4-4.3 of the HWA, neither the Secretary of NMED nor a duly authorized representative issued a proper request for information concerning the generation, storage, treatment, transportation, disposal, or handling of a hazardous waste as to the waste DOE sent from INEEL to WIPP in April 1999.

5. Neither 20 NMAC 4.1.300 nor 40 C.F.R. § 262.11 requires persons performing hazardous waste determinations to provide the bases of those determinations to NMED.

6. Neither 20 NMAC 4.1.600 nor 40 C.F.R. § 265.13(a) requires the owner and operator of an interim status facility to provide the results of a general waste analysis to NMED.
Moreover, neither 20 NMAC 4.1.600 nor 40 C.F.R. § 265.13(a) requires the owner and operator of an interim status facility to perform a general waste analysis on non-hazardous waste prior to storing or disposing of it.

7. Nothing in the HWA, RCRA, 20 NMAC 4.1.900 or 40 C.F.R. § 270.1(a) requires WIPP to have a permit or interim status in order to dispose of non-hazardous waste.

8. This waste was never “defined or classified as hazardous waste in the state of origin,” and therefore section 74-4-3.3 of the HWA does not apply.

9. The listings of wastes in the Transuranic Waste Baseline Inventory Report reflect preliminary estimates of potential waste stream constituents. The report preliminarily listed the waste stream from which DOE selected the 42 drums it shipped to WIPP from INEEL as mixed transuranic waste pending completion of waste characterization. DOE completed the characterization of these drums and that characterization conclusively demonstrates that they contain non-mixed waste. DOE stated in its Part B Application for WIPP’s RCRA permit that: “The information provided by the generator/storage sites in the WTWBIR [WIPP Transuranic Waste Baseline Inventory Report] is not the result of waste characterization. It is an estimate of waste stream constituents. . . . All waste characterization activities must still be conducted and each waste stream submitted to the WIPP facility on a Waste Stream Profile Form for approval. Waste stream descriptions will be finalized over the course of waste characterization at the sites.” WIPP RCRA Part B Permit Application, DOE/WID 91-005, Rev. 6 at C-8.

10. DOE performed a hazardous waste determination on this waste that satisfies all applicable regulatory requirements and comports with all applicable guidance.
11. Although DOE is not required to comply with 20 NMAC 4.1.500 or 40 C.F.R. § 265.13(a) when it disposes of non-hazardous waste at WIPP, the information that DOE collected for its hazardous waste determination would satisfy all applicable requirements and would comport with all applicable guidance concerning general hazardous waste analysis under interim status.

12. DOE has provided all of the information requested in the Compliance Order and required under applicable statutes and regulations.

13. NMED's demands for information as to waste destined for disposal at WIPP exceed what the applicable regulations require, ignore applicable guidance issued by the United States Environmental Protection Agency and the Nuclear Regulatory Commission, and go far beyond what is requested or required of others who manage non-hazardous waste in New Mexico.

14. The penalty threatened in the Order exceeds the amount authorized by law and is excessive in any event.

CERTIFICATION OF COMPLIANCE

DOE certifies that it has complied with all aspects of this Compliance Order and requests that NMED approve this certification. By making this certification DOE is not admitting any allegations of fact or agreeing to any interpretations of law contained in the Compliance Order. In addition, this certification is not a waiver of any of the affirmative defenses stated in this Answer and Request for a Hearing.

1. Before 5:00 pm on April 21, 1999, a representative of the Department of Energy submitted to NMED an adequate hazardous waste determination for the waste DOE sent to
WIPP from INEEL in April 1999 as well as for the remainder of this waste stream at INEEL and the Rocky Flats Environmental Technology Site (RFETS). This determination demonstrated that this waste is not a hazardous waste. In addition, DOE’s representative provided NMED with background and supplementary information that exceeded the regulatory requirements for an adequate hazardous waste determination.

2. Before 5:00 pm on April 21, 1999, a representative of the Department of Energy submitted to NMED a detailed chemical and physical analysis of a representative sample (i.e., a general waste analysis) of the waste DOE sent to WIPP from Idaho in April 1999 as well as for the remainder of this waste stream at INEEL and RFETS. DOE was under no obligation to provide a detailed chemical and physical analysis of a representative sample of this waste to NMED because it is not a hazardous waste, as demonstrated by DOE’s hazardous waste determination. In addition, DOE’s representative provided NMED with background and supplementary information that exceeded the regulatory requirements for a general waste analysis pursuant to 20 NMAC 4.1.300 (incorporating 40 C.F.R. § 265.13(a)).

3. On May 19, 1999, DOE sent NMED additional information informally requested by NMED and its consultant TechLaw. This is background and supplementary information and in no way affects the adequacy of DOE’s prior hazardous waste determination or of a general waste analysis of this waste, which were provided on April 21, 1999.

**REQUEST FOR APPROVAL OR A HEARING**

DOE hereby requests that NMED approve DOE’s Certification of Compliance attached hereto or promptly schedule a public hearing before an independent hearing officer.
AFFIRMATION

I hereby affirm that the information contained herein is true and correct to the best of my knowledge.

Inés Triay, Manager
Carlsbad Area Office

5/19/99
Date
CERTIFICATION OF SERVICE

I hereby certify that on this 17th day of May 1999 I sent a copy of this Answer and Request for a Hearing and a copy of the Compliance Order to the person indicated below by facsimile and overnight delivery service.

Greg Lewis  
Director, Water and Waste Management Division  
New Mexico Environment Department  
Harold Runnels Building  
1190 St. Francis Drive  
Santa Fe, NM 87502  
Facsimile No. 505-827-2836

APPROVAL OF DOE'S CERTIFICATION OF COMPLIANCE

On behalf of the New Mexico Environment Department, I approve DOE's certification of compliance and hereby terminate this Compliance Order. By approving DOE's certification of compliance, NMED is not admitting any allegation of fact, agreeing to any interpretation of law, or accepting any affirmative defense contained in DOE's Answer and Request for a Hearing. In addition, this approval does not affect NMED's ability to take any enforcement actions other than those set forth in Compliance Order HRM-99-04 (CO) dated April 20, 1999.

Name

Date
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,

[Signature]

Greg Lewis  
Director, Water and Waste Management Division

cc: Governor Johnson  
Attorney General Madrid
Secretary Salisbury, NMEMNRD
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
NM4890139082,

RESPONDENT.

COMPLIANCE ORDER
HRM-99-04 (CO)

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 4.1.500 (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.


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 WIPP.


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 FWA, §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 Tymkowycz  
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

DATE: 4/20/99

GREG LEWIS  
DIRECTOR, WATER AND  
WASTE MANAGEMENT DIVISION
CERTIFICATE OF SERVICE

I certify that on this 21st 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

[Signature]
Eric Ames
United States Department of Energy
Office of the General Counsel (GC-1)

FACSIMILE TRANSMISSION FORM

Facsimile from: R. Paul Detwiler
Forrestal Building, Room 6A-245
1000 Independence Avenue, SW
Washington, DC 20585

Phone: 202-586-1371
Facsimile: 202-586-1499

To: Greg Lewis, NMED

Facsimile number(s): 505-827-2836

Date: May 19, 1999

Pages: 21 (including cover page)

Message: DOE's Answer and Request for a Hearing re Compliance Order HRM-99-04 (copy of original order attached).

This facsimile is intended only for the use of the recipient(s) to whom it is addressed and may contain information that is privileged and confidential. If you are not the intended recipient (or a person responsible for delivering this to the intended recipient), you are hereby notified that any disclosure, distribution or copying of this information is strictly prohibited. If you have received this facsimile in error, please notify Paul Detwiler immediately at 202-586-1371 and return the facsimile to him at the address shown above via the United States Postal Service. Thank you.