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**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT**

**IN THE MATTER OF THE FINAL PERMIT)
ISSUED TO THE U.S. DEPARTMENT OF)
ENERGY (DOE) AND THE WESTINGHOUSE)
ELECTRIC COMPANY WASTE ISOLATION) **HRM 98-04(P)**
DIVISION (WID) FOR THE WASTE)
ISOLATION PILOT PLANT (WIPP))
U.S. EPA No. NM4890139088)**

**MEMORANDUM IN SUPPORT OF
UNITED STATES DEPARTMENT OF ENERGY AND
WESTINGHOUSE WASTE ISOLATION DIVISION'S
MOTION FOR STAY OF CERTAIN PROVISIONS OF THE FINAL
PERMIT OR TO DELAY THE EFFECTIVE DATE OF THOSE PROVISIONS**

The United States Department of Energy ("DOE") and the Westinghouse Waste Isolation Division ("WID") (collectively "the Permittees") respectfully submit this Memorandum in Support of their motion to stay certain provisions of the hazardous waste permit for the Waste Isolation Pilot Plant ("WIPP") issued October 27, 1999 ("Final Permit"), until all legal challenges (including any appeals thereof) to the permit have been decided. In the alternative, the Permittees ask that the Secretary set an effective date for these provisions that is after completion of all judicial challenges to the Final Permit, including any appeals taken from those challenges.

INTRODUCTION

Pursuant to § 74-4-14.D of the New Mexico Hazardous Waste Act, NMSA 1978 §§ 74-4-1 et seq. ("HWA"), the Permittees seek a stay of enforcement of these provisions:

Module IV.B.2.b (regulating disposal of non-mixed waste)

Modules II.N, II.O, II.P, II.Q (imposing financial assurance requirements)



Module II.C, Permit Attachment B2, Section B2-1, pages B2-1, line 22 through B2-2, line 6 (calculating the rate for visual examination based on an 11% initial miscertification rate applied to individual waste streams)

Module II.C, Permit Attachment B1, Section B1-2a(2), page B1-15, lines 24-30 (requiring the resampling of homogeneous waste that is ready to go to WIPP and that has been sampled according to procedures approved by EPA)

Module V.D, Table V.D (requiring groundwater monitoring for gross alpha and beta radiation).

These provisions are collectively referred to as the "Challenged Provisions" in this motion. In the alternative, the Permittees request that the Secretary, pursuant to 20 NMAC 4.1.901.A.10, set the effective date for the Challenged Provisions as the day after all judicial challenges (including any appeals thereof) have been decided. While the Permittees recognize that WIPP must operate under the Final Permit, they seek this stay because serious legal and factual issues exist as to each of the Challenged Provisions, and irreparable harm to workers, WIPP operations and the public will result if these provisions are allowed to become effective during the pendency of the pending judicial challenges. A stay of these provisions (or the setting of an appropriate effective date for them) is essential to avoid suspension of waste disposal operations, increased risk of radiation exposure to workers, and the needless expenditure of taxpayer dollars.

I. A STAY OF THE CHALLENGED PROVISIONS PENDING APPEAL IS WARRANTED

Section 74-4-14.D of the HWA provides in pertinent part that "[a] stay of enforcement of the action being appealed may be granted after hearing and upon good cause shown (1) by the board or secretary, whichever took the action being appealed." The good cause necessary to stay agency or administrative action pending appeal is shown by establishing the elements required to obtain a preliminary injunction. Tenneco Oil Co. v. N.M. Water Quality Control Com'n, 105 N.M. 708, 710, 736 P.2d 986, 988 (Ct. App. 1986). Those elements are: irreparable injury if

the stay does not issue; no substantial harm to other interested parties; no adverse impact on the public interest; and, likelihood of success on the merits. Tenneco, 105 N.M. at 710, 736 P.2d at 988. Each of these four elements is present here.

A. Irreparable Injury Will Result If The Challenged Provisions Are Not Stayed Pending Appeal

Each of the Challenged Provisions will cause irreparable harm if it is not stayed pending appeal. This first element is satisfied if the moving parties are likely to suffer harm before a decision is rendered on the merits. Puerto Rico Conservation Foundation v. Larson, 797 F. Supp. 1066, 1071 (D. Puerto Rico 1992).¹ The harm resulting from the Challenged Provisions will occur when the permit conditions go into effect. Irreparable injury is harm for which monetary remedies do not provide adequate compensation. Id., see also Auburn News Co. v. Providence Journal Co., 659 F.2d 273, 277 (1st Cir. 1981). No money damages would be available to compensate DOE or WID because this is an appeal of specific permit conditions, not an action for damages, and no cause of action for monetary compensation for these injuries exists against the NMED, the Secretary or the State of New Mexico. Each of the Challenged Provisions would produce irreparable harm.

1. Module IV.B.2.b Will Cause Irreparable Harm

Module IV.B.2.b contains two distinct prohibitions. In its first clause, the Module prohibits the disposal of non-mixed waste (that is, waste which is only radioactive) unless that waste has been characterized in accordance with the Waste Analysis Plan ("WAP") set forth in the Final Permit. In its second clause, Module IV.B.2.b prohibits the disposal of mixed waste in any underground Hazardous Waste Disposal Unit ("HWDU") if the HWDU contains non-mixed

¹ Because there are few New Mexico cases discussing the elements of a preliminary injunction, New Mexico courts

waste which was not characterized in accordance with the WAP set forth in the Final Permit.

This regulation of non-mixed waste creates irreparable harm.

The non-mixed waste going to WIPP is special nuclear or byproduct material. In the Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.* ("AEA"), Congress created a comprehensive program governing the production, use and disposal of source, special nuclear, and byproduct materials. The AEA authorized the Atomic Energy Commission to establish rules, regulations, or orders governing the possession and use of such materials as it deemed necessary or desirable to promote the common defense and security and to protect health and minimize danger to life or property. 42 U.S.C. § 2201(i)(3). This authority was transferred to DOE as one of the successor agencies of the Commission. *See* 42 U.S.C. §§ 5814, 7101. Consistent with its AEA authority, DOE developed regulations and Orders that directly control DOE's management of radioactive waste.²

The Final Permit is issued under the HWA, which is New Mexico's hazardous waste program approved by USEPA pursuant to section 3006 of RCRA, 42 U.S.C. § 6926. RCRA and the HWA regulate "hazardous waste," which is defined as "solid waste" exhibiting certain characteristics. RCRA, 42 U.S.C. § 6903(5); HWA, NMSA 1978 § 74-4-3(I). In defining "solid waste," both RCRA and the HWA specifically exclude source, special nuclear or byproduct material as defined in the AEA. RCRA, 42 U.S.C. § 6903(27); HWA, NMSA 1978 § 74-4-3(M). Thus, neither the HWA nor RCRA allows New Mexico to regulate non-mixed waste at WIPP.³

look to federal case law. *See LaBalbo v. Hymes*, 115 N.M. 314, 318, 850 P.2d 1017, 1021 (Ct. App. 1993).

² *See e.g.*, 10 CFR Part 835, "Occupational Radiation Protection" (1999); DOE Order 435.1, "Radioactive Waste Management" (July 9, 1999); DOE Order 5400.5, "Radiation Protection of the Public and the Environment" (Feb. 8, 1990); DOE Order 5400.1, "General Environmental Protection Program" (Nov. 9, 1988).

³ Moreover, the AEA preempts states from regulating source, special nuclear and byproduct material under RCRA or any other regulatory regime.

Indeed, in the Fact Sheet that accompanied the November 13 Draft Permit, NMED specifically stated that the disposal of non-mixed waste was one of a number of issues which are "not within the purview of the Permit or that NMED does not have statutory or regulatory authority under the HWA or 20 NMAC 4.1."

In addition, RCRA contains only a limited waiver of the United States' sovereign immunity as to the application of state hazardous waste laws to federal facilities like WIPP. RCRA waives this immunity only to the extent that such laws apply to the management of solid waste and hazardous waste. 42 U.S.C. § 6961(a). Because the waste which Module IV.B.2.b seeks to regulate is neither solid waste nor hazardous waste, there is no waiver of sovereign immunity as to the regulation of that waste.

Pursuant to Judge Penn's order of March 22, 1999, Record Proper ("R.P.") No. 154, the Permittees have disposed of non-mixed waste in Panel 1 in accordance with all applicable requirements of RCRA, the AEA, and the HWA. Triay Declaration ¶ 5, attached hereto as Attachment A. The State of New Mexico was a party to the action in which this order was entered. Module IV.B.2.b now threatens DOE's ability to continue to use Panel 1. The first clause prohibits disposal of non-mixed waste unless DOE accedes to regulation of such waste. The language of the second clause of Module IV.B.2.b remains ambiguous as to whether DOE can use Panel 1 for the disposal of mixed waste. The addition of the phrase "after the permit is effective" to the beginning of the module, *see* R.P. 222, does not resolve the ambiguity because it can be read to apply only to the time of disposal of mixed waste, not the characterization and disposal of the non-mixed waste already in Panel 1.⁴ It appears that the Secretary did not intend

⁴ Compare with the DOE's proposal, R.P. No. 221 at p. 3, which makes it clear that only characterization of non-mixed waste which was disposed after the permit's effective date should implicate the prohibition on mixed waste

to create such an ambiguity; his final order states that "The New Mexico Environment Department ('NMED') does not intend that the permit condition apply to the pre-permit period." R.P. No. 227 at 3.

Nevertheless, Module IV.B.2.b could be read so as to prevent DOE from disposing of mixed waste in Panel 1 after the permit becomes effective. Such a result would require the Permittees to either forfeit the remaining 98% of the disposal capacity of Panel 1 and halting all disposal operations until Panel 2 is mined (July 2000 or later), or to continue to use Panel 1 for the disposal of non-mixed waste and delay mixed waste disposal until Panel 2 is ready. Triay Declaration ¶¶ 5-7. See also Permittees' Comments on the Report of the Hearing Officer, R.P. No. 214, which are incorporated herein by reference. Either option requires the suspension of permitted disposal activity, which will slow down environmental cleanups at DOE sites needing to ship waste to WIPP and will jeopardize DOE's ability to comply with binding schedules for waste shipment. Triay Declaration ¶ 7. None of these adverse effects on operations and cleanup can be "remedied" or "repaired" after Module IV.B.2.b is stricken from the permit on appeal. As such, these injuries are by definition irreparable.

2. Modules II.N, II.O, II.P, and II.Q Will Cause Irreparable Harm

Modules II.N, II.O, II.P, II.Q require WID to provide financial assurance for the final closure and monitoring of WIPP after disposal operations end about 35 years from now. They also require that WID obtain liability insurance for sudden and non-sudden accidental occurrences.

As the Permittees have repeatedly explained throughout the permit process, WID's expenditures for financial assurance and liability insurance will be reimbursed by DOE, with the result that the

disposal.

ultimate source of the funds to pay these costs is the federal taxpayer, even though the federal government is by regulation specifically exempt from these requirements. Triay Declaration ¶ 8. The cost of providing such assurances is estimated to be about \$20 million annually for the next five years, *id.*, and unless this provision is stayed, these monies will be set aside in a trust fund and the costs of establishing and managing this trust cannot be recovered if these provisions are later struck down.

3. The Waste Characterization Provisions DOE Has Challenged Will Cause Irreparable Harm

Module II.C, Permit Attachment B2, Section B2-1, requires that the DOE calculate the rate of visual examination of waste containers based on an 11% initial miscertification rate applied to each waste stream.⁵ This higher miscertification rate will require that workers open and visually examine substantially more waste containers than they would under the 2% initial rate in the Permit Application and earlier Draft Permits. The permit also requires that sites apply the miscertification rate to each individual waste stream rather than to the entire population of waste containers radiographed by a site each year. Applying this miscertification rate to each waste stream would require workers to visually examine even more waste containers. Triay Declaration ¶ 9. Thus, the Final Permit's requirements concerning the miscertification rate pose a significant increased risk of radiation exposure for workers at DOE sites throughout the country, including New Mexico citizens working at Los Alamos National Laboratory. *Id.*; Tr. p. 436, lines 8-17

⁵ Radiography is a standard x-ray technique used to determine if prohibited items are present in a waste container without opening the container. Tr. p. 442, lines 7-20, p. 447, lines 9-19 (E. Hunter). Visual examination involves the opening of a waste container to look at every single item, *id.* at p. 448, lines 1-12, and is used as a quality control check on radiography. When visual examination determines that radiography has incorrectly certified the absence of prohibited items in the waste container, a "miscertification" is said to occur. *Id.* at p. 667, lines 11-15. A "miscertification rate" is calculated by comparing the number of miscertifications against the total number of drums. Tr. p. 2730, lines 5-9 (C. Walker). The Final Permit requires each site to assume initially that its miscertification rate is 11%.

and p. 536, line 14 through p. 538, line 17 (E. Hunter); Tr. p. 1947, line 16 through p. 1948, line 22 (B. Franke). See Permittees' Comments on the Report of the Hearing Officer, R.P. No. 214 at pp. 18-20. In addition, visual examination generates up to an additional one-half drum of new waste for every drum examined, and thus increased rates of visual examination produce additional radioactive waste. Triay Declaration ¶ 9.

Module II.C, Permit Attachment B1, Section B1-2a(2), at page B1-15, lines 24-30, requires three sub-samples from core samples of homogeneous wastes for VOC analysis. This requirement will necessitate the resampling of already-characterized wastes and invalidate over \$7 million dollars of work, see R.P. No. 28 at Comment 1, as well as increase the risk to workers of radiation exposure during the resampling.

The increased risks of radiation exposure, increased amounts of waste, and duplicative characterization work cannot be "remedied" or "repaired" after these provisions are removed from the permit on appeal. As such, these injuries are by definition irreparable.

4. The Groundwater Monitoring Provision in Module V.D, Table V.D, Will Cause Irreparable Harm

Table V.D of Module V.D requires the Permittees to monitor groundwater for gross alpha and beta radiation. The only evidence in the record on gross alpha and gross beta radiation was offered by the Permittees and establishes that monitoring these parameters is duplicative, unreliable and ineffective for assessing whether a release has occurred. The Permittees monitor groundwater for specific radionuclides, see AR No. X: Permit Application Appendix D5 at p. 5-10 and Table 5-2, which is a better and more reliable diagnostic tool for detecting releases (Tr. p. 227, lines 1-10 (R. Kehrman)) because it analyzes for the radionuclides in the waste and because the methods used in this analysis are more reliable and precise. In fact, monitoring for

gross alpha or gross beta radiation is only a screening process; additional sampling must occur to determine which specific radionuclides make up the "gross" readings. See USEPA Method 9310, ¶ 1.9. Further, monitoring for gross alpha and gross beta radiation is not a reliable indicator for the presence of hazardous constituents because the samples detect naturally occurring radionuclides (e.g., radon) which have no relationship to hazardous constituents in the waste. Tr. p. 224 lines 20-23 (R. Kehrman).

In addition, the groundwater at WIPP is high in total dissolved solids, see AR No. AQ, p. 27 (WIPP RCRA Background Groundwater Quality Baseline Report); Permit Application Appendix D17, p. 2-18, and Appendix D18, p. D18-29; these high levels of total dissolved solids require that samples for gross alpha and beta radiation be highly diluted and the analytical results multiplied by the dilution factor. USEPA Analysis Method 9310. The effect is a sample result with such a high detection limit that the results can produce "false positives;" anomalous results that incorrectly suggest there has been a release. These false positives could expose DOE and WID to citizen suits, enforcement actions, and the obligation to undertake corrective actions even though there has not in fact been any release from the repository. They might also unduly concern those who live in the vicinity of WIPP. The risks posed by false positives and phantom violations constitute a significant and irreparable injury.

B. A Stay Pending Appeal Will Not Substantially Harm Other Interested Parties

The second requirement for a stay pending appeal is that the stay would not substantially harm other interested parties. Courts view this element as involving a balancing of interests. For example, in Padilla v. Lawrence, 101 N.M. 556, 685 P.2d 964 (Ct. App. 1994), the court found that the shutdown of a plant and resulting effect on jobs outweighed a nearby resident's concern about dust, noise and flies. *Id.* at 562, 685 P.2d at 970. Here, the Challenged Provisions create

numerous harms, including the suspension of waste disposal, increased risk of radiation exposure to workers, additional generation of radioactive waste, the risk of phantom violations based on unreliable groundwater monitoring, and significant loss of taxpayer dollars.

In contrast, there are no substantial harms to other interested parties. The Hearing Officer found that WIPP will contain the wastes which are emplaced within it. HO Report at Findings Nos. 124-126. This is consistent with the USEPA's findings -- made pursuant to congressionally-mandated authority, see 42 U.S.C. §10141(a) and 106 Stat. 4777 (1992) -- that WIPP will safely isolate radioactive waste for 10,000 years. 63 Fed. Reg. 27,354 at 27,363, 27,383 col. 2, and 27,385 col. 3 (May 18, 1998), set forth in full at R.P. No. 119.⁶ WIPP would operate under the uncontested provisions of the Final Permit; thus, the interests of other parties and citizens are protected by the Final Permit itself. NMED will have enforcement authority over WIPP by virtue of the Final Permit, and there is no evidence to suggest that a stay of the Challenged Provisions will adversely impact NMED's authority. The balance of harm clearly favors the issuance of a stay pending the resolution of all judicial challenges to the permit.

C. A Stay Pending Appeal Will Promote The Public Interest

The third requirement for a stay pending appeal is that the stay will not be adverse to the public interest. In numerous ways, a stay pending appeal will promote the public interest. The public interest in continuing the shipment of radioactive waste to WIPP is significant. Congress sought to promote that interest by requiring DOE to begin disposal operations by November 30, 1997, provided all relevant requirements have been met. Waste Isolation Pilot Plant Land Withdrawal Act ("WIPP Act"), Pub. L. No. 102-579, 106 Stat. 4777 (1992), as amended by Pub. L.

⁶ The USEPA's finding was upheld on appeal. See Southwest Research and Information Center v. EPA No. 98-1323 (D.C. Cir. June 18, 1999).

No. 104-201, 110 Stat. 2422 (1996), § 10. Those requirements, including EPA's certification of WIPP, have been met for the disposal of mixed and non-mixed transuranic waste, and DOE's ability to comply with Congress' direction should not be impaired.

Further delays or restrictions as to the shipment of transuranic waste to WIPP will prolong the temporary storage of this waste at almost two dozen storage sites across the country. These temporary storage facilities are not as safe as WIPP, which EPA has certified will safely contain this waste for at least 10,000 years, and there is a much greater chance for a natural disaster (e.g., tornados, forest fires, earthquakes) at these temporary facilities. In addition, there are concerns regarding worker exposure to the waste in these storage facilities sites and during visual examinations.

Restricting shipments to WIPP would delay DOE from carrying out its radioactive waste cleanup program at other sites that are currently storing transuranic waste above-ground in shallow trenches, berms and other facilities. Given the sequential nature of the cleanup program, any significant interruption or delay in shipments to WIPP will result in increased exposure to the risks associated with the temporary storage of transuranic waste at all sites storing these wastes. In addition, delaying shipments may preclude DOE from satisfying compliance obligations under existing consent decrees. Triay Declaration ¶ 7. For instance, under the Settlement Agreement and Consent Order in Public Service Co. of Colorado v. Batt, No. CV 91-0035-S-EJL (D. Idaho) (consolidated), DOE must ship 3,100 cubic meters of transuranic waste (about 15,000 drums) from the Idaho National Engineering and Environmental Laboratory ("INEEL") to WIPP by December 31, 2002. A stay of the Challenged Provisions will allow the cleanup of INEEL and other DOE facilities to continue unimpeded during the litigation concerning the HWA permit.

A stay will also prevent the diversion of economic assistance funds to a closure trust fund. Congress passed legislation that requires that any funds needed to meet the financial assurance requirements come from funds appropriated for economic assistance. See 106 Pub. Law 60,202 (113 Stat. 483). In the absence of a stay, Westinghouse and DOE will be required to create a trust fund to satisfy the financial assurance requirements; the State of New Mexico has stated that it will suspend or cancel \$200 million of highway projects if it does not receive the economic assistance funds it had anticipated.

D. The Permittees Have A Likelihood Of Success On Appeal Concerning The Challenged Provisions

The final requirement for a stay pending appeal is that the movant have a likelihood of success on the merits on appeal. Having established the other three elements for a stay, this last element requires only that the Permittees establish "questions going to the merits so serious, substantial, difficult and doubtful, as to make them fair ground for litigation." Resolution Trust Corp. v. Cruce, 972 F.2d 1195, 1199 (10th Cir. 1992); Central Avenue Enterprises, Inc. v. City of Las Cruces, 845 F. Supp. 1499, 1503 (D.N.M. 1994). The Challenged Provisions present serious and complex questions regarding the existence and scope of NMED's legal authority and the legality of specific permit provisions.

1. The Permittees Have a Likelihood of Success on the Merits in Their Challenge to Module IV.B.2.b

The Permittees have raised a number of serious, substantial and difficult questions about Module IV.B.2.b. As noted above, the non-mixed waste coming to WIPP is special nuclear and byproduct material under the AEA and therefore is not solid waste under RCRA or the HWA. Thus, there is a serious question as to whether NMED has any legal authority to regulate non-mixed waste through the imposition of explicit characterization requirements in the Module's first

clause and the implicit characterization requirement in the second clause. The exclusion of source, special nuclear, and byproduct materials from the definition of solid waste raises serious questions concerning the waiver of sovereign immunity in RCRA, which is explicitly limited to the management of solid waste. NMED's repeated claims that Module IV.B.2.b is merely regulation of the hazardous portion of the waste in WIPP ignores the serious and difficult question of whether the waste characterization requirements substantially regulate the disposal of waste over which New Mexico has no regulatory authority. In a recent decision, a federal district court held that the AEA preempted regulations Kentucky sought to impose in a solid waste permit concerning the characterization and disposal of radioactive waste. United States v. Kentucky, No. 5:99CV-87-R (D. Ky. Nov. 5, 1999).

Further, serious questions exist about the need for Module IV.B.2.b in light of the Hearing Officer's and USEPA's findings that the geologic containment of WIPP will safely isolate the wastes disposed of in the repository. Similar questions also exist as to the legal justification proffered for Module IV.B.2.b itself. The HO Report reluctantly recommended that Module IV.B.2.b be a part of the final permit "by the thinnest of threads" and with "serious reservations," HO Report at p. 77, by relying on United States v. New Mexico, 32 F.3d 494 (10th Cir. 1994). However, as discussed more fully in the Permittees' Comments on the Hearing Officer Report, the decision in United States v. New Mexico does not justify Module IV.B.2.b's unprecedented regulation of non-mixed waste. At the very least, the numerous legal and factual issues concerning Module IV.B.2.b are so substantial and difficult as to satisfy this element for a stay pending the resolution of all legal challenges.

2. The Permittees Have a Likelihood of Success on the Merits in Their Challenge to Financial Assurance

It is highly unlikely that the Final Permit's requirements concerning financial assurance will survive a judicial challenge. Because it has serious concerns about the imposition of financial assurance requirements on federal facilities, Congress recently passed legislation that would exempt WIPP from these requirement regardless of whether they are imposed under RCRA or the HWA. H.R. 3425, 106th Cong., 1st Sess. § 220 (November 19, 1999). If the President signs this legislation, it would clearly prevent New Mexico from including these requirements in this permit. In addition, there are serious legal issues as to whether the financial assurance requirements violate the HWA itself.

The HWA mandates that New Mexico adopt Hazardous Waste Management Regulations that "are equivalent to and no more stringent than" the regulations adopted by USEPA. NMSA 1978 § 74-4-4.A. The Act only allows adoption of more stringent regulations if the Environmental Improvement Board ("EIB") determines after notice and public hearing that the federal regulations are not sufficient. NMSA 1978 § 74-4-4.D. In 1980, USEPA explicitly stated that its regulations exempted both the government and its contractors from financial assurance requirements at federally-owned facilities. 45 Fed. Reg. 33,198/3 (May 19, 1980). The EIB adopted the federal regulations verbatim, see 20 NMAC 4.1.500 (adopting 40 CFR § 264.140), and held no public hearing nor made any determination that more stringent requirements concerning financial assurance are necessary. Thus, the permit's requirements for financial assurance appear on their face to violate the requirement of section 74-4-4.A of the HWA, which mandates that these requirements be equivalent to and no more stringent than the federal requirements.

Finally, serious due process questions exist about NMED's inconsistent application of the financial assurance requirements both at WIPP (where NMED originally found the Permittee's Application technically complete even though it omitted financial assurance) and at other federally-owned facilities in New Mexico (where it has not required financial assurance). In light of these issues and the recent federal legislation, there is almost no likelihood that these provisions will survive in the face of a legal challenge.

3. The Permittees Have a Likelihood of Success on the Merits in Their Challenges to the Waste Characterization Requirements

The challenges to the waste characterization requirements in Module II.C, Permit Attachment B2 (concerning visual examination and miscertification rates) and in Module II.C, Permit Attachment B1 (concerning the sampling of homogeneous waste for VOCs) raise serious legal and factual questions. First, the uncontroverted evidence of increased risk of radiation exposure to workers in New Mexico and elsewhere created by the miscertification rate provisions raises serious questions as to the Atomic Energy Act, codified in 10 CFR Part 835, that radiation exposures be kept "as low as reasonably achievable" (ALARA). This evidence also raises a question as to whether this increased risk violates the HWA's requirements designed to protect the state's citizens. Section 1006 of RCRA prohibits states from imposing requirements concerning hazardous waste that are inconsistent with regulations imposed under the AEA such as 10 CFR Part 835. Increasing rates of visual examination substantially without any demonstrated benefit to public health or the environment is inconsistent with the AEA's mandates concerning ALARA because it needlessly exposes workers to radiation. Serious factual issues exist as to these challenged waste characterization provisions. The only support for the 11% miscertification rate is a one-time incident at Los Alamos National Laboratory as to

miscertifications unrelated to RCRA or the HWA. There is also no evidence that this anomaly has not been corrected at LANL or that it ever existed at other DOE sites. See Permittees Comments on the Report of the Hearing Officer, R.P. No. 214 at p. 21. There is no support for the notion that requiring three sub-samples from cores provides anything other than increased cost, and in fact the requirement creates an inconsistency between sampling methods that NMED claims it sought to avoid. See id. at p. 23 n. 21. These legal and factual issues are serious, substantial and difficult so as to satisfy the likelihood of success element as to these provisions.

4. The Permittees Have a Likelihood of Success on the Merits in Their Challenge to the Groundwater Monitoring Provision

The challenged groundwater monitoring requirement concerning gross alpha and beta radiation in Module V.D presents serious factual issues. As noted above, the only evidence related to this requirement was presented by the Permittees, and that evidence conclusively shows that the Challenged Provision is duplicative, unnecessary, and will create confusion. There is no evidence in the record that monitoring gross alpha or beta radiation is a reliable indicator of the presence of hazardous constituents. Thus, there is a serious issue as to whether the Secretary's approval of this provision is arbitrary and capricious because his approval lacks any support in the record. See Permittees' Comments on the Report of the Hearing Officer, R.P. No. 214, pp. 24-26. Moreover, this requirement is preempted by the AEA and outside the United States' waiver of sovereign immunity in RCRA. These issues are sufficient to meet the likelihood of success on the merits element.

Because the four elements for a stay are present, the Secretary should issue a stay of the Challenged Provisions pending the resolution of all judicial challenges and appeals thereof pursuant to NMSA 1978 § 74-4-14.D.

II. IN THE ALTERNATIVE, THE SECRETARY SHOULD SET AN EFFECTIVE DATE FOR THE CHALLENGED PROVISIONS WHICH IS AFTER ALL JUDICIAL CHALLENGES HAVE BEEN DECIDED

The Secretary also possesses the authority to set the effective date of the Challenged Provisions. A "final permit decision shall become effective thirty (30) days after notice of the decision has been served on the applicant, *or such later time as the Secretary may specify.*" 20 NMAC 4.1.901.A.10 (emphasis supplied). Given the significant legal and factual issues raised about the Challenged Provisions, and the indisputable irreparable harm that will result if the Challenged Provisions become effective during the pendency of the challenge to the Final Permit, the Secretary should exercise his discretion under 20 NMAC 4.1.901.A.10 and set an effective

date for the Challenged Provisions which is after all judicial challenges (including any appeals) have been decided.

Respectfully submitted,

THE UNITED STATES DEPARTMENT OF
ENERGY and THE WESTINGHOUSE WASTE
ISOLATION DIVISION

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ISOLATION PILOT PLANT (WIPP))
U.S. EPA No. NM4890139088)

DECLARATION OF INÉS R. TRIAY, Ph.D.
Manager, Carlsbad Area Office, U.S. Department of Energy

I, Inés R. Triay, hereby declare as follows:

1. I have prepared this declaration for use in the above-captioned proceeding. I have personal knowledge of the matters set forth herein.

2. I am currently the Manager of the United States Department of Energy's ("DOE") Carlsbad Area Office ("CAO"). I assumed this position in May 1999. After obtaining my Ph.D. in chemistry in 1985, I began working at DOE's Los Alamos National Laboratory ("LANL") where I acquired significant experience in most areas of environmental management. My work at LANL included leading numerous investigations within projects such as the Yucca Mountain Project, the LANL Environmental Restoration Project, the LANL Waste Management Program, and work at LANL concerning the Waste Isolation Pilot Plant ("WIPP"). From 1994 until 1999, I was

ATTACHMENT A

the Environmental Science and Waste Technology Group Leader of the Chemical Science and Technology Division at LANL. In this capacity I was responsible for the Transuranic Waste Characterization/Certification Program and supervised the personnel, equipment, and facilities for waste characterization of transuranic waste. The first shipment of waste to WIPP was characterized under my supervision.

3. The Carlsbad Area Office is responsible for overseeing operations directly related to WIPP. This includes the operations of the National TRU Waste Program, which oversees and approves waste characterization at generator sites, as well as overseeing the activities of the Westinghouse Waste Isolation Division ("WID"), DOE's Management and Operating Contractor at WIPP.

4. As described in the Permit Application and the hazardous waste permit for WIPP issued on October 27, 1999 ("Final Permit"), transuranic waste will be disposed of in underground Hazardous Waste Disposal Units ("HWDU") known as panels consisting of disposal rooms and associated access and ventilation drifts. The Final Permit allows the mining of and waste disposal in Panels 1-3. At present, only Panel 1 has been mined and DOE's best

estimate is that it will take until at least July 2000 to ready Panel 2 for the disposal of waste.

5. The shipment of waste to WIPP began on March 25, 1999, with a shipment from LANL. Since that time, 44 shipments of waste have been sent to WIPP and emplaced in Room 7 of Panel 1. This volume of waste occupies about 2 percent of the total capacity of Panel 1.

6. Module IV.B.2.b of the Final Permit prohibits the disposal of mixed TRU waste in any HWDU if that HWDU contains non-mixed TRU waste which was not characterized in accordance with the Waste Analysis Plan in the Final Permit. DOE is concerned that Module IV.B.2.b could be interpreted so as to prevent further use of Panel 1 for any disposal of waste, particularly mixed TRU waste.

This would force DOE to suspend some or all disposal operations at WIPP until Panel 2 is ready.

7. The suspension of disposal operations at WIPP would have serious operational consequences for WIPP and the DOE complex.

The mission of WIPP is to dispose of transuranic waste from the cleanup of DOE facilities across the country. A suspension of disposal operations while Panel 2 is mined when more than 98% of Panel 1 is available will slow down cleanups at DOE facilities and will jeopardize DOE's ability to satisfy obligations under agreements with the States of Idaho and Colorado to permanently

dispose of transuranic waste pursuant to certain schedules. The time lost in such a suspension of disposal operations cannot be "made up" once disposal resumes. Thus, DOE would be unable to fully overcome the effects of a suspension of disposal operations.

8. Modules II.N, II.O, II.P, and II.Q require WID to provide financial assurance for closure and post-closure costs at WIPP and liability insurance. Final Closure at WIPP will not occur for at least 35 years. Under the Management and Operating Contract for WIPP, No. DE-AC04-86AL1950, WID's costs in securing the necessary financial assurance and liability insurance are reimbursable expenses which DOE would pay for with funds that would otherwise be used for economic assistance in New Mexico. The cost of providing these financial assurances is estimated to be about \$20 million annually for the next five years. If the requirements concerning financial assurance and liability insurance go into effect and then are overturned by a court, not all of the money expended to satisfy these requirements will be refunded, and the longer these requirements are in effect, the greater the amount of money that will be expended.

9. Permit Attachment B2, Section B2-1, requires generator sites to use an 11% initial miscertification rate to determine the frequency of visual examination of waste containers as a check on radiography, and requires that the miscertification

rate be applied to each waste stream. These provisions will have the effect of requiring workers to visually examine a significantly larger number of waste containers. For example, a generator site, with a site specific miscertification rate of 5%, which conducted radiography on 20 waste streams each containing 100 drums (2,000 total) would be required, under the Permit Application and the Draft Permits, to apply the 5% rate to the total population of drums, and thus under Table B2-1 would visually examine 46 drums.

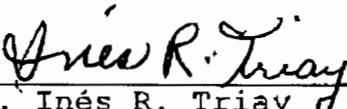
However, under the Final Permit, workers would apply the 5% rate to each waste stream and would need to visually examine 33 drums from each waste stream for a total of 660 drums requiring visual exam. Because visual examination requires the opening of a waste container and the physical handling of each waste item in the drum, higher rates of visual examination means that workers at generator sites such as LANL will have increased risk of radiation exposure from glove punctures or other accidents during visual examination.

In addition, increased visual examination produces additional waste. Based on my experience at LANL, visual examination of 1 drum of waste tends to produce anywhere from one quarter to one half of a drum of additional waste. Thus, the increased visual examination required by these permit provisions will generate additional radioactive waste that will be disposed of at WIPP.

10. Permit Attachment B1, Section B102(a)(2), requires generator sites to take three sub-samples from core samples of homogeneous waste when analyzing for volatile organic compounds ("VOCs"). The permit application and evidence presented during the permit proceedings demonstrated that a single sample selected randomly from the core sample would be representative of the VOCs in the waste. Generator sites such as the Idaho National Engineering and Environmental Laboratory have conducted sampling utilizing the method described in the permit application. If this method is deemed inadequate under the Final Permit, it would invalidate existing sample results, require at least \$7 million to repeat the sampling and analysis, and delay the shipment of this waste to WIPP. The three sub-sample requirement does not increase representativeness of samples and will delay the waste characterization process.

I hereby declare, under penalty of perjury, that the foregoing statements in my Declaration are true and accurate to the best of my knowledge, information, and belief.

Dated: November 19, 1999



Dr. Inés R. Triay

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of November 1999, a copy of the foregoing **MEMORANDUM IN SUPPORT OF THE UNITED STATES DEPARTMENT OF ENERGY'S AND THE WESTINGHOUSE WASTE ISOLATION DIVISION'S MOTION FOR STAY OF CERTAIN PROVISIONS OF THE FINAL PERMIT OR TO DELAY THE EFFECTIVE DATE OF THOSE PROVISIONS** was mailed by first-class mail, postage prepaid to the following:

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