

STATE OF NEW MEXICO  
ENVIRONMENT DEPARTMENT

ENTERED

IN THE MATTER OF  
U.S. DEPARTMENT OF ENERGY  
AND WESTINGHOUSE WASTE  
ISOLATION DIVISION,  
NEW MEXICO, NM4890139088,

COMPLIANCE ORDER  
HRM 99-05 (CO)

*Dec 10 1999*

Respondents.

**ANSWER, REQUEST FOR A HEARING, AND EMERGENCY  
REQUEST FOR A STAY OF CORRECTIVE ACTION REQUIREMENTS**

Pursuant to section 74-4-10 of the New Mexico Hazardous Waste Act (HWA), NMSA 1978 § 74-4-10 (Repl. Pam. 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) and the Westinghouse Waste Isolation Division (WID) hereby request a hearing concerning Administrative Compliance Order HRM 99-05 (the Order) issued by the New Mexico Environment Department (NMED) on November 30, 1999. They also request an emergency stay of the corrective action requirements imposed by the Order, answer the allegations in the Order and assert their affirmative defenses.

**RESPONSES TO NMED'S FINDINGS OF FACT**

DOE and WID (Respondents) respond to NMED's allegations in the 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. Denied. DOE is the owner and operator of WIPP; WID is the co-operator of the facility. The allegation is also denied to the extent that it asserts that WIPP must have a permit or interim status in order to store or dispose of waste that is not regulated by the HWA or the Resource



Conservation and Recovery Act (RCRA); i.e., non-mixed waste. The remaining allegations are conclusions of law and as such require no response at this time.

3. Denied. DOE is the owner and operator of WIPP; WID is the co-operator of the facility.

4. Denied. WID is a division of the Westinghouse Government Environmental Services Company LLC; it is under contract with DOE and the co-operator of the facility.

5. Admitted.

6. Admitted.

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 and therefore no response is required at this time.

8. The extent of the obligations imposed by 20 NMAC 4.1.200 (incorporating 40 C.F.R. § 261.20) of the HWMR is a question of law, not an issue of fact. As such, the allegation requires no response at this time.

9. 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.

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

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

12. The extent of the obligations imposed by 20 NMAC 4.1.600 (incorporating 40 C.F.R. § 265 Subpart H) of the HWMR is a question of law, not an issue of fact. As such, the allegation requires no response at this time.

13. The extent of the obligations imposed by 20 NMAC 4.1.600 (incorporating 40 C.F.R. § 265.140(c)) of the HWMR is a question of law, not an issue of fact. As such, the allegation requires no response at this time.

14. The extent of the obligations imposed by 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 documentation DOE provided NMED on or about June 22, 1999, concerned some material from IDC 454X that became part of Waste Stream RF005.01. An IDC (Item Description Code) can comprise some or all of the following complementary categories of materials: (1) residues and wastes; (2) low-level radioactive material and transuranic material; and (3) mixed and non-mixed waste. The fact that some material within an IDC is determined to be a non-mixed transuranic waste does not indicate that all of the material comprised by that IDC is waste, non-mixed, or transuranic. The documentation DOE provided demonstrated that: (1) Rocky Flats had determined that the material from IDC 454X that became part of Waste Stream RF005.01 is not regulated by RCRA; and (2) DOE's Carlsbad Area Office had confirmed that this determination was correct.

16. Denied. NMED's letter listed information that NMED asserted was relevant to determining whether waste DOE intended to send to WIPP from IDC 454X was regulated by RCRA or the HWA. DOE determined that most if not all of the information listed in the letter was irrelevant or duplicative but nevertheless provided it to NMED.

17. Admitted.

18. Admitted.

19. Denied. The documents DOE submitted to NMED on or about July 30, 1999, provided information about some material from IDC 411X that DOE intended to send to WIPP.

20. Admitted.

21. Denied. The documents DOE submitted to NMED on or about September 9, 1999, provided information about some material from IDC 433X that DOE intended to send to WIPP.

22. Denied. NMED informed DOE that NMED believed the information DOE had submitted was not adequate; however, NMED did not request any additional information about the waste DOE had sent to WIPP from Rocky Flats. In fact, NMED instructed DOE not to provide additional information at that time in correspondence dated November 5 and November 10, 1999. NMED's actions violated the Memorandum of Agreement DOE and NMED had entered into on June 16, 1999, which required NMED to raise "as soon as possible" any questions about waste streams sent to WIPP before the HWA permit became effective.

23. Admitted.

24. Denied. Waste Stream RF005.01 consists of some material from IDCs 411X, 433X, 429X and 454X. Prior to November 30, 1999, DOE sent to WIPP material from IDCs 411X, 433X and 454X only as part of this waste stream. As DOE has repeatedly made clear, these four residue IDCs supercede the outdated IDCs referred to in Paragraph 24 of the Order.

25. Denied. In the past, some of the materials in Waste Stream RF005.01 were conservatively assumed to contain hazardous constituents pending further characterization. Further characterization demonstrated that all of the residues in the 574 containers were non-hazardous waste. None of these residues were defined or classified as hazardous waste in Colorado at the time

they were sent to WIPP. Rocky Flats conducted the characterization and classification of these residues in continual consultation with the Colorado Department of Public Health and Environment.

26. Denied. In the past some of the materials in Waste Stream RF005.01 were conservatively assumed to contain hazardous constituents pending further characterization. Further characterization demonstrated that all of the residues in the 574 containers were non-hazardous waste. None of these residues were defined or classified as hazardous waste in Colorado at the time they were sent to WIPP. Rocky Flats conducted the characterization and classification of these residues in continual consultation with the Colorado Department of Public Health and Environment.

27. Denied. None of the residues that eventually became Waste Stream RF005.01 were listed as "mixed waste" in Rocky Flats' Site Treatment Plan. Because these materials were deemed to be residues from which plutonium could be economically recovered, they were managed under a settlement agreement and compliance order on consent in case No. B-91-1326; this order replaced all previous compliance orders and is referred to as the "Mixed Residue Order." Over time, further waste characterization demonstrated that all of the residues that became Waste Stream RF005.01 were non-hazardous waste. None of these residues were defined or classified as hazardous waste in Colorado at the time they were sent to WIPP. Rocky Flats conducted the characterization and classification of these residues in continual consultation with the Colorado Department of Public Health and Environment.

28. Denied. Based on process knowledge, analyses, sampling and consultations with the Colorado Department of Public Health and Environment, DOE has conclusively demonstrated that the 574 containers of Waste Stream RF005.01 sent to WIPP from Rocky Flats prior to November 30, 1999, are not subject to regulation under the HWA or RCRA.

29. Denied. There is no obligation under the interim status regulations to provide any analysis to NMED prior to shipment of waste to WIPP; nor is there any obligation to obtain a detailed chemical and physical analysis of a representative sample of non-mixed waste under the interim status regulations. Nevertheless, DOE obtained a detailed chemical and physical analyses of a representative sample of this waste using process knowledge and sampling. This analysis provided all of the information needed to store and dispose of this waste safely.

30. Denied. There is no obligation under the interim status regulations to characterize non-mixed waste according to a written waste analysis plan except in a very limited number of situations that do not apply to WIPP. Nevertheless, DOE followed its written waste analysis plan (the Quality Assurance Program Plan) as to these 574 containers of Waste Stream RF005.01. This plan allowed for demonstrations of equivalency for headspace gas sampling requirements if process knowledge demonstrates that volatile and semi-volatile hazardous constituents would not be present in the waste.

31. Denied. The 574 waste containers from Waste Stream RF005.01 pose no significant risk to human health and the environment, and were characterized, stored and disposed of in accordance with all applicable requirements. Monitoring for volatile organic compounds at WIPP has not detected any emissions of these compounds from these containers, and Rocky Flats confirmed the absence of prohibited items in these containers prior to their shipment to WIPP.

32. Denied. Neither Westinghouse nor DOE have had any obligation at any time to provide financial assurance and liability coverage as to WIPP.

**RESPONSES TO NMED'S CONCLUSIONS OF LAW**

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

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

34. Denied. Neither DOE nor WID has managed, stored or disposed of transuranic waste that is hazardous 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.

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

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

37. Respondents incorporate by reference their responses to Paragraphs 1 through 36.

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

39. Respondents incorporate by reference their responses to Paragraphs 1 through 38.

40. Admitted.

41. Denied. Some of the materials in the 574 containers from Waste Stream RF005.01 that were sent from Rocky Flats to WIPP prior to November 30, 1999, were at one time listed in the Mixed Residue Order as hazardous waste. Since March 1998, however, all of these materials have been classified as non-mixed (i.e., non-hazardous) waste based on waste characterization and consultations with the Colorado Department of Public Health and Environment.

42. Denied. Based on process knowledge, analyses, sampling and consultations with the Colorado Department of Public Health and Environment, DOE has conclusively demonstrated that

the 574 containers from Waste Stream RF005.01 are not subject to regulation under the HWA or RCRA.

- 43. As this is a conclusion of law, no response is required at this time.
- 44. Respondents incorporate by reference their responses to Paragraphs 1 through 43.
- 45. As this is a conclusion of law, no response is required at this time.
- 46. Respondents incorporate by reference their responses to Paragraphs 1 through 45.
- 47. As this is a conclusion of law, no response is required at this time.

**SCHEDULE OF COMPLIANCE**

48. Based on the responses set forth above and the affirmative defenses set forth below, Respondents have not violated any applicable requirement of the HWA, HWMR or RCRA and therefore should not be obligated to perform any of the corrective actions listed in the Order. In particular:

- A. DOE has performed an adequate hazardous waste determination that conclusively demonstrates that the 574 containers from Waste Stream RF005.01 that were sent from Rocky Flats to WIPP prior to November 30, 1999, do not contain hazardous waste and therefore are not subject to regulation under RCRA or the HWA;
- B. DOE has already provided the Secretary of NMED with a detailed chemical and physical analysis of a representative sample of this waste despite the fact that it is under no obligation to obtain one or provide it to the Secretary;
- C. Respondents are under no obligation to perform headspace gas analysis on these 574 drums because: (1) the waste in them is non-mixed waste; (2) Rocky Flats was granted an equivalency concerning headspace gas sampling requirements because

process knowledge demonstrated that volatile and semi-volatile hazardous constituents would not be present in the waste; and (3) the interim status regulations do not impose waste characterization requirements on non-mixed waste except in situations that are not applicable here; and

D. Respondents are not and have never been under an obligation to comply with the requirements for financial assurance and liability coverage in the HWA or RCRA as to WIPP.

### CIVIL PENALTY

49. Respondents have not violated the HWA and therefore are not liable for civil penalties. In addition, Paragraph 49 of the Administrative Compliance Order incorrectly sets forth the penalty authority of the Secretary under section 74-4-10 of the HWA. The civil penalty calculations attached to the Order are based on incorrect allegations of the potential for harm and the extent of deviation, and incorrectly calculate the duration of the alleged noncompliance.

### AFFIRMATIVE DEFENSES

1. The waste DOE shipped from Rocky Flats to WIPP prior to November 30, 1999, is not a hazardous waste as defined in section 74-4-3(1) of the HWA.
2. Neither the HWA nor RCRA gives NMED subject matter jurisdiction over the 574 containers from Waste Stream RF005.01 that DOE shipped from Rocky Flats to WIPP prior to November 30, 1999.
3. The United States has not waived its sovereign immunity as to any counts seeking to impose requirements based solely on state law.
4. WID is immune as to any counts seeking to impose requirements based solely on state law because it is a contractor of the federal government and acted pursuant to validly conferred

governmental authority; therefore, the United States' sovereign immunity extends to WID.

5. The alleged violations in the Order that purportedly occurred during the period in which WIPP had interim status are barred by the doctrines of collateral estoppel, equitable estoppel, res judicata, merger and bar.

6. All of the alleged violations in the Order are barred by the doctrine of laches.

7. WID has no responsibility for waste characterization at Rocky Flats and did not participate in the decisions regarding how this waste was characterized, whether it would be shipped to WIPP, and what information would be provided to NMED.

8. Even if all of the allegations in the Order are taken as true -- and they are not -- there is no basis for the allegations that there are potentially significant risks of exposures to humans or other environmental receptors due to the storage and disposal of these 574 containers from Waste Stream RF005.01. These allegations are contrary to the EPA's certification of WIPP, 63 Fed. Reg. 27,354 (May 18, 1998), and to the findings of fact and conclusions of law that the Secretary of NMED adopted in issuing the final HWA permit to WIPP on October 27, 1999.

9. Even if all of the allegations in the Order are taken as true -- and they are not -- there is no basis for the allegations that these 574 containers from Waste Stream RF005.01 pose a significant risk to human health and the environment due to the presence of prohibited items, the release of volatile organic compounds from waste containers, or other reasons not specified in the Order. These allegations are contrary to the EPA's certification of WIPP, 63 Fed. Reg. 27,354 (May 18, 1998), and to the findings of fact and conclusions of law that the Secretary of NMED adopted in issuing the final HWA permit to WIPP on October 27, 1999.

10. Even if all of the allegations in the Order are taken as true -- and they are not -- there is no basis for the allegations that there are substantial adverse effects on the statutory or regulatory

purposes for implementing the RCRA program due to the storage and disposal of these 574 containers of waste from Rocky Flats. These allegations are contrary to the EPA's certification of WIPP, 63 Fed. Reg. 27,354 (May 18, 1998), and to the findings of fact and conclusions of law that the Secretary of NMED adopted in issuing the final HWA permit to WIPP on October 27, 1999.

11. Several paragraphs of the Order contain allegations concerning unspecified hazardous constituents, unspecified prohibited items, unspecified provisions of a "waste analysis plan," unspecified reasons for risk to human health and the environment, unspecified additional violations and continued noncompliance, unspecified regulatory requirements, etc. Such allegations violate section 74-4-10(A)(1) of the HWA in that they fail to state with reasonable specificity the nature of the alleged violation or threatened violation.

12. Even if all of the allegations in the Order are taken as true -- and they are not -- the civil penalty assessed in the Order is unjustified, exceeds the amount authorized by law, is incorrectly calculated in the penalty calculation worksheets and is excessive in any event.

13. Even if all of the allegations in the Order are taken as true -- and they are not -- the time period for completing the corrective actions imposed by the Order is unreasonable as the Order fails to establish the need for corrective action and that the failure to implement these actions within the time period would result in potentially significant risk of exposure to humans or other environmental receptors.

14. NMED's claims concerning the 574 containers from Waste Stream RF005.01 that DOE sent to WIPP prior to November 30, 1999, violate the Memorandum of Agreement between DOE and NMED dated June 16, 1999.

15. Neither the HWA nor RCRA requires that hazardous waste determinations or general waste analyses be conducted in accordance with waste characterization provisions proposed in a draft permit.

16. Contrary to the provisions 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 the waste that DOE sent from Rocky Flats to WIPP prior to November 30, 1999.

17. 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.

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

19. Neither 20 NMAC 4.1.600 nor 40 C.F.R. § 265.13 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 requires DOE or WID to perform a general waste analysis on the 574 containers of non-hazardous waste from Waste Stream RF005.01 that were sent to WIPP prior to November 30, 1999.

20. At the time this waste was sent to WIPP from Rocky Flats, it was not "defined or classified as hazardous waste in the state of origin," and therefore section 74-4-3.3 of the HWA does not apply.

21. The materials that became IDCs 411X, 429X, 433X and 454X and that constitute Waste Stream RF005.01 have been classified and managed under the rubric of "residues" since 1989. Rocky Flats managed certain of these residues and others under the requirements established by several compliance orders issued by Colorado until April 23, 1993, when Colorado and DOE entered

into a settlement agreement and compliance order on consent in case No. B-91-1326; this order replaced all previous compliance orders and is referred to as the "Mixed Residue Order." The earlier compliance orders and the Mixed Residue Order initially assumed that many of the residues at Rocky Flats were hazardous waste and listed them as mixed waste or mixed residues in a number of reports and exhibits. However, both DOE and Colorado explicitly recognized that the listing of some residues as hazardous waste was preliminary and subject to change over time as these residues were characterized. Paragraph 26(h) of the Mixed Residue Order states: "If any of the backlog mixed residues (or the TRU-mixed waste generated by their processing) are determined to not be (or no longer be) hazardous waste, they shall no longer be subject to the requirements of this Order." In addition, Paragraph 29 of the Mixed Residue Order exempts the residues managed under the order from inclusion in Rocky Flats' Site Treatment Plan. In September 1999, Colorado and DOE executed a major modification to the Mixed Residue Order that reflected the progress DOE had made in characterizing and dispositioning mixed residues since April 1993. As a result of that modification, the materials from IDCs 411X, 429X, 433X and 454X that became Waste Stream RF005.01 are no longer listed as mixed residues and therefore are not subject to the Mixed Residue Order.

22. DOE performed a hazardous waste determination on this waste that satisfies all applicable regulatory requirements and comports with all applicable guidance.

23. Although DOE is not required to comply with 20 NMAC 4.1.600 or 40 C.F.R. § 265.13 when it disposes of non-hazardous waste at WIPP during interim status, the information that DOE collected for its hazardous waste determination would satisfy all requirements in these regulations and would comport with all applicable guidance concerning general waste analysis during interim status.

24. NMED's attempt to impose requirements on Respondents concerning hazardous waste determinations, general waste analysis and interim status violates state law. Sections 74-4-4.A and 74-4-4.D of the HWA prohibit NMED and New Mexico from imposing hazardous waste management regulations that are more stringent than EPA's regulations unless the Environmental Improvement Board provides notice of its intention to adopt more stringent regulations, holds a public hearing, and makes a determination that the EPA regulations are not sufficient to protect human health and the environment. NMED's enforcement actions regarding 20 NMAC 4.1.200, 4.1.300, 4.1.600 and 4.1.900 violate sections 74-4-4.A and 74-4-4.D of the HWA because they are an attempt to impose regulations that are more stringent than EPA's without complying with the requirements of these sections of the HWA.

25. NMED's attempt to impose requirements on Respondents concerning hazardous waste determinations, general waste analysis and interim status on non-mixed waste violates federal law and the Supremacy Clause of the United States Constitution because it seeks to regulate source, special nuclear and byproduct material which are excluded from the definition of "solid waste" under RCRA and the HWA. These materials are subject to exclusive regulation under the Atomic Energy Act of 1954.

26. NMED's attempt to impose requirements on DOE concerning hazardous waste determinations, general waste analysis and interim status on non-mixed waste is inconsistent with the limited waiver of the United States' sovereign immunity in section 6001 of RCRA.

27. The corrective action concerning headspace gas analysis of the 574 containers from Waste Stream RF005.01 is excessive and unjustified because it would require the return of these containers to Rocky Flats for this analysis even though monitoring at WIPP has not detected volatile organic compounds being released from them.

28. The corrective action concerning headspace gas analysis of the 574 containers from Waste Stream RF005.01 is excessive and unjustified because it would pose unnecessary risks to workers at WIPP and Rocky Flats during this analysis even though monitoring at WIPP has not detected volatile organic compounds being released from them.

29. The provision in WIPP's HWA permit regarding the characterization and management of non-mixed waste is arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the record, and otherwise not in accordance with law.

30. DOE has challenged the provision in WIPP's HWA permit concerning the characterization and management of non-mixed waste in state and federal court and Respondents have asked the Secretary of NMED to stay this provision or delay its effective date. Until these challenges are resolved and the Secretary issues his decision on Respondents' request for a stay of this provision, it is inappropriate and inequitable for NMED to seek to enforce these provisions through the imposition of fines, penalties and corrective actions.

31. Even if some of the waste DOE sent from Waste Stream RF005.01 to WIPP prior to November 30, 1999, is regulated by RCRA or the HWA -- and it is not -- Respondents complied with all applicable requirements concerning hazardous waste determinations, general waste analysis, and interim status.

32. NMED's demands 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 waste in New Mexico.

33. NMED's attempt to impose requirements concerning financial assurance and liability coverage on WIPP is contrary to state law. Sections 74-4-4.A and 74-4-4.D of the HWA prohibit

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NMED and New Mexico from imposing hazardous waste management regulations that are more stringent than EPA's regulations unless the Environmental Improvement Board provides notice of its intention to adopt more stringent regulations, holds a public hearing, and makes a determination that the EPA regulations are not sufficient to protect human health and the environment. From their promulgation, EPA's regulations concerning financial assurance have exempted both the federal government and its contractors from these requirements at federally owned facilities. 40 C.F.R. § 264.140(c) and 45 Fed. Reg. 33,155, 33,198/3 (May 19, 1980).

34. NMED's attempt to impose requirements concerning financial assurance and liability coverage on WID violates federal law. Section 1000(a)(5) of Public Law 106-113, 113 Stat. 1501 (Nov. 29, 1999), enacts the provisions of H.R. 3425 of the 106<sup>th</sup> Congress as introduced on November 17, 1999. Section 220 of H.R. 3425 explicitly exempts the federal government and its contractors from any requirements concerning financial responsibility at federal facilities that manage transuranic waste material regardless of whether those requirements are imposed under state or federal law.

35. NMED's attempts to impose financial assurance and liability on WID represent inconsistent interpretations and applications of the HWMR and therefore are improper, violate due process, and are not entitled to deference.

36. Because the materials DOE sent to WIPP from Waste Stream RF005.01 are not regulated by the HWA or RCRA, there is no obligation under those statutes for WID to provide financial assurance or liability coverage for WIPP.

37. The provisions in WIPP's HWA permit regarding financial assurance and liability coverage are arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the record, and otherwise not in accordance with law.

38. DOE has challenged the provisions in WIPP's HWA permit concerning financial assurance and liability coverage in state and federal court and Respondents have asked the Secretary of NMED to stay these provisions or delay their effective date. Until these challenges are resolved and the Secretary issues his decision on Respondents' request for a stay of these provisions, it is inappropriate and inequitable for NMED to seek to enforce these provisions through the imposition of fines, penalties and corrective actions.

**REQUEST FOR A HEARING**

Respondents hereby request that NMED promptly schedule a hearing before an independent hearing officer on the issues presented by the Order and Respondents' Answer to it.

**EMERGENCY REQUEST FOR A STAY  
OF CORRECTIVE ACTION REQUIREMENTS**

In light of the information provided to NMED by DOE and the Colorado Department of Public Health and Environment as well as the issues raised by Respondents' Answer, the Respondents submit this emergency request for a stay of the Order's corrective action requirements. The information recently provided to NMED and the issues raised by Respondents demonstrate that there are substantial issues as to the justification and need for these corrective action requirements at this time.

The information that DOE and the Colorado Department of Public Health and the Environment have separately provided to NMED indicate that the factual predicate for this Order -- that Waste Stream RF005.01 contains hazardous waste -- is incorrect. Accordingly, the corrective actions are unnecessary and unjustified. If DOE and WID were required to undertake these corrective actions before they are given a hearing on this Order, these actions would result in

unnecessary radiological and non-radiological risks to the workers involved in the sampling of these wastes as well as unnecessary expenditures of time, resources and funds.

Respondents have requested that the Secretary of NMED stay the effectiveness of several provisions in the permit and DOE has appealed these provisions in state and federal court. Two of these challenged provisions relate to some of the corrective actions that this Order seeks to impose. The State of New Mexico has asked for more time to respond to these judicial appeals and to the motion to stay the effectiveness of the challenged provisions. DOE and WID did not oppose these requests by the State for additional time. As Respondents have agreed to delay the resolution of these matters that could affect NMED's ability to impose some of the Order's corrective actions, it would be equitable for NMED to stay the effectiveness of the corrective action requirements contained in this Order.

**AFFIRMATION**

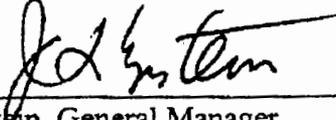
I hereby affirm that the information contained in this Answer, Request for a Hearing and Emergency Request for a Stay of Corrective Action Requirements is true and correct to the best of my knowledge.

Inés Triay  
Inés Triay, Manager  
Carlsbad Area Office

12/16/99  
Date

AFFIRMATION

I hereby affirm that the information contained in this Answer, Request for a Hearing and Emergency Request for a Stay of Corrective Action Requirements is true and correct to the best of my knowledge.



\_\_\_\_\_  
Joe Epstein, General Manager  
Westinghouse Waste Isolation Division

12/15/99  
Date

**CERTIFICATION OF SERVICE**

I hereby certify that on this 16<sup>th</sup> day of December 1999 I sent a copy of this Answer, Request for a Hearing and Emergency Request for a Stay of Corrective Action Requirements along with a copy of the Order to the persons 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

Hearing Clerk  
New Mexico Environment Department  
Harold Runnels Building  
1190 St. Francis Drive  
Santa Fe, NM 87502

Facsimile No. 505-827-2836

Facsimile No. 505-827-2836

  
Name

**STATE OF NEW MEXICO  
ENVIRONMENT DEPARTMENT**

**IN THE MATTER OF  
U.S. DEPARTMENT OF ENERGY  
AND WESTINGHOUSE WASTE  
ISOLATION DIVISION,  
NEW MEXICO, NM4890139088,**

**COMPLIANCE ORDER  
HRM-99-05 (CO)**

**Respondents.**

**ORDER GRANTING RESPONDENTS' EMERGENCY REQUEST FOR A STAY OF  
CORRECTIVE ACTION REQUIREMENTS**

On behalf of the New Mexico Environment Department ("NMED"), I hereby GRANT Respondents' emergency request for a stay of the corrective action requirements in Administrative Compliance Order HRM 99-05 (Nov. 30, 1999) ("Order") until such time as the Secretary issues a final administrative action concerning this Order after a hearing. By granting Respondents' request for an emergency stay, NMED is not admitting any allegation of fact, agreeing to any interpretation of law, or accepting any affirmative defense contained in Respondents' Answer. In addition, this entry of an emergency stay does not affect NMED's ability to impose any corrective actions other than those set forth in the Order. Finally, NMED reserves the right to terminate the stay of corrective action requirements by providing Respondents with written notice of the termination at least 30 days in advance of the termination date.

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