

ENTERED



Department of Energy

Carlsbad Area Office
P. O. Box 3090
Carlsbad, New Mexico 88221

December 23, 1999



John Kieling, Manager
Hazardous Waste Permits Program
Hazardous and Radioactive Materials Bureau
New Mexico Environment Department
P.O. Box 26110
Santa Fe, New Mexico 87502-6110

Dear Mr. Kieling:

Enclosed herein are signed duplicate originals of closure and post-closure trust fund documents. These are provided pursuant to the requirements of Module II.O.1, and Attachments K-2 and K-4 of the Waste Isolation Pilot Plant (WIPP) Hazardous Waste Facility Permit, Permit Number: NM4890139088-TSDF.

As you are aware, federal law unequivocally exempts WIPP contractors from the financial assurance requirements of the Resource Conservation and Recovery Act (RCRA) and the New Mexico Hazardous Waste Act (HWA). However, the New Mexico Environment Department (NMED) has not taken steps to remove the financial assurance provisions from the WIPP hazardous waste permit or to stay their effectiveness while this issue is resolved in court. The enclosed trust fund documents are submitted under protest, pending final resolution of this matter, so that WIPP may begin receiving mixed waste under the HWA permit.

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing of violations.

Dr. Inés R. Triay, CAO Manager
U. S. Department of Energy

J. L. Epstein, General Manager
Westinghouse Waste Isolation Division

Enclosures



TRUST AGREEMENT

Trust Agreement, the "Agreement," entered into as of December 21, 1999 by and between Westinghouse Government Environmental Services Company LLC Waste Isolation Division, a Delaware company, in its capacity as co-operator of the U.S. Department of Energy's Waste Isolation Pilot Plant Hazardous Waste Facility, the "Grantor," and U.S. Bank Trust National Association, a national banking association, the "Trustee." Whereas, the New Mexico Environment Department ("NMED"), an agency of the New Mexico State Government, has established certain regulations applicable to the Grantor, requiring that an owner or operator of a hazardous waste management facility shall provide assurance that funds will be available when needed for closure and/or post-closure care of the facility,

Whereas, the Grantor has elected to establish a trust to provide all or part of such financial assurance for the facilities identified herein,

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this agreement, and the Trustee is willing to act as trustee,

Now, Therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions.

As used in this Agreement:

- (a) The term "Grantor" means the owner or operator who enters into this Agreement and any successors or assigns of the Grantor.**
- (b) The term "Trustee" means the Trustee who enters into this Agreement and any successor Trustee.**

Section 2. Identification of Facilities and Cost Estimates.

This Agreement pertains to the facilities and cost estimates identified on attached Schedule A.

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Section 3. Establishment of Fund.

The Grantor and the Trustee hereby establish a trust fund, the "Fund," for the benefit of the State of New Mexico. The Grantor and the Trustee intend that no third party have access to the Fund except as herein provided. The Fund is established initially as consisting of the property, which is acceptable to the Trustee, described in Schedule B attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profits thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor established by the State of New Mexico.

Section 4. Payment for Closure and Post-Closure Care.

The Trustee shall make payments from the Fund as the Secretary of the New Mexico Environment Department or his/her designee shall direct, in writing, to provide for the payment of the costs of closure and/or post-closure care of the facilities covered by this Agreement. The Trustee shall reimburse the Grantor or other persons as specified by the Secretary of the New Mexico Environment Department or his/her designee from the Fund for closure and post-closure expenditures in such amounts as the Secretary of the New Mexico Environment Department or his/her designee shall direct in writing. In addition, the Trustee shall refund to the Grantor such amounts as the Secretary of the New Mexico Environment Department or his/her designee specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund as defined herein.

Section 5. Payments Comprising the Fund.

Payments made to the Trustee for the Fund shall consist of cash or securities acceptable to the Trustee.

Section 6. Trustee Management.

The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time, subject, however, to the provisions of this section. In investing, reinvesting, exchanging, selling, and managing the Fund, the Trustee shall discharge his duties with respect to the trust fund solely in the interest of the beneficiary and with the care, skill, prudence, and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims; *except that:*

- (i) Securities or other obligations of the Grantor, or any other owner or operator of the facilities, or any of their affiliates as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2.(a), shall not be acquired or held, unless they are securities or other obligations of the Federal or a State government;
- (ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent insured by an agency of the Federal or State government; and
- (iii) The Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment.

The Trustee is expressly authorized in its discretion:

- (a) To transfer from time to time any or all of the assets of the Fund to any common, commingled, or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein; and**
- (b) To purchase shares in any investment company registered under the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.*, including one which may be created, managed, underwritten, or to which investment advice is rendered or the shares of which are sold by the Trustee. The Trustee may vote such shares in its discretion.**

Section 8. Express Powers of Trustee.

Without in any way limiting the powers and discretions conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

- (a) To sell, exchange, convey, transfer, or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expediency of any such sale or other disposition;**
- (b) To make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;**
- (c) To register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in bearer form or in book entry, or to combine certificates representing such securities with certificates of the same issue held by the Trustee in other fiduciary capacities, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository**

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with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the United States Government, or any agency or instrumentality thereof, with a Federal Reserve bank, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund;

(d) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the Federal or State government; and

(e) To compromise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses.

All taxes of any kind that may be assessed or levied against or in respect of the Fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee to the extent not paid directly by the Grantor, and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuation.

The Trustee shall annually, at least 30 days prior to the anniversary date of establishment of the Fund, furnish to the Grantor and to the appropriate Secretary of the New Mexico Environment Department or his/her designee a statement confirming the value of the Trust. Any securities in the Fund shall be valued at market value as of no more than 60 days prior to the anniversary date of establishment of the Fund. The failure of the Grantor to object in writing to the Trustee within 90 days after the statement has been furnished to the Grantor and the Secretary of the New Mexico Environment Department or his/her designee shall constitute a conclusively binding assent by the Grantor, barring the Grantor

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from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel.

The Trustee may from time to time consult with counsel, who may be counsel to the Grantor, with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation.

The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor.

Section 13. Successor Trustee.

The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in a writing sent to the Grantor, the Secretary of the New Mexico Environment Department or his/her designee, and the present Trustee by certified mail 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee.

All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are designated in the attached Exhibit A or such other designees as the Grantor may designate by amendment to Exhibit A. The Trustee shall be fully protected in acting without inquiry in accordance with the Grantor's orders, requests, and instructions. All orders, requests, and instructions by the Secretary of the New Mexico Environment Department or his/her designee to the Trustee shall be in writing, signed by the Secretary of the New Mexico Environment Department or his/her designees of the Regions in which the facilities are located, or their designees, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and

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instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of the Grantor or NMED hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests, and instructions from the Grantor and/or NMED, except as provided for herein.

Section 15. Notice of Nonpayment.

The Trustee shall notify the Grantor and the appropriate Secretary of the New Mexico Environment Department or his/her designee, by certified mail within 10 days following the expiration of the 30-day period after the anniversary of the establishment of the Trust, if no payment is received from the Grantor during that period. After the pay-in period is completed, the Trustee shall not be required to send a notice of nonpayment.

Section 16. Amendment of Agreement.

This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the appropriate Secretary of the New Mexico Environment Department or his/her designee, or by the Trustee and the appropriate Secretary of the New Mexico Environment Department or his/her designee if the Grantor ceases to exist.

Section 17. Irrevocability and Termination.

Subject to the right of the parties to amend this Agreement as provided in Section 16, this Trust shall be irrevocable and shall continue until terminated at the written agreement of the Grantor, the Trustee, and the Secretary of the New Mexico Environment Department or his/her designee, or by the Trustee and the Secretary of the New Mexico Environment Department or his/her designee, if the Grantor ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to the Grantor.

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Section 18. Immunity and Indemnification.

The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the Secretary of the New Mexico Environment Department or his/her designee issued in accordance with this Agreement. The Trustee shall be indemnified and saved harmless by the Grantor or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 19. Choice of Law.

This Agreement shall be administered, construed, and enforced according to the laws of the State of New Mexico.

Section 20. Interpretation.

As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

Schedule A: EPA ID# and Closure/Post-Closure Information

EPA ID #NM4890139088

Closure/Post-Closure Information

**TABLE K-1
RCRA CLOSURE COST ESTIMATE**

This estimate equals the cost of final closure at the point in the facility's active life when the extent and manner of its operation would make closure the most expensive, in accordance with the requirements of 20 NMAC 4.1.500 (incorporating 40 CFR §264.142(a)(1)).

		Partial Closure Cost (1 year)	Contingency Closure Cost (3 years)	Final Closure Cost (10 years)
Infrastructure	RCRA Permit Fee	*	*	*
Section I-2a	Engineering Certification	\$140,472	\$2,321,187	\$4,194,393
Subtotal		\$140,472*	\$2,321,187*	\$4,194,393*
Panel Closure	Excavate salt for concrete barriers	\$42,000	\$42,000	\$84,000
Section I-1e(2)(d)	Excavate salt for explosion-isolation walls	\$14,000	\$14,000	\$28,000
Section I-1e(1)	Steel for concrete barriers	\$150,000	\$150,000	\$300,000
Figure I-4	Concrete for concrete barriers	\$676,000	\$676,000	\$1,352,000
Attachment I1	Grout for concrete barriers	\$370,000	\$370,000	\$740,000
	Concrete blocks in place for explosion-isolation walls	\$290,000	\$290,000	\$580,000
Subtotal		\$1,542,000	\$1,542,000	\$3,084,000
Shafts/Borehole Closure	Equipment	NA	NA	\$5,450,000
Section I-1e(2)(e)	Mobilization and Demobilization	NA	NA	\$4,090,800
Attachment I2	Decommissioning and Disposal	NA	NA	\$1,451,950
	Seal materials	NA	NA	\$43,549,220
	Grouting	NA	NA	\$1,454,842
	Borehole plugging	NA	NA	\$1,300,000
Subtotal		\$0	\$0	\$57,296,812
Site Contamination Surveys	Surface	NA	\$1,354,182	\$1,354,182
Section I-1e(2)(a)	Underground	NA	\$1,227,607	NA
Subtotal		\$0	\$2,581,789	\$1,354,182
Decontamination	Surface	NA	957,000	957,000
Section I-1e(2)(b)	Underground	NA	798,590	NA
Subtotal		\$0	\$1,755,590	\$957,000
Subtotals		\$1,682,472*	\$8,200,566*	\$66,886,387*
Contingency (20%)		\$336,494*	\$1,640,113*	\$13,377,274*
Totals		\$2,018,966*	\$9,840,679*	\$80,263,664*

* RCRA Permit Fee will be included upon approval of NMED Fee Regulations

**TABLE K-2
RCRA POST-CLOSURE COST ESTIMATE**

		Post-Closure Cost (30 years)
Infrastructure Section J-2	RCRA Permit Fee	*
Subtotal		*
Active Institutional Controls^a	Groundwater Monitoring	\$14,000,000
Section J-1a(1) Attachment J1	Repository Footprint Fencing	\$1,138,526
	Surveillance Monitoring	\$528,653
Subtotal		\$15,667,179
Subtotals		\$15,667,179*
Contingency (20%)		\$3,133,436*
Totals		\$18,800,615*

* RCRA Permit Fee will be included upon approval of NMED Fee Regulations

^a Labor costs are included in each line item under active institutional controls.

Schedule B: Description of Property

Legal description and map of the facility site, including land use and zoning of the surrounding area

The WIPP site is located in Eddy County in southeastern New Mexico (Figure 2). The site is 26 miles (mi) (42 kilometers [km]) east of Carlsbad, New Mexico in an area known as Los Medaños (the dunes). Los Medaños is a relatively flat (Figure 3), sparsely inhabited plateau with little water and limited land uses.

The WIPP site (Figure 3) consists of 16 sections of Federal land in Township 22 South, Range 31 East. The 16 sections of Federal land were withdrawn from the application of public land laws by the WIPP Land Withdrawal Act (LWA), Public Law 102-579. The WIPP LWA transferred the responsibility for the administration of the 16 sections from the Department of Interior, Bureau of Land Management, to the U.S. Department of Energy (DOE). This law specified that mining and drilling for purposes other than support of the WIPP project are prohibited within this 16-section area with the exception of Section 31. Oil and gas drilling activities are restricted in Section 31 from the surface down to 6,000 feet.

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Exhibit A: Persons Authorized Signature for the Grantor

**Westinghouse Government Environmental Services Company LLC, Waste Isolation
Division (WID)**

Joseph L. Epstein, WID General Manager

Gloria J. Barnes, WID Legal Counsel

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In Witness Whereof the parties have caused this Agreement, to be executed by their respective officers duly authorized and attested as of the date first above written: The parties below certify that the wording of this Agreement is identical to the wording specified in 40 CFR 264.151(a)(1) as revised by 20NMAC4.1 I.102 as such regulations were constituted on the date first above written.

Grantor

Signature: Gloria J. Barnes, Senior Counsel

Title: Westinghouse Government and Environmental Services Company LLC

Waste Isolation Division, in its capacity as co-operator of the U.S. Department of Energy's Waste Isolation Pilot Plant Hazardous Waste Facility.

Attest:

Signature: Martha L. Rust

Title: Controller

Notary's Certification of Acknowledgement:

State of New Mexico County of Eddy On this date, 12/23/99, before me personally came [name] to me known, who, being by me duly sworn, did depose and say that she/he is [title] of [company], the company described in and which executed the above instrument; and that she/he signed her/ his name thereto by like order.

Gloria Barnes

[Signature of Notary Public]

Carla Terese Duarte

Trustee:

J. Hammel
[Signature]

Signature:

Title: U.S. Bank Trust National Association

Attest:

Signature: [Signature]
Robert Schneider

Title: Assistant Vice President

Notary's Certification of Acknowledgement

State of CA County of LA On this date, 12/22/99, before me personally came [name] to me known, who, being by me duly sworn, did depose and say that she/he is [title] of [company], the company described in and which

Julie Hammel

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executed the above instrument; and that she/he signed her/ his name thereto by
like order.

Grace Yang

