

STATE OF NEW MEXICO
ENVIRONMENT DEPARTMENT



IN THE MATTER OF
U.S. DEPARTMENT OF ENERGY
AND WASHINGTON TRU SOLUTIONS LLC,
CARLSBAD, NEW MEXICO
PERMIT NO. NM 4890139088-TSDF

COMPLIANCE ORDER
HWB 04-07 (CO)

RESPONDENTS.

COPY

SETTLEMENT AGREEMENT

This Settlement Agreement is made between the New Mexico Environment Department (hereinafter "NMED") and the U.S. Department of Energy and Washington TRU Solutions LLC (hereinafter collectively referred to as "the Respondents") for the purpose of resolving Compliance Order No. HWB 04-07 (hereinafter "the Compliance Order").

I. PARTIES

1. NMED is an agency of the executive branch of New Mexico state government and is charged with the administration and enforcement of the Hazardous Waste Act (hereinafter "HWA"), NMSA 1978 Section 74-4-1 *et seq.* (2000), and New Mexico Hazardous Waste Management Regulations (hereinafter "the HWMR"), 20.4.1 NMAC.

2. The Respondents are the United States Department of Energy, owner and operator, and Washington TRU Solutions LLC, co-operator, of the Waste Isolation Pilot Plant (hereinafter "WIPP"), a mixed waste storage and disposal facility for which a permit is required under the HWMR, 20.4.1.900 NMAC (incorporating 40 CFR § 270.1(a)).



II. JURISDICTION AND AUTHORITY

3. NMED has jurisdiction and authority over the subject matter of this Settlement Agreement pursuant to the HWA and the HWMR.

4. Respondents admit to the foregoing jurisdiction and authority of NMED.

III. COMPLIANCE ORDER

5. On August 31, 2004, the NMED issued the Compliance Order for alleged violations of the conditions of the Respondents' hazardous waste permit issued on October 27, 1999 (Permit Number NM4890139088-TSDF) for the operation of a hazardous waste storage and disposal facility at the WIPP. Exhibit 1.

6. Respondents timely filed a Request for Hearing and a motion for an extension of time to file an Answer, which was granted.

7. Respondents neither admit nor deny the allegations contained in the Compliance Order. The Respondents do not admit liability by entering into or complying with this Settlement Agreement or by completing corrective measures.

IV. COMPROMISE AND SETTLEMENT

8. The Parties have engaged in settlement discussions in an effort to resolve the Compliance Order without further administrative or judicial actions. As a result of these discussions, the Parties have entered into this Settlement Agreement. The Parties have entered into this Settlement Agreement for the sole purpose of settling the claims of the NMED as stated in the Compliance Order and avoiding the time and expense of engaging in further legal proceedings regarding this matter.

9. For purposes of this Settlement Agreement, Respondents accept NMED's interpretation concerning the use of preliminary data as reflected in Paragraph 74 of the

Compliance Order, i.e., that the Permittees "ensure that random selection and sampling of homogeneous solid waste containers within a waste stream lot [have] been achieved prior to receipt and disposal at WIPP." Such acceptance shall not invalidate Respondent's prior use of preliminary data nor affect the ability of the Permittees to submit permit modification requests concerning the use of preliminary data.

V. COMPLIANCE HISTORY

10. The Parties agree that this Settlement Agreement shall not be used in the future as part of any proceeding to demonstrate the compliance history of Washington TRU Solutions, LLC or any parent or affiliate ("WTS").

11. It is the intent of the Parties that this Settlement Agreement shall not be used by any local, state or federal agency or third party in any administrative or judicial proceeding or for any purpose to establish or demonstrate compliance history of WTS.

VI. SETTLEMENT OF ALLEGED VIOLATIONS

12. In compromise and settlement of the alleged violations set forth in the Compliance Order, the Parties agree that the Respondents will pay a penalty of Ninety Thousand dollars (\$90,000) within 30 days of the date the Settlement Agreement becomes effective.

13. The Respondents shall also provide \$600,000 per year payable quarterly for the State of New Mexico fiscal years 2006, 2007 and 2008, to fund the Carlsbad, NM office of the NMED pursuant to the Agreement-in-Principle (AIP), dated November 29, 2000, between the U.S. Department of Energy and the State of New Mexico, which AIP shall remain in force and effect until June 30, 2008, for purposes of carrying out the obligations of this Settlement Agreement. Respondents shall fund the annual amount on a quarterly basis. In the event Congressional appropriations are not made sufficient for this purpose for any fiscal year, the

\$600,000 settlement assessment for such year shall be a stipulated penalty and shall be payable within 30 days after the passage of the Department of Energy appropriations legislation for such fiscal year. Such payments shall be made within 30 days after the date the U.S. appropriations become available for payment.

14. No provision of this Agreement shall be interpreted as, or constitute, a commitment or requirement that the United States shall obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341. Payment or obligation of funds by the United States is subject to the availability of appropriated funds. "Availability of appropriated funds," for the purpose of this section, refers to the aggregate of funds appropriated for WIPP activities. Funds shall not be considered to be unavailable for payment under this section solely due to the absence of a specific line item appropriation for the payments.

15. The Respondents shall make payments to the State of New Mexico, by electronic transmittal, certified or corporate check or other guaranteed negotiable instrument. Unless otherwise specified, all payments and other correspondence required by this Agreement shall be sent to the NMED Office of General Counsel at the following address:

New Mexico Environment Department
Office of General Counsel
Post Office Box 26110
1190 St. Francis Drive
Santa Fe, New Mexico 87502-6110

Copies of all checks and correspondence shall also be sent to the NMED Hazardous Waste Bureau at the following address:

Chief, Hazardous Waste Bureau
New Mexico Environment Department
2905 Rodeo Park Drive East, Building 1
Santa Fe, New Mexico 87505-6303

VII. CORRECTIVE MEASURES

16. In response to the Schedule of Compliance in the Compliance Order, the Respondents and NMED agree as follows:

- a. The Respondents, in the document entitled "Information in Response to NMED Compliance Order HWB 04-07 (CO), Paragraph 80(A)," dated September 30, 2004, and December 16, 2004 (revised), have provided NMED with an adequate and acceptable retrieval plan for the containers described by the Compliance Order;
- b. The Respondents, in the document entitled "Information in Response to NMED Compliance Order HWB 04-07 (CO), Paragraph 80(B)," dated September 30, 2004, and December 16, 2004 (addendum), have adequately demonstrated that all containers described by the Compliance Order pose no elevated risk to human health and the environment, and that the waste containers otherwise satisfy all other waste characterization requirements of the Permit. Notwithstanding the plan for retrieval of containers submitted in response to Paragraph 80A of the Compliance Order, NMED shall not require the retrieval of containers from the WIPP;
- c. The Respondents, in the document entitled "Information in Response to NMED Compliance Order HWB 04-07 (CO), Paragraph 80(C)," dated December 16, 2004, have adequately identified all containers described by the Compliance Order, and NMED is satisfied that all containers described by the Compliance Order have been accurately identified;

HWA and the HWMR, and any other laws NMED is authorized to enforce. NMED specifically retains the right as provided by law to conduct environmental studies, investigations, monitoring, or emergency activities at property owned or controlled by Respondents. In any such action against Respondents, Respondents reserve the right to assert any defenses they may have. NMED's failure to exercise any power, authority or right in this Settlement Agreement, or its election not to exercise such power, authority or right, shall not be construed as a waiver or relinquishment of such power, authority or right, at other times or circumstances.

IX. RELEASE OF LIABILITY

18. Compliance with the terms of the Settlement Agreement shall constitute full satisfaction and release from liability for the violations alleged in the Compliance Order. Nothing in this Settlement Agreement shall constitute or be construed as a release from liability for any claims arising as a result of past, current or future operations of Respondents, other than the violations alleged in the Compliance Order.

X. RIGHTS EXPRESSLY RESERVED

19. This Settlement Agreement in no way relieves the Respondent of their legal obligations to comply with any applicable federal or state environmental law or regulation. This Settlement Agreement shall not be construed as curtailing or impeding in any way NMED's legal right to require Respondents' compliance with any statutory or regulatory requirement or to seek penalties and damages for noncompliance not addressed in this Settlement Agreement or the Compliance Order.

XI. GOOD FAITH PERFORMANCE

20. The Parties agree that they will act reasonably and in good faith at all times to accomplish the objectives of this Settlement Agreement.

XII. MERGER AND INTEGRATION

21. This Settlement Agreement merges and incorporates all prior written and oral communications between the Parties concerning the subject matter of this Settlement Agreement, and contains the entire agreement reached between the Parties. This Settlement Agreement shall not be altered or amended without the express written consent of the Parties and approval of the Secretary.

XIII. BINDING EFFECT

22. This Settlement Agreement shall be binding on the Parties and their officers, directors, employees, agents, subsidiaries, successors, assigns, trustees, or receivers.

XIV. WAIVER OF STATE LIABILITY

23. The Respondents shall assume all costs and liabilities incurred in performing any obligation under this Settlement Agreement. NMED, on its own behalf and on behalf of the Department and the State of New Mexico, shall not assume any liability for the performance of any obligation under this Settlement Agreement.

XV. DISCLOSURE TO SUCCESSORS-IN-INTEREST

24. The Respondents shall disclose this Settlement Agreement to any successor-in-interest to the facilities cited in the Compliance Order and shall advise such successor-in-interest that this Settlement Agreement is binding on the successor-in-interest until the Respondents comply with the terms and conditions of this Settlement Agreement or it is terminated by written agreement of the Parties.

XVI. FORCE MAJEURE

25. The obligations of the Respondents to accomplish any corrective measures described by this Settlement Agreement shall be deferred to the extent and for the duration that

the failure is caused by force majeure. For purposes of this Settlement Agreement, force majeure is defined as an event or set of circumstances which are beyond the control of the Respondents and which could not have been prevented by their reasonable action or due diligence. Force majeure shall not apply to any failure to accomplish corrective measures due to increased cost or financial inability. Force majeure shall also not include or apply to actions, failures or omissions of generators that dispose of wastes at WIPP. The Respondents shall submit notification to NMED within 15 days after the date when they first obtain knowledge of the inability to accomplish corrective measures. Such written notice shall include the nature, cause, and anticipated length of the delay associated with the failure of compliance and all steps that the Respondents have taken and will take to avoid or minimize the failure to accomplish corrective measures, along with a schedule of implementation. Failure to provide written notice within the required time period shall constitute a waiver of the right to invoke force majeure. If NMED agrees that the failure to accomplish corrective measures is attributable to force majeure, the corrective measures shall be modified or the time for implementation shall be extended by written stipulation by the Parties.

XVII. SEVERABILITY

26. If any part or application of this Settlement Agreement is held invalid, the remainder, or its application to other situations or persons, shall not be affected.

XVIII. ENFORCEABILITY

27. This Settlement Agreement may be enforced by any of the Parties in a court of competent jurisdiction within the State of New Mexico.

XIX. EFFECTIVE DATE AND DURATION

28. This Settlement Agreement shall become effective on the date that is has been approved by the Secretary of NMED and shall remain in effect until the Respondents fully comply with its terms and conditions.

XX. AUTHORITY OF SIGNATORIES

29. By signing this Settlement Agreement, the signatory for each Party below certifies that he or she has the authority to legally bind the Party to this Settlement Agreement.

U.S. DEPARTMENT OF ENERGY

By: CJ Wu for IRT

Date: February 11, 2005

Typed Name: Dr. Chuan-Fu Wu

Title: Acting Manager

WASHINGTON TRU SOLUTIONS, LLC

By: Richard Dean Raaz

Date: February 11, 2005

Typed Name: Richard Dean Raaz

Title: President & General Manager

NEW MEXICO ENVIRONMENT DEPARTMENT

By: [Signature]

Date: _____

Typed Name: _____

Title: _____