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STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

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FILE NAME: STATEWIDE PERMIT  
RCRA  
PERCLA

June 30, 1994

Mr. William T. Dixon, Manager  
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Westinghouse Hanford Company  
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Mr. Glenn R. Hoenes, Manager  
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Mr. Joe F. Nemecek, Vice President  
Bechtel Hanford, Inc.  
P. O. Box 969  
Richland, WA 99352



Dear Messrs. Dixon, Hoenes, and Nemecek:

Thank you for your June 23, 1994, letter requesting an interpretation of the financial assurance and liability protection requirements for federal contractors pursuant to Washington Administrative Code (WAC) 173-303-620(1)(c). Based upon our review of this issue, we have concluded that the financial requirements of the Washington State Dangerous Waste Regulations (Chapter 173-303 WAC) were never intended to apply to contractors for a federal or state government in situations such as that at the U.S. Department of Energy's (USDOE) Hanford Facility.

The financial requirements of Chapter 173-303 WAC provide an exemption for state and federal governments (WAC 173-303-620(1)(c)) similar to that found in the federal Resource Conservation and Recovery Act (RCRA) regulations (40CFR264/265 Subpart H). However, the state regulations contain an exception to the exemption. The state exemption reads "States and federal government are exempt from the requirements of this section, except that operators of facilities who are under contract with the state or federal government must meet the requirements of this section." It is this exception that has been in the Dangerous Waste Regulations since 1982, which could appear to require your companies to meet the financial requirements for some of



your dangerous waste activities at Hanford. Our office was not successful in locating relevant written legislative history or interpretive documents to accompany the exception. Therefore, our interpretation is based upon Environmental Protection Agency (EPA) analyses of federal regulations, Washington State Department of Ecology institutional memory, and a common sense approach to regulatory interpretation.

The RCRA exemption for state and federal governments was provided because state and federally-owned facilities "will always have adequate resources to conduct closure and post-closure care activities properly" (45FR33198; May 19, 1980). Therefore, under RCRA requirements, there is no reason to impose financial assurance requirements at the Hanford Facility because the U. S. Department of Energy (USDOE), as a federal agency, is financially secure. The Department concurs with the federal interpretation and therefore concludes that USDOE, as part of the federal government is, in itself, financially secure and inherently meets the financial assurance and liability requirements of Chapter 173-303 WAC.

Additionally, the EPA, in order to differentiate between owner versus operator responsibility, "changed its usage of the term 'owner/operator' to 'owner or operator' to indicate when EPA will be satisfied by compliance by either party (but also to indicate that the agency may enforce against either or both)" (45FR33169; May 19, 1980). Since the financial requirements within the RCRA regulations apply to the "owner or operator," these requirements may be satisfactorily fulfilled by either the owner or operator. As the Department also uses the term "owner or operator" in our financial responsibility regulations, we will also be satisfied with compliance by either the owner or operator, or in the case at Hanford, the co-operators. Since, as stated above, we believe USDOE already meets the financial requirements, we see no reason to require your companies to also meet the financial requirements.

It is, however, not our position that all contractors to the federal or state government are exempt from the financial requirements. This is obvious from the state-only exception to the exemption. We believe our position is consistent with the EPA as they clarified that the governmental exemption applies to "State and Federally-owned facilities" [emphasis added] (45FR33198; May 19, 1980). Therefore, the EPA did not intend that all hazardous waste facilities involving the state and federal government be exempted. Only facilities owned by the government may qualify for the federal exemption. It is our interpretation that the state-only exception was added for similar reasons. As an example, a private company under contract to the government, but conducting dangerous waste treatment, storage, or disposal on the company's property, would need to meet the financial requirements. The state-only exception may also be applied in situations not contemplated by EPA because it may be applied at a government-owned facility. For example, the government may choose to vest all operational responsibility in the contractor, including financial assurance. This would be legitimate as we have interpreted that the financial requirements may be fulfilled by either the owner or operator. As the Hanford Facility is owned


by the federal government and it is willing to accept financial responsibility for dangerous waste management operations, the Hanford Facility does not fit into the category of facilities at which we would interpret the state-only exception to apply.

In summary, the Department does not interpret the state's dangerous waste financial requirements to be applicable to your companies' dangerous waste work at the Hanford Facility. It should be noted that this only relieves your companies from complying with the financial requirements. It does not relieve your companies from preparing closure and postclosure plans, nor from closing and/or postclosure of dangerous waste management units for which you are operationally responsible in an environmentally protective manner and consistent with Chapter 173-303 WAC. Furthermore, although we do not believe it is required for your companies to provide financial assurance and liability protection, it is our opinion that closure and postclosure cost estimates continue to be valuable information. We appreciate USDOE's willingness to provide such estimates in light of the governmental exemption. We also encourage and appreciate your support in providing such information.

It is understandable that the current language of WAC 173-303-620(1)(c) needs to be clarified. Therefore, during the next revision to Chapter 173-303 WAC, we will consider modifications to this language that would clarify the Department's intent. Until that time, this letter will serve as our interpretation that financial assurance and liability protection requirements will not be imposed by the Department on your companies.

If you have questions regarding the future revision of the Dangerous Waste Regulations, please contact Ms. Lorie Hewitt at (206) 407-6714. Questions regarding the applicability of financial requirements at the Hanford Facility should be directed to Mr. Joe Witczak at (206) 407-7132.

Sincerely,



Tom Eaton, Manager  
Hazardous Waste and Toxics Reduction



Drusilla Butler, Manager  
Nuclear Waste Program

JJW:dr

cc: Dan Duncan, EPA  
Cliff Clark, USDOE  
Tanya Barnett, AG Office  
Moses Jaraysi, Ecology