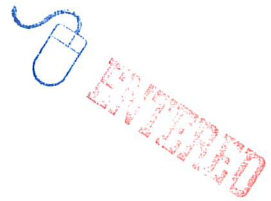




Attorney General of New Mexico



PATRICIA A. MADRID
Attorney General

STUART M. BLUESTONE
Deputy Attorney General

September 10, 2003

U.S. Senator Pete V. Domenici
328 Hart Senate Office Building
Washington, D.C. 20510



Dear Senator Domenici:

I write to express my concern over proposed legislative limits on waste characterization for the Waste Isolation Pilot Plant (WIPP). Section 310 of S. 1424, the Energy & Water Appropriations bill for fiscal year 2004, seriously reduces characterization of waste destined for WIPP. This legislation, which would dictate the requirements of RCRA-based waste characterization, is a significant erosion of state control through the New Mexico Hazardous Waste Act, which implements RCRA.

There is no justification for Congress to impose statutory limits over the head of experts at the New Mexico Environment Department (NMED), which has been carefully regulating WIPP for four years. Those most affected by WIPP, particularly New Mexicans in the Carlsbad area and along shipping routes, currently have a public permit modification process in which to express their concerns and opinions about how waste should be examined before going to WIPP. DOE and other interested parties have been heard in this process, and all participants have accepted NMED's decisions. Congress should not upset a successful state regulatory process, strip New Mexicans of their participation in regulation of WIPP, and force rigid statutory rules on the regulatory process. In addition, the legislation would cause confusion over its effect on waste characterization required under EPA's certification and by NRC and DOT, as outlined in the attached memorandum.

There is no need for Congress to dictate waste characterization. Waste shipments are moving far faster than originally planned. When DOE presents modification proposals, New Mexico considers them with full regard for the needs of DOE and the health and safety of the public. There is no compelling reason to deviate from this



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process. Especially given the more problematic waste streams anticipated in the near future, strong state oversight of WIPP and other DOE facilities must remain an imperative. The Senate should delete section 310.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Patricia A. Madrid".

PATRICIA A. MADRID
ATTORNEY GENERAL



Attorney General of New Mexico

Office Memorandum

TO: Attorney General Madrid

FROM: Water, Utilities and Environment Division

DATE: September 10, 2003

RE: S. 1424, sec. 310

Having reviewed section 310 of the FY 2004 Energy & Water Appropriations Bill, we see several serious problems with this legislation from the viewpoint of regulation of health and safety at the Waste Isolation Pilot Plant. (WIPP). WIPP is regulated under the New Mexico Hazardous Waste Act, which implements the federal Resource Conservation and Recovery Act (RCRA) in New Mexico. Section 310 directs the U.S. Department of Energy (DOE) to amend the Waste Analysis Plan, which is part of WIPP's permit under the New Mexico Hazardous Waste Act, so that waste confirmation is restricted to finding that the waste contains no ignitable, corrosive, or reactive waste. Further, the bill directs that only a "statistically representative subpopulation" of the waste actually be examined.

This legislation would seriously limit the authority of the New Mexico Environment Department (NMED). Ongoing state oversight of WIPP's operations was one of the commitments by DOE underlying enactment of the WIPP Land Withdrawal Act in 1992. Since then, waste characterization under WIPP's Hazardous Waste Act permit has been carefully worked out in a public process of issuance and modification of the permit that takes into account DOE's scientific presentations and the concerns of interested agencies and citizens. Recent permit modifications, proposed by DOE, such as the Drum Age Criteria modification, have reduced the cost of waste characterization. Other DOE proposals are pending. DOE has asked to forego headspace gas sampling for containers holding only radioactive sealed sources, to adopt further drum age criteria for newly authorized containers, and to dispose of PCB-contaminated waste. NMED will consider these proposals on their merits.

The appropriate level of waste characterization is based on regulatory and scientific principles and requires deliberate study of extensive data. For Congress to make such decisions through an abbreviated legislative process risks serious error. For instance, Congress was originally told that the National Academy of Sciences and the New Mexico Environmental Evaluation Group had considered and supported the proposed legislation, but both organizations have since denied this. Moreover, on August 13 one of DOE's transuranic waste drums in Idaho burst into flames when vented, suggesting that New Mexico's interest in characterizing waste gases is well founded.

Further, section 310 will cause confusion as to its impact on WIPP waste characterization requirements. In calling for amendment of the WIPP Waste Analysis Plan, which is part of the Hazardous Waste Act permit, the bill would direct New Mexico to abandon requirements for headspace gas sampling for volatile organic compounds, radiography to identify prohibited items (e.g., liquid wastes, pyrophorics, incompatible wastes, compressed gases, wastes with surface dose exceeding 200 millirems per hour), and verification that contents are limited to authorized hazardous waste codes. Thus, the bill directs characterization procedures that conflict with RCRA regulations (40 CFR sec. 270.14(b)(2)), which New Mexico must follow to retain its EPA authorization (40 CFR 270.14).

In addition, when EPA certified WIPP to operate in 1998, it imposed waste characterization and quality control requirements calling for radioassay and quantification of waste material parameters that affect WIPP's performance. If the bill, in referring to "other applicable laws," mandates that EPA-directed waste characterization be stopped, EPA might then revoke its certification of WIPP to operate.

Moreover, the Waste Analysis Plan incorporates by reference the WIPP Waste Acceptance Criteria, which contain numerous Nuclear Regulatory Commission (NRC) and Department of Transportation (DOT) characterization requirements that must be met for shipping, viz: radionuclides must be identified; fissile material quantities are limited; external dose rate is limited; free liquids are limited to 1% by volume; sealed containers larger than four liters are barred; radioactive pyrophorics are limited to 1% by weight; chemical constituents must conform to a specific list; radioactive decay heat is limited to 40 watts; and flammable volatile organic compounds may not exceed 500 parts per million. The bill may bar the application of such limitations, in which case the shipments would neither be safe nor lawful.

At the same time, waste shipments to WIPP are going forward expeditiously; thus, characterization does not seem to have slowed shipments.