

Allen, Pam, NMENV

From: Maestas, Ricardo, NMENV
Sent: Monday, January 09, 2017 1:37 PM
To: Allen, Pam, NMENV
Subject: FW: Resumption of normal operating status at WIPP???
Attachments: FOIA_WIPP_Emergency_Release.docx; DOE Response to Expedited FOIA 12-16-16.docx; CANM & CCNS OHA WIPP Appeal 12-22-16.docx

Email and attachments for the WIPP record.

From: Joni Arends [mailto:jarends@nuclearactive.org]
Sent: Thursday, December 22, 2016 8:32 PM
To: Maestas, Ricardo, NMENV <Ricardo.Maestas@state.nm.us>; Don Hancock <sricon@earthlink.net>; Dave McCoy <dave@radfreenm.org>; Janet Greenwald <contactus@cardnm.org>; Scott Kovac <scott@nukewatch.org>; Kieling, John, NMENV <john.kieling@state.nm.us>
Subject: Resumption of normal operating status at WIPP???

Ricardo,

I wanted to make sure that you received the expedited FOIA request to DOE from Citizen Action New Mexico and CCNS, DOE's denial, and CANM and CCNS appeal regarding the planned reopening of the WIPP facility.

We are puzzled by NMED's approval of "the resumption of normal operating status at WIPP" without citing violations of the WIPP Hazardous Waste Permit (HWP). Can you explain that approval in light of the following?

Even though the DOE Operational Readiness Review (ORR) is not yet publicly available, CCNS was surprised to learn from the December 15, 2016 Town Hall meeting (and powerpoint) of outstanding issues that are subject to regulation by the WIPP HWP. For example, addressing emergency preparedness, engineering, fire protection, industrial hygiene/occupational safety, nuclear safety, training and waste acceptance, see below. We have included references to other requirements that are included in the WIPP HWP.

- 1. Emergency Preparedness EP.1-PRE-2:** "Staffing does not provide emergency Medical Technicians or first responders currently 100% of the time in the underground when work is being conducted." Slide 16.
- 2. Emergency Preparedness Drill Performance:** "However, the Radiological Control group stands out as not meeting expected performance during the observed exercises." Slide 16.
- 3. Engineering ENG.2-POST-1:** "... the UVS/IVS systems' operability could be impaired by unresolved **known** issues, lack of spare parts, and incomplete construction punch list items." [Emphasis supplied.] Slide 17.
- 4. Fire Protection FP.1-PRE-1:** "Fire suppression systems have not yet been installed/accepted for all non-waste handling vehicles prior to use as required by fire protection equivalency WIPP EQ-2015-01, and

Documented Safety Analysis Key Element (KE) 11-5." Slide 18. Inadequate and ill-maintained fire suppression systems on vehicles was the cause of the February 5, 2014 vehicle fire.

5. Industrial Hygiene/Occupational Safety IH.1-PRE-1: "The Mine Rescue Team (MRT) did not have an approved procedure for the calibration or calibration check of atmosphere monitoring equipment, were not maintaining records of the tests, and were using expired calibration gas." Slide 18. Correct and compliant air monitoring is essential at WIPP.

6. Nuclear Safety NS.2-PRE-1: "Contrary to the requirements of 10 CFR 830.203, LCO 3.1.1 Condition C was exited with a NFPA 13 INOPERABLE/non-compliance installed sprinkler system without DOE approval." Slide 22. Why?

7. Training TRG.1-PRE-1: "Some Operators and Radiation Control Technicians (RCT) are being qualified through an NWP task-based qualification process that does not ensure compliance with DSA KE 12-3 and DOE O 426.2 requirements." Slide 26.

8. Waste Acceptance WA.1-PRE-1: "CBFO procedures are inadequate to implement the DSA/TSR actions/requirements prior to emplacement of waste containers residing in the Waste Isolation Pilot Plan (WIPP) Waste Handling Building (WHB) and prior to shipment for previously certified waste containers in the complex (including those containers continuing to be certified)." Slide 27.

9. Waste Acceptance WA.1-PRE-2: "Contractor's procedures/documentation that implement DSA/TSR Waste Acceptance Criteria (WAC) and Chapter 18 actions and requirements have not all been developed and/or revised to incorporate the DSA/TSR requirements." Id.

10. Waste Acceptance WA.1-PRE-3: "The current administrative controls to preclude the placement of the waste containers located in the Waste Handling Building into the underground prior to satisfactory performance of DSA, Chapter 18.8 requirements do not satisfy the requirements of WP 13-QA3004. Id.

11. Waste Acceptance WA.1-PRE-4: The Waste Data System is incorrectly graded as non-safety software. Id. Why?

CCNS is concerned about whether NMED is fulfilling its mission "to protect and restore the environment, and to foster a healthy and prosperous New Mexico for present and future generations." NMED responsibilities include issuing permits "to facilities and businesses to ensure operations meet established environmental and health standards." The above examples clearly demonstrate that WIPP is not meeting its HWP requirements and cannot resume "normal operating status" - there are too many items that require fixing, repair, completion, resolving, and finishing - before any planned reopening. NMED needs to do more - a lot more - to protect the people and environment with respect to WIPP and its operations in the radiologically contaminated mine.

Please include this communication and the attachments in the WIPP Administrative Record. Thank you.

--
Joni Arends, Executive Director
Concerned Citizens for Nuclear Safety
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Freedom Of Information Act Request for Expedited Emergency Release for Information for the Waste Isolation Pilot Plant (WIPP)

December 10, 2016

Ms. Ingrid A. Kolb, Chief FOIA Officer

Mr. Alexander Morris, FOIA Officer

FOIA Requester Service Center

US Department of Energy

1000 Independence Avenue, SW

Washington, DC 20585

Via e-mail to <ingrid.kolb@hq.doe.gov> and <Alexander.Morris@hq.doe.gov>

Dear FOIA Officers,

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. Section 552, (a)(6)(E)(ii)(I), as amended for the expedited processing and immediate emergency release of information regarding the Waste Isolation Pilot Plant (WIPP) located in Carlsbad, NM . *Citizen Action New Mexico* requests the following:

DOE internal and external documents, including emails, dealing with:

- Operational readiness review (ORR) for the reopening of the Waste Isolation Pilot Plant (WIPP).
- Unanswered Safety Questions (USQs).
- Corrective action plans for the issues that need to be resolved prior to reopening.
- Issues that will be resolved after the reopening after waste emplacement gets underway.
- Bonus amount that would be awarded to Nuclear Waste Partnership for emplacement of the first drum of waste.

The compelling need for the emergency release request are that the health and safety of individual workers, the public and the environment are placed at imminent and extreme risk by the carelessly planned and hasty reopening of the WIPP facility by the end of December 2016 without complete resolution of safety issues. Nondisclosure of the information imminently and substantially endangers the public and workers. The national and local public interest in the integrity of the investigation for the handling of safety matters for the WIPP reopening dictate the immediate release of the above information. Certainly, under the "balancing of interests approach," the public interest in this matter outweighs any possible concerns of DOE not to immediately release the requested information. The requested information is electronically held by the DOE and can and should be made available immediately.

The circumstances surrounding reopening WIPP need to be considered fully by the public prior to the reopening of WIPP that has already injured and contaminated workers with a February 2014 truck fire and explosion of container waste with radionuclides of Plutonium and Americium. Unsafe conditions remain and continue to proliferate:

- Ceiling collapses are increasing during 2016.

- The ventilation system remains inadequate to protect workers and to accomplish the emplacement of wastes and remediate existing contamination in the facility.
- Mismanagement of the clean-up has involved poor safety practices, according to the DOE's Independent Office of Enterprise Assessments that points to "*serious issues in conduct of operations, job hazard analysis, and safety basis.*" http://www.wipp.energy.gov/Special/EA_memo_10152015.pdf.

A plume of radioactive contamination swept across New Mexico, Texas, Oklahoma, and Kansas due to the explosion of a container and release of radionuclides from the WIPP site. It was among the costliest accidents in U.S. history that could total \$2 billion, rivaling the 1979 Three Mile Island accident. The public is entitled to the immediate release of the information regarding reopening of the WIPP site due to the imminent and substantial endangerment from circumstances that are presented by a history of disregard of safety in WIPP operations. http://www.theecologist.org/News/news_analysis/2988145/wipp_nuclear_waste_accident_will_cost_us_taxpayers_2_billion.html

The pressure to reopen WIPP despite the existent unresolved safety issues may be a contributing industry factor to premature reopening, similar to the rush that LANS was working under when 600 drums of waste were shipped to WIPP with explosive organic kitty litter. These drums remain as a continuing threat within the WIPP facility. Complete closure of the contaminated areas must be accomplished prior to any reopening of the WIPP facility. Failure to disclose the information immediately places a severe burden on national taxpayers who must ultimately pay for any further shutdowns of WIPP and the loss of the only licensed deep geological nuclear waste repository in the United States.

As a reminder President Obama's Freedom of Information Act Memorandum For The Heads Of Executive Departments And Agencies states, "All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA." (http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/)

We request an unlocked electronic format (e.g. PDF or Word) of this document, as provided for by 5 U.S.C. § 552, (a)(3), which states:

(B) In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

In the event that an electronic version(s) is not available, we then request paper copy(ies) of this document(s). However, we consider that event unlikely since a document will almost always first be created electronically to begin with..

If you regard this information as exempt from required disclosure under the Act, *Citizen Action New Mexico* requests that you exercise your discretion to disclose them nevertheless. If the document(s) includes classified or otherwise restricted information and the volume of this material makes a lengthy declassification review necessary, *Citizen Action New Mexico* requests the prompt release of all elements of the document portions marked 'Unclassified,' 'For Official Use Only,' or 'Declassified.' Additionally, *Citizen Action New Mexico* requests that the remaining classified portions undergo a careful review for the purpose of declassification, in whole or in part, and that you release to *Citizen Action New Mexico* all reasonably segregated portions of the classified record, except those portions which damage national security.

Citizen Action New Mexico further requests that you disclose these materials as they become available to you without waiting until all the documents have been assembled.

As you know, an agency cannot rely simply on the markings of a document to deny its release. In order that a document be withheld under Exemption 1 of FOIA, it must be reviewed and found to be properly classified pursuant to both procedural and substantive criteria found in the governing Executive Order, E.O. 12356. See Conf. Rep., H.R. Rep. No. 1380 (Freedom of Information Act Amendments), 93rd Cong., 2d Sess. 6 (1974); see also Lesar v. Department of Justice, 636 F. 2d 472, 483 (D.C. Cir. 1980); Allen v. CIA, 636 F. 2d 1287, 1291 (D.C. Cir. 1980). This requires an actual, substantive review of the materials and their classification markings. E.O. 12356, Section 3.4, Mandatory Review for Declassification.

Should you elect to invoke an exemption to the FOIA, *Citizen Action New Mexico* will require in your full or partial denial letter sufficient information to appeal the denial. In accordance with the minimum requirements for administrative due process, this information should include:

1. Basic factual material, including the originator, date, length, and addresses of the withheld items.
2. Explanations and justifications for denial, including the identification of the procedural category of E.O. 12356 under which the withheld document or portions of the document was found to be subject to classification, at what level the entire document was ultimately classified and the nature and variety of the document's portion-marking and, most importantly, explanations of how each exemption fits the withheld material.

Citizen Action New Mexico is a non-profit, tax-exempt, public policy research and information environmental organization. *Citizen Action New Mexico* makes information available to citizens by means of publications, educational programs, and its website. The information disclosed pursuant to the request will be made directly available to the public and others engaged in policy analysis and research, including historians, policy makers, area specialists, and journalists.

In the recent past, the Department of Energy has, as a matter of course, sent a letter asking for clarification of the following:

1. Whether the subject of the requested record(s) concerns "the operations or activities of the government;"
2. Whether the disclosure is "likely to contribute" to an understanding of government operations or activities;
3. The contribution to an understanding by the general public of the subject likely to result from disclosure, taking into account one's ability and intent to disseminate the information to the public in a form that can further understanding of the subject matter;
4. Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities;
5. Whether the requester has a commercial interest that would be furthered by the requested disclosure; and if so
6. The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in the disclosure, that disclosure is "primarily in the commercial interest of the requester."

In order to save time and help expedite our request, *Citizen Action New Mexico* herein responds to the above questions in sequential order. This will also help your office clarify any questions you may have regarding *Citizen Action New Mexico* eligibility for FOIA fee waivers or reductions under 10 CFR 1004.9(a)(8). Furthermore, it should assist your office in speedy compliance and consideration of this FOIA request, as required by 5 U.S.C. Section 552, as amended.

Our answers are as follows:

1) All information requested in this FOIA is for information directly related to federal Department of Energy (DOE) activities. Therefore, our request indisputably concerns "the operations or activities of the government." Further, documents generated by DOE management contractors are "owned" by the federal government and therefore fall under this request (e.g., see LANL management contract #W-7405-ENG-36/Mod M440/M507, §I.067 and NM CIVIL NO. 97-1412 DJS/WWD "Los Alamos Study Group vs. Dept. of Energy"). Additionally, the fact that a requested document may have been generated by a contractor, rather than the federal government itself, does not excuse any delay to the fulfillment of our request.

2) DOE activities in New Mexico are of concern to many citizens, yet it is an area where public information is often lacking or inadequate. This FOIA request will enable the public and their advocates to better understand DOE activities.

3) *Citizen Action New Mexico* is in an excellent position to aid the public in its understanding of government activities, particularly with respect to the clean-up of DOE facilities and public participation in clean-up and public health activities around DOE facilities. We publish research articles, maintain a website, and participate in conferences and committees. The information received under this FOIA will be reviewed and presented to the public through any or all of these means.

4) The requested material in this FOIA is likely to contribute "significantly" to public understanding of government operations or activities because it will provide *Citizen Action New Mexico* with important information that will help clarify DOE activities. In turn, *Citizen Action New Mexico* will convey the information to the public so that the general citizenry can be better informed.

5) *Citizen Action New Mexico* has no commercial interest in this FOIA request. *Citizen Action New Mexico* operates as a 501(c)3 non-profit organization. As a result, *Citizen Action New Mexico* cannot in any way make a profit from its activities, whether from this FOIA request, or any other endeavor.

6) The response to question 5 satisfies question 6.

As per 10 CFR 1004.4 (e), *Citizen Action New Mexico* assures our willingness to pay fees, unless a waiver is granted. The FOIA provides that you may waive fees "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." (5 U.S.C. Section 552(a)(4)(A)(iii) and 10 CFR 1004.9(a)(8)) This request clearly meets these requirements. Therefore, I request that you waive all fees in connection with this request. I further ask, in the event that fees are not waived, that you inform me of the specific basis for such a decision.

We appreciate your help in obtaining this information. Should you need further information concerning *Citizen Action New Mexico* or this expedited request, we would appreciate your immediate attempts to contact us in order to expedite this request. We expect a definitive determination of DOE's intent to release the Expedited Response within 10 working days, as 5 U.S.C. Section 552, (a)(6)(E)(ii)(I) stipulates:

(E)

(i) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing for expedited processing of requests for records—

(I) in cases in which the person requesting the records demonstrates a compelling need; and

(II) in other cases determined by the agency.

(ii) Notwithstanding clause (i), regulations under this subparagraph must ensure— that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request; and

(II) expeditious consideration of administrative appeals of such determinations of whether to provide expedited processing.

In your determination, we also expect a stated date when this document will be released to us, or, alternatively, any reason for denial.

I hereby certify that the information contained above is true and correct to the best of my knowledge and belief.

Sincerely,

David B. McCoy
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Via e-mail: dave@radfreenm.org

Department of Energy
Washington, DC 20585

December 16, 2016
Re: HQ-2017-00262-F

Re:

Operational readiness review (ORR) for the reopening of the Waste Isolation Pilot Plant (WIPP), Unanswered Safety Questions (USQs); corrective action plans for the issues needed to be resolved prior to reopening; issues that will be resolved after the reopening after waste emplacement gets underway; and bonus amounts that would be awarded to Nuclear Waste Partnership for emplacement of the first drum of waste.

Dear Mr. McCoy:

Thank you for the request for information that you made to the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your request was received in this office on December 12, 2016, and has been assigned a controlled number, HQ-2017-00262-F. Since we receive several hundred requests a year, please use this number in any correspondence with the DOE regarding your request.

We are reviewing your request to determine if it addresses all of the criteria of a proper request under the FOIA and the DOE regulation that implements the FOIA at Title 10, Code of Federal Regulations, Part 1004. We will send you a subsequent letter to inform you if we need additional information or to state where the request has been assigned to conduct a search for responsive documents.

In your request, you asked for expedited processing of the request. You stated that the information requested is urgently needed because "the health and safety of individual workers, the public and the environment are placed at imminent and extreme risk by the carelessly planned and hasty reopening of the WIPP facility by the end of December 2016 without complete resolution of safety issues."

The FOIA permits agencies to expedite the processing of requests if requesters demonstrate a "compelling need." 5 U.S.C. § 552(a)(6)(E)(i)(I). A "compelling need" is established when one of two criteria are met. 5 U.S.C. § 552(a)(6)(E)(v)(II). The criteria are met when (1) failure to obtain the records quickly "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," or (2) if the "requester is primarily engaged in disseminating information" and can demonstrate that there is an "urgency to inform the public concerning actual or alleged Federal Government activity." Id.

The reasons you have provided do not adequately address the basis for which a request may be expedited. You have not provided material that establishes that there is any threat to the life or safety of an individual that would justify expeditious processing of the request.

You also have not identified an actual or alleged activity that poses any particular urgency that requires the dissemination of information in an expedited manner. In order to determine whether a requester has

demonstrated an "urgency to inform," and hence a "compelling need," courts consider at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *Al-Fayed v. C.J.A.*, 254 F.3d 300, 310 (D.C. Cir. 2001); *Associated Press v. DOE*, Case No. TFA-0273 (September 11, 2008). Your request does not sufficiently address factors one or two.

For these reasons, I am denying your request for expeditious processing. The request will be processed in accordance with provisions of the FOIA.

You may challenge the denial of your request for expedited processing by submitting a written appeal to the Director, Office of Hearings and Appeals, at HG-1/L'Enfant Plaza Building, Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585-1615. You may also submit your appeal by e-mail to OHA.filings@hq.doe.gov, including the phrase "Freedom of Information Appeal" in the subject line. You should submit the appeal within 90 calendar days of receipt of this determination. The written appeal, including the envelope, must clearly indicate that a FOIA appeal is being made. The appeal must contain elements required by 10 CFR § 1004.8, including a copy of this letter. Judicial review will thereafter be available in the Federal District Court either (1) in the district where you reside; (2) in the district where you have your principal place of business; (3) in the district where the DOE's records are located; or (4) in the District of Columbia.

You may contact DOE's FOIA Public Liaison, Alexander MmTis, FOIA Officer, Office of Public Information, at 202-586-5955 or by mail at MA-46/Forrestal Building 1000 Independence Avenue, S.W. Washington, D.C. 20585 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Please refer to the above referenced number in any communications with the DOE about the request. If you have any questions about the processing of the request or this letter, you may contact Ms. Camille Aponte-Rossini at MA-46/ Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585, or at 202-586-7504.

I appreciate the opportunity to assist you.
Office of Public Information

**Before the Director, Office of Hearings and Appeals
Department of Energy
HG-1/L Enfant Plaza Building
1000 Independence Avenue, SW, Washington, DC 20585-1615**

**FREEDOM OF INFORMATION APPEAL OF FOIA OFFICER DECISION FOR
HQ-2017-00262-F**

Sent by Email to: OHA.filings@hq.doe.gov on 12/22/2016

Citizen Action New Mexico (“CANM”) and Concerned Citizens for Nuclear Safety (“CCNS”) hereby appeal the December 16, 2016 decision of Department of Energy (“DOE”) Freedom of Information Act (“FOIA”) Officer Alexander C. Morris to deny the request for expedited provision of documents related to the Waste Isolation Pilot Plant (“WIPP”). CANM and CCNS meet both prongs necessary to establish a compelling need for an expedited FOIA.

Two prongs exist for establishing a compelling need for an expedited FOIA, according to the DOE Management Office:

A compelling need is established when one of the following two criteria are met: (1) by establishing that your failure to obtain the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual, or (2) if you are primarily engaged in disseminating information and can demonstrate an urgency to inform the public concerning actual or alleged Federal Government activities exists. You must certify the reasons for expedited processing by articulating with specific examples of either criterion, which both must be true and correct.

Source: <https://www.energy.gov/management/office-management/operational-management/freedom-information-act/foia-frequently-asked#Question6>

The FOIA Officer decision is both arbitrary and capricious and ignores the extreme and imminent endangerment that is present for workers and the public shown by an ongoing history of gross negligence, waste mischaracterization, accidents and radiation exposure in WIPP operations and ongoing secrecy about safety issues.

CANM and CCNS are Non-governmental Organizations (“NGOs”) primarily engaged in the occupation of information gathering and dissemination about radioactive waste generation and disposal at Federal Government facilities in the United States.

The consequences of delay in furnishing the requested information compromise the ability of CANM and CCNS to provide information to the public, workers and regulatory agencies about the extreme dangers of the planned premature reopening WIPP for emplacement of radioactive waste. CANM and CCNS have a particular urgency to inform the public about the

information sought by the FOIA Request prior to the planned reopening of the WIPP that poses unique danger and threat from government activity of the DOE proceeding in the face of uncorrected safety issues that are hidden from the workers and the public.

For 28 years, CCNS has provided a weekly broadcast of the latest nuclear news. Our recent stories have focused on WIPP and the proposed reopening. *See generally*, “WIPP Requests Temporary Authorization to Install Bulkheads and Proposed Above Ground Storage Public Comment Extended to February 3rd,” at <http://nuclearactive.org/wipp-requests-temporary-authorization-to-install-bulkheads-and-proposed-above-ground-storage-public-comment-extended-to-february-3rd/>; “SRIC and NRDC Address NEPA Requirements for Reopening WIPP,” at <http://nuclearactive.org/sric-and-nrdc-address-nepa-requirements-for-reopening-wipp/>; and “In Rush to Reopen WIPP, DOE Ignores the Safer “Clean Salt” Option,” at <http://nuclearactive.org/in-rush-to-reopen-wipp-doe-ignores-the-safer-clean-salt-option/>. CCNS disseminates the broadcast weekly by email and posts it to <http://www.nuclearactive.org>, Facebook and Twitter.

DOE is in a rush to re-open WIPP even though the facility cannot meet the previous operational and safety standards, let alone more stringent requirements that are necessary to prevent future accidents. That the safe reopening of WIPP is of national public concern as well as to CANM, CCNS and other NGOs is irrefutable as demonstrated by thousands of articles published in the local and national news media regarding the Federal Government nuclear waste disposal operations at WIPP. Examples are set forth below. WIPP is the only Federal repository for the shipment and disposal of radioactive Transuranic (TRU) and hazardous waste from numerous Federal facilities in the U.S. that include for example, Hanford, WA, Idaho National Laboratory, ID, Oak Ridge, TN, Savannah River Site, SC, Los Alamos National Laboratory, NM.

No bounding exists for DOE FOIA Office intransigence. The FOIA Office has misinterpreted the first prong of the standard for an expedited FOIA for the meaning of imminent threat to life or physical safety. The continuing history of radioactive waste disposal at WIPP demonstrates ongoing threats to life and physical safety: DOE miscalculations; diesel truck fire caused by lack of maintenance, an explosion of a radioactive waste drum(s); radioactive breach of WIPP facility filter containment to the environment; worker and public exposures to radionuclides; radioactive contamination of the facility; four roof collapses; lack of trained personnel; absence of protective safety equipment; ignorance about air flow and worker ventilation; lack of emergency medical teams; absence of adequate fire protection; inability to provide the appropriate level of radiological personnel response. All this demonstrates the fact that FOIA personnel are unwilling to recognize any imminent danger that could recommend and result in the expeditious release of FOIA documents.

The standard for obtaining an expedited FOIA is imminent threat to life or physical safety of an individual, not that “someone will die tomorrow” as was stated during a teleconference between FOIA staff and CANM, CCNS and the Southwest Research Information Center

("SRIC") on 12/21/2016. The threats to worker and public health and safety are legion at WIPP.

Worker and public exposure to the release of plutonium and americium from the WIPP facility and ½ mile into the atmosphere resulted from the explosion of a drum of waste that contained organic kitty litter on February 14, 2014. The improper use of organic kitty litter occurred despite DOE knowledge that organic matter cannot be combined with radioactive waste. Six hundred such drums improperly containing organic kitty litter remain in the WIPP at present and have the potential to explode creating an imminent threat to the lives or health of workers at WIPP.

DOE is on the record that it intends to reopen WIPP for the emplacement of radioactive waste by the end of December 2016. The reopening of WIPP in less than ten (10) days is of urgent consideration to CANM and CCNS to inform the public regarding Federal Government nuclear waste operations which are unsafe given reports by the Defense Nuclear Facility Safety Board, the Mine Safety and Health Administration ("MSHA"), and the DOE Office of Enterprise Assessments that strongly indicate that WIPP is not ready to reopen, as well as a December 15, 2016 town hall meeting that admitted 21 prestart and 15 post-start safety issues still remain. The Government Accountability Office ("GAO") harshly criticized DOE cost and schedule estimates for restart in their August 4, 2016 report entitled, "Nuclear Waste: Waste Isolation Pilot Plant Recovery Demonstrates Cost and Schedule Requirements Needed for DOE Cleanup Operations." at GAO-16-608 at <http://www.gao.gov/products/GAO-16-608>

The failure to complete and issue the Operational Readiness Report (ORR) for public review is a major concern for CANM, CCNS and is also demonstrated by numerous media outlets that have sought to obtain detailed information about the WIPP reopening but have been unable to receive the documentation in a timely fashion. The person or persons having responsibility for the decision to reopen WIPP is undisclosed. The DOE is withholding the ORR documentation to maintain secrecy about WIPP operations and conditions that make it unsafe to proceed with radioactive waste emplacement operations that continue to threaten the lives or the physical safety of both the public and workers, especially given the rush to reopen in the face of numerous identified safety issues:

- Inadequate ventilation exists for workers. WIPP was conceived of and permitted by the New Mexico Environment Department as a clean work environment. Future work at WIPP will require work in radiologically controlled areas in personnel protective suits. Two major findings of the December 16, 2016 DOE Office of Enterprise Assessment were – The WIPP Ventilation Plan does not adequately reflect the mine ventilation system as currently configured or the conditions and assumptions under the Recovery Plan – NWP does not have a sound engineering approach for determining the minimum ventilation rates for diesel equipment. "Assessment of Work Planning and Control at the Waste Isolation Pilot Plant – December 2016," at

<https://www.energy.gov/ea/downloads/office-enterprise-assessments-assessment-work-planning-and-control-waste-isolation>

- In September 2016, DNFSB found weak Radiological Control practices observed during the Bison 2 Emergency Response exercise. Contractor (NWP) management reviews of equipment logbooks in the underground were not being consistently performed and NWP lacked a consistent process for verifying that operators possess the latest revision of an underground vehicle's preoperational check procedures which indicated operators may be using outdated procedures.
http://www.dnfsb.gov/sites/default/files/Board%20Activities/Reports/Site%20Rep%20Monthly%20Reports/Waste%20Isolation%20Pilot%20Plant/2016/mr_20160831_122.pdf
- As recently as December 13, 2016, DNFSB asked for briefing by DOE on the safety of operations at WIPP and verification of readiness to start based on findings from the Operational Readiness Review.
http://www.dnfsb.gov/sites/default/files/Board%20Activities/Letters/2016/ltr_20161213_32216.pdf
- [R]adioactive materials should not be mixed with organic chemicals because the radiation generates explosive gases. It raises questions about the Energy Department's ability to apply what it has learned over decades of painstaking, mistake-ridden stewardship of the leftovers of nuclear bomb manufacture.
<https://www.nytimes.com/2014/10/30/us/in-us-cleanup-efforts-accident-at-nuclear-site-points-to-cost-of-lapses.html? r=0>
- Six WIPP personnel were evaluated for smoke inhalation and released from a local hospital the day of an underground diesel truck fire. In fact, one employee was permanently disabled and has received compensation through litigation. As a result of an explosion of a waste drum, bioassay tests showed that 22 workers received internal contamination as a result of February fire and release.
<http://www.wipp.energy.gov/wipprecovery/faq.html>
- Continuing roof collapses are certainly "imminent" events capable of killing workers. Roof collapses could occur on top of drums that are potentially explosive. Four roof collapses have occurred since October 2016 - any worker present during a roof collapse while handling waste in such an area would be crushed to death. The Mine Safety and Health Administration found a massive area of the ceiling in Room 4 of Panel 7 had crashed: a rock fall two-thirds the length of a football field, eight feet thick. Workers had to be evacuated.
<https://www.apnews.com/497c0f6bf9844f348eb9ce09a37a351f>
- "Presumably all we have left in Panel 7 is Rooms 1, 2 and 3," said John Heaton, chairman of the Carlsbad Mayor's Nuclear Task Force. "They have to get the roof bolting done before they can do anything else with those three rooms. You almost have to assume that it's been willfully ignored. MSHA has been in almost monthly, criticizing the maintenance of the "back," or ceiling.

“In view of that,” he said, “it’s difficult to understand how you can come to any other conclusion than that it has not been a priority of the contractor. Of course, DOE has some responsibility in oversight of that.”

<https://www.abqjournal.com/902842/new-safety-questions-come-up-at-wipp.html>

- Recent roof collapses inside WIPP ... call into question the facility’s ability to handle ground control in a contaminated mine. <https://www.abqjournal.com/902842/new-safety-questions-come-up-at-wipp.html>
- Mining Safety and Health citations have doubled during 2016, including citations from February, May, and subsequently that are not yet resolved. <http://arlweb.msha.gov/drs/ASP/InspectionViolations.asp>
- Potential hazards associated with the operation of the diesel-powered roof bolters from the accumulation of toxic atmospheres, especially since the airflow available underground at WIPP is limited at this time. Problems with mine stabilization of the roof. <https://energy.gov/sites/prod/files/2015/10/f27/Review%20of%20Mine%20Safety,%20Stabilization,%20and%20Habitability%20at%20WIPP%20-%20October%202015.pdf>
- [T]he explosion ranks among the costliest nuclear accidents in U.S. history, according to a *Los Angeles Times* analysis. The long-term cost of the mishap could top \$2 billion, an amount roughly in the range of the cleanup after the 1979 partial meltdown at the Three Mile Island nuclear power plant in Pennsylvania. <http://www.latimes.com/nation/la-na-new-mexico-nuclear-dump-20160819-snap-story.html>
- DOE failure to follow best practices, especially with regard to the ventilation system, caused 9 month delay and \$61.6 M increased costs for WIPP operation in 2016. <http://www.gao.gov/products/GAO-16-608>
- The WIPP Ventilation Plan does not meet U.S. Mine Safety and Health Administration requirements. In particular, the contractor had been using non-approved diesel engines that were banned in 2001. The review states, “[t]he identified deficiencies are significant and need to be addressed before WIPP begins to use diesel engines underground.” https://www.energy.gov/sites/prod/files/2014/12/f19/2014_WIPP_Recovery_Plan_for_Diesel_Equipment_-_December_2014.pdf
- The WIPP contractor did not conduct basic equipment maintenance and inspections as required by DOE orders and the management contract. https://www.energy.gov/sites/prod/files/2014/12/f19/2014_-_WIPP_Conduct_of_Maintenance_Recovery_Plan_-_December_2014.pdf

CONCLUSION

CANM and CCNS have met both the requirements for provision of documents related to their FOIA request. The decision of the FOIA Officer should be reversed and the requested documents provided prior to the proposed reopening of WIPP. We hereby certify the

reasons for expedited processing as described above, with reference to specific examples.
We certify that the above is true and correct.

Respectfully submitted,

Dated: December 22, 2016

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Attachment: December 16, 2016 response of the Department of Energy to Citizen Action
New Mexico denying expedited processing

Mr. David B. McCoy
Citizen Action New Mexico
P.O. Box 4276
Albuquerque, NM 87196-4276

Via e-mail: dave@radfreenm.org

Department of Energy
Washington, DC 20585

December 16, 2016
Re: HQ-2017-00262-F

Re:

Operational readiness review (ORR) for the reopening of the Waste Isolation Pilot Plant (WIPP), Unanswered Safety Questions (USQs); corrective action plans for the issues needed to be resolved prior to reopening; issues that will be resolved after the reopening after waste emplacement gets underway; and bonus amounts that would be awarded to Nuclear Waste Partnership for emplacement of the first drum of waste.

Dear Mr. McCoy:

Thank you for the request for information that you made to the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Your request was received in this office on December 12, 2016, and has been assigned a controlled number, HQ-2017-00262-F. Since we receive several hundred requests a year, please use this number in any correspondence with the DOE regarding your request.

We are reviewing your request to determine if it addresses all of the criteria of a proper request under the FOIA and the DOE regulation that implements the FOIA at Title 10, Code of Federal Regulations, Part 1004. We will send you a subsequent letter to inform you if we need additional information or to state where the request has been assigned to conduct a search for responsive documents.

In your request, you asked for expedited processing of the request. You stated that the information requested is urgently needed because "the health and safety of individual workers, the public and the environment are placed at imminent and extreme risk by the carelessly planned and hasty reopening of the WIPP facility by the end of December 2016 without complete resolution of safety issues."

The FOIA permits agencies to expedite the processing of requests if requesters demonstrate a "compelling need." 5 U.S.C. § 552(a)(6)(E)(i)(I). A "compelling need" is established when one of two criteria are met. 5 U.S.C. § 552(a)(6)(E)(v)(II). The criteria are met when (1) failure to obtain the records quickly "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," or (2) if the "requester is primarily engaged in disseminating information" and can demonstrate that there is an "urgency to inform the public concerning actual or alleged Federal Government activity." Id.

The reasons you have provided do not adequately address the basis for which a request may be expedited. You have not provided material that establishes that there is any threat to the life or safety of an individual that would justify expeditious processing of the request.

You also have not identified an actual or alleged activity that poses any particular urgency that requires the dissemination of information in an expedited manner. In order to determine whether a requester has

demonstrated an "urgency to inform," and hence a "compelling need," courts consider at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *Al-Fayed v. C.J.A.*, 254 F.3d 300, 310 (D.C. Cir. 2001); *Associated Press v. DOE*, Case No. TFA-0273 (September 11, 2008). Your request does not sufficiently address factors one or two.

For these reasons, I am denying your request for expeditious processing. The request will be processed in accordance with provisions of the FOIA.

You may challenge the denial of your request for expedited processing by submitting a written appeal to the Director, Office of Hearings and Appeals, at HG-1/L'Enfant Plaza Building, Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585-1615. You may also submit your appeal by e-mail to OHA.filings@hq.doe.gov, including the phrase "Freedom of Information Appeal" in the subject line. You should submit the appeal within 90 calendar days of receipt of this determination. The written appeal, including the envelope, must clearly indicate that a FOIA appeal is being made. The appeal must contain elements required by 10 CFR § 1004.8, including a copy of this letter. Judicial review will thereafter be available in the Federal District Court either (1) in the district where you reside; (2) in the district where you have your principal place of business; (3) in the district where the DOE's records are located; or (4) in the District of Columbia.

You may contact DOE's FOIA Public Liaison, Alexander MmTis, FOIA Officer, Office of Public Information, at 202-586-5955 or by mail at MA-46/Forrestal Building 1000 Independence Avenue, S.W. Washington, D.C. 20585 for any further assistance and to discuss any aspect of your request. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services they offer. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Please refer to the above referenced number in any communications with the DOE about the request. If you have any questions about the processing of the request or this letter, you may contact Ms. Camille Aponte-Rossini at MA-46/ Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585, or at 202-586-7504.

I appreciate the opportunity to assist you.
Office of Public Information