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Washington, D.C. 20548

Re: Waste Isolation Pilot Plant ("WIPP")

Dear Ms. Feldman:

We have your inquiry letter dated August 3, 1994 to the Environmental Protection Agency ("EPA") and the response letters dated September 19, 1994 from the Department of Energy ("DOE") and November 23, 1994 from the EPA concerning the laws applicable to the Waste Isolation Pilot Plant ("WIPP"). Since our office was directly involved in the passage of the legislation in issue, the Waste Isolation Pilot Plant Land Withdrawal Act of 1992, Pub. L. 102-579, 106 Stat. 4777 (the "WIPP Act"), and the State of New Mexico has a vital interest in the safe and lawful operation of the WIPP, we are impelled to address the principal issue raised by your letter.

That issue is whether, under the WIPP Act, DOE is authorized to apply to EPA for certification that WIPP complies with the radioactive waste disposal regulations, 40 CFR Part 191 subparts B and C, as to only a portion of the waste intended for disposal at the WIPP. Such a procedure would enable DOE to obtain EPA's approval to introduce certain types of waste initially and to postpone to one or more later applications the issue of EPA certification to receive other types of waste. We are convinced that such a procedure is impermissible under Pub. L. 102-579.

Before discussing the statute it is important to set aside one issue. WIPP is not designed to receive all transuranic waste (as defined in the statute) which exists in DOE facilities or will exist during WIPP's operational life. For instance, pre-1970 waste, much of which is not retrievably stored, is not planned for disposal at WIPP, and any certification application may properly exclude such waste. It has also been assumed that transuranic waste would continue to be generated during WIPP's operational life; thus, an application clearly may include such to-be-generated

waste, even though the waste does not exist yet. It is also clear that the statute places limits on the quantity of waste to be placed in WIPP, both as to total volume (§7(a)(3)) and as to curie content of remote-handled waste (§7(a)(2)). Any certification application must respect these limitations.

The present question is whether, within the class of existing post-1970 waste and to-be-generated waste and within the capacity limits, DOE may select a subcategory of waste to which it may confine its certification application, in the hope that such waste may be more easily deemed acceptable by EPA, and can withhold from EPA the more difficult scientific questions presented by the remainder of the waste until a later date, in the hope that obtaining initial certification for a small amount and proceeding by stages may make it more feasible to achieve certification for the entire capacity.

Under the WIPP Act such a piecemeal approach is impermissible. Section 7(b) of the statute lists several "requirements for commencement of disposal operations." Each of the items listed indicates that EPA must rule upon an application to certify WIPP's compliance as to its entire planned inventory:

Subsection (1) calls for EPA's certification "that the WIPP facility will comply with the disposal regulations" -- language that calls for a ruling as to the entire facility, not as to a subcategory of the waste intended to be emplaced.

Subsection (2) requires that DOE submit plans for "decommissioning" WIPP and managing the withdrawn land. The "decommissioning" phase is defined as the period from the completion of emplacement of waste until the backfilling and sealing of shafts (WIPP Act §2(4),(6)). For DOE to submit a valid decommissioning plan, it must know the quantities of waste, types of containers, waste forms, backfill characteristics, room seals, drift seals, and shaft seals to be employed. Such factors are all relevant to repository performance and cannot be determined by DOE until DOE has presented to EPA a performance assessment of the facility using stated assumptions as to all such factors and received EPA's certification that such a facility will satisfy the disposal regulations. In order words, DOE must obtain EPA's certification of compliance as to the entire repository capacity before it can prepare a decommissioning plan, which is a prerequisite to <u>begin</u> disposal.

Subsection (3) requires that DOE notify Congress and initiate a 180 day waiting period. The legislative history indicates that this waiting period was introduced as a substitute for a previous

provision that required that Congress take a "second look" and enact new legislation authorizing disposal of waste, after EPA has determined that WIPP would comply with the disposal regulations. See H.R. 2637, passed by House Committee on Interior & Insular Affairs October 7, 1991, §7(b); compare draft Amendment in the Nature of a Substitute to H.R. 2637 (June 17, 1992), §7(b)(3) at 23. The purpose of the 180 day waiting period was to permit Congress, if it wished, to take legislative action authorizing disposal. Plainly, Congress would not be in a position to consider the overall question whether WIPP should be used for disposal and to enact such legislation, if EPA had merely evaluated some strictly limited use of the facility. It would make no sense for this provision to apply unless EPA has certified use of the entire capacity of WIPP.

When the House Committee on Interior and Insular Affairs reported a bill on October 7, 1991, authorizing disposal after "the Administrator's certification under section 9(c)(1)(B) that the WIPP facility will comply with the disposal standards" (language almost identical to §7(b)(1) of the WIPP Act), and requiring a further legislative land withdrawal before disposal, the committee clearly intended that the "Administrator's certification" answer all questions as to the suitability of WIPP for waste disposal, because it stated that "[i]nasmuch as this bill sets out the requirements to be satisfied for beginning disposal operations at the WIPP, the Committee intends that if those requirements are met, this subsequent permanent withdrawal should be a fairly simple and expeditious undertaking." H.R. Rep. No. 102-241, 102d Cong. 1st Sess., at 18 (Oct. 7, 1991).

Subsection (4), in conjunction with §4(b)(5), requires EPA to determine whether acquisition of certain nearby oil and gas leases is required to comply with the radioactive waste disposal regulations or the Solid Waste Disposal Act. EPA could not make that determination without reviewing a performance assessment based on stated assumptions as to the nature and amount of the waste to be emplaced (in other words, a full compliance application), deciding that the entire repository would meet the disposal regulations, and ordering that the repository be operated in accord with the stated assumptions -- in other words, a certification of compliance by the entire repository based on use of its full capacity. Again, EPA's determination is a prerequisite to <u>begin</u> disposal.

Subsection (5) requires that DOE present comprehensive recommendations for the disposal of all transuranic waste under its control, including a timetable. Such requirement means that before disposing of <u>any</u> waste at WIPP, DOE must have a plan for disposal

of all its transuranic waste, including a plan and timetable to send to WIPP all the waste that DOE may want to send there. In that situation, to allow DOE to postpone obtaining EPA certification for some of the shipments make very little sense.

Subsection (6) requires that DOE complete a "survey identifying all transuranic waste types at all sites from which wastes are to be shipped to WIPP." Thus, DOE must know all the locations which will send waste to WIPP. By implication, DOE must know what wastes "are to be shipped to WIPP" before disposal can begin. DOE can only have that information if EPA has certified WIPP to receive such waste. Thus, EPA must certify that use of the full capacity of WIPP before any disposal may begin.

The GAO should be aware, in addition, that a major concern in drafting the WIPP Act was DOE's planned introduction of waste for on-site tests before any EPA determination of compliance with the disposal regulations. Those plans have since been abandoned, but the statutory restrictions on such tests remain, and they are instructive. Such tests are required to be terminated, and any test waste removed, unless EPA has certified "that the WIPP facility will comply with the final disposal regulations" within 10 years after the tests begin (§8(d)(2)(A)). Further, in the absence of such EPA certification, DOE would be required to implement decommissioning and post-decommissioning plans, the land withdrawal would terminate, and any permit or variance under the Solid Waste Disposal Act would expire within a year. (§8(d)(2)(C)). Such severe sanctions were obviously intended to create the greatest possible incentive for DOE to obtain the critical EPA certification "that the WIPP facility will comply with the final disposal regulations." (§8(d)(2)). It would be unimaginable, and clearly contrary to the congressional intent, to allow such sanctions to be avoided by DOE's obtaining an EPA certification limited to some insignificant portion of WIPP's capacity.

Indeed, if Congress intended that DOE could submit a partial certification application, the stringent sanctions of §8(d)(2) would make no sense. Under §8(d)(2) if EPA does not certify that the facility will comply with the disposal regulations by a specific date, the land withdrawal terminates, and hazardous waste permits terminate -- ending any possible use of the site as a waste repository. But if the EPA certification proceeding could involve only a small subset of the planned waste inventory, it would not make sense to end the entire repository project on a determination that that small part of the inventory was not acceptable. Plainly, the "application for certification of compliance with such regulations" (§8(d)(1) is intended to encompass DOE's plans to use the entire capacity of the site.

The principal amendment to the WIPP Act debated in the House was Representative Richardson's proposal that would have prohibited the introduction of any waste for tests until EPA had certified that "the WIPP facility will comply with the final disposal standards." Cong. Rec. H6316 (July 21, 1992). Spokesmen on both sides of this issue assumed that such an EPA ruling would embrace the use of the entire capacity of the facility, to the extent DOE desired to use it. Rep. Richardson described his amendment as requiring DOE "to prove WIPP is safe" (Id.) -- not to prove that some minor category of waste can be safely emplaced. Rep. Moorhead, in opposition, objected that the amendment required EPA to "certify the compliance of WIPP with the standards prior to the introduction of any waste at WIPP" (at H6318). Rep. Spratt, also in opposition, said that the Richardson amendment "prohibits the emplacement of waste...until it has been finally certified that it complies with all the regulations" (at H6320). Such congressmen would be startled to hear it claimed that the conditions of the amendment could be satisfied by an EPA certification limited to a small subcategory of waste, leaving undetermined the performance of the facility as to the majority of its capacity.

The history of the WIPP land withdrawal legislation goes back at least as early as 1987. See H.R.2504 (introduced May 21, 1987); S.1272 (introduced May 21, 1987). DOE was involved in the activity throughout. At no time in the five year process of legislation did DOE request that Congress authorize phased compliance. Although DOE had a consultation and cooperation agreement with the State which referred to compliance determination, there is no provision, and there was no request for a provision, authorizing a phased compliance determination.

Consequently, the WIPP Act contains no authority for a phased compliance determination. As EPA points out in its letter (at pages 4-5), the only statutory provision for EPA action on WIPP's compliance with the disposal regulations after the §8(d)(2) certification is §8(f), which calls for periodic recertification, i.e., confirmation on a fixed schedule of the initial certification by an abbreviated process without rulemaking or judicial review. In no way could the §8(f) procedure be distorted to create an avenue to phased certification of categories of waste omitted from the initial determination.

Clearly, WIPP's overall compliance is to be decided in "the rulemaking under paragraph (1)(B)" (§8(d)(3)) based on "the application" (§8(d)(1)(B)) and leading to "the certification" (§8(d)(1)(c)) -- that is, a single rulemaking. There is no statutory provision at all for a time-consuming multi-stage

rulemaking, and it would take legislative action to change the situation.

Very truly yours,

Lindsay A. Lovejoy, Jr.

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